2022 Indiana Department of Transportation Disparity Study

FINAL REPORT

Final Report

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2022 Indiana Department of Transportation Disparity Study

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Table of Contents

1. Introduction

A. Background 1–2
B. Study Scope 1–3
C. Study Team Members 1–5

2. Legal Analysis

A. Legal Standards for Different Types of Measures 2–1
B. Seminal Court Decisions 2–3
C. Addressing Legal Requirements 2–4

3. Marketplace Conditions

A. Human Capital 3–2
B. Financial Capital 3–6
C. Business Ownership 3–9
D. Business Success 3–11
E. Summary 3–13

4. Anecdotal Evidence

A. Data Collection 4–1
B. Key Themes 4–2

5. Data Collection

A. Contract and Procurement Data 5–1
B. Collection of Vendor Data 5–2
C. Relevant Geographic Market Area 5–3
D. Subindustry Classifications 5–3
E. Agency Review 5–5

6. Availability Analysis

A. Purpose of the Availability Analysis 6–1
B. Available Businesses 6–1
C. Availability Database 6–2
D. Availability Calculations 6–3
E. Availability Analysis Results 6–4

Table of Contents

7. Utilization Analysis

A. Purpose of the Utilization Analysis 7–1
B. Utilization Analysis Results 7–1
C. Concentration of Dollars 7–5

8. Disparity Analysis

A. Overview 8–1
B. Disparity Analysis Results 8–2
C. Statistical Significance 8–6

9. Program Measures

A. Race- and Gender-Neutral Measures 9–1
B. Race- and Gender-Conscious Measures 9–3

10. Findings and Recommendations

A. Key Findings 10–1
B. Recommendations 10–3

Appendices

A. Definitions of Terms
B. Legal Framework and Analysis
C. Quantitative Analyses of Marketplace Conditions
D. Anecdotal Information about Marketplace Conditions
E. Availability Analysis Approach
F. Disparity Analysis Results Tables

CHAPTER 1.
Introduction

The Indiana Department of Transportation (INDOT) is responsible for managing, maintaining, and constructing Indiana's transportation infrastructure, including federal and state highways, railroads, and airports. As a United States Department of Transportation (USDOT) fund recipient, INDOT implements the Federal Disadvantaged Business Enterprise (DBE) Program, which is designed to address potential discrimination against DBEs in the award and administration of USDOT-funded contracts and procurements. INDOT retained BBC Research & Consulting (BBC) to conduct a *disparity study* to evaluate whether person of color (POC)- and woman-owned businesses face any barriers in the agency's work and evaluate the effectiveness of its implementation of the Federal DBE Program in encouraging the participation of those businesses in its Federal Highway Administration (FHWA)-funded projects.[1] As part of the study, we examined whether there are any disparities, or differences, between:

- The percentage of contract and procurement dollars INDOT awarded to POC- and woman-owned businesses during the study period, which was October 1, 2016 through September 30, 2021 (i.e., *utilization*); and
- The percentage of contract and procurement dollars POC- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of INDOT prime contracts and subcontracts (i.e., *availability*).

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

- The legal framework surrounding the Federal DBE Program and other POC- and woman-owned business programs;
- Marketplace conditions for POCs, women, and POC- and woman-owned businesses; and
- Contracting practices INDOT has in place or could consider implementing in the future and its implementation of the Federal DBE Program.

There are several reasons why information from the disparity study is useful to INDOT:

- The study provides information about whether POC- and woman-owned businesses face any barriers in competing for or performing INDOT work.
- The study identifies barriers POCs, women, and POC- and woman-owned businesses face in the Indiana marketplace that might affect their ability to compete for or perform INDOT work.
- The study provides an evaluation of how effective various efforts are in encouraging POC- and woman-owned business participation in INDOT contracts and procurements.

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[1] "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

- The study provides insights into how INDOT could refine contracting processes and its implementation of the Federal DBE Program to better encourage the participation of POC- and woman-owned businesses in its work and help address any barriers.

BBC introduces the 2022 INDOT Disparity Study in three parts:

A. Background;

B. Study Scope; and

C. Study Team Members.

A. Background

The Federal DBE Program is designed to increase the participation of POC- and woman-owned businesses in USDOT-funded projects. As a recipient of FHWA funds, INDOT must implement the Federal DBE Program and comply with program regulations.

1. Overall DBE goal. Every three years, INDOT is required to set an overall aspirational goal for the participation of DBEs in its FHWA-funded work.[2] If DBE participation in such work is less than INDOT's overall DBE goal in a particular year, then the agency must analyze the reasons for the difference and establish specific measures that enable it to meet the goal in the next year. The Federal DBE Program specifies the steps INDOT must follow to establish its overall DBE goal. To begin the process, the agency must examine demonstrable evidence of the availability of *potential DBEs* to participate in its FHWA-funded projects to develop a *base figure* for its goal. Then, it must consider conditions in its *relevant geographic market area* and other factors to determine whether an adjustment to its base figure is necessary to ensure its overall DBE goal accurately reflects current contracting conditions for POC- and woman-owned businesses (referred to as a *step-2 adjustment*).[3] INDOT is not required to make a step-2 adjustment to its base figure, but it is required to consider relevant factors and explain its decision to FHWA.

2. Efforts to meet the goal. The Federal DBE Program also requires INDOT to project the portion of its overall DBE goal it will meet through *race- and gender-neutral* measures and the portion it will meet through any *race- and gender-conscious* measures. Race- and gender-neutral measures are designed to encourage the participation of all businesses—or all small businesses—in an agency's work, regardless of the race/ethnicity or gender of business owners [for examples of race- and gender-neutral measures, see 49 Code of Federal Regulations (CFR) Section 26.51(b)]. If an agency cannot meet its goal solely through the use of race- and gender-neutral measures, then it must consider also using *race- and gender-conscious* measures. Race- and gender-conscious measures are designed to encourage the participation of POC- and woman-owned businesses in an agency's work (e.g., using condition-of-award DBE goals to award individual contracts or procurements).

INDOT uses a combination of race- and gender-neutral and race- and gender-conscious efforts to meet its overall DBE goal each year. If, like INDOT, an agency determines that using race- or gender-

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[2] http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/html/2011-1531.htm

[3] BBC identified the relevant geographic market area for the study as the entire state of Indiana, because INDOT awarded the vast majority of its relevant contract and procurement dollars during the study period to businesses with locations in Indiana.

conscious measures is appropriate for its implementation of the Federal DBE Program, then it must also determine which race/ethnic or gender groups are eligible to participate in those measures. Eligibility for such measures must be limited to those groups for which compelling evidence of discrimination exists in the marketplace (i.e., *inferences of discrimination*). The Federal DBE Program provides a waiver provision if an agency determines only certain groups are eligible to participate in the race- or gender-conscious measures it uses.

3. DBE certification. INDOT's Equity Initiative Services Division operates the agency's implementation of the Federal DBE Program, including certifying DBEs. The application is entirely online and free to submit, apart from small notary fees in some cases. To be eligible, business owners must prove they are part of a "socially and economically disadvantaged" group as defined by 49 CFR Part 26.[4] Business owners must have a personal net worth of less than $1.32 million, and the businesses themselves must have average revenues of less than $26.29 million over three years. Owners must also have 51 percent ownership interests in their businesses, including management and control of day-to-day decisions. Finally, owners must be United States citizens or legal residents, and the businesses must be independent of other entities. Once applications are submitted, on-site visits occur, and a DBE Certification Committee reviews applications to make final decisions.[5]

B. Study Scope

BBC conducted a disparity study based on the state- and FHWA-funded contracts and procurements INDOT awarded during the study period. Information from the study will help the agency encourage the participation of POC- and woman-owned businesses in its work and implement the Federal DBE Program effectively and in a legally defensible manner.

1. Definitions of POC- and woman-owned businesses. To interpret the analyses presented in the disparity study, it is useful to understand how BBC defined POC- and woman-owned businesses, certified DBEs, and potential DBEs in its analyses.

a. POC-owned businesses. BBC focused its analyses on the POC business groups presumed to be disadvantaged as part of the Federal DBE Program:

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

Businesses had to be 51 percent owned and controlled by individuals who identify with one of the above race/ethnic groups to be considered POC-owned businesses. We gathered business ownership information from a variety of sources, including surveys, business listings, and Internet research. We

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[4] Businesses owned by white men can also be certified as DBEs if they meet the certification requirements in 49 CFR Part 26.

[5] Due to the COVID-19 pandemic, OCR conducted site visits virtually. This practice has continued into 2022, though in-person site visits will be required once circumstances allow.

considered businesses to be POC-owned based on the known races/ethnicities of their business owners, regardless of whether they were DBE-certified or held any other types of certification. Our definition of POC-owned businesses included businesses owned by men of color and women of color. For example, we grouped results for businesses owned by Black American men with results for businesses owned by Black American women to assess outcomes for Black American-owned businesses in general.

b. Woman-owned businesses. Because BBC classified businesses owned by women of color according to their corresponding race/ethnic groups, analyses and results pertaining to woman-owned businesses pertain specifically to results for *white woman-owned businesses*. As with POC-owned businesses, we considered businesses to be woman-owned if they were 51 percent owned and controlled by individuals who identify as women, based on the known genders of business owners and regardless of whether the businesses were DBE-certified or held any other types of certification.

c. DBEs. We considered businesses as DBEs if they were POC- or woman-owned businesses specifically certified as DBEs by INDOT.

d. Potential DBEs. BBC considered businesses to be potential DBEs if they were POC- or woman-owned businesses that were currently DBE-certified or appeared they could be DBE-certified based on revenue requirements described in 49 CFR Part 26 (regardless of actual certification).[6] We did not consider businesses that have been decertified or have graduated from the DBE Program as potential DBEs. We examined the availability of potential DBEs as part of helping INDOT calculate the base figure for its next overall DBE goal.

2. Analyses in the disparity study. The crux of the disparity study was to examine whether there are any disparities between the participation and availability of POC- and woman-owned businesses for the construction; professional services; and non-professional services, goods, and supplies contracts and procurements INDOT awarded during the study period. The study also includes various analyses related to outcomes for POCs, women, and POC- and woman-owned businesses throughout Indiana. Information in the study is organized 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 study and inform INDOT's implementation of the Federal DBE Program. The legal framework and analysis for the study is summarized in **Chapter 2** and presented in detail in **Appendix B.**

b. Marketplace conditions. BBC conducted quantitative analyses of outcomes for POCs, women, and POC- and woman-owned businesses working in relevant Indiana contracting industries relative to white men and businesses owned by white men. In addition, we collected anecdotal evidence about potential barriers POC- and woman-owned businesses face in Indiana from public meetings, in-depth interviews, and other efforts. Information about marketplace conditions is presented in **Chapter 3, Chapter 4, Appendix C,** and **Appendix D.**

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[6] BBC did not collect information about business owners' personal net worths.

c. Data collection and analysis. BBC examined data from multiple sources to conduct the utilization and availability analyses, including surveys the study team conducted with thousands of businesses throughout Indiana. The scope of the study team's data collection and analysis for the study is presented in **Chapter 5**.

d. Availability analysis. BBC estimated the percentage of INDOT's relevant prime contract and subcontract dollars that POC- and woman-owned businesses are *ready, willing, and able* to perform. That analysis was based on agency data and surveys the study team conducted with close to 3,000 Indiana businesses that work in industries related to the types of contracts and procurements INDOT awards. We analyzed availability separately for businesses owned by specific POC groups and white women and for different types of contracts and procurements. Results from the availability analysis are presented in **Chapter 6** and **Appendix E**.

e. Utilization analysis. BBC analyzed relevant prime contract and subcontract dollars INDOT awarded to POC- and woman-owned businesses during the study period.[7] We analyzed that information separately for businesses owned by specific POC groups and white women and for different types of contracts and procurements. Results from the utilization analysis are presented in **Chapter 7**.

f. Disparity analysis. BBC examined whether there were any disparities between the participation of POC- and woman-owned businesses in contracts and procurements INDOT awarded during the study period and the availability of those businesses for that work. BBC analyzed disparity analysis results separately for businesses owned by specific POC groups and white women and for different types of contracts and procurements. We also assessed whether any observed disparities were statistically significant. Results from the disparity analysis are presented in **Chapter 8** and **Appendix F.**

g. Program measures. BBC reviewed measures INDOT uses to encourage the participation of small businesses as well as POC- and woman-owned businesses in its contracts and procurements as well as its implementation of the Federal DBE Program. That information is presented in **Chapter 9**.

h. Considerations. BBC provided guidance related to additional program options and changes to current contracting practices INDOT could consider, including information related to its next overall DBE goal for FHWA-funded work. Our review and guidance related to program implementation is presented in **Chapter 10**.

C. Study Team Members

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

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

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[7] Prime contractors—not INDOT—actually award subcontracts to subcontractors. However, for simplicity, throughout the report, BBC refers to INDOT as *awarding* subcontracts.

2. Briljent. Briljent is a DBE-certified, woman-owned research and training firm based in Indianapolis, Indiana. The firm conducted in-depth interviews as part of the study team's anecdotal evidence process.

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

CHAPTER 2.
Legal Analysis

As a recipient of United States Department of Transportation (USDOT) funds, the Indiana Department of Transportation (INDOT) implements the Federal Disadvantaged Business Enterprise (DBE) Program, which is designed to encourage the participation of person of color (POC)- and woman-owned businesses in an agency's USDOT-funded work. As part of its implementation of the program, INDOT uses a combination of *race- and gender-neutral* and *race- and gender-conscious* measures to encourage the participation of POC- and woman-owned businesses in its Federal Highway Administration (FHWA)-funded projects. Race- and gender-neutral measures are designed to encourage the participation of all businesses in an agency's work, regardless of the race/ethnicity or gender of business owners. Examples of such measures include networking and outreach efforts, technical assistance programs, and mentor-protégé programs. In contrast, *race- and gender-conscious* measures are specifically designed to encourage the participation of POC- and woman-owned businesses in an agency's contracting. For example, INDOT's use of condition-of-award DBE contract goals for the participation of DBEs in FHWA-funded projects is a race- and gender-conscious measure.

It is instructive to review information related to the legal standards governing the use of race- and gender-neutral and race- and gender-conscious measures, particularly if INDOT determines that the continued use of those measures is appropriate as part of its implementation of the Federal DBE Program. BBC Research & Consulting (BBC) summarizes legal information related to the use of those measures in three parts:

A. Legal Standards for Different Types of Measures;

B. Seminal Court Decisions; and

C. Addressing Legal Requirements.

Appendix B presents additional information about the above topics.

A. Legal Standards for Different Types of Measures

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

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

2. Programs that include race- and gender-conscious measures. POC- and woman-owned business programs that include race- and gender-conscious measures—like INDOT's implementation of the Federal DBE Program—must meet the *strict scrutiny* and *intermediate scrutiny* standards of constitutional review, respectively.

a. Strict scrutiny. Agencies' use of race-conscious program measures must meet the strict scrutiny standard, which represents the highest threshold for evaluating the legality of contracting programs that could impinge on the rights of others, short of prohibiting them altogether. Under the strict scrutiny standard, agencies must show a *compelling governmental interest* in using race-conscious measures and ensure that the use of such measures is *narrowly tailored* to address any discrimination or barriers in their work.

i. Compelling governmental interest. Agencies that use race-conscious measures have the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. They cannot rely on national statistics of discrimination to draw conclusions about the prevailing market conditions in their own regions. Rather, they must assess discrimination within their own relevant market areas.[1] Furthermore, it is not necessary for organizations themselves to have discriminated against POC-owned businesses for them to take remedial action. They could take action if evidence indicates they are *passive participants* in race-based discrimination that exists in their *relevant geographic market areas* (RGMAs).

ii. Narrow tailoring. In addition to demonstrating a compelling governmental interest, agencies must demonstrate that their use of race-conscious measures is narrowly tailored to address any discrimination or barriers in their work. There are a number of factors courts consider when determining whether the use of such measures is narrowly tailored:

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

b. Intermediate scrutiny. Agencies' use of gender-conscious program measures must meet the intermediate scrutiny standard. The intermediate scrutiny standard is less rigorous than the strict scrutiny standard but more rigorous than the rational basis standard. In order for a program to meet intermediate scrutiny, it must serve an important government objective and be substantially related to achieving the objective. Although certain courts apply the intermediate scrutiny standard to gender-conscious programs, many courts apply the strict scrutiny standard to both race- and gender-conscious programs.

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

B. Seminal Court Decisions

Two Supreme Court cases established that the use of race-conscious measures in contracting programs must adhere to the requirements of the strict scrutiny standard:

- *City of Richmond v. J.A. Croson Company* (*Croson*);[2] and
- *Adarand Constructors, Inc. v. Peña* (*Adarand*).[3]

Many subsequent decisions in state and federal courts have further defined the requirements for the use of race-conscious measures as part of POC- and woman-owned business programs, including *Midwest Fence Corporation v. USDOT, Illinois DOT, and Illinois State Toll Highway Authority (Midwest Fence)*, which was decided by the Seventh Circuit Court of Appeals, and thus, also has substantial precedential value in Indiana.[4]

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

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

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

2. *Midwest Fence.* In *Midwest Fence*, the Midwest Fence Corporation challenged the Illinois DOT's and the Illinois State Toll Highway Authority's (Illinois Tollway's) implementations of the Federal DBE Program on the grounds they put undue burden on non-DBE subcontractors; they were not adequately tailored to the business groups that face barriers in the marketplace; and that regulations

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

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

[4] *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).

around the Federal DBE Program are unconstitutionally vague. The United States District Court first heard the case and ruled in favor of USDOT, Illinois DOT, and Illinois Tollway in summary judgement. The Midwest Fence Corporation appealed the ruling to the Seventh Circuit Court of Appeals, which affirmed the district court's grant of summary judgement. In its ruling, the Seventh Circuit Court of Appeals held that:

- Government agencies' use of race- and gender-conscious measures must be narrowly tailored, including maximizing the use of race- and gender-neutral measures, providing flexibility and waiver processes, ensuring any numerical goals are related to their RGMAs, and continually assessing the need for race- and gender-conscious measures.
- It is important for government agencies to consider the impact of race- and gender-conscious measures on third-parties—specifically, businesses owned by white Americans and men—and ensure their use of such measures does not put undue burdens on those businesses.
- Government agencies do not need definitive proof of discrimination to use race- and gender-conscious measures but must show a strong basis of evidence supporting the need for such measures.
- It is important for disparity studies to account for the *capacity* of businesses when estimating the availability of POC- and woman-owned businesses for government work and failing to do so could result in availability estimates being biased upward.

C. Addressing Legal Requirements

Many government agencies have used information from disparity studies as part of determining whether their contracting practices are affected by race- or gender-based discrimination and ensuring their use of race- and gender-conscious measures meets the strict scrutiny and intermediate scrutiny standards, respectively. Various aspects of the 2022 INDOT Disparity Study specifically address requirements the United States Supreme Court and other federal courts have established around POC- and woman-owned business programs and race- and gender-conscious measures:

- The study includes extensive econometric analyses and analyses of anecdotal evidence to assess whether any discrimination exists for POCs, women, and POC- and woman-owned businesses in the RGMA and whether INDOT is actively or passively participating in that discrimination.
- The availability analysis accounts for various characteristics of the prime contracts and subcontracts INDOT awards as well as the specific characteristics of businesses working in the RGMA, including capacity. That approach resulted in accurate estimates of the degree to which POC- and woman-owned businesses are ready, willing, and able to perform that work.
- The study includes assessments of whether POC- and woman-owned businesses exhibit substantial statistical disparities between participation and availability for INDOT work, indicating whether any inferences of discrimination exist for individual business groups.
- The study includes specific recommendations to help ensure INDOT's implementation of the Federal DBE Program is narrowly tailored in remedying any identified discrimination, including recommendations related to:
  - Maximizing the use of race-neutral measures to address any barriers;
  - Identifying which race/ethnic groups exhibit substantial barriers;

- Ensuring race-conscious measures are flexible, rationally related to marketplace conditions, and not overly burdensome on third parties; and
- Setting goals related to the availability of POC-owned businesses for INDOT work and accounting for conditions in the RGMA.

CHAPTER 3.
Marketplace Conditions

Historically, there have been myriad legal, economic, and social obstacles that have impeded persons of color (POCs) and women from acquiring the human and financial capital necessary to start and operate successful businesses. Barriers such as slavery, racial oppression, segregation, race-based displacement, and labor market discrimination have resulted in substantial disparities for POCs and women, the effects of which are still apparent today. Those barriers limited opportunities for POCs in terms of both education and workplace experience.[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] POCs 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 POCs 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 POCs and women nationwide. For example, *Brown v. Board of Education, The Equal Pay Act*, *The Civil Rights Act*, and *The Women's Educational Equity Act* outlawed many forms of discrimination. Workplaces adopted personnel policies and implemented programs to diversify their staffs.[8] Those reforms increased diversity in workplaces and reduced educational and employment disparities for POCs and women.[9, 10, 11, 12] However, despite those improvements, POCs and women continue to face barriers—such as disproportionate 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 POCs, women, and POC- and woman-owned businesses face in a geographical 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 POCs, women, and POC- and woman-owned businesses are instructive in determining whether agencies' implementations of POC- and woman-owned business programs are appropriate and justified. Those analyses help agencies determine whether they are *passively participating* in any race- or gender-based discrimination that makes it more difficult for POC- and woman-owned businesses to successfully compete for government work. 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 action to address discrimination.[20, 21, 22]

BBC Research & Consulting (BBC) conducted quantitative and qualitative analyses to assess whether POCs, women, and POC- and woman-owned businesses face any barriers in the Indiana construction; professional services; and non-professional services, goods, and supplies industries. We also

examined the potential effects any such barriers have on the formation and success of businesses and on their participation in, and availability for, work awarded by the Indiana Department of Transportation (INDOT) and the Indianapolis Airport Authority (IAA). We examined conditions in four areas:

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

The information in Chapter 3 comes from existing research related to discrimination as well as from primary research BBC 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. 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 POCs and women to work in relevant industries and prevent some of them from starting and operating businesses successfully.

1. Education. Barriers associated with educational attainment may preclude 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, POCs lag behind white Americans in terms of both educational attainment and the quality of education they receive.[29, 30] POCs are far more likely than white Americans 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 as likely as white Americans to be expelled or suspended from high school.[32] For those and other reasons, POCs are far less likely than white Americans to attend college, enroll at highly or moderately selective four-year institutions, or earn college degrees.[33]

Educational outcomes for POCs in Indiana are similar to those for POCs nationwide. For example, BBC's analyses of the Indiana labor force indicate that certain POC groups are far less likely than white Americans to earn a college degree. Figure 3-1 presents the percentage of Indiana workers that have earned four-year college degrees by race/ethnicity and gender. As shown in Figure 3-1, Black American, Hispanic American, and Native American workers are substantially less likely than white American workers to have four-year college degrees.

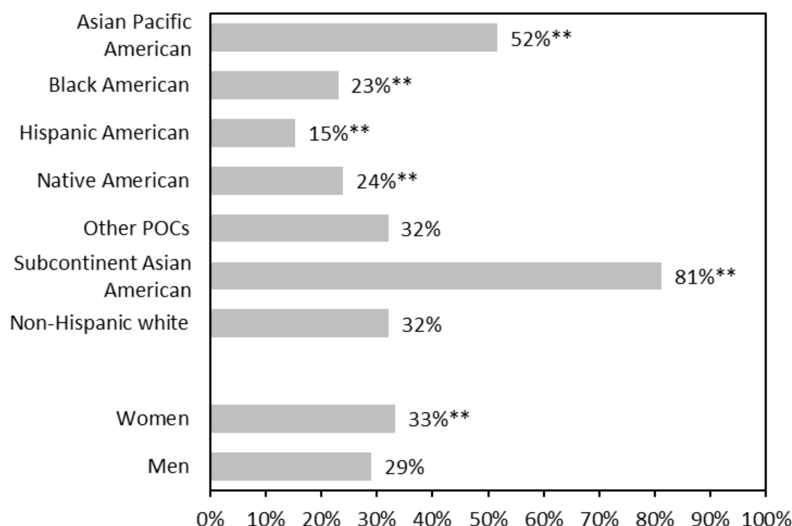
Figure 3-1.
Percentage of Indiana workers 25 and older with at least a four-year college degree

Note:

** Denotes that the difference in proportions between the POC group and white Americans (or between women and men) is statistically significant at the 95% confidence level.

Source:

BBC 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/.

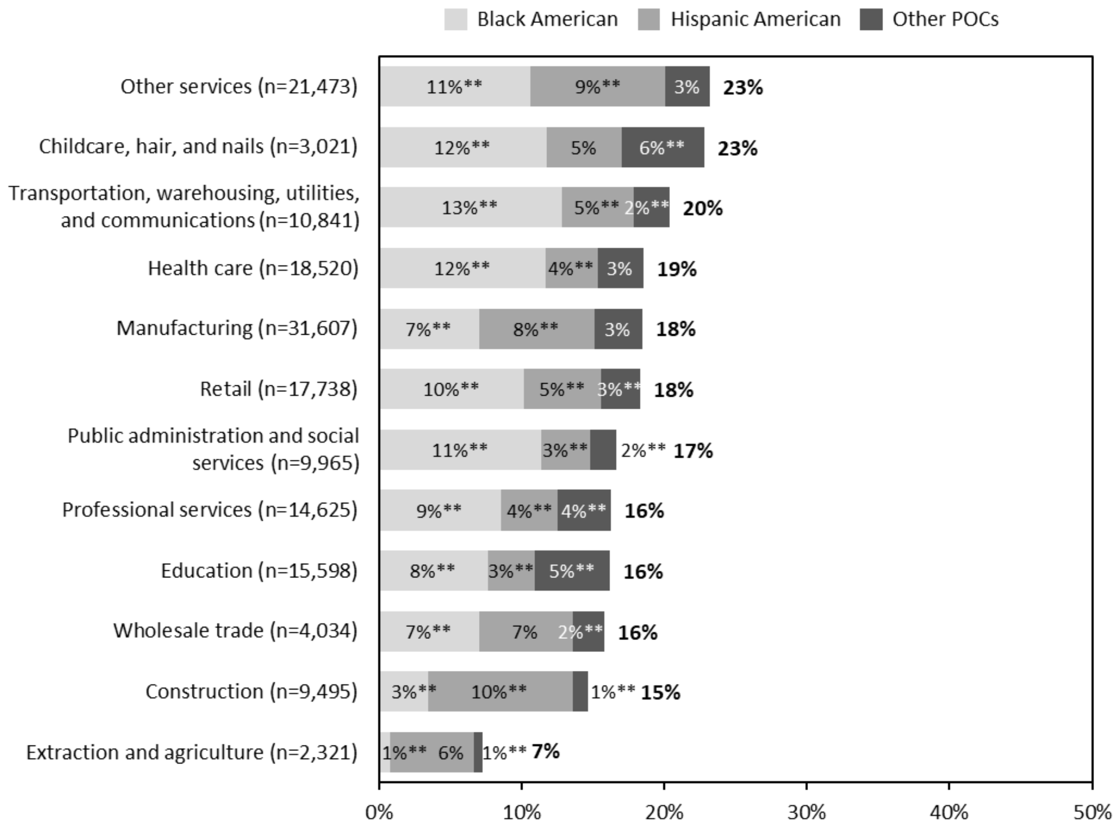


2. Employment and management experience. An important precursor to business ownership and success is acquiring direct experience in relevant industries. Any barriers that limit POCs and women from acquiring that experience could prevent them from starting and operating related businesses in the future.

a. Employment. On a national level, prior industry experience has been shown to be an important indicator of business ownership and success. However, POCs and women are often less able to acquire that experience than white Americans and men, respectively. 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 or to industries that exhibit already high concentrations of POCs or women.[37, 38, 39, 40, 41] In addition, POCs are incarcerated at a higher rate than white Americans in Indiana and nationwide, which contributes to many labor difficulties, including difficulties finding jobs and relatively slow wage growth.[42, 43, 44, 45]

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

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



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

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

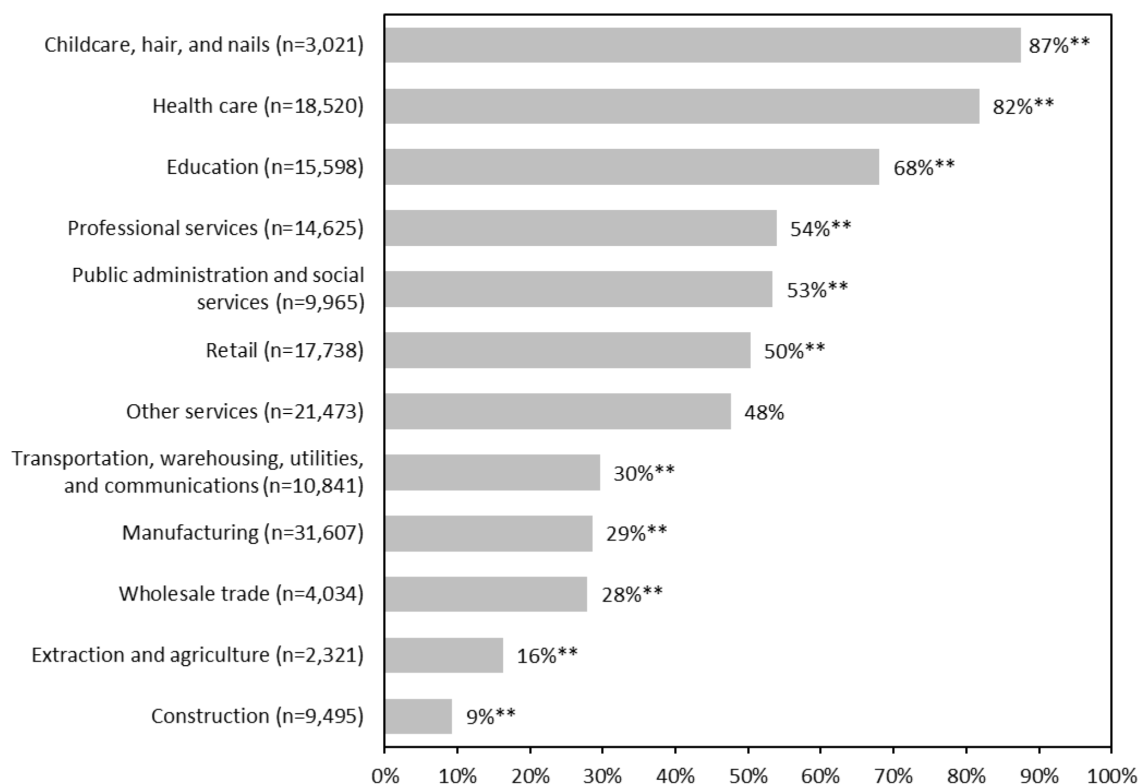
Other race POCs include Asian Pacific Americans, Native Americans, Subcontinent Asian Americans, and POCs of other races and ethnicities.

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 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 wholesale trade, 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 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, but discrimination remains a persistent obstacle to greater diversity in management positions.[46, 47, 48] Nationally, POCs and women are far less likely than white men to work in management positions.[49, 50] Similar outcomes appear to exist for POCs and women in Indiana. BBC examined the concentration of POCs and women in management positions in the Indiana construction; professional services; and non-professional services, goods, and supplies industries. As shown in Figure 3-4:

- Smaller percentages of Black Americans, Hispanic Americans, and Native Americans than white Americans work as managers in the construction industry. 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 than white Americans work as managers in the professional services industry. A smaller percentage of women than men work as managers in the professional services industry.

- A smaller percentage of Black Americans than white Americans work as managers in the non-professional services, goods, and supplies industry. In addition, a smaller percentage of women than men work as managers in the non-professional services, goods, and supplies industries.

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 POC group and white Americans (or between women and men) is statistically significant at the 90% and 95% confidence level, respectively.

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

Source:

BBC 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	Non-prof. svcs, goods, and supplies
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 POCs	0.0 % †	14.4 % †	0.0 % †
Subcontinent Asian American	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 %

3. Intergenerational business experience. Having family members who own and work in businesses is an important predictor of business ownership and business success. Such experiences help entrepreneurs gain access to important opportunity networks, obtain knowledge of best practices and business etiquette, and receive hands-on experience in helping to run businesses. However, nationally, POCs have substantially fewer family members who own businesses than white Americans, and both POCs and women have fewer opportunities to be involved with those businesses.[51, 52] That lack of experience makes it difficult for POCs 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, POCs and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.

1. Wages and income. Wage and income gaps between POCs and white Americans and between women and men are well-documented throughout the country, even when researchers have statistically controlled for various other personal factors.[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 white American households.[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 POCs 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 and gender. As shown in Figure 3-5:

- Black Americans, Hispanic Americans, Native Americans, and other race POCs in Indiana earn substantially less than white Americans; and
- Women earn substantially less than men.

Figure 3-5.
Mean annual wages in Indiana

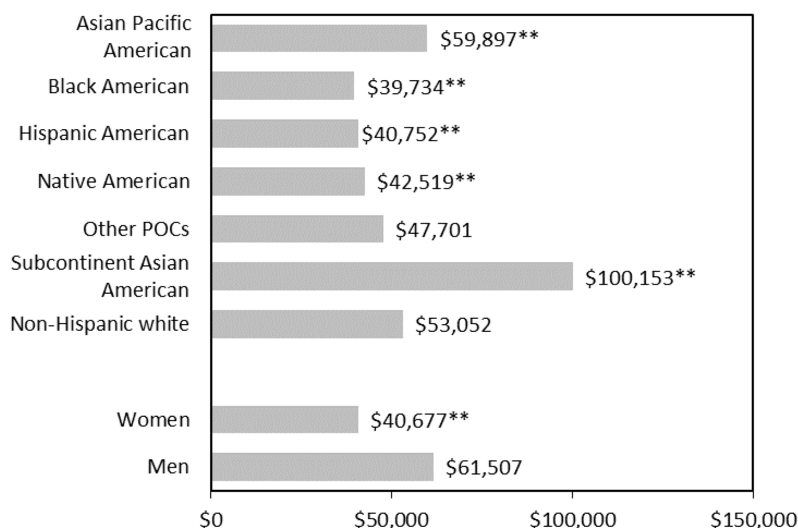
Note:

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 white Americans (for POC groups), or from men (for women) at the 95% confidence level.

Source:

BBC 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 race- or gender-based disparities in wages exist even after accounting for various other 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 white American. 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 POCs and white Americans 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 worths that were 5 percent and 1 percent that of white Americans, respectively. In addition, approximately one out of five Black Americans and Hispanic Americans in the United States are living in poverty, about double the rate of white Americans.[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, POCs appear to face substantial barriers nationwide in owning homes. For example, Black Americans and Hispanic Americans own homes at less than two-thirds the rate of white Americans.[68] Discrimination is at least partly to blame for those disparities. Research indicates that, compared to white Americans, POCs continue to be given less information on prospective homes and have their purchase offers rejected because of their race.[69, 70] POCs who own homes tend to own

homes that are worth substantially less than those of white Americans and also tend to accrue substantially less equity.[71, 72] Differences in home values and equity between POCs and white Americans can be attributed, at least, in part, to the depressed property values that tend to exist in racially-segregated neighborhoods.[73, 74]

POCs appear to face homeownership barriers in Indiana that are similar to those observed nationally. As shown in Figure 3-6, Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, Subcontinent Asian Americans, and other race POCs in Indiana exhibit homeownership rates lower than that of white Americans.

Figure 3-6.
Home ownership rates in Indiana

Note:

The sample universe is all households.

** Denotes statistically significant differences from white Americans at the 95% confidence level.

Source:

BBC 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/.

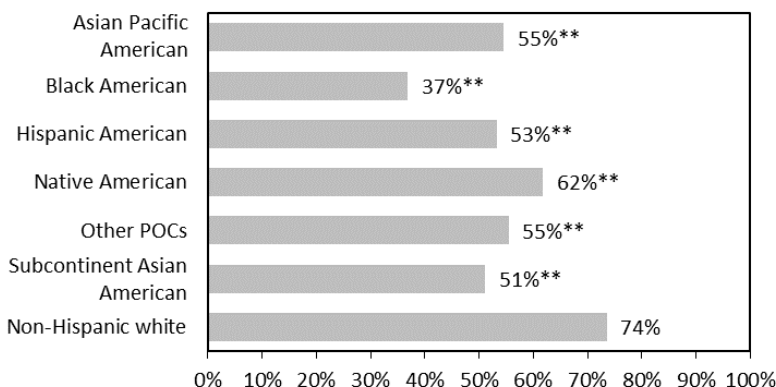


Figure 3-7 presents median home values among homeowners of different racial/ethnic groups in Indiana. Consistent with national trends, homeowners that identify with certain POC groups—Black Americans, Hispanic Americans, Native Americans, and other race POCs—own homes that, on average, are worth less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

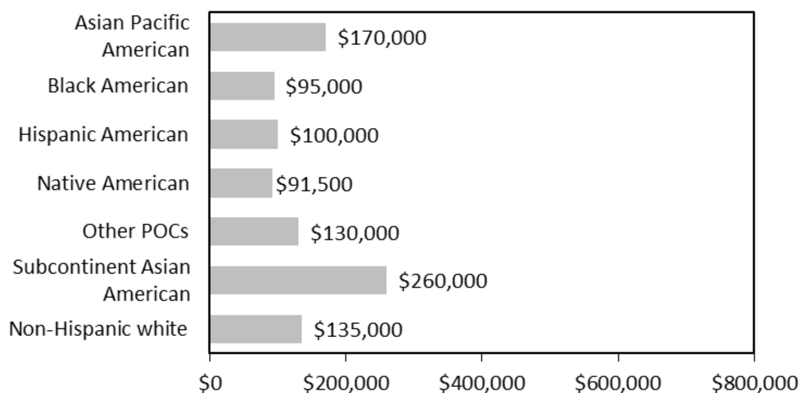
Figure 3-7.
Median home values in Indiana

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC 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. POCs 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] BBC assessed difficulties POCs and women face in home credit and business credit markets.

a. Home credit. POCs and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of POCs and women during the pre-application phase and disproportionate targeting of POC and women borrowers for subprime home loans.[81, 82, 83, 84, 85] Race- and gender-based barriers in home credit markets have led to

decreases in homeownership among POCs and women and have eroded their levels of personal wealth.[86, 87, 88, 89] To examine how POCs fare in the home credit market relative to white Americans, BBC analyzed home loan denial rates for high-income households by race/ethnicity. We 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 white Americans. In addition, our analyses indicate that certain POC groups in Indiana are more likely than white Americans to receive subprime mortgages (for details, see Figure C-13 in Appendix C).

b. Business credit. POC- and woman-owned businesses face substantial difficulties accessing business credit. For example, during loan pre-application meetings, POC-owned businesses are given less information about loan products, are subjected to more credit information requests, and are offered less support than their white American white counterparts.[90] Researchers have shown that Black American- and Hispanic American-owned businesses are more likely than white Americans 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 other personal factors.[91, 92, 93] In addition, women are less likely than men to apply for credit and receive loans of less value when they do.[94, 95] Without equal access to business capital, POC- and woman-owned businesses must operate with less capital than businesses owned by white Americans 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

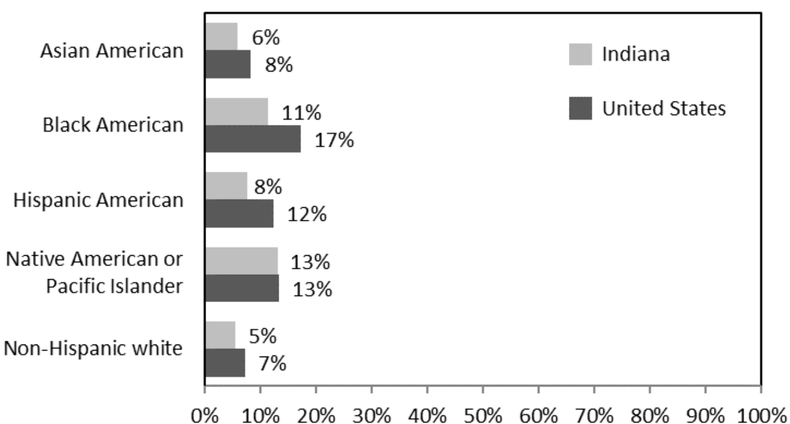
Note:

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 POC- 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 POCs 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 white men.[101, 102, 103, 104] In addition, although rates of business ownership have increased among POCs and women, they have been unable to penetrate all industries evenly. POCs 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 non-professional services, goods, and supplies industries by race/ethnicity and gender. 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 white Americans and women own professional services businesses at a lower rate than men; and
- Black Americans own non-professional services, goods, and supplies businesses at a lower rate than white Americans.

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

	Construction	Professional Services	Non-prof. svcs, goods, and supplies
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 POCs	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 %
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 POC group and white Americans (or between women and men) 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 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 and gender exist even after statistically controlling for various personal factors such as income, education, and familial status. Figure 3-10 presents the racial/ethnic- and gender-related factors that were significantly and independently related to business ownership for each relevant industry. As shown in Figure 3-10:

- 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 white

American. 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, white Americans for the race variables, and men for the gender variable.

Source:

BBC 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	-0.1047
Professional Services	
Asian Pacific American	-0.3908
Black American	-0.3074
Subcontinent Asian American	-0.5180
Women	-0.1326
Non-prof. svcs, goods, and supplies	
Asian Pacific American	0.5869
Hispanic American	0.4707
Women	0.1041

D. Business Success

A wealth of research indicates that, nationally, POC- and woman-owned businesses fare worse than businesses owned by white men. For example, Black Americans, Native Americans, Hispanic Americans, and women exhibit higher rates of business closures than white Americans and men, respectively. In addition, POC- and woman-owned businesses have been shown to be less successful than businesses owned by white Americans and men, respectively, based on different indicators such as profits and business size (but see Robb and Watson 2012).[108, 109, 110] BBC examined data on business closures, receipts, and owner earnings to further explore business success in Indiana.

1. 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 businesses owned by white Americans. 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 non-publicly held businesses.

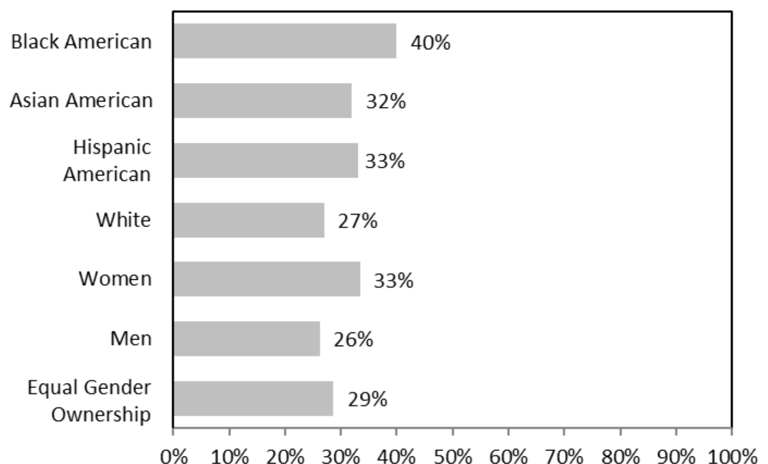
Equal Gender Ownership refers to those businesses for which ownership is split evenly between women and men.

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

Source:

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

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



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

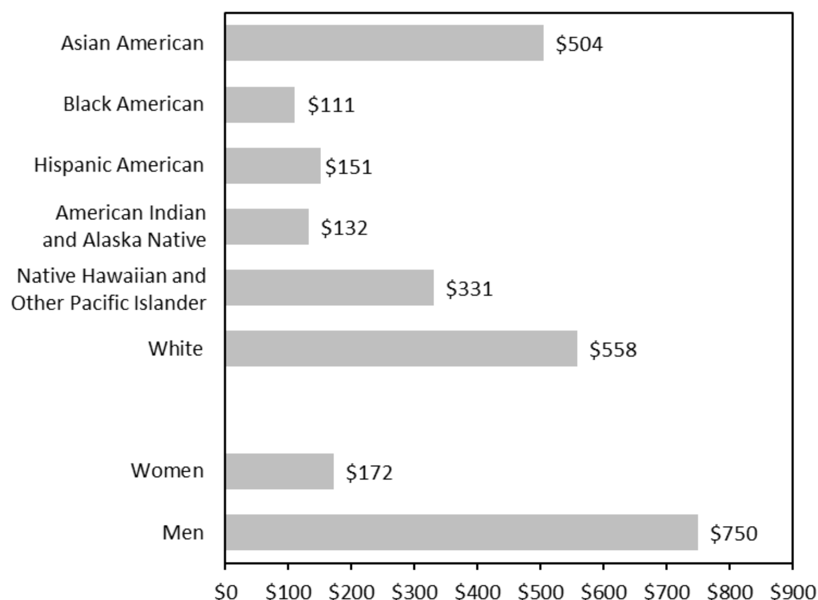
Figure 3-12.
Mean annual business receipts (in thousands) in Indiana

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.



3. Business owner earnings. BBC analyzed business owner earnings to assess whether POC and woman business owners in Indiana earn as much as white American and male business owners, respectively. As shown in Figure 3-13:

- Black American, Hispanic American, Native American, and other race POC business owners earned less on than white American business owners; and
- Woman business owners earned less than male business owners.

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 a white American business owner, being a Black American or Native American business owner was associated with substantially lower business owner earnings. Similarly, being a woman business owner was associated with substantially lower business owner earnings than being a male business owner (for details, see Figure C-26 in Appendix C).

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

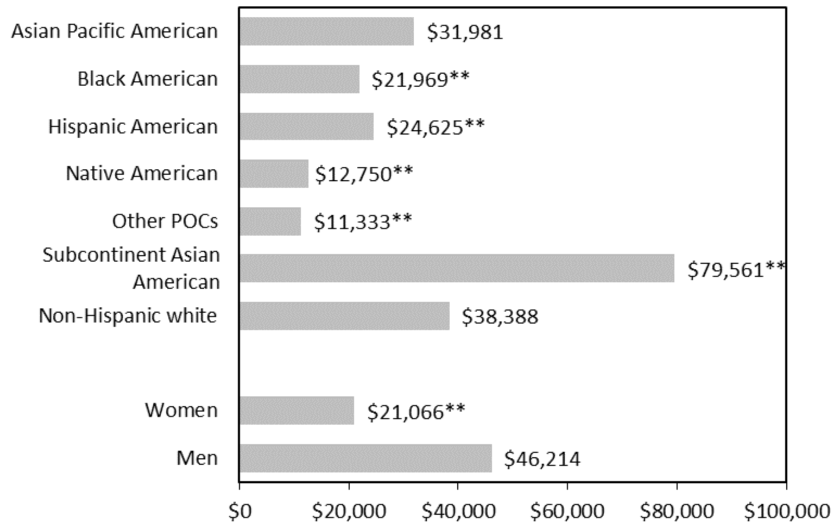
Note:

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

** Denotes statistically significant differences from white Americans (for POC groups), or from men (for women) at the 95% confidence level.

Source:

BBC 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 POCs and women face certain barriers in Indiana. Existing research, as well as primary research we 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 POCs and women to start businesses in relevant industries—construction; professional services; and non-professional services, goods, and supplies—and operate those businesses successfully. Any difficulties those individuals face in starting and operating businesses may reduce their availability for government work and may also reduce the degree to which they are able to successfully compete for government projects. In addition, the existence of barriers in the marketplace indicates that government agencies in the region—including INDOT and IAA—may be passively participating in discrimination that makes it more difficult for POC- and woman-owned businesses to successfully compete for their work. 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 the discrimination.

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[17] *Adarand VII*, 228 F.3d at 1167– 76; *see also Western States Paving*, 407 F.3d at 992 (Congress "explicitly relied upon" the Department of Justice study that "documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts"); *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.,* 2015 WL 1396376, *appeal pending*.

[18] *Adarand VII*, 228 F.3d. at 1168-70; *Western States Paving*, 407 F.3d at 992; *see DynaLantic,* 885 F.Supp.2d 237; *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.,* 2015 WL 1396376, *appeal pending; Geyer Signal,* 2014 WL 130909297 at *14.

[19] *Adarand VII* at 1170-72; *see DynaLantic, 885* F.Supp.2d 237; *Geyer Signal,* 2014 WL 1309092 at *14.

[20] *City of Richmond v. J.A. Croson Co*., 488 U.S. 469 (1989).

[21] *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994).

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CHAPTER 4.
Anecdotal Evidence

As part of the disparity study, business owners, trade association representatives, and other stakeholders had the opportunity to share anecdotal evidence about their experiences working in Indiana, including with the Indiana Department of Transportation (INDOT) and the Indianapolis Airport Authority (IAA). BBC Research & Consulting (BBC) documented that evidence and identified key themes about conditions in the local marketplace for disadvantaged, person of color (POC-)-, and woman-owned businesses. We used that information to augment many of the quantitative analyses we conducted as part of the disparity study to provide context for study results and provide explanations for various barriers POC-, and woman-owned businesses potentially face as part of INDOT's and IAA's contracting and procurement processes. Chapter 4 describes the anecdotal evidence collection process and key themes the study team identified from that information. We present all the anecdotal evidence we collected as part of the disparity study in Appendix D.

A. Data Collection

The study team collected anecdotal information about marketplace conditions, experiences working with INDOT and IAA, and recommendations for program implementation through various means between February and June 2022.

1. Public meetings. INDOT, IAA, and the study team solicited stakeholders for verbal and written comments about the marketplace at four public meetings, which BBC facilitated virtually on January 26 and 27, 2022. We compiled and analyzed comments we received during the meetings as part of the anecdotal evidence process.

2. In-depth interviews. The study team conducted 25 in-depth interviews with owners and other high-ranking representatives of Indiana businesses. The interviews included discussions about interviewees' perceptions of and experiences with the Indiana contracting industry, working or attempting to work with government agencies in Indiana, INDOT's and IAA's implementations of the Federal Disadvantaged Business Enterprise Program; and other relevant topics. Interviewees included individuals representing construction; professional services; and non-professional services, goods, and supplies businesses. BBC identified interview participants primarily from a random sample of businesses the study team contacted for *availability surveys*, stratified by business type, location, and the race/ethnicity and gender of business owners.

3. Availability surveys. BBC conducted availability surveys with 3,045 businesses between March and May 2022. As a part of the surveys, the study team asked business owners and managers to share qualitative information about whether their companies have experienced barriers or difficulties starting or expanding businesses in their industries, obtaining work in the Indiana marketplace, or working with government organizations in the region. Two-hundred forty business owners and representatives shared such information.

4. Written comments. Throughout the study, stakeholders and community members had the opportunity to submit written comments regarding their experiences working in the Indiana marketplace directly to the study team. However, BBC received no such comments.

B. Key Themes

Various themes emerged across all the anecdotal evidence BBC collected as part of the disparity study. We summarize them by relevant topic area along with illustrative quotations. In order to protect the anonymity of individuals and businesses, we coded the source of each quotation by random numbers and prefixes that represent the individual who submitted the comments and the data collection method. In-depth interview comments do not have a prefix, availability survey comments appear with the prefix "AV," and public forum comments appear with the prefix "PT." We preface each quotation with a brief description of the race and gender of the business owner and the business type. In addition, we indicate whether each participant represents a certified disadvantaged, POC-, or woman-owned business (i.e., Disadvantaged Business Enterprise, or DBE; Minority-owned Business Enterprise, or MBE; and Woman-owned Business Enterprise, or WBE, respectively).

1. Keys to business success. Businesses shared what they think are the keys to being successful in Indiana. For public sector work, many owners and representatives stressed the ability to control costs and be the lowest bidder. For private sector work, many businesses identified two keys to success: having a reputation for good work and building networks and relationships. For both sectors, business owners and representatives noted that having the technical experience required to conduct the work is critical.

> *The owner of a white male-owned professional services firm stated, "If you're bidding on public work, low bid wins, so you have to cut your fees. I would say in the private sector, reputation and service are the key. I think there's only one thing that you have to worry about as an architect, and that's keeping your clients happy. If they're happy, they'll tell other people. Referral-based work is the best work, so just keep your clients happy." [#12]*
>
> *A representative of a white male-owned professional services company stated, "In the line of business we do, which is investigation of failures and repairs, to remain competitive it is non-negotiable that you have to provide high levels of technical quality and not decrease the quality due to other factors, such as time or money." [#19]*
>
> *The owner of a WBE- and DBE-certified construction company stated, "We have to have the low bid. But we won't do it for free. We have to make sure we're making money. Like I said, I check prices and I go back and see how much it costs me an acre to feed or put down straw blanket. All these prices have been going up, so I have to make sure that I'm competitive, but also that I don't lose money. I've seen people bid, and I'm like, 'I don't even know how you can do that.' You have to be competitive, but you also have to make money." [#8]*

2. Experience in the private and public sectors. The private sector is attractive for many businesses, because they consider it to be more profitable, have quicker paying engagements, and is more relationship-based than the public sector. Businesses discussed how it can often be easier to negotiate better prices in the private sector than in the public sector. Furthermore, certain businessess see the public sector as too crowded and competitive and work being easier to obtain in the private sector.

The Black American owner of an MBE-certified professional services firm stated, "Oh, I'm going to always trend toward private sector work. It's more lucrative, and the turnover is faster. There are not as many hoops to jump through when it's time to get paid. … For me, my fee and dollar amount for that public work is going to be less than what I'm getting in the private sector." [#16]

The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Public sector you always got to be low. You've got to be the low bidder, even if you are a DBE, you've got to be low. In the private world … it's easier to negotiate." [#1]

The owner of a majority-owned professional services firm stated, "[In the public sector], you end up with … the agencies looking for low fee, high expectations, and you end up getting low bid contractors, and it's just not worth it. Most public agencies require the traditional design-bid-build scenario, and they have to take the lowest qualified bidder. … The private sector, I think, is a more respectful partnership between architect, contractor, and owner." [#12]

The Black American owner of a WBE- and DBE-certified goods and services firm stated, "Number one, the payout, it comes quicker [in the private sector], whereas if you're waiting for the state and government, you got a 30-day payout. There are all these procedures. You invoice 'em, and it's immediate payment [in the private sector]. There's no hold." [#22]

The owner of a majority-owned professional services firm stated, "[Public work is] just about competing with other architects and trying to avoid projects where the owner has invited five or more architects. It's just not worth it, because someone's going to lower their fee to get the work, so what's the point? For example, recently we got [a request for proposal] from the Indianapolis Marion County Public Library and there were a hundred architects and engineers on the e-mail. What are your chances of getting that job? And why would you spend any time replying? It's not worth it." [#12]

3. Doing business with INDOT and IAA. Businesses discussed various aspects of their experiences competing and performing work for INDOT and IAA, including learning about opportunities, contracting resources, contracting requirements, and payment practices.

a. Learning about opportunities. Finding work is generally seen as a difficult process. Business owners and representatives said that INDOT sends e-mails about bidding opportunities, but professional services and goods and services businesses find the e-mails to be too focused on construction-related work. IAA is considered to be more transparent about upcoming projects relative to INDOT and other public agencies.

The Hispanic American owner of an MBE- and DBE-certified construction company stated, "There's a seminar coming up next week online from, I can't remember if it's INDOT or IDOA. They're going to teach us where to find opportunities in the market. I get these emails from IDOA or INDOT all the time telling me about jobs they are bidding. They are very incomplete. If you only relied on what they sent us, we'd never get anything. You've got to get in there on the INDOT website or other websites and you got to figure it out yourself." [#1]

The owner of a WBE- and DBE-certified construction company stated, "I would suggest … [IAA] do some kind of a workshop with all of the XBEs and train them on how to navigate their website. Because the first time I got on PlanetBids, it took me to some other PlanetBids and I registered there and … you have to go through like 200 projects to even find Indianapolis [Airport Authority]'s

project and then there was no information on it, but it was the wrong PlanetBids. It wasn't the IAA PlanetBids. So, I would say let's do a workshop with the XBEs [and] show them how to navigate the system, … how to find stuff, [and] how to respond. [#2]

The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "You do not hear about professional services. You will not hear about it. If you hear about it, I would say 90 percent of the time it's already too late, because someone has already been soliciting for services for that particular RFQ and you're wasting your time. … [In] Indiana you don't hear about professional services because they don't want to receive 120 proposals. I can understand that too, but if it's federal or state money that's how it should be. … I just think it should be more open to all professional services versus a few professional services that have their pulse on the purchasing department to know when a certain project is being let. … I never see INDOT solicitations other than bidding, and we don't bid. … [#14]

A representative of a majority-owned professional services company stated, "I think IAA would top the list for me. They're pretty transparent about what opportunities are coming." [#19]

Once an opportunity has been identified, the bidding process itself is thought to be hard to navigate. Businesses report that they experience challenges finding the right person to which to direct questions, and the bidding system is not user-friendly. However, despite the perception that there are too many rules and regulations when it comes to bidding on INDOT and IAA work, INDOT is seen as relatively quick when making contract awards.

Now as far as IAA … before they changed administration, I was rewarded at least seven projects. I mean we were working on IAA back-to-back. And then change of administration, new people and starting over again, and then I was not as successful. And then I had a bad experience with one of the newer people that discouraged us to go after any more IAA projects." [#14]

The Black American owner of an MBE- and DBE-certified construction firm stated, "There's a lot of requirements to operate [with IAA]. It's hard for me as a prime or even as a sub, subbing it out some of it to another sub because of time constraints and being busy. … We had subcontractors we needed to do something out there, and they outright said no because it's at the airport. They said, 'No, it's too much red tape. It's too much [of a[pain in the neck. We don't want to deal with it.' I said, 'Well, I'm the one dealing with the red tape and paying for it, and all you have to do is show up and do the job.' They still … won't do it." [#17]

The owner of a WBE- and DBE-certified construction firm stated, "INDOT's bidding is very difficult … . It took me a lot of phone calls and a lot of studying to accurately use that. I still have to go back to my notes to get into that system. It's not very user friendly. INDOT is very difficult to obtain your prequalification and get your aggregate and that's to bid on certain work … it's their bidding software and their prequal requirements. I wouldn't have been able to do it without help from somebody that has [bid] before I can tell you that … we've been in business since 2013 and we didn't bid our first INDOT job until two years ago." [#23]

The owner of a majority-owned construction firm stated, "INDOT does a really good job of, if you've got all your DBE requirements and it's within an engineer's estimate, … if the number falls in that range, they usually award it pretty quick. Two weeks [and] you know you got the job." [#24]

b. Relationship building. Businesses that are aware of INDOT's DBE directory and other business listings found them to be helpful when developing project teams. However, businesses still reported experiencing difficulties building relationships with potential project partners, a prerequisite many businesses identified to successfully winning work. Some businesses reported that there is no pressure from agencies, such as IAA, for prime contractors to work with local companies, leading to additional difficulties in developing relationships with potential project partners.

The owner of a WBE- and DBE-certified construction company stated, "Well, with IAA they have a special certification called ACDBE, which is Airport Concession DBE, okay? So as a DBE I qualify for that, so I have that certification, and what it's supposed to do is enable me to work with the concessionaires at the airport, but what happens is there are national companies that come in from out of town and they bring their designers with them. Well, the airport could easily say, 'Hey we want somebody local. We want boots on the ground, so you need to team with one of our approved vendors to get the job done.' … I don't know if anybody, I guess they track it - I don't know that any ACDBE has gotten any work at all." [#2]

The owner of a WBE- and DBE-certified construction company stated, "The only barrier I see is just knowing in some cases who to bid it too, right? Getting your hands on plan holders lists. INDOT, that's all very public, very easy to get your hands on it the same way, because it flows through the INDOT portal. City of Indianapolis for plan holders, they use Reprographics. That's fairly easy sometimes. Sometimes those things cost money like plans and things like that, whereas INDOT's is all free and public. INDOT—that information is very forthright. It's all public. … The contact information is there. … [However,] networking with contractors to get work can be difficult … developing relationships with prime contractors." [#6]

The owner of a WBE- and DBE-certified construction company stated, "One of the hardest things of being a startup [is] not having connections." [#3]

The Black American owner of an MBE- and DBE-certified construction firm stated, "Some of the advantages of being on the MBE [certification list] is there are requirements put in place for certain jobs, whether it be city, state, or even at the Airport Authority that have requirements. We're on that list to help meet that requirement. I think that's good that it forces people to look at us or make an attempt, which is great." [#17]

c. Contract requirements. INDOT requires bonding for most construction projects. Businesses discussed the challenges they have faced in obtaining bonding, noting that bonding requirements can be a barrier for small, POC-, and woman-owned businesses if they are bidding as prime contractors. Subcontractors generally do not report the same issues with bonding, because often bonding requirements only apply to prime contractors, and businesses reported that some prime contractors provide bonding support to subcontractors.

The Black American owner of an MBE- and DBE-certified construction firm stated, "It's always been a problem for minorities acquiring financing and bonding." [#18]

A representative of a minority-owned construction company stated, "The difficulty is to find the insurance they require and the surety bond [of] $50,000. … I feel like our company has gotten looked over because we are minority-owned … ." [#AV45]

The owner of a WBE- and DBE-certified construction company stated, "I have one company that just recently had us get a bond, and they paid for the bond. Anything over $50,000 with that company they said they require a bond." [#8]

The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "We have had some difficulties [with bonding requirements], obtaining bonds, etc., yeah. Well, you know, the bond is very expensive. … Yeah. I think that's the most difficult thing. The barrier for people to get in because this job is like a $200,000 or $300,000. I can do it, but I don't want to put $10,000 or $20,000 there for a bond … . You know if I don't get anything, I lose this. Yeah, you don't want to lose $10,000 or $20,000 for nothing." [#9]

Business owners discussed their experiences getting paid by INDOT and IAA. Business owners generally think payments are slow, particularly when it comes to change orders. Slow payment is especially problematic for subcontractors, as they are often the last ones to get paid. However, several businesses noted that even if it takes a while, they are always confident INDOT will pay.

The owner of a WBE- and DBE-certified construction company stated, "IAA is good on payments, but yeah, the problem with INDOT is. because we're a sub, we're the last to get paid, and if the inspector is behind in their work, they can extend that by two to three months if they don't get caught up on their pay [outs]." [#2]

The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "The only thing is as a sub that I would like to know is if you do have problems getting payment who do we contact? You know, 'cause, I feel like … there's so many people with INDOT and with, you know, the Airport Authority. If you're not getting payment, then who would you contact? I guess just knowing 'cause … there's been times [with] the Airport Authority where I had trouble getting payment from somebody and … I didn't even know who to contact in regard to that." [#7]

A representative of a majority-owned professional services company stated, "We did have some slow payments from the IAA due to their contracting or their budgetary cycle where we had performed accepted work prior to the new budget taking effect and therefore they needed to delay payment until the new budget took effect." [#19]

The Hispanic American owner of an MBE- and DBE-certified construction company stated, "You can't be beating on [agencies and prime contractors] all the time to get paid. And they know the issues, too. … Right now, INDOT is so shorthanded, and there's so much work going on that a change order paperwork goes to the bottom of the pile on a project manager/engineer's desk. So, they usually don't do change orders right away. It might take them 90 days just to write the change order, and then it has to go up the chain. Depending on how much the change order is for, it has to go up the chain of demand in INDOT through the area engineers, sometimes to the district engineer. And then maybe even the central office to get approved. Then it comes back down and then they can create an estimate. And then the estimate gets paid in 30 to 60 days. They say 35 days but that's not always true. And then the contractor has to pay you within 10 days [because of] prompt payment. So, if you think about that, [payments can get up past six months real quick. And that's a big problem." [#1]

The Black American owner of an MBE- and DBE-certified construction company stated, "The other concept that's in a lot of contracts is that the subs don't get paid until the general gets paid by the owner. Maybe not as big of a deal for an INDOT job, but as you can imagine, if the owner is having

some money troubles and the general doesn't get paid on time, it just [the] issue rolls downhill, it becomes a bigger and bigger problem for the next guy, because they just have that much less money." [#4]

4. Doing business as a prime contractor or subcontractor. Businesses that work mostly as subcontractors expressed disappointment and frustration that INDOT does not allow second-tier subcontractors on its projects, which sometimes prevents first-tier subcontractors from going after larger pieces of work.

The Hispanic American owner of an MBE- and DBE-certified construction company stated, "We can't subcontract INDOT work. They don't allow secondary subcontractors." [#1]

The owner of a WBE- and DBE-certified construction company stated, "We're not allowed to subcontract [to a second-tier sub]. So, we can't subcontract any of our work to anybody else. So, for instance, we can't subcontract pavement marking. We don't have a big truck for pavement markings. So, it would be really advantageous if they would let us subcontract that because we're the ones who have to coordinate it anyway. So, why not let us subcontract? ... It's just a silly rule. I don't understand where it ever came from. I mean, that, to me, is a barrier, because you're trying to build your business and offer other things, and if you could start doing things like that, then maybe you could get to the point where you could afford to buy a pavement marking truck." [#2]

Many businesses noted that prior relationships often drive prime contractors' decisions around subcontractors to consider for teaming opportunities. Disadvantaged, POC-, and woman-owned businesses discussed how they try to choose to work with prime contractors and subcontractors that are also disadvantaged, POC-, or woman-owned, stating that they feel a responsibility to make long-term investments into improving the marketplace for businesses like their own.

The Black American owner of an MBE- and DBE-certified professional services firm stated, "The prime would let us know that 'Hey, we're bidding this job. Are you interested in being a construction engineer on it?' ... These primes, they don't know you, so you want to get a job with them and you're [trying to grow]. You do the job site, and you do a good job and also you are with the foremen, and they like you, they like your work ethics and everything. That part of the building relationship is what happen s… When we started, they were giving us some challenges, but then when they realized we were capable of doing it, now we're doing almost ... 30, 20-percent of all their jobs, if not 50. I don't know. But it's a relationship that we built, and we hope we can still continue to do that work for them." [#5]

The Black American owner of an MBE-certified professional services firm stated, "It's going to be somebody like me that I'm going to bring on. All the time. Every time there is an opportunity for me to have a sub, that's how I do it. That's what I'm going to do." [#16]

A representative of a majority-owned professional services firm stated, "[Prime contractors] already had their own sort of people they wanted to work with. They didn't want to entertain anything else. It's all about relationships. There are some firms that are out there that they team with the same people all the time, and they don't defer from it. … You know, towns, cities, or counties, I see more opportunities for minority business owners and woman-owned businesses and veterans in those communities … . I see them focused more on that than I do anywhere throughout the state.

Indianapolis is one too. Especially with [IAA] and things like that. I mean they have a lot of [minority- and woman-owned business] requirements." [#20]

The Hispanic owner of an MBE- and DBE -certified professional services firm stated, "The public sector has more ancillary benefit to create that motivation. A lot of times we can do all of the work that is being asked but we bring on another MBE to train them so that they can also do the same work that we can do. It's a long-term investment in creating a more diverse market." [#21]

5. Barriers to success. Business owners and managers discussed various barriers to success in the marketplace, including difficulties with prequalification processes, accessing capital, hiring and training staff, and obtaining materials in the current economy.

a. Prequalification. Businesses stated that they were ready and willing to do work for public agencies, but sometimes they have difficulty prequalifying for it. Part of the issue according to those businesses is building up the necessary experience to meet prequalification requirements. New businesses considered it especially difficult to show sufficient histories of past performance.

The owner of a WBE- and DBE-certified construction company stated, "Prequalification comes with a hefty price tag. So that's definitely a big barrier to entry truckers … just being able to have money to do that. I know several people who, once you tell him that, then they think, 'Well, that's a roadblock that I can't get through,' and it is, because it's a big cost.." [#3]

The owner of a WBE- and DBE-certified construction company stated, "Being pre-qualified with INDOT, I mean, there are certain stipulations that probably most don't realize. You have to have a positive working capital, you have to have experience, you have to come show the assets, you have a man [on the project] to really help [you]m be successful. [#6]

The Black American owner of a construction company stated, "Actually, just a couple of weeks ago, I got something to prequalify for [a project for some] apartments, and some of the questions that they're asking for—they're needing references, they're needing bigger jobs, or my [more extensive] job history. They want to know what jobs I did in the past and have completed and what was the outcome. Well, I don't have any bigger jobs so, I can't really put anything. So, is that gonna disqualify me? It's kind of intimidating to even reach out because I don't want to be laughed at." [#11]

The owner of a WBE- and DBE-certified construction firm stated, "Pre-qualification is very tough when you're getting started, because it's based on what money you have. INDOT is very difficult to obtain … prequalification, and get your aggregate, and that's to bid on certain work. The prequalification through the public work, for public works projects… they have a requirement that you have to do, I think, five jobs that are in excess of either $350,000 or $500,000. I think that really prevents a lot of smaller companies from doing work because … they want you to do these larger jobs and a smaller company may not do that much work, you know that many dollars of work." [#23]

b. Access to capital. Many businesses noted that cashflow is crucially important to success, especially in the construction industry or for those who perform as subcontractors and may experience delays in payment. Accessing capital and credit lines is seen as dependent on the ability of businesses to develop relationships with banks, which is seen as a substantial barrier in Indiana.

The Hispanic American owner of an MBE- and DBE-certified construction company stated, "[Accessing capital] can be daunting—not to mention how daunting it can be to start a business when you really don't have many assets and try to get funding. … There's not a lot of banks that will loan commercial loans, and the requirements are stringent, [so] I don't know if it's much as of a barrier as it is in the DBE/MBE world as it is in any other world. Banks won't loan you money until you have a track record, usually a three-year track record. So, they want to see three years of financials, well done financials. … And it gets harder and harder to find banks that are willing to do commercial loans and have a local presence. [#1]

The Black American owner of an MBE- and DBE-certified professional services firm stated, "Banks won't give you loans to start a business, because they don't trust you [will be] able to establish it. I mean most of it was the trust between the banks. But ever since I've been able to establish the business and with our credit records and everything it hasn't been a problem with obtaining a loan if I need it so far." [#5]

The owner of a majority-owned professional services firm stated, "I would say the [one of the most difficult things] is getting any type of financing from banks. That was impossible. They all said, 'Come back in five or six years once you're established.' … I would say the first five years were the roughest. I don't think you're going to change the banking industry. But that is a big hurdle. Banks are not your friends, and they generally won't loan you money unless you've got collateral. … I don't know if there's any solution to that other than banks being forced to set aside community-based funds for startup businesses and entrepreneurs." [#12]

The Black American owner of an MBE-certified goods and services firm stated, "I would say, again, back to cash flow … managing cash flow would be a big issue if a winning contract was there. Just trying to manage the cash flow with that. Getting the finance would definitely be a barrier, because you definitely won't blow all your earnings on interest rate. Just mainly finding the right bank, I would say, that would give you the best financing, whether it's short-term or long-term financing." [#13]

The Black American owner of an MBE- and DBE-certified construction firm stated, "It's always been a problem for minorities acquiring financing and bonding. … Even though banks should commit to Community Reinvestment Act programs, they don't follow up in actually performing that service, whether you're a new operation or whether you've got good equipment or a good track record. Various banks do not want to fund minority operations." [#18]

c. Personnel and labor. When it comes to obtaining or performing work, the barrier business owners most often identified was finding, training, and keeping personnel and labor. Business owners noted the investment required to train new staff, especially because of wage competition in the market. They said that the issue is exacerbated in nonunion industries, because union workers are offered more on-the-job training opportunities that unions fund themselves. The perceived labor shortage and high cost to attract new talent has led businesses of all sizes and ownership to scale back the work they pursue and perform.

The Black American owner of a WBE- and DBE-certified goods and services firm stated, "The training, yeah. People, they don't have enough patience for it. If I bring somebody in here and I give 'em six weeks' worth of training, and then I'm paying for them to be certified and paying for certain amount of insurance to make them a viable asset, then they come in, and we're trying to get grants,

and they see us getting blocked, and they think that we are not stable enough to work for. We have put in all this money to train our employees to make sure that they're certified … ." [#22]

The Black American owner of a construction company stated, "I don't have any problems finding or training because we're part of the union, and anybody who comes out to my job sites would be trained. If not, they'd be an apprentice, and I would have somebody training them. A journeyman. So, no, finding manpower is not the problem. It's being able to pay manpower. But that's just my business specific, you know? Any other electrical company who's not union, they probably would have some troubles." [#11]

The owner of a WBE- and DBE-certified construction company stated, "Finding employees is always hard. Finding people that will show up at 4:00 in the morning to go to Terra Haute and put in 15,000 feet of straw wattle—we did that over two days actually. The ones we have, we pay more than prevailing wage requires. We are a union company, and the union requires we pay a certain amount. We pay more than that because you can't find people that just show up and will do the work. Our employees have been with us a long time, and I hope they'll keep staying with us." [#8]

The Black American male owner of an MBE- and DBE-certified construction firm stated, "One of the challenges we face the most is labor force and skilled labor. People being able to perform at a level that you would think that they could do, or they would indicate that they can. Just there's not enough manpower to take on the demand. That's one of the most challenging barriers to try to get over is even the old methods of hiring back in the day, you got a friend of a friend, or referral, but even that's not working. I think people aren't coming to work with the labor shortages, so therefore we had to scale back, because we didn't have people. The opportunities were there. We just didn't have the manpower to bid. I mean, labor has always been an issue, but it's [even more] difficult now." [#17]

d. Materials. Multiple businesses noted issues related to the supply chain and difficulties obtaining inventory, equipment, material, and supplies. They commented that for industries that require equipment and supplies, it is especially important they get their materials on time and that current delays have adversely affected their businesses. Businesses discussed the compounding effects of not having access to cash or other financing as it prevents them from keeping up with the rising costs. Some businesses are compensating by building those costs into their prices but noted that doing so impacts their ability to compete effectively in low-bid environments.

The Hispanic American owner of an MBE- and DBE-certified construction company stated, "We bought a big piece of equipment last year to do grooving of markings … Well, there was a lot of supply chain issues in getting the equipment. We ordered it in November 2020. We got it in June 2021. They had promised it to us for March 30, 2021. They were about 90 days late. … The contractor was calling us and saying, 'We need you to get out here and do this work,' and our machine wasn't ready because of supply chain issues. We were able to abate some of those, [but] there was a penalty on one job, and we had to send in all kinds of documentation to INDOT." [#1]

The owner of a WBE- and DBE-certified construction company stated, " … All the manufacturers, because of COVID, are requiring 100 percent deposit. … That's a barrier to small, minority-owned, any business. It's a barrier to any business to try to come up with that kind of money. And so, luckily, I was able to partner with a couple other firms, and the bank would give me 60 percent so, I had to use credit lines. I had to partner with somebody else who could bring in cash. … I don't know how INDOT's dealing with those kind of things, because the material prices are going up, and it's not the

business' fault and they shouldn't go out of business because of that. So, maybe they need to put in a contingency or something to be able to handle those kind of things - you know, supply chain issues and increasing freight and all that kind of stuff, because it's hard to get people to bid when there's that much risk." [#2]

The Black American owner of an MBE- and DBE-certified construction company stated, "What happens in the steel industry last year, again, don't know how familiar you are, but it had an historic rise in the price of steel. That resulted, for me, in 13 straight monthly price increases, whereas normally there's maybe one, two price increases and maybe one price decrease per year. So, what that did, imagine if I'm selling at 20 percent margin and I quote that in November/December of 2020, and then I don't perform it until March/April of 2021, or May/June of 2021, my margins are gone, and in fact I'm losing money just to perform the contract. … I don't know that we can have another year like we had last year. Because prices were constantly going up, it became hard to get the stuff we needed, because everybody was ordering more than they needed to try to beat the next price increase." [#4]

The owner of a WBE- and DBE-certified construction company stated, "Recently the price increased …. My fertilizer went from $10.50 a bag to $20 or more a bag. My feed has doubled. I have jobs that I bid two years ago that still are not finished that I have to go on prices that were way lower than I'm paying now. But that's just in the last four or five months, I guess. … First of all, you can't even buy trucks; you can't get equipment now. … For somebody as a startup in landscaping would be difficult." [#8]

6. Barriers related to race and gender. Businesses reported that falsification of good faith efforts are rampant in the marketplace and public agencies like INDOT and IAA seem to do little to address the issue. POC and woman business owners report not hearing about work opportunities until the very last minute, being used as a passthrough, or being put on project teams without their knowledge.

The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "We had a contract two years ago with a company that was doing a bunch of mowing contracts and they wrote us in in the proposal for 10 contracts. We didn't even know they wrote us in. We quoted them and they committed to us for 10 contracts. Well, later on after the season was over in November or December 2020, I got a call from INDOT that said did they use you on these jobs? They hadn't used us at all, and the jobs were over. So, I think the IDOA was supposed to be monitoring that with INDOT's help and I think they all dropped the ball. I think the contractor that was virtually, as far as I know very little consequences. … Usually, we get requests for quotes for just about everything. I think what happens is the big contractors, knowing that they are going to be [asked] about whether they met the goal if they don't meet it, what kind of an effort did you make to meet the goal? We get, probably within three weeks of the next highway [project], we will get a whole slew of emails from our customers saying are you going to bid on this job, this job, this job? And they would like to have a response. We don't think they necessarily always want a quote because they know we're not quoting it. But they do that to cover themselves in case they don't meet the goal." [#1]

The owner of a WBE- and DBE-certified construction company stated, "From INDOT, they have to request DBE companies and even though they probably won't use us because we're non-union, they still have to request it. They do follow that part of the regulation; they just don't follow the other part. … I was involved in a project ... I think I might have told you one story, but we were the

architectural record and they told us they wanted 20 percent participation on the construction side, which we really don't have anything to do with because it's dependent on the contractor who wins the low bid. So, the bids came in and they asked for their minority participation and the contractor said I don't have any. And they said well [you] you have to get him to get 20 percent, we have to have 20 percent. So, call him back and see what you can do. So, I call him back and when they bid for [this] County, they have to write down all of the people that they contacted, minorities and women that they contacted, and when they contacted and who they contacted, and I went through the list and there were people on the list who didn't work there anymore that they said they contacted. There were people that I called, and I said, 'When did you get the bid documents?' And they said, 'The day of, the day after or the day before.' So, it wasn't a fair bidding thing at all and so I went through the whole list, and I had comments on all of it and so I called the contractor and I said here what I found out. I said, 'Here's the bottom line, you have to get 20 percent. So, you need to call these people back and you need to figure out how to get 20 percent. And what [the] County told me is that if you have to raise your price because some of these people are higher, you can do that.' I very clearly, I said that. A week later he calls back he goes, 'I made the percentage, here's my bid it's the exact same place.' And I said, 'See how hard that was?' It wasn't hard at all; he just didn't want to do it." [#2]

The owner of a WBE- and DBE-certified construction company stated, "I feel like anybody can push the envelope as far as did they make a good faith effort? I know sometimes people, they want to do the bare minimum to prove that they made a good faith effort, but there are companies out there who legitimately outshine the other ones, and they will call you. I need a price. Get me this price. You know … And then you'll have other people that just send a blanket email and you know that blind copies everybody and their brother on it, and a lot of times, like, I'll get that email and it won't even be my line of work. And so, you know, you know that they're not really making a good faith effort. They're doing the bare minimum to try to make it look like they made a good faith effort when in all reality they didn't do everything they could to get the price." [#3]

Although considered to be less of an issue than falsification of good faith effortss, POC- and woman-owned business fronts, or businesses thatget certified as MBEs and WBEs despite being controlled by white men, are thought by many businesses to be an open secret in the Indiana marketplace.

The owner of a WBE- and DBE-certified construction company stated, "I've heard people that didn't get certified - like a friend of mine didn't get certified 'cause she bought the company from her father, but he funded the sale, but if she would have gone to a bank, she would have gotten certified. And I'm like well that's not right, she's still buying the company she can still prove that she's buying in, but they wouldn't certify her. And I've heard of other ones that maybe shouldn't have been certified that did get certified. They definitely - it was their husband's business, and they just took it over and they ended up being certified and it's kind of like did they pay somebody off or something to get that done, because it just seemed like the ones that were actually legitimate didn't get certified and the ones that were not legitimate got certified." [#2]

The owner of a WBE- and DBE-certified construction company stated, "I have a competitor right now and all along, he was going to buy the business, and now all the sudden his wife bought the business, and everything is in her name, and they've hired a DBE attorney and she has no experience in the field and blah, blah, blah. And it's just like … that goes on because people instead of just telling the truth and being honest and doing the right thing, they think that they can get ahead." [#3]

The owner of a majority-owned professional services firm stated, "Probably 20 years ago we did some work for IU Health, and they asked us to use an MBE, and we ended up using the same engineer and just funneling it through an MBE. I'm sure that happens every day." [#12]

A representative of a majority-owned professional services company stated, "I've witnessed that is MBE or WBE firms [are] checking the boxes to be designated as those firms when in reality they're ran and operated by Caucasian males. I can think of a couple examples where it's kind of like they're either just [checking] the checkbox for being a WBE, MBE firm but in the operations, it seems clear to me that they're not aligned with the spirit of what these designations mean. Right? Where we're trying to create a more diverse work environment, but people are just checking boxes to get new opportunities. There's one firm that I think of where it's a WBE firm because its 51 percent owned by females or a female. Where if we switched the shares by one percent, it's no longer a WBE firm and then it looks more like how non-DBE firms are ran. Right? I think that that to me looks like checking a box to open the door to other opportunities that you would otherwise not be eligible for and only doing that with a nominal investment of one percent of ownership." [#19]

The Hispanic male owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "I have seen in the news, and some of the briefings were front companies who claim that they're minority of the minority women-owned, minority-owned, veteran-owned, disadvantage-owned minority firms that were nothing but shell companies and fronts that received the contracts because of that, but in particular set aside. And they did not deliver what's required under the contract, so they were prosecuted, charged and prosecuted. So that is a problem for the rest of us because then that gives a bad rap. So, it's important that we police ourselves when we see that kind of behavior." [#21]

7. Business assistance programs and recommendations. Businesses discussed the benefits of programs INDOT and IAA has in place and offered suggestions for improving them. Most businesses were aware of a variety of programs INDOT offers and generally perceived those programs as effective. Businesses noted that IAA has effective subcontracting goals, and the usefulness of the Entrepreneurial Development Institute (EDI) Program, in which both IAA and INDOT participate.

The owner of a WBE- and DBE-certified construction company stated, "One thing that INDOT used to do that was really lovely [was the] Entrepreneurial Development Institute Program, which I'll go back to just 100 times over. They had meet and greets and they would bring in estimators or whoever from other companies and you get time just to stay in there and introduce yourself and to sit down and have a meal with them. And that was an awesome thing they did because I met some people there that I probably wouldn't have met, or it would have taken me a few years to get in front of. So, I think that was something cool and then … the next year … we could send an invitation to somebody that we do a lot of work with and that's sharing a contact you have." [#3]

The Black American male owner of an MBE- and DBE-certified construction company stated, "I know INDOT and other public agencies sometimes have seminars on bidding, on estimating, resources that have bank officers come in and talk, or HR officers come in and talk, and I'm sure all of that is helpful." [#4]

The Hispanic American male owner of an MBE- and DBE-certified construction company stated, "Over the past couple years, [INDOT has] been having Friday virtual training sessions. I like the idea. I don't always think the content is great, but I like the idea." [#1]

The owner of a WBE- and DBE-certified construction company stated, "[INDOT] started with the Construction Estimating Institute (CEI), and some of the workshops that CEI has put on for education purposes for DBEs have been phenomenal. … To some degree it's like maybe make some of that continuing educational requirement for the application or for the certification, you know, because that [lack of knowledge] can be a little frustrating. There's DBEs that have been DBEs a lot longer than I have, and [they] still don't know some of these things and I'm educating them right. So, I'm a big advocate of these agencies educating the certified companies so that they can be better. … Every business owner has these issues, but we as DBEs … I think the point is that we have a resource, i.e. the agency that certified us, to potentially assist with these things, right? They have to. … They're trying to prioritize. Where can we help? We want these DBEs to be successful." [#6]

The owner of a WBE- and DBE-certified construction company stated, "In regard to the networking and developing of relationships, I do think, again, INDOT hosts various events around certain projects to hopefully have that face-to-face interaction between subcontractors and suppliers and prime contractors that are bidding the work. I would say that it's never enough in my mind. It's usually in my mind what it appears to be is just the larger projects, right? I mean, the massive projects that not everybody as far as DBE have the wherewithal to bid on …. ." [#6]

Businesses discussed the benefits of both technical assistance and mentorship programs in developing experience and expertise in specific skill sets and providing support and guidance for general business needs. Multiple business owners were aware of existing programs and noted the efficacy of mentor/protégé programs, such as the Indiana Construction Round Table, in which IAA participates.

The owner of a WBE- and DBE-certified construction company stated, "Estimating [programs] would probably be worth it. … When you start out, you probably don't have an admin person so, unless it was free, a lot of startups can't pay for that kind of stuff. But if there was some kind of program that helps people learn how to do estimating correctly and learn how to put together a bid. I think Ace Mentoring [teaches people estimating], but I don't know if they do it on the professional level. I know they do it for high school and college kids." [#2]

The Black American owner of a construction company stated, "If I had someone that I could have talked to during the start of my business … someone who I could have called on a regular basis or as needed to ask different questions, because I've got myself into a few situations that I could have avoided. Now, I've learned, and I know now, but if I would have had to have opportunity to talk to somebody, there were some mistakes that could have been avoided." [#11]

The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I've had several [mentors] over the course of my profession that has … opened the door to what I do and also exposed me to people … that have recommended us as well. So, it has its benefit for sure. … I was a part of a program several years ago, Indiana Construction Roundtable … . Their program was stemmed off of the fact that you were partnered with a mentor that you met with so often to help you either finance or market or your books or anything. That was extremely helpful, because for one thing, that general contractor saw me in a different light. Even though I'm not supposed to use that person for work, that person saw me in a different light, and they saw some of the work that we did produce, so they did recommend me to other companies that ended up using us for their architectural work. So, it's the exposure of the potential that has gained a lot of awareness, so I think the program would be very beneficial if there is some type of incentive. The

only problem is the incentive for the prime is trying to get the work done. They're not trying to lose time, and if it can be structured where they could learn and benefit as well, I think it would be beneficial for both." [#14]

The Hispanic American owner of an MBE- and DBE-certified professional services firm stated, "Mentor protégé programs are available all throughout the primes. All the primes are pretty much engaged in that sort of thing because of the program the federal government started. They put in place the means to help small businesses. I think there are some areas where startups could benefit by being connected with universities or some of the areas where universities are launching programs to incubator programs. Those source programs may have the expertise to train and assist small businesses, especially start-ups, to get some training on what is necessary, what's required, what things to watch out for, how to go about doing things." [#21]

Businesses reported that many projects INDOT and IAA award are often too large for small, POC, and woman-owned businesses to bid. Unbundling large contracts is one of the ways business owners mentioned for agencies to create more opportunities for them to work as prime contractors and subcontractors. If projects cannot be unbundled, businesses also suggested creating set aside opportunities for small businesses as a path to build their capacities and eventually have the ability to bid on larger projects.

The owner of a WBE- and DBE-certified construction company stated, "I don't think they'll change this, but INDOT used to, every contract, every project, whether it was a small job or a bigger job, had its own contract number and was bid individually. Now they might put 15 different projects on one contract. And that tends to price us out of the market sometimes. I don't think they'll change it, because they like having fewer contracts and getting their work done, but that has caused some problems. I just don't bid some of those jobs cause they're just too big." [#8]

The owner of a WBE- and DBE-certified construction company stated, "You don't have to hire a huge 100-person firm to do a small project. Kind of tailor those smaller projects to a smaller firm, know what I'm saying? So, help give them the opportunity because, like I said, all architects have the same credentials. We're trained the same way. It's like doctors, you know? I mean, we know what we're doing. So, just because we haven't done exactly that project before or five of those exact projects doesn't mean we can't do it. It just means we haven't had the opportunity to do it. … When we did [a] project at Purdue, they actually put out a request for proposal only to XBE companies, they didn't put out to any other firms, just the XBEs. And so that's how we were able to get in on an interview. We ended up getting the project, and we wouldn't have gotten it otherwise. [#2]

The Black American woman owner of a WBE- and DBE-certified goods and services firm stated, "A lot of the bids that [agencies] do are for the bigger companies. They're not for small companies like myself." [#22]

Business owners also discussed how insurance requirements can be barriers for small businesses, noting that the size and scope of required insurance can far exceed the perceived value of the associated contract. Some businesses suggested that IAA and INDOT can facilitate relationships between small, disadvantaged businesses and insurance agencies through events like vendor fairs and others suggested that the agencies should review their insurance requirements to better align with the size and scope of associated contracts.

The owner of a WBE- and DBE-certified construction company stated, "Oh, insurance… in this recent RFP that's out, they want bodily injury of up to $10 million insurance. And they also want automobile up to $10 million … . That's a barrier to small businesses to have that much insurance. … Sometimes, you can bid on things at the airport that are smaller projects, but to have that kind of insurance is a barrier. … Did [they] just copy that from what they used for contractors, you know, and then, they put in the professional services? … I could probably get it, but a firm smaller than mine probably doesn't want to pay for that much extra insurance. [#2]

The owner of a WBE- and DBE-certified construction company stated, "It was difficult for car insurance carriers to look at myself as a new business owner and wanting to take on what they thought was risky as a new business owner … . Why wouldn't agencies bring some vendors that are willing to look at companies, new companies that are certified? This could be potential business for them. … I mean, it's just knowing instead of making 15 phone calls to insurance companies if there was an event that had folks, banks, insurance companies, bonding agencies all together. And they're like, 'Hey, we want to do business with folks just like you then.' I mean, how nice would that be to exchange contact information?" [#6]

CHAPTER 5.
Data Collection

Chapter 5 provides an overview of the contracts and procurements BBC analyzed as part of the disparity study and the process we used to collect relevant prime contract, subcontract, and vendor data for the study. Chapter 5 is organized into five parts:

A. Contract and Procurement Data;

B. Vendor Data;

C. Relevant Geographic Market Area (RGMA);

D. Subindustry Classifications; and

E. Agency Review.

A. Contract and Procurement Data

BBC collected data related to the work the Indiana Department of Transportation (INDOT) awarded during the study period from the AASHTOWare and PeopleSoft systems, which served as the basis for key disparity study analyses, including the utilization and availability analyses. We collected the most comprehensive data available on construction; professional services; and non-professional services, goods, and supplies prime contracts and subcontracts INDOT awarded between October 1, 2016 and September 30, 2021. We sought those data regardless of the race/ethnicity and gender of the owners of the businesses that performed the work or their statuses as Disadvantaged Business Enterprises (DBEs).

1. Prime contract data. INDOT provided BBC with electronic data on relevant prime contracts the agency awarded during the study period, including the following information:

- Contract or purchase order number;
- Prime contractor name;
- Prime contractor identification number;
- Description of work;
- Award date;
- Award amount (including change orders and amendments);
- Amount paid-to-date; and
- Funding source (federal or state funded).

INDOT advised BBC on how to interpret the data it provided, including how to identify unique bid opportunities and how to aggregate related payment amounts. When possible, we aggregated individual payments or purchase order line items into larger contract elements. In instances where

payments or line items could not be aggregated, we treated individual payments and line items as individual contract elements.

2. Subcontract data. INDOT provided BBC with comprehensive data on the subcontracts related to the prime contracts it awarded during the study period. INDOT provided subcontract data for 3,714 prime contracts, accounting for approximately $9.9 billion of the contract and procurement dollars it awarded during the study period, which included all the projects INDOT awarded during the study period with known subcontracts.

3. Prime contract and subcontract amounts. For each contract element included in our analyses, BBC examined the dollars INDOT awarded to each prime contractor and the dollars prime contractors committed to any subcontractors. If a project did not include any subcontracts, we attributed the entire award amount to the prime contractor. If a project included subcontracts, we calculated subcontract amounts as the amounts committed to each subcontractor. We then calculated the prime contract amount as the total award amount less the sum of dollars committed to all subcontractors.

4. Contracts and procurements included in study analyses. Figure 5-1 presents the number of contract elements and associated dollars BBC included in our analyses.

Figure 5-1.
INDOT contracts and procurements included in the disparity study

Source:
BBC from INDOT data.

Contract type	Number	Dollars (in thousands)
Construction	26,995	$8,870,035
Professional services	7,150	$1,911,110
Non-professional services, goods, and supplies	11,308	$111,753
Total	**45,453**	**$10,892,898**

B. Collection of Vendor Data

BBC compiled the following information on each business that participated in relevant INDOT prime contracts and subcontracts during the study period:

- Business names;
- Physical addresses and phone numbers;
- Ownership status (i.e., whether businesses were POC- or woman-owned);
- Race/ethnicity of ownership (if POC-owned);
- Gender of ownership;
- DBE certification status;
- Primary lines of work;
- Business sizes; and
- Years of establishment.

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

- INDOT contract, procurement, and vendor data;
- INDOT's DBE certification directory;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Surveys the study team conducted with business owners and managers; and
- Business websites and other secondary research.

C. Relevant Geographic Market Area

BBC used INDOT data to help determine the RGMA—the geographical area in which INDOT spends the substantial majority of its contract and procurement dollars—for the disparity study. INDOT awarded approximately 91 percent of relevant contract and procurement dollars to businesses located in the state of Indiana, indicating that the RGMA for the study should comprise the entire state. Our analyses—including the availability analysis and quantitative analyses of marketplace conditions—focused on the state of Indiana.

D. Subindustry Classifications

For each prime contract and subcontract, BBC determined the *subindustry* that best characterizes the vendor's primary line of work. We determined subindustries based on INDOT contract, procurement, and vendor data; surveys we conducted with prime contractors and subcontractors; business certification lists; D&B business listings; and other sources. Figure 5-2 presents subindustry classifications for the construction; professional services; and non-professional services, goods, and supplies work BBC included in the disparity study.

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 services." For example, the dollars INDOT awarded to contractors for "street cleaning and sweeping" represented less than 1 percent of total dollars we examined as part of the study. So, we combined "street cleaning and sweeping" with construction services that also accounted for relatively small percentages of total dollars into the "other construction services" subindustry.

There were also contracts and procurements we did not ultimately include in our analyses:

- Purchases and grants INDOT made with or awarded to government agencies, utility providers, hospitals, or other nonprofit organizations ($11.4 million);
- Contracts and procurements that reflected *national markets*—that is, subindustries dominated by large national or international businesses—or subindustries for which INDOT awarded most of the dollars to businesses outside of the RGMA ($99.4 million);[1]

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[1] Examples of such work include vehicles, computer manufacturing, and proprietary software.

- Purchases that included property, leases, or other pass-through dollars ($50.1 million);[2] and
- Types of work not typically included in disparity studies and that account for relatively small proportions of the organization's contract and procurement dollars ($1.1 million).[3]

Figure 5-2.
INDOT contract and procurement dollars by subindustry

Note:

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

Source:

BBC from INDOT data.

Industry	Total (in thousands)
Construction	
Highway, street, and bridge construction	$6,432,780
Excavation, drilling, wrecking, and demolition	$498,793
Fencing, guardrails, barriers, and signs	$449,375
Other construction services	$238,244
Painting, striping, marking, and weatherproofing	$222,305
Landscape services	$196,438
Electrical work	$179,723
Building construction	$174,113
Water, sewer, and utility lines	$137,065
Trucking, hauling and storage	$109,029
Concrete, asphalt, sand, and gravel products	$82,805
Other construction materials	$74,456
Concrete work	$73,482
Plumbing and HVAC	$1,428
Total construction	**$8,870,035**
Professional services	
Engineering	$1,504,768
IT and data services	$157,789
Environmental services	$118,188
Testing and inspection	$42,413
Transportation planning services	$37,097
Architectural and design services	$31,386
Other professional services	$19,470
Total professional services	**$1,911,110**
Non-professional services, goods, and supplies	
Vehicle parts and supplies	$79,799
Automobiles	$10,017
Industrial equipment and machinery	$5,732
Communications equipment	$4,741
Waste and recycling services	$4,478
Other goods	$2,500
Cleaning and janitorial services	$1,539
Industrial chemicals	$1,236
Furniture	$889
Other services	$570
Safety equipment	$198
Security systems services	$29
Transit services	$24
Total non-professional services, goods, and supplies	**$111,753**
GRAND TOTAL	**$10,892,898**

[2] Examples of such work include credit card services and investment holding companies.

[3] Examples of industries not typically included in disparity studies include publishing and educational services.

E. Agency Review

INDOT reviewed contract, procurement, and vendor data throughout the study process. BBC consulted with the agency to review the data collection process, information we gathered, and summary results. We incorporated feedback from INDOT in the final contract, procurement, and vendor data we used for the disparity study analyses.

CHAPTER 6.
Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of person of color (POC)- and woman-owned businesses *ready, willing, and able* to perform prime contracts and subcontracts the Indiana Department of Transportation (INDOT) awards in the areas of construction; professional services; and non-professional services, goods, and supplies.[1] Chapter 6 describes the availability analysis in five parts:

A. Purpose of the Availability Analysis;

B. Available Businesses;

C. Availability Database;

D. Availability Calculations; and

E. Availability Analysis Results.

Appendix E provides additional supporting information related to the availability analysis.

A. Purpose of the Availability Analysis

BBC examined the availability of POC- and woman-owned businesses for INDOT contracts and procurements to estimate the degree to which those businesses are ready, willing, and able to perform the agency's work. Estimating the availability of POC- and woman-owned businesses for INDOT work is useful to the agency in setting its next overall Disadvantaged Business Enterprise (DBE) goal for the participation of DBEs in the Federal Highway Administration (FHWA)- funded work INDOT awards, which is required as part of its implementation of the Federal DBE Program. In addition, assessing disparities between the actual participation and estimated availability of POC- and woman-owned businesses for INDOT work allows the agency to determine whether certain business groups are *substantially underutilized* in its work, which is crucial in ensuring its use of *race- and gender-conscious* measures is appropriate and tailored to those business groups for which compelling evidence of barriers exists.

B. Available Businesses

BBC's availability analysis focused on specific areas of work, or *subindustries*, associated with the relevant types of prime contracts and subcontracts INDOT awarded between October 1, 2016 and September 30, 2021 [i.e., federal fiscal years (FFYs) 2017 through 2021; the *study period*], which serves as a proxy for the work the agency might award in the future. We began the availability analysis by identifying the specific subindustries in which INDOT spends most of its contract and procurement dollars (for details, see Chapter 5) as well as the geographic area in which the majority of the businesses with which INDOT spends those dollars are located [i.e., the *relevant geographic*

[1] "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

market area (RGMA)]. We identified the RGMA for the study as the entire state of Indiana based on the fact that INDOT awards 91 percent of its contract and procurement dollars to businesses located within Indiana.

BBC conducted extensive surveys with close to 3,000 businesses in the marketplace to develop a representative and unbiased database of potentially available businesses located in the RGMA that perform relevant types of work. The objective of the surveys was not to collect information from every relevant business operating in Indiana. Rather, the purpose was to collect information from an unbiased subset of the relevant business population that appropriately represents the entire relevant business population, which allowed us to estimate the availability of POC- and woman-owned businesses in an accurate, statistically valid manner.

1. Overview of availability surveys. BBC worked with Davis Research to conduct surveys with business owners and managers to identify local businesses potentially available for INDOT prime contracts and subcontracts. We began the process by compiling a *phone book* of all types of businesses—regardless of ownership—that perform relevant work and are located within the RGMA based on information from Dun & Bradstreet (D&B) Marketplace listings. We compiled information about all business establishments D&B lists under 8-digit work specialization codes that were most related to the contracts and procurements INDOT awarded during the study period. We obtained listings on 17,656 local businesses that perform work related to those work specializations. We did not have working phone numbers for 2,140 of those businesses, but we attempted availability surveys with the remaining 15,526 businesses and completed surveys with 2,995 of them.

2. Survey information. The study team conducted availability surveys with businesses listed in our phone book to collect various pieces of information about each one, 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 government organizations;
- Interest in performing work as a prime contractor or subcontractor;
- Largest prime contract or subcontract the business is able to perform;
- Whether the business is able to work or serve customers in various regions of Indiana;
- Business size in terms of revenue and number of employees; and
- Race/ethnicity and gender of the owners.

C. Availability Database

After conducting availability surveys, BBC compiled an *availability database* that included information about businesses potentially available for relevant INDOT contracts and procurements. We included businesses in the availability database if they reported possessing *all* of the following characteristics:

- Being a private sector business;
- Having a location in the RGMA;
- Primary lines of work being in industries and subindustries directly relevant to INDOT work;
- Having bid on or performed relevant work in the past five years; and
- Being interested in working for government organizations.

Figure 6-1 presents the percentage of businesses in the availability database that were POC- or woman-owned. The database included information on 1,659 businesses potentially available for specific construction; professional services; and non-professional services, goods, and supplies contracts and procurements INDOT awards. As shown in Figure 6-1, 26.8 percent of those businesses were POC- or woman-owned, which merely reflects a simple count of businesses with no analysis of their availability for specific INDOT contracts or procurements. It represents only the first step in analyzing the availability of POC- and woman-owned businesses for that work.

Figure 6-1.
Percentage of businesses in the availability database that were POC- or woman-owned

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

Source:
BBC availability analysis.

Business group	Representation
All POC- and woman-owned	26.8 %
White woman-owned	15.1 %
POC-owned	11.8 %
Asian Pacific American-owned	1.0 %
Black American-owned	6.8 %
Hispanic American-owned	2.0 %
Native American-owned	0.8 %
Subcontinent Asian American-owned	1.2 %

D. Availability Calculations

BBC used a *custom census* approach—which accounts for specific business, contract, and procurement characteristics such as work type, role, size, capacity, geography, and interest—to estimate the availability of POC- and woman-owned businesses for INDOT work. We analyzed information from the availability database to develop dollar-weighted estimates of the degree to which POC- and woman-owned businesses are ready, willing, and able to perform that work.

BBC only considered a portion of the businesses in the availability database as potentially available for any given INDOT prime contract or subcontract. We first identified the characteristics of each prime contract or subcontract (referred to generally as a *contract element*), including type of work, contract size, geography, and contract role and then took the following steps to estimate availability for each contract element:

1. We identified businesses in the availability database that reported they:
   - Perform the same type of work involved in the contract element;
   - Perform work in the role corresponding to the contract element (i.e., as a prime contractor or subcontractor);
   - Have the ability to compete for or perform work of that size or larger; and

- Have the ability to perform work or serve customers in the geographical location where the work took place.

2. We counted the number of POC-owned businesses, woman-owned businesses, and businesses owned by white men that met the criteria specified in Step 1.

3. We translated the counts of businesses in step 2 into percentages.

We repeated the above steps for each contract element included in the disparity study and then multiplied the percentages of POC- and woman-owned businesses available for each contract element by the dollars associated with it, added results across all contract elements, and divided by the total dollars for all contract elements. The result was dollar-weighted estimates of the percentage of relevant contracting and procurement dollars one would expect INDOT to award to POC- and woman-owned businesses based on their availability for specific types and sizes of that work. We estimated the availability of POC- and woman-owned businesses for INDOT work overall and separately for each business group presumed to be disadvantaged in the Federal DBE Program: white woman-owned businesses, Asian Pacific American-owned businesses, Black American-owned businesses, Hispanic American-owned businesses, Native American-owned businesses, and Subcontinent Asian American-owned businesses. Figure 6-2 provides an example of how BBC calculated availability for a specific subcontract associated with a construction prime contract INDOT awarded during the study period.

Figure 6-2.
Example of calculating availability for an INDOT subcontract

On a construction contract INDOT awarded during the study period, the prime contractor awarded a subcontract worth $697,785 for engineering services. To determine the overall availability of POC- and woman-owned businesses for the subcontract, BBC identified businesses in the availability database that:

a. Indicated they perform engineering work;
b. Indicated they perform work as subcontractors;
c. Reported being able to perform work of equal size or larger; and
d. Reported being able to perform work or serve customers in the region where the work took place (i.e., INDOT's Seymour District).

BBC found 64 businesses in the availability database that met those criteria. Of those businesses, 8 were POC- or woman-owned. Thus, the availability of POC- and woman-owned businesses for the subcontract was 12.5 percent (i.e., 8/64 x 100 = 12.5).

E. Availability Analysis Results

BBC estimated the availability of POC-and woman-owned businesses for construction; professional services; and non-professional services, goods, and supplies prime contracts and subcontracts INDOT awarded during the study period. We estimated the overall availability of those businesses for all INDOT contracts and procurements considered together and separately for various subsets of contracts and procurements the agency awarded during the study period.

1. Overall. Figure 6-3 presents dollar-weighted estimates of the overall availability of POC- and woman-owned businesses for INDOT contracts and procurements. Overall, the availability of POC- and woman-owned businesses for that work is 12.9 percent, indicating that one might expect INDOT to award approximately 12.9 percent of its contracts and procurements to POC- and woman-owned businesses based on their availability. The groups that exhibit the greatest availability for INDOT work are white woman-owned businesses (5.5%), Native American-owned businesses (3.2%), and Black American-owned businesses (2.8%).

Figure 6-3.
Availability estimates for INDOT work

Note:

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

For more detail and results by group, see Figure F-1 in Appendix F.

Source:

BBC availability analysis.

Business group	Availability
All POC- and woman-owned	12.9 %
White woman-owned	5.5 %
POC-owned	7.4 %
Asian Pacific American-owned	0.0 %
Black American-owned	2.8 %
Hispanic American-owned	0.6 %
Native American-owned	3.2 %
Subcontinent Asian American-owned	0.7 %

2. Funding source. The Federal DBE Program applies specifically to INDOT's FHWA-funded projects.[2] BBC estimated availability separately for INDOT's FHWA-funded work to assess whether the availability of POC- and woman-owned businesses for FHWA-funded projects is different from their availability for the agency's non FHWA-funded projects. As shown in Figure 6-4, the availability of POC- and woman-owned businesses is less for INDOT's FHWA-funded projects (12.2%) than for its non FHWA-funded projects (18.8%). Among other factors, that result could be due to the fact that INDOT's FHWA-funded projects are substantially larger, on average, than its non FHWA-funded projects (FHWA average size = $471,000; non FHWA average size = $44,000), and the availability of POC- and woman-owned businesses is typically inversely related to project size. The groups that exhibit the greatest levels of availability are the same for both FHWA- and non FHWA-funded work: white woman-owned businesses (FHWA = 5.1%; non FHWA = 8.8%), Native American-owned businesses (FHWA = 3.1%; non FHWA = 4.5%), and Black American-owned businesses (FHWA = 2.6%; non FHWA = 4.1%).

Figure 6-4.
Availability estimates for FHWA- and non FHWA-funded 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 and F-15 in Appendix F.

Source:

BBC availability analysis.

	Funding source	
Business group	FHWA-funded	Non FHWA-funded
All POC- and woman-owned	12.2 %	18.8 %
White woman-owned	5.1 %	8.8 %
POC-owned	7.1 %	10.0 %
Asian Pacific American-owned	0.0 %	0.1 %
Black American-owned	2.6 %	4.1 %
Hispanic American-owned	0.6 %	1.0 %
Native American-owned	3.1 %	4.5 %
Subcontinent Asian American-owned	0.7 %	0.3 %

3. Contract role. Many POC- and woman-owned businesses are small businesses and, as a result, often work as subcontractors. It is thus instructive to examine availability estimates separately for INDOT prime contracts and subcontracts. As shown in Figure 6-5, the availability of POC- and woman-owned businesses considered together is in fact greater for INDOT subcontracts (20.6%) than for prime contracts (10.1%). The groups that exhibit the greatest levels of availability for prime contract and subcontracts are the same: Native American-owned businesses (prime contracts = 3.6%;

[2] BBC considered a project to be FHWA-funded if it included at least one dollar of FHWA funding.

subcontracts = 2.1%), white woman-owned businesses (prime contracts = 3.3%; subcontracts = 11.6%), and Black American-owned businesses (prime contracts = 2.1%; subcontracts = 4.6%).

Figure 6-5.
Availability estimates for prime contracts and subcontracts

Note:

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

For more detail, see Figures F-7 and F-8 in Appendix F.

Source:

BBC availability analysis.

Business group	Role	
	Prime contracts	Subcontracts
All POC- and woman-owned	10.1 %	20.6 %
White woman-owned	3.3 %	11.6 %
POC-owned	6.8 %	9.0 %
Asian Pacific American-owned	0.0 %	0.1 %
Black American-owned	2.1 %	4.6 %
Hispanic American-owned	0.4 %	1.4 %
Native American-owned	3.6 %	2.1 %
Subcontinent Asian American-owned	0.7 %	0.8 %

4. Goal status. As part of its implementation of the Federal DBE Program, INDOT uses race- and gender-conscious DBE contract goals to encourage the participation of certified DBE subcontractors in various FHWA-funded projects. Similarly, as part of the State of Indiana's Minority and Women's Business Enterprise (MBE/WBE) Program, INDOT uses MBE/WBE contract goals to encourage the participation of certified MBE/WBE subcontractors in various state-funded projects. As part of both programs, certified DBE/MBE/WBE prime contractors cannot count their own participation in projects toward meeting those goals—they must include certified DBE/MBE/WBE subcontractors (or demonstrate good faith efforts) as part of their bids, quotes, or proposals to meet goal requirements.

BBC assessed differences in the availability of POC- and woman-owned businesses for contracts and procurements to which INDOT's use of DBE and MBE/WBE contract goals apply (*goals projects*) and contracts and procurements to which DBE and MBE/WBE contract goals do not apply (*no goals projects*). Goals projects include subcontracts associated with projects INDOT awarded with the use of DBE or MBE/WBE contract goals. No goals projects include all prime contracts (because prime contract participation cannot count toward meeting goal requirements) and subcontracts associated with projects INDOT awarded without the use of DBE or MBE/WBE contract goals. As shown in Figure 6-6, POC- and woman-owned businesses exhibit greater availability for goals projects (20.6%) than for no goals projects (10.2%). The groups that exhibit the greatest levels of availability for goals and no goals projects are the same: white woman-owned businesses (goals = 11.6%; no goals = 3.3%), Black American-owned businesses (goals = 4.6%; no goals = 2.1%), and Native American-owned businesses (goals = 2.1%; no goals = 3.6%).

Figure 6-6.
Availability estimates for goals and no goals projects

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-16 and F-17 in Appendix F.

Source:

BBC availability analysis.

Business group	Goals status	
	Goals	No goals
All POC- and woman-owned	20.6 %	10.2 %
White woman-owned	11.6 %	3.3 %
POC-owned	9.0 %	6.8 %
Asian Pacific American-owned	0.1 %	0.0 %
Black American-owned	4.6 %	2.1 %
Hispanic American-owned	1.4 %	0.4 %
Native American-owned	2.1 %	3.6 %
Subcontinent Asian American-owned	0.8 %	0.7 %

5. Industry. BBC also estimated availability separately for INDOT's construction; professional services; and non-professional services, goods, and supplies work to assess whether the availability of POC- and woman-owned businesses differs by industry. As shown in Figure 6-7, POC- and woman-owned businesses exhibit less availability for INDOT's construction work (12.8%) and professional services work (12.5%) than for the organization's non-professional, goods, and supplies work (25.2%). That result may be due to the fact that the construction (average size = $329,000) and professional services (average size = $267,000) projects INDOT awards are larger, on average, than the non-professional services, goods, and supplies (average size = $9,900) projects the organization awards. Typically, there is an inverse relationship between work size and the availability of POC- and woman-owned businesses. Availability for individual business groups differs by contract role:

- The groups that exhibit the greatest levels of availability for construction projects are white woman-owned businesses (5.5%), Native American-owned businesses (3.9%), and Black American-owned businesses (2.8%).
- The groups that exhibit the greatest levels of availability for professional services projects are white woman-owned businesses (4.6%), Subcontinent Asian American-owned businesses (3.8%), and Black American-owned businesses (2.5%).
- The groups that exhibit the greatest levels of availability for non-professional services, goods, and supplies projects are white woman-owned businesses (17.0%), Black American-owned businesses (4.1%), and Hispanic American-owned businesses (3.2%).

Figure 6-7.
Availability estimates for construction; professional services; and non-professional services, goods, and supplies 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-4, F-5, and F-6 in Appendix F.

Source:

BBC availability analysis.

Business group	Industry		
	Construction	Professional services	Non-prof. svcs., goods, and supplies
All POC- and woman-owned	12.8 %	12.5 %	25.2 %
White woman-owned	5.5 %	4.6 %	17.0 %
POC-owned	7.3 %	7.9 %	8.1 %
Asian Pacific American-owned	0.0 %	0.2 %	0.4 %
Black American-owned	2.8 %	2.5 %	4.1 %
Hispanic American-owned	0.5 %	1.3 %	3.2 %
Native American-owned	3.9 %	0.2 %	0.1 %
Subcontinent Asian American-owned	0.0 %	3.8 %	0.3 %

6. Overall DBE Goal. As a United States Department of Transportation (USDOT) fund recipient, INDOT must set an overall aspirational goal for the participation of DBEs in its USDOT-funded work every three years. USDOT requires agencies to set their overall DBE goals using a two-step process: establishing a *base figure* and considering whether a *step 2 adjustment* to the base figure is warranted. To establish the base figures for their overall DBE goals, agencies must assess the availability of DBEs or *potential DBEs* for their USDOT-funded work. In accordance with those requirements, BBC assessed the availability of potential DBEs—that is, POC- and woman-owned businesses that are currently DBE-certified or appear they could be DBE-certified according to size limits specified in the Federal DBE Program—for the FHWA-funded projects INDOT awarded during the study period.[3] As presented in Figure 6-8, the availability of potential DBEs for INDOT's FHWA-funded work is 10.2 percent, which INDOT could consider as the base figure for its next overall DBE goal. We provide information related to a potential step 2 adjustment to the base figure in Chapter 10.

Figure 6-8.
Availability of potential DBEs for INDOT's FHWA-funded work (base figure)

Potential DBE group	Industry			Total
	Construction	Professional services	Non-prof. svcs, goods, and supplies	
Asian Pacific American-owned	0.0 %	0.1 %	1.2 %	0.0 %
Black American-owned	2.5 %	2.4 %	3.2 %	2.5 %
Hispanic American-owned	0.4 %	1.2 %	0.0 %	0.6 %
Native American-owned	3.8 %	0.2 %	0.0 %	3.1 %
Subcontinent Asian American-owned	0.0 %	1.7 %	1.1 %	0.3 %
Total POC-owned	6.8 %	5.6 %	5.6 %	6.6 %
White woman-owned	3.5 %	4.27 %	18.6 %	3.6 %
Total potential DBEs	**10.3 %**	**9.9 %**	**24.1 %**	**10.2 %**

[3] By definition, the population of potential DBEs is a subset of the population of all POC- and woman-owned businesses, because many POC- and woman-owned businesses have annual revenues that exceed size limits specified in the Federal DBE Program.

CHAPTER 7.
Utilization Analysis

BBC Research & Consulting (BBC) measured the participation of person of color- (POC-) and woman-owned businesses in the construction; professional services; and non-professional services, goods, and supplies prime contracts and subcontracts the Indiana Department of Transportation (INDOT) awarded between October 1, 2016 through September 30, 2021 (i.e., the *study period*).[1] We measured participation in terms of *utilization*—the percentage of prime contract and subcontract dollars the organization awarded to those businesses during the study period. Chapter 7 presents the disparity analysis in three parts:

A. Purpose of the Utilization Analysis;

B. Utilization Analysis Results; and

C. Concentration of Dollars.

A. Purpose of the Utilization Analysis

Calculating the percentage of dollars INDOT awarded to POC- and woman-owned businesses during the study period is a measure of the degree to which the agency's contracting and procurement practices result in meaningful participation of those businesses in its work. Moreover, comparing the participation of POC- and woman-owned businesses in INDOT work to their availability for it allows the agency to determine whether certain business groups are substantially underutilized on its projects. The existence of *substantial disparities* between participation and availability provides support for the use of *race- and gender-conscious measures* as part of INDOT's contract and procurement processes and can help the agency determine which groups might be eligible to participate in such measures.

B. Utilization Analysis Results

BBC calculated the participation of POC-and woman-owned businesses in construction; professional services; and non-professional services, goods, and supplies prime contracts and subcontracts INDOT awarded during the study period. We estimated the overall participation of those businesses for all INDOT contracts and procurements considered together and separately for various subsets of contracts and procurements the agency awarded during the study period.

1. Overall. Figure 7-1 presents the overall participation of POC- and woman-owned businesses in all relevant construction; professional services; and non-professional services, goods, and supplies prime contracts and subcontracts INDOT awarded during the study period. As shown in Figure 7-1, overall, INDOT awarded 12.4 percent of corresponding contract and procurement dollars to POC- and woman-owned businesses. The groups that exhibited the greatest levels of participation in INDOT

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[1] "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

work were white woman-owned businesses (8.1%), Subcontinent Asian American-owned businesses (1.3%), and Black American-owned businesses (1.2%).

Figure 7-1. Utilization analysis results for INDOT work

Note:

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

For more detail, see Figure F-1 in Appendix F.

Source:

BBC utilization analysis.

Business group	Utilization
All POC- and woman-owned	12.4 %
White woman-owned	8.1 %
POC-owned	4.3 %
Asian Pacific American-owned	0.1 %
Black American-owned	1.2 %
Hispanic American-owned	0.7 %
Native American-owned	0.9 %
Subcontinent Asian American-owned	1.3 %

2. Funding source. The Federal Disadvantaged Business Enterprise (DBE) Program applies specifically to INDOT's Federal Highway Administration- (FHWA-) funded projects.[2] We examined utilization analysis results separately for INDOT's FHWA-funded work to assess whether the participation of POC- and woman-owned businesses in those projects was different from their participation in non FHWA-funded projects during the study period. As shown in Figure 7-2, the participation of POC- and woman-owned businesses was slightly higher in INDOT's FHWA-funded projects (12.5%) than its non FHWA-funded projects (12.2%). Participation for individual business groups differed between funding sources:

- The groups that exhibited the greatest levels of participation in FHWA-funded work were white woman-owned businesses (8.1%), Subcontinent Asian American-owned businesses (1.4%), and Black American-owned businesses (1.2%).
- The groups that exhibited the greatest levels of participation in non FHWA-funded work were white woman-owned businesses (8.1%), Hispanic American-owned businesses (1.5%), and Black American-owned businesses (1.2%).

Figure 7-2. Utilization analysis results for FHWA- and non FHWA-funded 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-16 and F-17 in Appendix F.

Source:

BBC utilization analysis.

	Funding source	
Business group	FHWA-funded	Non FHWA-funded
All POC- and woman-owned	12.5 %	12.2 %
White woman-owned	8.1 %	8.1 %
POC-owned	4.3 %	4.1 %
Asian Pacific American-owned	0.1 %	0.1 %
Black American-owned	1.2 %	1.2 %
Hispanic American-owned	0.6 %	1.5 %
Native American-owned	1.0 %	0.5 %
Subcontinent Asian American-owned	1.4 %	0.7 %

[2] The study team considered a project to be FHWA-funded if it included at least one dollar of FHWA funding.

3. Contract role. Many POC- and woman-owned businesses are small businesses and thus often work as subcontractors. In addition, INDOT's use of race- and gender-conscious contract goals is designed to encourage the participation of POC- and woman-owned businesses in subcontracts but not in prime contracts. For those reasons, it is useful to examine utilization analysis results separately for the prime contracts and subcontracts INDOT awarded during the study period. As shown in Figure 7-3, the participation of POC- and woman-owned businesses was in fact greater in INDOT's subcontracts (39.0%) than in the organization's prime contracts (3.2%). Participation for individual business groups differed between prime contracts and subcontracts:

- The groups that exhibited the greatest levels of participation in prime contracts were white woman-owned businesses (1.9%), Subcontinent Asian American-owned businesses (1.0%), and Black American-owned businesses (0.3%).
- The groups that exhibited the greatest levels of participation in subcontracts were white woman-owned businesses (26.0%), Black American-owned businesses (4.0%), and Native American-owned businesses (3.6%).

Figure 7-3. Utilization analysis results for prime contracts and subcontracts

Note:

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

For more detail, see Figures F-7 and F-8 in Appendix F.

Source:

BBC utilization analysis.

Business group	Role: Prime contracts	Role: Subcontracts
All POC- and woman-owned	3.2 %	39.0 %
White woman-owned	1.9 %	26.0 %
POC-owned	1.3 %	13.0 %
Asian Pacific American-owned	0.0 %	0.5 %
Black American-owned	0.3 %	4.0 %
Hispanic American-owned	0.0 %	2.5 %
Native American-owned	0.0 %	3.6 %
Subcontinent Asian American-owned	1.0 %	2.4 %

4. Goal status. As part of its implementation of the Federal DBE Program, INDOT uses race- and gender-conscious DBE contract goals to encourage the participation of certified DBE subcontractors in various FHWA-funded projects. Similarly, as part of the State of Indiana's Minority and Women's Business Enterprise (MBE/WBE) Program, INDOT uses MBE/WBE contract goals to encourage the participation of certified MBE/WBE subcontractors in various state-funded projects. As part of both programs, certified DBE/MBE/WBE prime contractors cannot count their own participation in projects toward meeting those goals—they must include participation from certified DBE/MBE/WBE subcontractors as part of their bids, quotes, or proposals or demonstrate good faith efforts that they tried to do so to meet goal requirements.

BBC assessed differences in the participation of POC- and woman-owned businesses in contracts and procurements to which INDOT's use of DBE and MBE/WBE contract goals applied during the study period (*goals projects*) and contracts and procurements to which DBE and MBE/WBE contract goals did not apply (*no goals projects*). Goals projects include subcontracts associated with projects INDOT awarded with the use of DBE or MBE/WBE contract goals. No goals projects include all prime contracts (because prime contract participation cannot count toward meeting goal requirements) and subcontracts associated with projects INDOT awarded without the use of DBE or MBE/WBE contract goals. That comparison provides preliminary information about the effectiveness of INDOT's

use of contract goals in encouraging the participation of POC- and woman-owned businesses in its work, although more relevant information regarding the effectiveness of contract goals comes from the *disparity analysis* (for details, see Chapter 8).

As shown in Figure 7-4, the participation of POC- and woman-owned businesses was greater in goals projects (39.1%) than no goals projects (3.2%). Participation for individual business groups differed between goals and no goals projects.

- The groups that exhibited the greatest levels of participation in goals projects were white woman-owned businesses (26.1%), Black American-owned businesses (4.0%), and Native American-owned businesses (3.6%).
- The only groups to exhibit any participation in no goals projects were white woman-owned businesses (1.9%), Subcontinent Asian American-owned businesses (1.0%), and Black American-owned businesses (0.3%).

Figure 7-4.
Utilization analysis results for goals and no goals projects

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-16 and F-17 in Appendix F.

Source:

BBC utilization analysis.

Business group	Goals status	
	Goals	No goals
All POC- and woman-owned	39.1 %	3.2 %
White woman-owned	26.1 %	1.9 %
POC-owned	13.0 %	1.3 %
Asian Pacific American-owned	0.5 %	0.0 %
Black American-owned	4.0 %	0.3 %
Hispanic American-owned	2.5 %	0.0 %
Native American-owned	3.6 %	0.0 %
Subcontinent Asian American-owned	2.4 %	1.0 %

5. Industry. BBC also examined utilization analysis results separately for the construction; professional services; and non-professional services, goods, and supplies work INDOT awarded during the study period to determine whether the participation of POC- and woman-owned businesses differed by industry. As shown in Figure 7-5, the participation of POC- and woman-owned businesses was greatest in the organization's professional services work (17.5%), followed by construction work (11.5%), and then non-professional services, goods, and supplies work (4.5%). Participation for individual business groups differed across industries:

- The groups that exhibited the greatest levels of participation in construction work were white woman-owned businesses (8.4%), Native American-owned businesses (1.1%), and Black American-owned businesses (1.0%).
- The groups that exhibited the greatest levels of participation in professional services work were Subcontinent Asian American-owned businesses (7.6%), white woman-owned businesses (7.4%), and Black American-owned businesses (2.1%).
- The groups that exhibited the greatest levels of participation in non-professional services, goods, and supplies work were Black American-owned businesses (1.8%), white woman-owned businesses (1.4%), and Asian Pacific American-owned businesses (1.1%).

Figure 7-5. Utilization analysis results for construction; professional services; and non-professional services, goods, and supplies 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-4, F-5, and F-6 in Appendix F.

Source:

BBC utilization analysis.

Business group	Industry		
	Construction	Professional services	Non-prof. svcs., goods, and supplies
All POC- and woman-owned	11.5 %	17.5 %	4.5 %
White woman-owned	8.4 %	7.4 %	1.4 %
POC-owned	3.1 %	10.0 %	3.1 %
Asian Pacific American-owned	0.1 %	0.0 %	1.1 %
Black American-owned	1.0 %	2.1 %	1.8 %
Hispanic American-owned	0.7 %	0.3 %	0.0 %
Native American-owned	1.1 %	0.0 %	0.2 %
Subcontinent Asian American-owned	0.0 %	7.6 %	0.0 %

C. Concentration of Dollars

BBC analyzed the degree to which relevant contract and procurement dollars INDOT awarded to POC- and woman-owned businesses during the study period were spread across different businesses. We used that analysis as an indication of whether many businesses share in the aggregate participation of their respective racial/ethnic and gender groups in INDOT work, or, alternatively, whether only a few businesses account for each group's participation in INDOT work. We assessed that question by calculating:

- The number of different businesses within each race/ethnic and gender group to which INDOT awarded contract and procurement dollars during the study period; and
- The number of different businesses within each group it took to account for at least 50 percent of the group's total dollars during the study period after we ordered businesses within each group from greatest to least awarded dollars.

Figure 7-6 presents those results for each relevant POC- and woman-owned business group. In total, INDOT awarded $1.4 billion to 167 different POC- and woman-owned businesses during the study period. However, only 8 percent of those businesses accounted for 50 percent of the corresponding contract and procurement dollars:

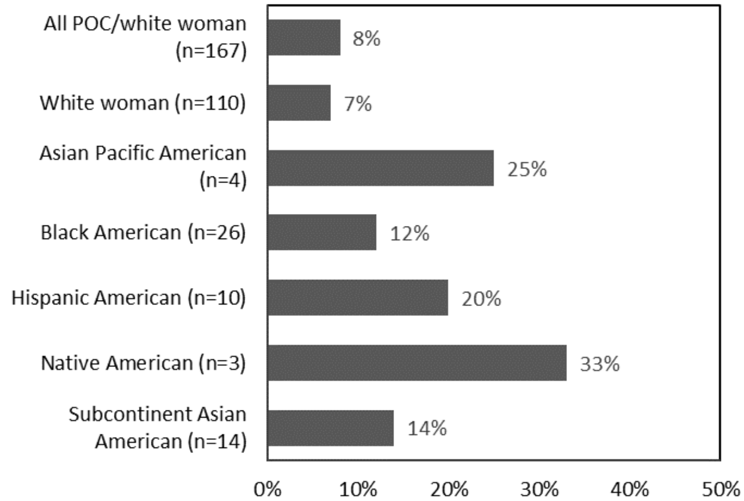
- Seven percent of utilized white woman-owned businesses accounted for 50 percent of the dollars INDOT awarded to the group.
- Twenty-five percent of utilized Asian Pacific American-owned businesses accounted for 91 percent of the dollars INDOT awarded to the group.
- Twelve percent of utilized Black American-owned businesses accounted for 52 percent of the dollars INDOT awarded to the group.
- Twenty percent of utilized Hispanic American-owned businesses accounted for 66 percent of the dollars INDOT awarded to the group.

- Thirty-three percent of utilized Native American-owned businesses accounted for nearly all of the dollars INDOT awarded to the group.
- Fourteen percent of utilized Subcontinent Asian American-owned businesses accounted for 64 percent of the dollars INDOT awarded to the group.

Figure 7-6.
Percent of businesses in each group required to account for at least 50 percent of the group's awarded dollars

Source:

BBC utilization analysis.



In general, those results indicate that a relatively small number of POC- and woman-owned businesses accounted for the majority of the total contract and procurement dollars INDOT awarded to those businesses during the study period. Thus, although the agency awarded $1.4 billion to POC- and woman-owned businesses during the study period, it appears most POC- and woman-owned businesses did not participate in that work proportionally.

CHAPTER 8.
Disparity Analysis

BBC Research & Consulting (BBC) compared the percentage of contract and procurement dollars the Indiana Department of Transportation (INDOT) awarded to person of color- (POC-) and woman-owned businesses during the study period (i.e., *utilization* or *participation*) with the percentage of dollars one might expect the agency to award to those businesses based on their *availability* for that work.[1] The analysis focused on construction; professional services; and non-professional services, goods, and supplies work INDOT awarded between October 1, 2016 and September 30, 2021 (the *study period*). Chapter 8 presents the disparity analysis in three parts:

A. Overview;

B. Disparity Analysis Results; and

C. Statistical Significance.

A. Overview

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

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

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 index 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 interpreted substantial disparities as *inferences of discrimination* against particular business groups, and they often serve as justification for organizations to use relatively strong measures—such as *race- and gender-conscious* measures—to address corresponding barriers.[2]

[1] "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

[2] 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).

B. Disparity Analysis Results

BBC measured overall disparities between the participation and availability of POC- and woman-owned businesses for all relevant contracts and procurements as well as separately for various subsets of contracts and procurements INDOT awarded during the study period.

1. Overall. Figure 8-1 presents disparity indices for all relevant prime contracts and subcontracts INDOT awarded during the study period. There is a line at the disparity index level of 100, which indicates parity, and a line at the disparity index level of 80, which indicates a substantial disparity. Disparity indices of less than 100 indicate disparities, and disparity indices of less than 80 indicate substantial disparities. As shown in Figure 8-1, POC- and woman-owned businesses exhibited a disparity index of 97 for all relevant contracts and procurements INDOT awarded during the study period, indicating a disparity where INDOT awarded POC- and woman-owned businesses $0.97 for every dollar one might expect the agency to award to those businesses based on their availability for that work. Two business groups exhibited substantial disparities for INDOT work: Black American-owned businesses (disparity index of 45) and Native American-owned businesses (disparity index of 29).

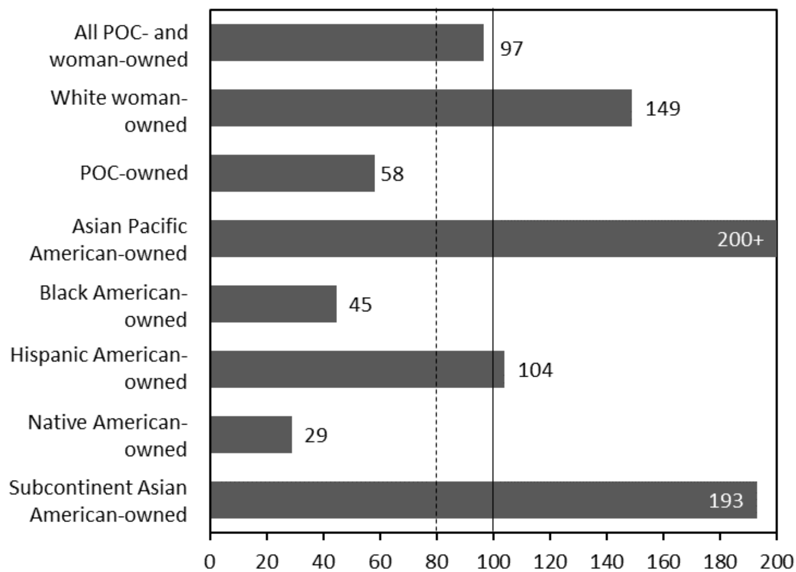
Figure 8-1.
Disparity analysis results for INDOT work

Note:

For more detail, see Figure F-1 in Appendix F.

Source:

BBC disparity analysis.



2. Funding source. The Federal Disadvantaged Business Enterprise (DBE) Program applies specifically to INDOT's Federal Highway Administration- (FHWA-) funded projects.[3] It is instructive to examine disparity analysis results separately for INDOT's FHWA-funded work, because any disparities for that work is indicative of the efficacy of INDOT's implementation of the Federal DBE Program to encourage the participation of POC- and woman-owned businesses in its FHWA-funded projects relative to their availability. As shown in Figure 8-2, POC- and woman-owned businesses did not exhibit a disparity for FHWA-funded work (disparity index of 102) but did exhibit a substantial disparity for non FHWA-funded work (disparity index of 65). The same two groups exhibited substantial disparities for both FHWA- and non FHWA-funded work: Black American-owned

[3] The study team considered a project to be FHWA-funded if it included at least one dollar of FHWA funding.

businesses (FHWA disparity index of 47; non-FHWA disparity index of 30) and Native American-owned businesses (FHWA disparity index of 32; non-FHWA disparity index of 12).

Figure 8-2.
Disparity analysis results for FHWA- and non FHWA-funded work

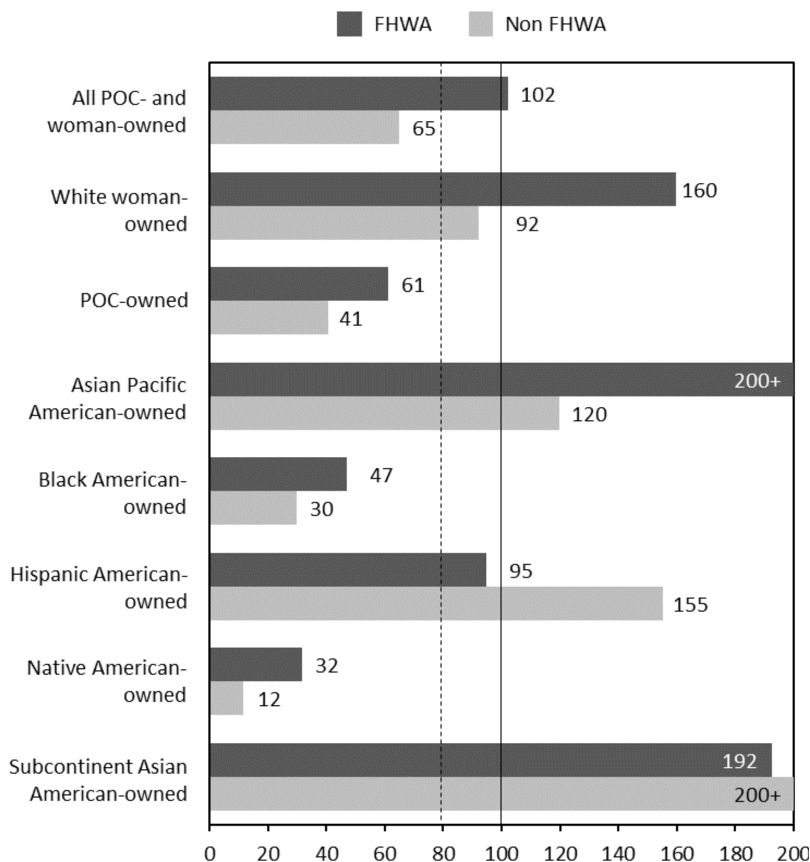
Note:

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 and F-15 in Appendix F.

Source:

BBC disparity analysis.



3. Contract role. Many POC- and woman-owned businesses are small businesses and thus often work as subcontractors. In addition, INDOT's use of race- and gender-conscious contract goals is designed to encourage the participation of POC- and woman-owned businesses in subcontracts but not in prime contracts. For those reasons, it is useful to examine disparity analysis results separately for the prime contracts and subcontracts INDOT awarded during the study period. As shown in Figure 8-3, POC- and woman-owned businesses considered together exhibited a substantial disparity for prime contracts (disparity index of 31) but not for subcontracts (disparity index of 189). Disparity analysis results for individual business groups differed by contract role:

- White woman-owned businesses (disparity index of 57), Black American-owned businesses (disparity index of 13), Hispanic American owned businesses (disparity index of 8), and Native American-owned businesses (disparity index of 0) all exhibited substantial disparities for prime contracts.
- Black American-owned businesses (disparity index of 87) exhibited a disparity for subcontracts, although that disparity was not substantial.

Figure 8-3.
Disparity analysis results for prime contracts and subcontracts

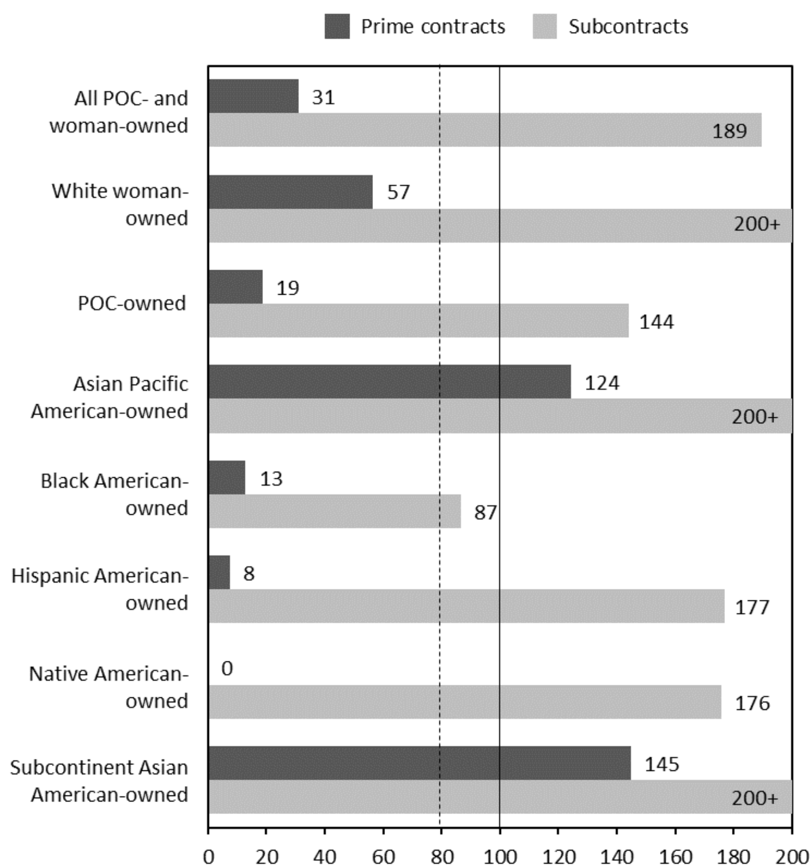
Note:

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

For more detail, see Figures F-7 and F-8 in Appendix F.

Source:

BBC disparity analysis.



4. Goal status. As part of its implementation of the Federal DBE Program, INDOT uses race- and gender-conscious DBE contract goals to encourage the participation of certified DBE subcontractors in various FHWA-funded projects. Similarly, as part of the State of Indiana's Minority and Women's Business Enterprise (MBE/WBE) Program, INDOT uses MBE/WBE contract goals to encourage the participation of certified MBE/WBE subcontractors in various state-funded projects. As part of both programs, certified DBE/MBE/WBE prime contractors cannot count their own participation in projects toward meeting those goals—they must include participation from certified DBE/MBE/WBE subcontractors part of their bids, quotes, or proposals or demonstrate good faith efforts that they tried to do so as to meet goal requirements.

BBC examined disparity analysis results separately for work the agency awarded with the use of DBE or MBE/WBE contract goals (*goals projects*) and work the agency awarded without the use of goals or any other race- or gender-conscious measures (*no goals projects*). Goals projects include subcontracts associated with projects INDOT awarded with the use of DBE or MBE/WBE contract goals. No goals projects include all prime contracts (because prime contract participation cannot count toward meeting goal requirements) and subcontracts associated with projects INDOT awarded without the use of DBE or MBE/WBE contract goals.

As shown in Figure 8-4, POC- and woman-owned businesses considered together did not exhibit a disparity on goals projects (disparity index of 190) but did exhibit a substantial disparity on no goals projects (disparity index of 31). Disparity analysis results for individual business groups differed by goal status:

- Black American-owned businesses (disparity index of 87) exhibited a disparity on goals projects, but that disparity was not substantial.
- White woman-owned businesses (disparity index of 57), Black American-owned businesses (disparity index of 13), Hispanic American-owned businesses (disparity index of 8), and Native American-owned (disparity index of 0) exhibited substantial disparities on no goals projects.

Figure 8-4. Disparity analysis results for goals and no goals projects

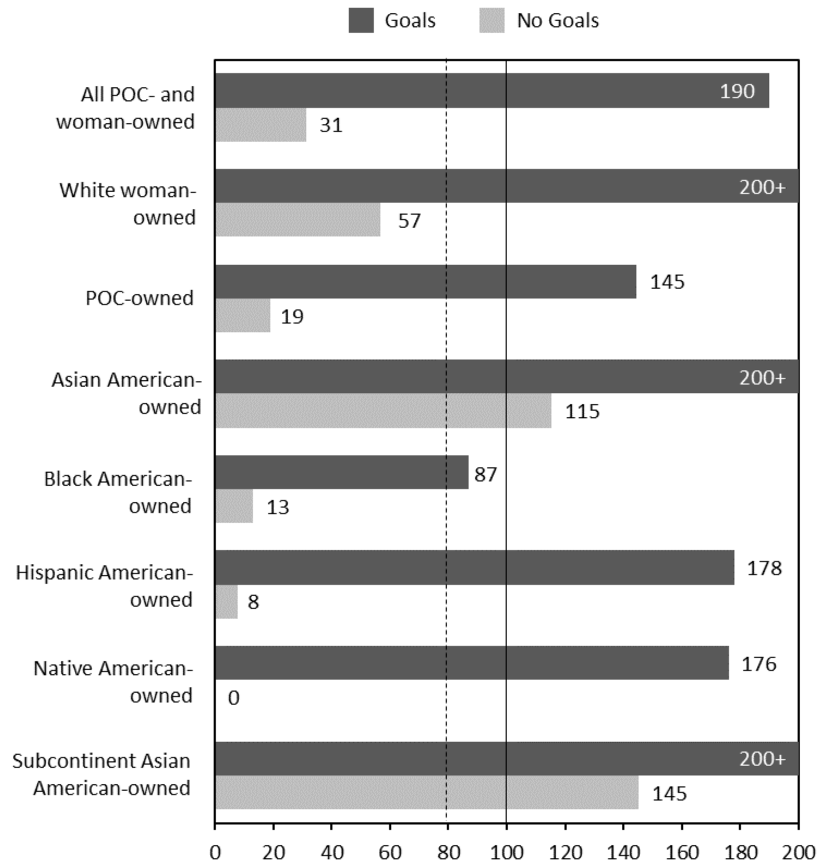
Note:

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-16 and F-17 in Appendix F.

Source:

BBC disparity analysis.



5. Industry. INDOT can make different decisions about its implementation of the Federal DBE Program based on industry, including decisions about whether the continued use of race- and gender-conscious measures is appropriate for its FHWA-funded projects and which groups might be eligible to participate in those measures. Thus, BBC examined disparity analysis results separately for the construction; professional services; and non-professional services, goods, and supplies contracts and procurements INDOT awarded during the study period to determine whether outcomes for POC- and woman-owned businesses differed by industry. As shown in Figure 8-5, POC- and woman-owned businesses exhibited a substantial disparity on non-professional services, goods, and supplies work (disparity index of 18) but not on construction work (disparity index of 90) or professional services work (disparity index of 140). Disparity analysis results for individual business groups differed by industry:

- Black American-owned businesses (disparity index of 37), Native American-owned businesses (disparity index of 29), and Subcontinent Asian American-owned businesses (disparity index of 45) exhibited substantial disparities for construction work.

- Asian Pacific American-owned businesses (disparity index of 1), Hispanic American-owned businesses (disparity index of 22), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities on professional services work. Black American-owned businesses (disparity index of 87) also exhibited a disparity on professional services work, but that disparity was not substantial.
- White woman-owned businesses (disparity index of 8), Black American-owned businesses (disparity index of 43), Hispanic American-owned businesses (disparity index of 0), and Subcontinent Asian American (disparity index of 0) exhibited substantial disparities on non-professional services, goods, and supplies work.

Figure 8-5. Disparity analysis results for construction; professional services; and non-professional services, goods, and supplies work

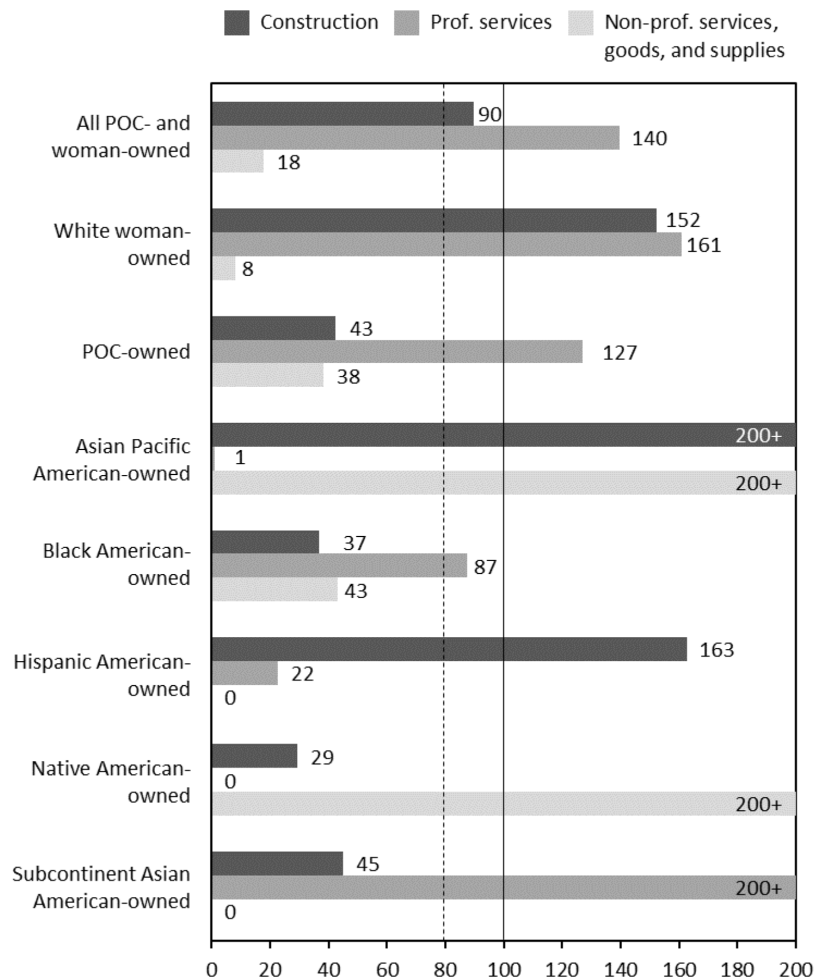
Note:

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-4, F-5, and F-6 in Appendix F.

Source:

BBC disparity analysis.



C. Statistical Significance

Statistical significance tests allow researchers to assess the probability that any observed quantitative differences were due to *real* differences rather than chance. In other words, a statistically significant difference is one that can be considered as statistically reliable or real. BBC used Monte Carlo analysis, which relies on repeated, random simulations of outcomes, to examine the statistical significance of key disparity analysis results.

1. Overview of Monte Carlo. BBC used Monte Carlo simulations to randomly be selected a business to win each individual contract element included in the disparity study. For each contract element, the availability analysis provided information on individual businesses potentially available to perform that contract element based on type of work, contractor role, contract size, and other factors. Then, using Monte Carlo, we randomly chose a business from the pool of available businesses to win the contract element. The chance of a business from a particular business group winning the contract element was equal to the number of businesses from that group available for it divided by the number of all businesses available for it.

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

The output of Monte Carlo simulations represents the number of simulations out of 1 million that produced participation equal to or less than the actual, observed participation for each relevant business group for each applicable contract set. If that number was less than or equal to 50,000 (i.e., 5.0% of the total number of simulations, or $p = .05$), then we considered the disparity index to be statistically significant at $\alpha = .05$, using one-tailed tests.

2. Results. BBC ran Monte Carlo simulations for disparity indices we observed on the FHWA-funded projects INDOT awarded during the study period as well as on no goals projects. We ran simulations on those contract sets because they are most relevant to the agency's implementation of the Federal DBE Program and its use of race- and gender-conscious contract goals. We present results from the Monte Carlo simulations in Figure 8-6.

a. FHWA-funded work. As shown in panel (a) of Figure 8-6, the disparities we observed for INDOT's FHWA-funded work were statistically significant for the following groups at $p < .01$:

- POC-owned businesses considered together;
- Black American-owned businesses; and
- Native American-owned businesses.

b. No goals projects. As shown in panel (b) of Figure 8-6, the disparities we observed for no goals projects were statistically significant for the following groups at $p < .01$:

- POC- and woman-owned businesses considered together;
- White woman-owned businesses;
- POC-owned businesses considered together;
- Black American-owned businesses;
- Hispanic American-owned businesses; and
- Native American-owned businesses.

Figure 8-6. Statistical significance of observed disparities for INDOT work

Note:

** indicates statistical significance at $p < .01$, two-tailed tests

+ indicates marginal statistical significance at $p < .10$, two-tailed tests

Source:

BBC disparity analysis.

Contract set and business group	Disparity index	Probability that disparity is due to chance (p value)
a) FHWA-funded contracts		
POC- and woman-owned businesses	102.2	N/A
White woman-owned	159.6	N/A
POC-owned	61.0	0.00 **
Asian Pacific American-owned	200+	N/A
Black American-owned	47.2	0.00 **
Hispanic American-owned	94.7	0.36
Native American-owned	31.7	0.00 **
Subcontinent Asian American-owned	192.4	N/A
b) No goals projects		
POC- and woman-owned businesses	31	0.00 **
White woman-owned	57	0.00 **
POC-owned	19	0.00 **
Asian Pacific American-owned	115	N/A
Black American-owned	13	0.00 **
Hispanic American-owned	8	0.00 **
Native American-owned	0	0.00 **
Subcontinent Asian American-owned	145	N/A

CHAPTER 9.
Program Measures

As part of implementing the Federal Disadvantaged Business Enterprise (DBE) Program, the Indiana Department of Transportation (INDOT) uses a combination of *race- and gender-neutral* and *race- and gender-conscious* measures to encourage the participation of person of color (POC)- and woman-owned businesses in its contracting and procurement.[1] Race- and gender-neutral measures are measures designed to encourage the participation of all businesses—or, all small businesses—in an organization's work, regardless of the race/ethnicity or gender of business owners. In contrast, race- and gender-conscious measures are measures designed to specifically encourage the participation of POC- and woman-owned businesses in an organization's contracting (e.g., using DBE contract goals to award individual contracts and procurements).

To meet the *narrow tailoring* requirement of the *strict scrutiny* standard of constitutional review, agencies that implement the Federal DBE Program must meet the maximum feasible portion of their overall DBE goals through the use of race-neutral measures.[2, 3] If they cannot meet their overall DBE goals through the use of race-neutral measures alone, then they must consider also using race-conscious measures. When submitting documentation related to their overall DBE goals to the United States Department of Transportation (USDOT), agencies must project the portion of their goals they expect to meet through race- and gender-neutral measures and what portion they expect to meet through race- and gender-conscious measures. USDOT offers guidance concerning how agencies should make such projections.

BBC Research & Consulting (BBC) reviewed measures INDOT currently uses to encourage the participation of POC- and woman-owned businesses in its contracting and procurement. BBC reviewed INDOT's program measures in two parts:

A. Race- and Gender-Neutral Measures; and

B. Race- and Gender-Conscious Measures.

A. Race- and Gender-Neutral Measures

INDOT uses myriad race- and gender-neutral measures to encourage the participation of small businesses—including many POC- and woman-owned businesses—in its contracting and procurement. INDOT uses the following types of race- and gender-neutral measures as part of its

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[1] "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

[2] 49 CFR Section 26.51.

[3] Technically, only an organization's use of race-conscious measures must adhere to the requirements of the strict scrutiny standard. Gender-conscious measures must adhere to the requirements of the *intermediate scrutiny* standard, which is less rigorous than strict scrutiny.

implementation of the Federal DBE Program and the State of Indiana's Minority and Women's Business Enterprises Program:

- Advocacy and outreach efforts;
- Technical assistance programs; and
- Prompt payment policies.

1. Advocacy and outreach efforts. INDOT participates in various advocacy and outreach efforts, including hosting DBE workshops and using communications targeted specifically to disadvantaged businesses.

a. Communications. INDOT communicates with DBEs through email, its website, and its DBE newsletter. The agency uses its website and its newsletter to announce contracting opportunities, special events, and new DBE program measures. The agency also contracts with an independent consultant who conducts additional outreach and targets communications to DBEs through mailings, phone calls, and emails.

b. Identification of potential DBEs. INDOT makes efforts to identify POC- and woman-owned businesses that are not currently DBE-certified but that could become certified based on certification requirements. Those businesses are encouraged to become DBE-certified through INDOT.

2. Technical assistance programs. INDOT hosts two, multi-day events geared toward providing DBEs and other businesses with assistance in the areas of networking, technology, business development, and other topics. The agency also offers technical assistance through DBE Supportive Services programs and on-the-job training (OJT).

a. Statewide Indiana DBE Initiative (SINDI). INDOT developed SINDI to encourage POC- and woman-owned businesses in the highway construction industry to consider pursuing work with INDOT. The program includes multiple events that take place throughout the year. The events range from one-day roundtable discussions to three-day workshops and cover myriad technical assistance topics, including risk management, INDOT's supply chain, prequalification processes, technology training, and business development.

b. Entrepreneurial Development Institute (EDI). INDOT sponsors an annual multi-day event for DBEs called the EDI. It includes a series of workshops related to different business topics such as marketing and advertising, networking, and doing business with INDOT. The workshops are led by INDOT staff, local community partners, and professional outreach consultants.

c. DBE Supportive Services. INDOT provides Supportive Services to DBEs certified and based in Indiana through the Construction Estimating Institute (CEI). CEI's program is designed to contribute to the growth and sustainability of DBEs so that they may achieve proficiency in competing for contracts and subcontracts. The program contributes to DBEs' growth and business efficiency through coursework focused on doing business with INDOT, compliance with all required INDOT regulations, cash flow and accounting, and business planning, marketing, and networking.

d. OJT. INDOT's OJT program helps ensures that contractors provide training and improve the skills of POCs, women, and disadvantaged persons so they have access to skilled trade jobs and journey-

level positions in highway construction classifications. OJT requirements are part of all of INDOT's USDOT-funded contracting opportunities.

3. Prompt payment policies. INDOT has policies in place to help ensure prompt payment to both prime contractors and subcontractors. Prime contractors are paid within 35 days after the State Auditor receives approved invoices from INDOT. Prime contractors are then required to pay their subcontractors within 10 days after receipt of payment from the State Auditor. Prime contractors are required to report payments made to all subcontractors into the Subcontractor Payment Tracking System (SPT). Subcontractors subsequently verify those payments in SPT.

B. Race- and Gender-Conscious Measures

INDOT uses race- and gender-conscious measures to award many of its FHWA- and non FHWA-funded contracts and procurements. As part of its implementation of the Federal DBE Program, the agency uses DBE contract goals to encourage the participation of certified DBEs in various FHWA-funded projects. As part of the State of Indiana's M/WBE Program, the agency uses MBE/WBE contract goals to encourage the participation of certified MBE/WBEs in various state-funded projects. The Indiana Department of Administration sets separate goals for MBEs and WBEs and separate goals across construction; professional services; and non-professional services, goods, and supplies work, which, as a state agency, INDOT uses to award corresponding work.[4]

Prime contractors bidding on those contracts must meet the goals by either making subcontracting commitments to certified DBE/MBE/WBEs or submitting documentation that they made *good faith efforts* (GFEs) to meet the goals but failed to do so. INDOT reviews GFEs documentation and approves it if prime contractors demonstrate genuine efforts towards compliance with goal requirements. Examples of GFEs are:

- Identifying elements of the contract to make them available for DBE/MBE/WBE subcontractors;
- Soliciting bids from DBE/MBE/WBEs directly, including following up and negotiating when possible;
- Providing DBE/MBE/WBEs with information about the project, contract requirements, and other elements of the work; and
- Assisting DBE/MBE/WBEs with obtaining bonding, insurance, or other finance requirements, as well as supplies and materials.

Bidders may also provide other information about the efforts they made in partnering with DBE/MBE/WBE subcontractors if they think they represent genuine efforts to engage with those businesses. If prime contractors do not meet the goals through subcontracting commitments or through approved GFEs documentation, then INDOT rejects prime contractors' bids.

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[4] https://www.in.gov/idoa/mwbe/minority-and-womens-business-enterprises/participation-goals/

CHAPTER 10.
Findings and Recommendations

The disparity study provides information related to outcomes for person of color- (POC-) and woman-owned businesses in the Indiana Department of Transportation's (INDOT's) contracts and procurements and as part of the agency's implementation of the Federal Disadvantaged Business Enterprise (DBE) Program.[1] BBC presents key findings from the disparity study as well as recommendations INDOT should consider to further encourage the participation of POC- and woman-owned businesses in its Federal Highway Administration (FHWA)-funded work.

A. Key Findings

BBC analyzed relevant contract and procurement dollars INDOT awarded between October 1, 2016 and September 30, 2021 (the *study period*) to:

- Calculate the participation, or *utilization*, of POC- and woman-owned businesses in INDOT work;
- Estimate the *availability* of those businesses for that work; and
- Assess whether any *disparities* exist between participation and availability.

We also conducted quantitative and qualitative research on outcomes for POCs, women, and POC- and woman-owned businesses in Indiana to assess whether any barriers exist in the larger marketplace that make it more difficult for POC- and woman-owned businesses to compete for and perform agency work. That information can help INDOT assess whether POC- and woman-owned businesses experience any disadvantages as part of its contracting and procurement processes and what types of measures the agency could use as part of the Federal DBE Program to help address those disadvantages effectively and in a legally defensible manner.

1. Availability analysis. BBC's *custom census* availability analysis indicates that POC- and woman-owned businesses are available for 12.9 percent of INDOT's construction; professional services; and non-professional services, goods, and supplies contracts and procurements. That estimate takes into account the specific characteristics of potentially available businesses throughout the marketplace as well as the specific characteristics of the contracts and procurements INDOT awards. Availability for INDOT work is greatest among white woman-owned businesses, Native American-owned businesses, and Black American-owned businesses. The availability of POC- and woman-owned businesses for INDOT work also varies depending on various contract and procurement characteristics. For example, availability is higher for non FHWA-funded work than FHWA-funded work; higher for subcontracts than prime contracts; and higher for non-professional services, goods, and supplies work than other work.

2. Utilization analysis. The utilization analysis indicated that INDOT awarded 12.4 percent of its construction; professional services; and non-professional services, goods, and supplies contracts and

[1] "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

procurements to POC- and woman-owned businesses during the study period. Participation in INDOT work was greatest among white woman-owned businesses, Subcontinent Asian American-owned businesses, and Black American-owned businesses. Participation of POC- and woman-owned businesses in INDOT work also varied depending on various contract and procurement characteristics. For example, participation was higher in subcontracts than prime contracts; higher in work INDOT awarded with the use of race- and gender-conscious goals; and higher for professional services work than other work.

3. Disparity analysis. As part of the disparity analysis, BBC compared the availability of POC- and woman-owned businesses for INDOT work to their participation in that work to assess whether any relevant business groups exhibited *substantial disparities* between those measures (i.e., disparity indices equal to or less than 80). Such information indicates *inferences of discrimination* against particular race/ethnic and gender groups in the marketplace and often serves as justification for agencies to use, or continue to use, race- and gender-conscious measures to help address corresponding barriers. BBC observed substantial disparities between availability and participation for most relevant groups of POC- and woman-owned businesses across different sets of contracts and procurements INDOT awarded during the study period, particularly when the agency did not use race- or gender-conscious measures to award projects.

Figure 10-1 presents a visual summary of the substantial disparities we observed for each group on key sets of INDOT work. Of particular relevance to INDOT's use of race- and gender-conscious measures is that whereas no relevant business groups showed substantial disparities on work the agency awarded with the use of race- and gender-conscious goals, most groups showed substantial disparities on work the agency awarded without the use of such measures. Those results indicate that:

- INDOT's use of race- and gender-conscious measures is effective in increasing the participation of POC- and woman-owned businesses relatively to their availability; and
- Substantial barriers exist for POC- and woman-owned businesses when INDOT awards work without using race- and gender-conscious measures.

Figure 10-1.
Substantial disparities for POC- and woman-owned businesses for key contract sets

	Business group							
Contract set	All POC and white woman	White woman	All POC	Asian American	Black American	Hispanic American	Native American	Subcontinent Asian
All work		●	●		●		●	
Funding source								
FHWA-funded		●	●		●		●	
Non FHWA-funded	●	●	●		●		●	
Contract role								
Prime contracts	●	●	●		●	●	●	
Subcontracts								
Goal status								
Goals								
No goals	●	●	●		●	●	●	

4. Barriers in the marketplace. The United States Supreme Court and other courts have held that analyses of conditions in a local marketplace for POC- and woman-owned businesses are instructive in determining whether agencies' use of race- and gender-conscious programs as part of their contracting processes are appropriate and justified. Many courts have held that evidence of marketplace barriers for POCs, women, and POC- and woman-owned businesses helps to establish a *compelling government interest* for organizations to take remedial action to address those barriers. BBC's analyses of marketplace conditions in Indiana indicate that POCs, women, and POC- and woman-owned businesses face various barriers in the region in terms of acquiring human capital, accruing financial capital, owning businesses, and operating successful businesses (for details, see Chapters 3 and 4 and Appendices C and D). In many cases, there is evidence those disparities exist even after accounting for various other factors such as age, income, education, and familial status. Marketplace barriers likely have important effects on the ability of POCs and women to start businesses in relevant industries and operate them successfully. Any difficulties they face in starting or operating businesses may reduce their availability for INDOT work and their ability to successfully compete for or perform it.

B. Recommendations

The disparity study provides substantial information INDOT should examine as it considers refinements to its implementation of the Federal DBE Program and ways to further encourage the participation of POC- and woman-owned businesses in its work. BBC presents several recommendations that might help the agency address some of the difficulties POC- and woman-owned businesses face in the marketplace as well as the disparities we observed between the participation and availability of POC- and woman-owned businesses in its work. In considering our recommendations, INDOT should be particularly mindful of the legal requirements surrounding the use of race- and gender-conscious measures, including state and federal regulations as well as relevant case law. The organization should consult closely with internal legal counsel in developing any new policies or programs related to POC- and woman-owned businesses to ensure they are consistent with the requirements of the *strict scrutiny* and *intermediate scrutiny* standards of constitutional review, respectively.

1. Overall DBE goal. In accordance with 49 Code of Federal Regulations (CFR) Part 26 and United States Department of Transportation (USDOT) requirements, every three years, INDOT must establish an overall goal for the participation of DBEs in the FHWA-funded projects it awards. USDOT requires agencies to set their overall DBE goals using a two-step process: establishing a *base figure* and considering whether a *step 2 adjustment* to the base figure is warranted. The disparity study provides important information regarding both steps of the required goal-setting process for INDOT to consider as it sets its next overall DBE goal.

a. Base figure. In accordance with USDOT requirements, BBC assessed the availability of *potential DBEs*—that is, POC- and woman-owned businesses that are currently DBE-certified or appear they could be DBE-certified according to size limits specified in the Federal DBE Program—for the FHWA-funded projects INDOT awarded during the study period. That analysis indicated that the availability of potential DBEs for INDOT's FHWA-funded work is 10.2 percent, which INDOT could consider as its base figure for its next overall DBE goal.

b. Step 2 adjustment. After establishing a base figure, INDOT must consider additional information to determine whether any adjustment is needed to the base figure to ensure the agency's new overall DBE goal is precise and reflects current conditions in the local marketplace for POCs, women, and POC- and woman-owned businesses. USDOT suggests agencies consider the following information in assessing whether to make step 2 adjustments to their base figures:

- Current capacity of DBEs to perform agency work;
- Information related to employment, self-employment, education, training, and unions;
- Disparities in the ability of DBEs to access financing, bonding, or insurance; and
- Other factors.[2]

BBC assessed information related to each of the above factors, which we summarize below:

- ***Current capacity of DBEs to perform agency work.*** Results from the utilization analysis indicate that INDOT awarded 9.5 percent of its FHWA-funded contract and procurement dollars to certified DBEs in FFYs 2017 through 2021, which is an indication of the collective capacity of DBEs to participate in INDOT's FHWA-funded work and supports a downward adjustment to the agency's base figure.
- ***Information related to employment, self-employment, education, training, and unions.*** The disparity study includes extensive quantitative and qualitative analyses of barriers POCs, women, and POC- and woman-owned businesses face related to employment, self-employment, education, and other business areas in Indiana (for details, see Chapters 3 and 4 as well as Appendices C and D). Such barriers may depress the availability of POC- and woman-owned businesses for the FHWA-funded projects INDOT awards, which supports an upward adjustment to the agency's base figure.
- ***Any disparities in the ability of DBEs to get financing, bonding, or insurance.*** The disparity study also included quantitative and qualitative analyses of barriers POCs, women, and POC- and woman-owned businesses face in accessing financing, bonding, and insurance in Indiana (for details, see Chapters 3 and 4 as well as Appendices C and D). Any barriers to obtaining financing, bonding, or insurance might limit opportunities for POCs and women to successfully form and operate businesses in Indiana, impacting the availability of POC- and woman-owned businesses for INDOT's FHWA-funded work. Thus, that information also supports an upward adjustment to INDOT's base figure.
- ***Other relevant data.*** Marketplace analyses also indicate that POC- and woman-owned businesses are less successful than other businesses in Indiana in terms of business closures, business receipts, business owner earnings, and other metrics (for details, see Chapters 3 and 4 as well as Appendices C and D). Barriers in business success among POC- and woman-owned businesses can limit their growth, which may depress their availability for INDOT's FHWA-funded work. Thus, that information also supports an upward adjustment to the agency's base figure.

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[2] 49 CFR Section 26.45.

The agency should consider the above information carefully as part of setting its next overall DBE goal. INDOT is not required to make a step 2 adjustment, but it has to explain its decision to make or not make an adjustment in goal documentation it submits to FHWA.

2. Race- and gender-conscious contract goals. Results from the disparity analysis indicated that when INDOT awarded contracts and procurements without the use of race- and gender-conscious measures, most groups of POC- and woman-owned businesses exhibited substantial disparities between their participation in and availability for that work. Those results suggest that the race- and gender-neutral measures INDOT uses are not sufficient to address the barriers POC- and woman-owned businesses face as part of the agency's contracting processes. In addition, some business owners who participated in in-depth interviews made comments about the use of race- and gender-conscious measures, including DBE contract goals:

- Several POC- and woman-owned businesses commented that race- and gender-conscious measures help open opportunities for POC- and woman-owned businesses. They indicated that such measures have helped those businesses obtain work they would not have otherwise obtained.
- Several POC- and woman-owned businesses stated that DBE certification has helped their companies gain exposure in the business community.

The Federal DBE Program requires agencies to use race- and gender-conscious measures—such as DBE contract goals—to meet any portion of their overall DBE goals they do not project being able to meet using race- and gender-neutral measures alone. Based on disparity study results and other information, INDOT should consider continuing its use of race- and gender-conscious contract goals to award contracts and procurements, both on FHWA-funded and non FHWA-funded work [i.e., DBE contract goals for FHWA-funded work and minority- and woman-owned business enterprise (MBE/WBE) contract goals for non FHWA-funded work]. If INDOT decides to continue using those measures, the agency must ensure their use meets the strict scrutiny standard of constitutional review for race-conscious measures, including showing a *compelling governmental interest* for their use and ensuring their use is *narrowly tailored* (for race-conscious measures), and the intermediate scrutiny standard of constitutional review for gender-conscious measures (for details, see Chapter 2 and Appendix B).

a. Setting contract goals. Currently, INDOT sets DBE goals of either 12 percent or 14 percent on individual FHWA-funded projects it awards. Prime contractors must meet those goals at the time of bid by either making subcontract commitments with DBE-certified subcontractors or by demonstrating genuine and sufficient good faith efforts (GFEs) that they tried but failed to do so. INDOT determines whether to set a 12 percent or 14 percent goal on a particular project depending on whether the agency determines the availability of DBEs for the work involved is greater than or less than 50 percent, respectively. For non FHWA-funded projects, in adherence with state code, INDOT sets the same MBE/WBE contract goals on all projects within a particular industry based on overall aspirational goals the State of Indiana's Governor's Commission on Supplier Diversity has set for each industry. To set DBE and MBE/WBE contract goals more effectively, INDOT could consider setting goals in a more tailored manner based on the availability of eligible POC- and woman-owned businesses for the types of work involved in the project as well as other relevant factors (e.g., other contracting demands in the marketplace, recent business closures or changes, and the size of the

contract or procurement opportunity). Based on that information, goals would vary from project to project, and sometimes they might be 0 percent. The agency could base such determinations, at least in part, on results from the availability analysis.

b. Group eligibility. INDOT's use of race- and gender-conscious goals must meet the requirements of the strict scrutiny and intermediate standards of constitutional review, respectively. For strict scrutiny in particular, that includes showing a compelling government interest for their use and ensuring their use is narrowly tailored (for details, see Chapter 2 and Appendix B). Among several factors, one key factor of narrow tailoring is that eligibility for participation in race-conscious measures must be limited to those business groups for which inferences of discrimination exist in an agency's contracting and procurement processes. Only the participation of businesses that are part of eligible groups would count toward meeting contract goals INDOT establishes on individual contract or procurement opportunities.

One of the primary reasons for conducting a disparity study is to assess whether any relevant POC- or woman-owned business groups exhibit substantial disparities between participation and availability for organization work, which many courts have considered inferences of discrimination against particular business groups in the marketplace.[3] As part of the disparity analysis, BBC observed that most relevant business groups—woman-owned businesses, Black American-owned businesses, Hispanic American-owned businesses, and Native American-owned businesses—exhibited substantial disparities across different sets of INDOT contracts and procurements. If INDOT decides to continue using race- and gender-conscious contract goals, it should review those results carefully to ensure its program accounts for them properly.

3. Procurement policies. Based on our analysis of INDOT policies and feedback we collected from stakeholders, BBC identified several areas of INDOT's procurement processes the agency should consider refining to help increase the participation of POC- and woman-owned businesses in its work. The refinements we recommend below are all race- and gender-neutral in nature – that is, they may make it easier for all businesses to participate in INDOT work, regardless of the race/ethnicity or gender of their owners.

a. Bid opportunities. As part of the anecdotal evidence process, many participants indicated that they experience difficulties learning about bid opportunities and that finding work is generally seen as a difficult process. INDOT sends out e-mails with information about bidding opportunities, but they are often construction-focused, making it hard for other businesses to learn about work. Several businesses noted that once they identify bid opportunities, the bidding process itself can still be very hard to navigate. Many businesses reported that the Bid Express platform is somewhat cumbersome and difficult to navigate and that contacting procurement staff to ask questions can be challenging. INDOT could consider simplifying the platform as well as hiring more staff to support businesses—especially small businesses—that have questions about the bid process.

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[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).

b. Teaming opportunities. There are several considerations INDOT could make to better facilitate meaningful partnerships between prime contractors and subcontractors, which could result in more work opportunities and growth for POC- and woman-owned businesses.

i. DBE directories and other vendor lists. As part of the anecdotal evidence process, prime contractors indicated that they use a variety of resources—including recommendations from other prime contractors, certification lists, business mailers, trade associations, and various INDOT resources—to find potential subcontractors. INDOT offers a directory of all DBE-certified businesses on its website, searchable by business name, industry code, industry type, and geographical location. Anecdotal evidence indicated that many business owners and managers are aware of the directory but others may not be. Some prime contractors indicated that they have had difficulties in locating DBE contractors with which to partner. INDOT might consider working to increase awareness of the DBE directory so prime contractors are better aware of qualified DBE subcontractors. The agency currently publicizes bid and solicitation information on its website but should consider also linking that information to listings of qualified DBEs, so when prime contractors become aware of opportunities in which they might be interested, they are also notified of DBEs that might be interested in participating in that work as subcontractors.

ii. Joint ventures. Small businesses often work solely as subcontractors, preventing them from gaining the experience or capital to bid on future work as prime contractors. One way INDOT could better support business growth is by identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures that include small businesses—including DBEs—to compete for and perform prime contracts. Encouraging joint ventures would allow businesses to gain experience working as prime contractors while mitigating some of the difficulties and costs of doing so, which might allow them to be more competitive on future projects. Currently, INDOT only allows for the formation of joint ventures for professional services work but could consider extending their joint venture policies to construction projects as well.

iii. Working with new subcontractors. The disparity study indicated that a substantial portion of the contract and procurement dollars INDOT awarded to POC- and woman-owned businesses during the study period were largely concentrated with a relatively small number of businesses. INDOT could consider using bid and contract language to encourage prime contractors to partner with subcontractors and suppliers with which they have never worked. For example, as part of the bid process, INDOT might ask prime contractors to submit information about the efforts they made to identify and team with businesses with which they have not worked, and INDOT could award evaluation points or price preferences based on the quality of those efforts. Increasing the number of new subcontractors that are involved in INDOT's bid process could help many small businesses—including DBEs—become aware of and compete for INDOT opportunities and grow the pool of small businesses involved in the agency's work.

c. Unbundling contracts. In general, POC- and woman-owned businesses exhibited reduced availability for relatively large contracts INDOT awarded during the study period. In addition, as part of in-depth interviews, several business owners reported that the size of INDOT contracts and procurements is sometimes a barrier to their success. To further encourage the participation of POC- and woman-owned businesses in its work, INDOT should consider making efforts to unbundle relatively large prime contracts, and even subcontracts, into several smaller pieces. Such initiatives might increase the number of contracting opportunities for all small businesses, including many POC-

and woman-owned businesses. For example, the City of Charlotte, North Carolina encourages prime contractors to unbundle subcontract opportunities into smaller pieces, making them more accessible to small businesses, and accepts such efforts as GFEs as part of its contracting goals program.

d. Small business set asides. Disparity analysis results indicated substantial disparities for most relevant racial/ethnic and gender groups on prime contracts INDOT awarded during the study period. The agency might consider reserving, or *setting aside*, certain, small prime contracts exclusively for competition among small businesses, including DBEs. Doing so could encourage the participation of small businesses as prime contractors in INDOT work. In addition to using small business set asides, INDOT could consider encouraging at least one quote from small businesses for certain small procurements.

e. Subcontracting minimums. Subcontracts often represent accessible opportunities for small businesses—including DBEs—to become involved in an organization's contracting and procurement. However, subcontracting accounts for a relatively small percentage of the total contract and procurement dollars INDOT awards. For example, during the study period, subcontracting represented only 26 percent of the work INDOT awarded. To increase the amount of subcontract opportunities on its projects, INDOT could consider using subcontracting minimums to award certain types of work. For specific types of contracts and procurements for which subcontracting opportunities might exist, INDOT could set a minimum percentage of work to be subcontracted. Prime contractors would then have to meet or exceed those minimums in order for their bids or proposals to be considered responsive. If INDOT were to implement such a program, it should include GFEs provisions that would require prime contractors to document their efforts to identify and include potential subcontractors in their bids or proposals.

f. Prequalification requirements and contractor experience. INDOT requires prequalification for all construction and professional services projects, and only prequalified companies are allowed to submit bids or proposals for that work. Those requirements do not apply to subcontracts worth less than $300,000. INDOT could consider eliminating prequalification requirements or changing how it uses them so they are less burdensome to small businesses, including DBEs. For example, the agency could still advertise projects directly to prequalified companies but allow other companies to propose on them or could use preference points for prequalified businesses without limiting the bidding opportunities to only those businesses. INDOT could also raise the threshold at which it requires prequalification for both prime contract and subcontract opportunities.

g. Non-professional services, goods, and supplies work. Disparity analysis results indicated substantial disparities for most relevant POC- and woman-owned business groups on non-professional services, goods, and supplies work INDOT awarded during the study period. Although those contracts and procurements are typically state-funded and the State of Indiana's MBE/WBE Program applies to them, INDOT does not enforce the use of MBE/WBE contract goals when awarding such work. INDOT should consider working with its Procurement Division to explore race- and gender-neutral and, if appropriate, race- and gender-conscious program measures that might better encourage the participation of POC- and woman-owned businesses in its non-professional services, goods, and supplies work.

h. Prompt payment. Indiana state law requires state agencies to pay prime contractors within 35 days of agencies receiving invoices.[4] In addition, INDOT requires prime contractors to pay their subcontractors within 10 days of receiving payment from the agency. As part of in-depth interviews and surveys, several businesses—including many POC- and woman-owned businesses—reported difficulties with receiving payment in a timely manner on government projects, particularly when they work as subcontractors and suppliers. Many businesses also commented that having capital on hand is crucial to business success and a lack of access to capital can be particularly challenging for small businesses. INDOT should continue ensuring full enforcement of the state's prompt payment policies to ensure timely payment to prime contractors and especially from prime contractors to subcontractors or suppliers.

i. Data collection. INDOT maintains comprehensive data on both the prime contracts and subcontracts it awards, and those data are generally well-organized and accessible. INDOT should continue their data collection efforts to ensure they are accurately tracking the participation of POC- and woman-owned businesses in the agency's work.

4. Business assistance programs. In addition to refinements related to procurement policies, INDOT should consider implementing or strengthening assistance programs that encourage the participation of small businesses, as well as POC- and woman-owned businesses, in its work. The refinements we recommend below are also all race- and gender-neutral in nature.

a. Bonding assistance. INDOT requires bonding for all permitted projects, regardless of contract size.[5] As part of in-depth interviews, several business owners reported that bonding requirements are a barrier for small businesses—particularly POC- and woman-owned businesses—competing for prime contract work. INDOT could consider setting a dollar threshold on projects and only enforce bonding requirements to projects above that threshold. Such a measure could reduce barriers associated with bonding on smaller projects, which tend to be more accessible to small businesses. Alternatively, the agency could consider breaking up multiyear projects into smaller annual pieces to help DBEs and other small businesses avoid reaching their bonding limits. For example, a three-year project worth $6 million could be broken down into three annual pieces each worth $2 million, which would reduce bonding requirements for each individual piece. Finally, INDOT could partner with financial institutions to standardize bonding rates at more equitable levels. Currently, small businesses—including DBEs—are subject to higher bond rates, making it more difficult for them to obtain bonds relative to larger businesses.

b. Training and technical assistance. Anecdotal evidence indicated that businesses find training and technical assistance programs—when implemented well—to be valuable in helping them build their capacities for larger projects and learn the necessary skills required to compete in their industries. INDOT currently conducts various trainings and other technical assistance programs (for more information, see Chapter 9). The agency should continue conducting those programs and should consider additional programs focused on bonding, bookkeeping, business plan development and refinement, financial literacy, and other topics. It could host those programs on its own or with local

[4] IC 5-17-5.

[5] A permit is permissive authority for the permittee to enter Indiana State highway right-of-way to construct, alter, repair, or improve facilities or conduct specified activities.

partners. INDOT should also continue encouraging participation in programs that help diversify the Indiana workforce, including On-the-Job Training Supportive Services and DBE Supportive Services.

c. Networking and outreach. INDOT hosts and participates in many networking and outreach events that include information about marketing, the DBE and MBE/WBE certification processes, doing business with the agency, and available bid opportunities. The agency should consider continuing those efforts but might also consider broadening its efforts to include networking events around small contracting opportunities. INDOT might also consider creating a consortium of local organizations and public agencies that would jointly host quarterly outreach and networking events and training sessions for businesses seeking public sector work.

APPENDIX A.
Definitions of Terms

Appendix A defines terms useful to understanding the 2022 Indiana Department of Transportation Disparity Study report.

49 Code of Federal Regulations (CFR) Part 26

49 CFR Part 26 are the federal regulations that set forth requirements for the Federal Disadvantaged Business Enterprise Program.

Anecdotal Information

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

Base Figure

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

Business

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

Compelling Governmental Interest

As part of the strict scrutiny standard of constitutional review, a government agency must demonstrate a compelling governmental interest in remedying past identified discrimination in order to implement race-conscious measures. That is, an agency that uses race-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 need for such measures. The agency must assess such discrimination within its own relevant geographic market area.

Consultant

A consultant is a business that performs professional services work.

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 Goals

Contract goals are often a race- and gender-conscious effort whereby organizations set percentage goals for the participation of small businesses or person of color- and woman-owned businesses in individual contracts and procurements they award. As a condition of award, prime contractors have to meet contract goals as part of their bids, quotes, or proposals by making participation commitments with eligible, certified businesses or, if they fail to do so, by demonstrating they made genuine and sufficient good faith efforts to do so. The use of contract goals as they apply to person of color- and woman-owned businesses must meet the strict and intermediate scrutiny standards of constitutional review, respectively.

Contract Element

A contract element is either a prime contract or subcontract.

Contractor

A contractor is a business that performs construction work.

Control

Control means exercising management and executive authority over 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 their specific characteristics. Researchers then take survey information about potentially available businesses and match them to the characteristics of prime contracts and subcontracts an agency actually awarded during the study period to assess the percentage of dollars one might expect the agency to award to a particular group of businesses. A custom census approach is accepted in the industry as the preferred method for conducting availability analyses, because it takes several different factors into account, including businesses' primary lines of work and their capacities to perform work on an agency's contracts or procurements.

Disadvantaged Business Enterprise (DBE)

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

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

A determination of economic disadvantage includes assessing businesses' gross revenues (maximum revenue limits ranging from $7 million to $26.29 million depending on work type) and business owners' personal net worths (maximum of $1.32 million excluding equity in their primary homes and their businesses). Businesses owned by white men can also be certified as DBEs if they meet the economic requirements set forth in 49 CFR Part 26.

Disparity Analysis

A disparity analysis examines whether there are any differences between the participation of a specific group of businesses in an agency's contracts and procurements and the estimated availability of the group for that work. A disparity index is computed by dividing the actual participation of a specific group of businesses in the agency's work by the estimated availability of the group for that work and multiplying the result by 100. Smaller disparity indices indicate larger disparities.

Federal DBE Program

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

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

Federal Highway Administration (FHWA)

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

Federally-funded Project

A federally-funded project is any project funded in whole or in part with United States Department of Transportation financial assistance, including loans. The study team considered a project to be federally-funded if it included at least $1 of United States Department of Transportation funding.

Indiana Department of Transportation (INDOT)

INDOT is responsible for managing, maintaining, and constructing Indiana's transportation infrastructure, including federal and state highways, railroads, and airports.

Indianapolis Airport Authority (IAA)

IAA is responsible for developing and operating several public airports and one public heliport located in and around Indianapolis, Indiana, most notably, the Indianapolis International Airport.

Industry

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

Inference of Discrimination

An inference of discrimination is the conclusion that businesses whose owners identify with particular race/ethnic or gender groups suffer from barriers or discrimination in the marketplace based on sufficient quantitative or qualitative evidence. When inferences of discrimination exist, government organizations sometimes use race- or gender-conscious measures to address barriers affecting those businesses.

Intermediate Scrutiny

Intermediate scrutiny is the legal standard an agency's use of gender-conscious measures must meet to be considered constitutional. It is more rigorous than the rational basis test, which applies to business measures unrelated to race/ethnicity or gender, but less rigorous than the strict scrutiny test, which applies to business measures related to race/ethnicity. In order for a program to pass intermediate scrutiny, it must serve an important government objective, and it must be substantially related to achieving the objective.

Narrow Tailoring

As part of the strict scrutiny standard of constitutional review, a government organization must demonstrate its use of race-conscious measures is narrowly tailored. There are several factors 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-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.

Overall DBE Goal

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

Participation

See *utilization*.

Person of Color (POC)

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

POC-owned Business

A POC-owned business is a business with at least 51 percent ownership and control by individuals who identify with one of the following race/ethnic groups: Asian Pacific American, Black American, Hispanic American, Native American, Subcontinent Asian American, or other non-white race or ethnic group. The study team considered businesses owned by men of color or women of color as POC-owned businesses. A business does not have to be certified as a DBE or hold any other type of certification to be considered a POC-owned business.

Potential DBE

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

Prime Consultant

A prime consultant is a professional services business that performs professional services work directly for end users such as INDOT.

Prime Contract

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

Prime Contractor

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

Procurement

See *contract*.

Project

A project refers to a construction; professional services; or non-professional services, goods, and supplies endeavor an agency bids out. 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 designed to increase the participation of POC- and woman-owned businesses specifically in government work. Businesses owned by individuals who identify with particular race/ethnic groups might be eligible for such measures whereas others would not. Similarly, businesses owned by individuals who identify as women might be eligible for such measures whereas businesses owned by individuals who identify as men would not. An example of race- and gender-conscious measures is an organization's use of condition-of-award DBE contract goals.

Race- and Gender-neutral Measures

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

Rational Basis

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

Relevant Geographic Market Area (RGMA)

The RGMA is the geographic area in which the businesses to which agencies award most of their contracting dollars are located. Case law related to contracting programs and disparity studies requires analyses to focus on the RGMA. The RGMA for the disparity study is the entire state of Indiana.

State-funded Project

A state-funded project is any contract or project wholly funded by state or local sources. That is, the project does not include any United States Department of Transportation or other federal funds.

Statistically Significant Difference

A statistically significant difference refers to a quantitative difference for which there is a 0.95 or 0.90 probability that chance can be correctly rejected as an explanation for the difference. In other words, 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 a government agency's use of race-conscious measures must meet to be considered constitutional. Strict scrutiny is the highest threshold for evaluating the legality of measures that might impinge on the rights of others, 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 the use of any such measures is narrowly tailored to achieve the goal of remedying the identified discrimination.

An organization's use of race-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. INDOT had to have awarded a contract or procurement during the study period for it to be included in the study team's analyses. The study period for the disparity study was October 1, 2016 through September 30, 2021.

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 or projects.

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*).

Substantial Disparity

A substantial disparity is a disparity index of 80 or less, indicating that the actual participation of a specific business group in agency work is 80 percent or less of the group's estimated availability. Substantial disparities are considered *inferences of discrimination* in the marketplace against

particular business groups. Government organizations sometimes use substantial disparities as justification for the use of race- or gender-conscious measures to address barriers affecting certain groups.

Utilization

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

Vendor

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

Woman-owned Business

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

TABLE OF CONTENTS

APPENDIX B. LEGAL FRAMEWORK AND ANALYSIS 1

A. Introduction 1

B. U.S. Supreme Court Cases 4

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

2. Adarand Constructors, Inc. v. Pena ("Adarand I"), 515 U.S. 200 (1995) 6

C. The Legal Framework Applied to State and Local Government MBE/WBE/DBE Programs 6

1. Strict scrutiny analysis 6

2. Intermediate scrutiny analysis 26

3. Rational basis analysis 28

4. Pending cases (at the time of this report) 30

SUMMARIES OF RECENT DECISIONS 38

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 38

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) 38

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) 48

3. Northern Contracting, Inc. v. Illinois, 473 F.3d 715 (7th Cir. 2007) 52

4. Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc., 460 F.3d 859 (7th Cir. 2006) 55

5. Builders Ass'n of Greater Chicago v. County of Cook, Chicago, 256 F.3d 642 (7th Cir. 2001) 55

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) 57

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) 67

8. Northern Contracting, Inc. v. Illinois, 2005 WL 2230195 (N.D. Ill., 2005), affirmed, 473 F.3d 715 (7th Cir. 2007) 71

9. Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT, 2004 WL 422704 (N.D. Ill. March 3, 2004) 76

10. The Builders Ass'n of Greater Chicago v. The City of Chicago, 298 F. Supp.2d 725 (N.D. Ill. 2003) 78

11. Indianapolis Minority Corrections Assoc., Inc. v. Wiley, 1998 WL 1988826 (S.D. Ind. 1998) 80

12. Milwaukee County Pavers, Association v. Fiedler, 922 F.2d 419 (7th Cir. 1991) 83

E. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in Other Jurisdictions 86

Recent Decisions in Federal Circuit Courts of Appeal 86

13. H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al., 615 F.3d 233 (4th Cir. 2010) 86

14. Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development, 438 F.3d 195 (2d Cir. 2006) 96

15. Virdi v. DeKalb County School District, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion) 97

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) 99

17. In re City of Memphis, 293 F.3d 345 (6th Cir. 2002) 111

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) 111

19. W.H. Scott Constr. Co. v. City of Jackson, Mississippi, 199 F.3d 206 (5th Cir. 1999) 115

20. Monterey Mechanical v. Wilson, 125 F.3d 702 (9th Cir. 1997) 118

21. Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997) 119

22. Contractor's Association of E. Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996) 129

23. Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994) 142

24. Contractor's Association of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 996 (3d Cir. 1993) 152

25. Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC"), 950 F.2d 1401 (9th Cir. 1991) 162

26. Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991) 165

Recent District Court Decisions 168

27. Kossman Contracting Co., Inc. v. City of Houston, 2016 WL 1104363 (S.D. Tex. 2016) 168

28. H. B. Rowe Corp., Inc. v. W. Lyndo Tippett, North Carolina DOT, et al., 589 F. Supp.2d 587 (E.D.N.C. 2008), affirmed in part, reversed in part, and remanded, 615 F.3d 233 (4th Cir. 2010) 175

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). 180

30. Thompson Building Wrecking Co. v. Augusta, Georgia, No. 1:07CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007)(Slip. Op.). 182

31. Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, 333 F. Supp.2d 1305 (S.D. Fla. 2004). 184

32. Florida A.G.C. Council, Inc. v. State of Florida, 303 F. Supp.2d 1307 (N.D. Fla. 2004). 188

33. Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore, 218 F. Supp.2d 749 (D. Md. 2002). 190

34. Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services, 140 F.Supp.2d 1232 (W.D. OK. 2001). 190

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). 195

36. Webster v. Fulton County, 51 F. Supp.2d 1354 (N.D. Ga. 1999), affirmed per curiam 218 F.3d 1267 (11th Cir. 2000). 201

37. Associated Gen. Contractors v. Drabik, 50 F. Supp.2d 741 (S.D. Ohio 1999). 204

38. Phillips & Jordan, Inc. v. Watts, 13 F. Supp.2d 1308 (N.D. Fla. 1998). 207

F. Recent Decisions Involving the Federal DBE Program and its Implementation by State and Local Governments 208

Recent Decisions in Federal Circuit Courts of Appeal 208

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. 208

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). 210

41. Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al., 713 F.3d 1187 (9th Cir. 2013). 216

42. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (2013). 222

43. Braunstein v. Arizona DOT, 683 F.3d 1177 (9th Cir. 2012). 225

44. Western States Paving Co. v. Washington State DOT, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006). 226

45. Western States Paving Co. v. Washington DOT, USDOT & FHWA, 2006 WL 1734163, (W.D. Wash. June 23, 2006) (unpublished opinion). 231

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). 232

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). 235

Recent District Court Decisions 243

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). 243

49. United States v. Taylor, 232 F.Supp. 3d 741 (W.D. Penn. 2017). 248

50. Geyer Signal, Inc. v. Minnesota, DOT, 2014 WL 1309092 (D. Minn. March 31, 2014). 252

51. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (September 4, 2013). 259

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). 262

53. Geod Corporation v. New Jersey Transit Corporation, et al., 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010). 264

54. Geod Corporation v. New Jersey Transit Corporation, et seq. 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009). 269

55. South Florida Chapter of the Associated General Contractors v. Broward County, Florida, 544 F. Supp.2d 1336 (S.D. Fla. 2008). 272

56. Klaver Construction, Inc. v. Kansas DOT, 211 F. Supp.2d 1296 (D. Kan. 2002). 275

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). 275

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). 276

G. Recent Decisions and Authorities Involving Federal Procurement That May Impact DBE and MBE/WBE Programs 277

59. Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 836 F3d 57, 2016 WL 4719049 (D.C. Cir. 2016), cert. denied, 2017 WL 1375832 (2017), affirming on other grounds, Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 107 F.Supp. 3d 183 (D.D.C. 2015). 277

60. Rothe Development Corp. v. U.S. Dept. of Defense, et al., 545 F.3d 1023 (Fed. Cir. 2008). 280

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). 289

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). 293

63. DynaLantic Corp. v. United States Dept. of Defense, et al., 503 F. Supp.2d 262 (D.D.C. 2007). 301

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.

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. Pena*,[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 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*

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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. Pena,* 515 U.S. 200 (1995).

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).

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 juridictions 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 Co*unty, 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 Signal, Inc. v. Minnesota DOT,*[18] *Geod Corporation*

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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 Tippett, 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).

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

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 N*orthern 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

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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).

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, 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 evidence[33]. 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

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.

legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

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

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[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.

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 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]

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45 *Id.*

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 (3d. Cir. 1996)*; Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I"),* 6 F.3d 990 (3d. 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*

a. The Compelling Governmental Interest Requirement. The first prong of the strict scrutiny analysis requires a governmental entity to have a "compelling governmental interest" in remedying past identified discrimination in order to implement a race- and ethnicity-based program.[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]

VII, 228 F.3d at 1176 (10th Cir. 2000)*; Associated Gen. Contractors of Ohio, Inc. v. Drabik ("Drabik II"),* 214 F.3d 730 (6th Cir. 2000)*; W.H. Scott Constr. Co. v. City of Jackson, Mississippi,* 199 F.3d 206 (5th Cir. 1999)*; Eng'g Contractors Ass'n of South Florida, Inc. v. Metro. Dade County,* 122 F.3d 895 (11th Cir. 1997)*; Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II"),* 91 F.3d 586 (3d. Cir. 1996)*; Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 990 (3d. Cir. 1993).

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.*

- 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 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 scrunity 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 Act[61]. 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

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

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.

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

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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).

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 scrunity standard to the state and local government DBE programs, the 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.

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69 49 CFR § 26.51(b); 49 CFR § 23.25.

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

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).

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

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

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

On December 3, 2015, the Fixing America's Surface Transportation Act'' or the ``FAST Act'' was passed by Congress, and it was signed by the President on December 4, 2015, as the new five year surface transportation authorization law. 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]

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]

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

[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.

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 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 "remedying 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

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76 *Id.*

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

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.3rd 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).

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 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

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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"),* 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)*; Kossman Contracting Co., Inc. v. City of Houston,* 2016 WL 1104363 (S.D. Tex. 2016)*; Geyer Signal*, 2014 WL 1309092.

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]

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].

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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*; Kossman 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).*

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).

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, 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

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[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*.*

[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).

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]
- **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]

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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.

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).*

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]

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]

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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).

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).

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 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]

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[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.*

[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.

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 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]

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

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)*.*

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
- 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

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[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 F3d 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).

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 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

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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).

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 F3d 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.

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 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]

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[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).

[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.

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 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;

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[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.

[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.

- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.[163]

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]

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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).

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)*; Kossman Contracting Co., Inc., v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016)*; Sherbrooke Turf*, 2001 WL 150284 (unpublished opinion)*, aff'd* 345 F.3d 964*.*

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

173 *Coral Constr.,* 941 F.2d at 925.

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]

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

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[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 W.L. 1309092 (D. Minn. 2014); *M. K. Weeden Construction v State of Montana, Montana DOT,* 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.,* 766 F. Supp.2d. 642 (D. N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida,* 544 F. Supp.2d 1336 (S.D. Fla. 2008).

[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 (3d Cir. 1993)*; see also U.S. v. Virginia,* 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification.")*; Geyer Signal*, 2014 WL 1309092*.*

[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 (3d 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 (3d Cir. 1993)*; Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000)*; see also U.S. v. Virginia,* 518 U.S. 515, 532 and n. 6 (1996)("exceedingly persuasive justification.").

[178] *Id*.

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 gender-based programs in connection with a challenge to the MBE Program involved in that case.[181] 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

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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*.*

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 scrunity 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).

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 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

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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*.

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).

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 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 percent; 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

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192 *See, e.g., Kadrmas 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).

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.*

"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 innovate 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-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, l983, 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

[201] *Id.*

[202] *Id.*

[203] *Id.*

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 Fifith 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 struct 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 15 percent of said licenses to economically disadvantaged groups, defined as African Americans, American Indians, Hispanics, and Asians.

  Plaintiff Greenleaf Gardens, LLC received a final score that would have otherwise qualified it to receive one of the twelve provisional licenses. Plaintiff was denied a provisional license, while Defendants Harvest Grows, LLC, and Parma Wellness Center, LLC were awarded provisional licenses due to the control of the defendant companies by one or more members of an economically disadvantaged group.

  In 2018, Plaintiff filed its intervening complaint, seeking equal protection under the law pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Plaintiff moved for summary judgment on counts one, two, and four of its complaint. On counts one and four of the complaint. Plaintiff seeks declaratory judgment that R.C. §3796.09(C) is unconditional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution. Count two asserts a similar claim under the Fourteenth Amendment and the Ohio Constitution, but on an as applied basis.

  R.C. §3796.09(C) is subject to strict scrutiny. The court held that strict scrutiny presumes the unconstitutionality of the classification absent a compelling governmental justification. Therefore, §3796.09(C) is presumed unconstitutional, absent sufficient evidence of a compelling governmental interest.

  Defendants assert the State had a compelling government interest in redressing past and present effects of racial discrimination within its jurisdiction where the State itself was involved. In support, Defendants put forth evidence of prior discrimination in bidding for Ohio government contracts, other states' marijuana licensing related programs, marijuana related arrests, and evidence of the legislature's desire to include a provision in R.C. §3796.09 similar to Ohio's MBE program.

Some of the evidence Defendants provide, the court found may not have been considered by the legislature during their discussion of R.C. §3796.09. In support of its inclusion, Defendants cite law upholding the use of "post-enactment" evidence. Courts have reached differing conclusions as to whether post-enactment evidence may be used in a court's analysis; but the court found persuasive courts that have held "post-enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling."

The only evidence clearly considered by the legislature *prior* to the passage of R.C. §3796.09(C), the court stated, is marijuana related arrests. There is evidence that legislators may have considered MBE history and specifically requested the inclusion of a provision similar to the MBE program. However, the only evidence provided are a few emails seeking a provision like the MBE program. There was no testimony showing any statistical or other evidence was considered from the previous studies conducted for the MBE program.

Defendants included evidence of statistical studies in 2013, showing the legislature considered evidence of racial disparities for African Americans and Latinos regarding arrest rates related to marijuana. The court did not find this to be evidence supporting a set aside for economically disadvantaged groups who are not referenced in either the statistical evidence or the anecdotal evidence on arrest rates. Evidence of increased arrest rates for African Americans and Latinos for marijuana generally, the court found, is not evidence

supporting a finding of discrimination within the medical marijuana industry for African Americans, Hispanics, American Indians, and Asians.

The Defendants assert the legislators considered the history of R.C. §125.081, Ohio's MBE program. The last studies Defendants reference to support the legislature's conclusion that remedial action is necessary in the industry of government procurement contracts were conducted in 2001, leading to the creation of the Encouraging Diversity Growth and Equity Program in 2003. Since then, various cities have conducted independent studies of their governments and the utilization of MBEs in procurement practices. Although Defendants reference these materials, these studies were not reviewed by the legislature for R.C. §3796.09(C).

The only evidence referenced in the materials provided by the Defendants to show the General Assembly considered Ohio's MBE and EDGE history are three emails between a congressional staff member and an employee of the Legislative Service Commission requesting a set aside like the one included in R.C. §125.081 and R.C. §123.125. There is no reference to the legislative history and evidence from the original review in between 1978 and 1980. The legislators who reviewed the evidence in 1980 clearly were not members of the legislature in 2016 when R.C. §2796.09(C) passed. Even if a few legislators might have seen the MBE evidence, the court stated it cannot find it was considered by the General Assembly as evidence supporting remedial action.

Additionally, even if the court could 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 15 percent of cultivator licenses are issued to economically disadvantaged group members. This is not an estimated goal, but a specific requirement. Additionally, R.C. §3796.09(C) does not include a proposed duration. Accordingly, the court found R.C. §3796.09(C) is not flexible.

Defendants admitted that the 15 percent stated within R.C. §3796.09(C) was lifted from R.C. §125.081 without any additional research or review by the legislature regarding the relevant labor market described in R.C. §3796.09(C), the medical marijuana industry. Defendants argued that the numbers as associated with the contracting market are directly applicable to the newly created medical marijuana industry because of a disparity study conducted by Maryland. The Maryland study was not reviewed by the legislature before enacting R.C. §3796.09(C), and is a review of markets and disparity in Maryland, not Ohio. Accordingly, the court found this one study the Defendants use to try to connect two very different industries (government contracting market and a newly created medical marijuana industry) has little weight, if any.

Regarding the statistics the legislature did not review prior to enacting R.C. §3796.09(C), the cited statistics pertaining to the arrest rates of minorities, the court found, are not directly related to the values listed within the statute. Much of the statistics referenced are based on general rates throughout the United States, or findings on discrimination pertaining to all drug related arrests. But these other statistics do not demonstrate the racial disparities

pertaining to specifically marijuana throughout the state of Ohio. The statistics cited in the materials, the court said, is not reflected in the amount chosen to remediate the discrimination R.C. §3796.09(C), 15 percent. This percentage is not based on the evidence demonstrating racial

discrimination in marijuana related arrest in Ohio. Therefore, the court concluded the numerical value was selected at random by the legislature, and not based on the evidence provided.

Defendants argued third parties are minimally impacted. R.C. §3796:2-1-01 allots twelve licenses to be issued to the most qualified applicants. By allowing a 15 percent set aside, the court concluded licenses are given to lower qualified applicants solely on the basis of race. The court found the 15 percent set aside is not insignificant and the burden is excessive for a newly created industry with limited participants.

Finally, the Defendants assert R.C. §3796.09(C) is a continual focus of the legislature which leads to reassessment and reevaluation of the program. As the statute does not include instructions for the legislature to assess and evaluate the program on a reoccurring basis, the court concluded that this factor is not fulfilled.

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 percent of prime contractors in the construction field, received 9.13 percent of prime contracts valued below $500,000 and 8.25 percent of the available contract dollars in that range, yielding a disparity ratio of 0.32 for prime contracts under $500,000. *Id.*

In the realm of contraction subcontracting, the study showed that DBEs may have 29.24 percent of available subcontractors, and in the construction industry they receive 44.62 percent of available subcontracts, but those subcontracts amounted to only 10.65 percent of available subcontracting dollars. *Id.* at *13. This, according to the study, yielded a statistically significant disparity ratio of 0.36, which the court found low enough to signal systemic under-utilization. *Id.*

IDOT relied on additional data to justify its program, including conducting a zero-goal experiment in 2002 and in 2003, when it did not apply DBE goals to contracts. *Id.* at *13. Without contract goals, the share of the contracts' value that DBEs received dropped dramatically, to just 1.5 percent of the total value of the contracts. *Id.* at *13. And in those contracts advertised without a DBE goal, the DBE subcontractor participation rate was 0.84 percent.

Tollway program. Tollway also relied on a disparity study limited to the Tollway's contracting market area. The study used a "custom census" process, creating a database of representative projects, identifying geographic and product markets, counting businesses in those markets, identifying and verifying which businesses are minority- and women-owned, and verifying the ownership status of all the other firms. *Id.* at *13. The study examined the Tollway's historical contract data, reported its DBE utilization as a percentage of contract dollars, and compared DBE utilization and DBE availability, coming up with disparity indices divided by race and sex, as well as by industry group. *Id.*

The study found that out of 115 disparity indices, 80 showed statistically significant under-utilization of DBEs. *Id.* at *14. The study discussed statistical disparities in earnings and the formation of businesses by minorities and women, and concluded that a statistically significant adverse impact on earnings was observed in both the economy at large and in the construction and construction-related

professional services sector." *Id.* at *14. The study also found women and minorities are not as likely to start their own business, and that minority business formation rates would likely be substantially and significantly higher if markets operated in a race- and sex-neutral manner. *Id.*

The study used regression analysis to assess differences in wages, business-owner earnings, and business-formation rates between white men and minorities and women in the wider construction economy. *Id.* at *14. The study found statistically significant disparities remained between white men and other groups, controlling for various independent variables such as age, education, location, industry affiliation, and time. *Id.* The disparities, according to the study, were consistent with a market affected by discrimination. *Id.*

The Tollway also presented additional evidence, including that the Tollway set aspirational participation goals on a small number of contracts, and those attempts failed. *Id.* at *14. In 2004, the court noted the Tollway did not award a single prime contract or subcontract to a DBE, and the DBE participation rate in 2005 was 0.01 percent across all construction contracts. *Id.* In addition, the Tollway also considered, like IDOT, anecdotal evidence that provided testimony of several DBE owners regarding barriers that they themselves faced. *Id.*

Midwest Fence's criticisms. Midwest Fence's expert consultant argued that the study consultant failed to account for DBEs' readiness, willingness, and ability to do business with IDOT and the Tollway, and that the method of assessing readiness and willingness was flawed. *Id.* at *14. In addition, the consultant for Midwest Fence argued that one of the studies failed to account for DBEs' relative capacity, "meaning a firm's ability to take on more than one contract at a time." The court noted that one of the study consultants did not account for firm capacity and the other study consultant found no effective way to account for capacity. *Id.* at *14, n. 2. The court said one study did perform a regression analysis to measure relative capacity and limited its disparity analysis to contracts under $500,000, which was, according to the study consultant, to take capacity into account to the extent possible. *Id.*

The court pointed out that one major problem with Midwest Fence's report is that the consultant did not perform any substantive analysis of his own. *Id.* at *15. The evidence offered by Midwest Fence and its consultant was, according to the court, "speculative at best." *Id.* at *15. The court said the consultant's relative capacity analysis was similarly speculative, arguing that the assumption that firms have the same ability to provide services up to $500,000 may not be true in practice, and that if the estimates of capacity are too low the resulting disparity index overstates the degree of disparity that exists. *Id.* at *15.

The court stated Midwest Fence's expert similarly argued that the existence of the DBE program "may" cause an upward bias in availability, that any observations of the public sector in general "may" be affected by the DBE program's existence, and that data become less relevant as time passes. *Id.* at *15. The court found that given the substantial utilization disparity as shown in the reports by IDOT and the Tollway defendants, Midwest Fence's speculative critiques did not raise a genuine issue of fact as to whether the defendants had a substantial basis in evidence to believe that action was needed to remedy discrimination. *Id.* at *15.

The court rejected Midwest Fence's argument that requiring it to provide an independent statistical analysis places an impossible burden on it due to the time and expense that would be required. *Id.* at

*15. The court noted that the burden is initially on the government to justify its programs, and that since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. *Id.* Speculative criticism about potential problems, the court found, will not carry that burden. *Id.*

With regard to the capacity question, the court noted it was Midwest Fence's strongest criticism and that courts had recognized it as a serious problem in other contexts. *Id.* at *15. The court said the failure to account for relative capacity did not undermine the substantial basis in evidence in this particular case. *Id.* at *15. Midwest Fence did not explain how to account for relative capacity. *Id.* In addition, it has been recognized, the court stated, that defects in capacity analyses are not fatal in and of themselves. *Id.* at *15.

The court concluded that the studies show striking utilization disparities in specific industries in the relevant geographic market areas, and they are consistent with the anecdotal and less formal evidence defendants had offered. *Id.* at *15. The court found Midwest Fence's expert's "speculation" that failure to account for relative capacity might have biased DBE availability upward does not undermine the statistical core of the strong basis in evidence required. *Id.*

In addition, the court rejected Midwest Fence's argument that the disparity studies do not prove discrimination, noting again that a state need not conclusively prove the existence of discrimination to establish a strong basis in evidence for concluding that remedial action is necessary, an

d that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Id.* at *15. The court also rejected Midwest Fence's attack on the anecdotal evidence stating that the anecdotal evidence bolsters the state defendants' statistical analyses. *Id.* at *15.

In connection with Midwest Fence's argument relating to the Tollway defendant, Midwest Fence argued that the Tollway's supporting data was from before it instituted its DBE program. *Id.* at *16. The Tollway responded by arguing that it used the best data available and that in any event its data sets show disparities. *Id.* at *16. The court found this point persuasive even assuming some of the Tollway's data were not exact. *Id.* The court said that while every single number in the Tollway's "arsenal of evidence" may not be exact, the overall picture still shows beyond reasonable dispute a marketplace with systemic under-utilization of DBEs far below the disparity index lower than 80 as an indication of discrimination, and that Midwest Fence's "abstract criticisms" do not undermine that core of evidence. *Id.* at *16.

Narrow Tailoring. The court applied the narrow tailoring factors to determine whether IDOT's and the Tollway's implementation of their DBE programs yielded a close match between the evil against which the remedy is directed and the terms of the remedy. *Id.* at *16. First the court addressed the necessity for the relief and the efficacy of alternative race-neutral remedies factor. *Id.* The court reiterated that Midwest Fence has not undermined the defendants' strong combination of statistical and other evidence to show that their programs are needed to remedy discrimination. *Id.*

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.*

The court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

As for flexibility, both IDOT and the Tollway make front-end waivers available when a contractor has made good faith efforts to comply with a DBE goal. *Id.* at *17. The court rejected Midwest Fence's arguments that there were a low number of waivers granted, and that contractors fear of having a waiver denied showed the system was a *de facto* quota system. *Id.* The court found that IDOT and the Tollway have not granted large numbers of waivers, but there was also no evidence that they have *denied* large numbers of waivers. *Id.* The court pointed out that the evidence from Midwest Fence does not show that defendants are responsible for failing to grant front-end waivers that the contractors do not request. *Id.*

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence's contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at *17. Midwest Fence's own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at *17. In addition, the Tollway granted at least some front-end waivers involving 1.02 percent of contract dollars. *Id.* Without evidence that far more waivers were requested, the court was satisfied that even this low total by the Tollway does not raise a genuine dispute of fact. *Id.*

The court also rejected as "underdeveloped" Midwest Fence's argument that the court should look at the dollar value of waivers granted rather than the raw number of waivers granted. *Id.* at *17. The court found that this argument does not support a different outcome in this case because the defendants grant more front-end waiver requests than they deny, regardless of the dollar amounts those requests encompass. Midwest Fence presented no evidence that IDOT and the Tollway have an unwritten policy of granting only low-value waivers. *Id.*

The court stated that Midwest's "best argument" against narrowed tailoring is its "mismatch" argument, which was discussed above. *Id.* at *17. The court said Midwest's broad condemnation of the IDOT and Tollway programs as failing to create a "light" and "diffuse" burden for third parties was not persuasive. *Id.* The court noted that the DBE programs, which set DBE goals on only some contracts and allow those goals to be waived if necessary, may end up foreclosing one of several opportunities for a non-DBE specialty subcontractor like Midwest Fence. *Id.* But, there was no evidence that they impose the entire burden on that subcontractor by shutting it out of the market entirely. *Id.* However, the court found that Midwest Fence's point that subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors "is troubling." *Id.* at *17.

Although the evidence showed disparities in both the prime contracting and subcontracting markets, under the federal regulations, individual contract goals are set only for contracts that have subcontracting possibilities. *Id.* The court pointed out that some DBEs are able to bid on prime contracts, but the necessarily small size of DBEs makes that difficult in most cases. *Id.*

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely "theoretical." *Id.* at *18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use neutral measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that

DBE trucking and material suppliers count toward fulfillment of a contract's DBE goal, even though they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

The court stated that if Midwest Fence "had presented evidence rather than theory on this point, the result might be different." *Id.* at *18. "Evidence that subcontractors were being frozen out of the market or bearing the entire burden of the DBE program would likely require a trial to determine at a minimum whether IDOT or the Tollway were adhering to their responsibility to avoid overconcentration in subcontracting." *Id.* at *18. The court concluded that Midwest Fence "has shown how the Illinois program *could* yield that result but not that it actually does so." *Id.*

In light of the IDOT and Tollway programs' mechanisms to prevent subcontractors from having to bear the entire burden of the DBE programs, including the use of DBE materials and trucking suppliers in satisfying goals, efforts to draw DBEs into prime contracting, and other mechanisms, according to the court, Midwest Fence did not establish a genuine dispute of fact on this point. *Id.* at *18. The court stated that the "theoretical possibility of a 'mismatch' could be a problem, but we have no evidence that it actually is." *Id.* at *18.

Therefore, the court concluded that IDOT and the Tollway DBE programs are narrowly tailored to serve the compelling state interest in remedying discrimination in public contracting. *Id.* at *18. They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers. *Id.* "So far as the record before us shows, they do not unduly burden third parties in service of remedying discrimination", according to the court. Therefore, Midwest Fence failed to present a genuine dispute of fact "on this point." *Id.*

Petition for a Writ of Certiorari. Midwest Fence filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2017, and Certiorari was denied. 2017 WL 497345 (2017).

2. Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al., 2016 WL 193809 (Oct. 3, 2016). Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT's DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 799 F.3d at 679. (*See* 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (*See* summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 799 F. 3d at 679. Its average annual gross receipts between 2007 and 2009 were over $52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77 percent. *Id.* at 680. Under IDOT's DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at 681. These requests for modification are also known as "waivers." *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at 681. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id*. at 697-698. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77 percent. *Id.* at 683, 698. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id*. Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at 683-684. Dunnet Bay did not achieve the goal of 22 percent, but three other bidders each met the DBE goal. *Id.* at 684. Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at 684. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at 684-687, 699.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at 687. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at 687. Dunnet Bay did meet the 22.77 percent contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages as well as a declaratory judgement that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgement and denied Dunnet Bay's motion. *Id.* at 687. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id. Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at 687. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a

showing that the state exceeded its federal authority. *Id.* at 688. (*See* discussion of the district court decision in *Dunnet Bay* below in Section E).

Dunnet Bay lacks standing to raise an equal protection claim. The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT's DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at 690. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* IDOT's DBE Program is not a "set aside program," in which non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.* at 690-691.

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at 691. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id*. Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id*.

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at 691. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 692.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at 692. For the three years preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over $52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's *size*. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.* at 693.

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at 693.

The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* at 694, *quoting*, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's *size*. *Id.*

The court stated that Dunnet Bay did not establish causational or redressability. *Id.* at 695. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.*

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at 695. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at 695-696.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at 696. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.*, at 697, *quoting Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id. quoting Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at 697. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22 percent without the required analysis; (2) implementing a "no-waiver" policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22 percent goal was "arbitrary" and that IDOT manipulated the process to justify a preordained goal. *Id.* at 698. The court stated Dunnet

Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT's methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at 698. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court's conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 698.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at 698. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60 percent of the waiver requests. *Id.* The court stated that IDOT's record of granting waivers refutes any suggestion of a no-waiver policy. *Id.* at 699.

The court did not agree with Dunnet Bay's challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at 699. The court found IDOT's determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id*. The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT's supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid*. Id.* at 699-700.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at 700. The court said Dunnet Bay's efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

Conclusion. The court affirmed the district court's grant of summary judgement to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

Petition for a Writ of Certiorari Denied. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Supreme Court denied the Petition on October 3, 2016.

3. Northern Contracting, Inc. v. Illinois, 473 F.3d 715 (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 IDOTs "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id*. at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id*.

Despite the fact the NCI forfeited the argument that IDOT's DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id*. at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government's compelling interest in implementing a local DBE plan. *Id*. at 720-21, *citing Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government …. If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution." *Id*. at 721, *quoting Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id*. The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id*. at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Pena*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court

did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id*. at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id*. The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id*. at 722, n. 5. Relatedly, the court stated that the Eighth Circuit's opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law "when the 10 percent federal set-aside was more mandatory") was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id*. at 722. Federal law makes 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 contacts 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 pass discrimination in the national construction market." *Id.* at *26, *quoting Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority. " *Id.* at *26, *quoting Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. " *Id.* at *26, *quoting Northern Contracting, Inc.,* 473. F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenges are foreclosed by *Northern Contracting*. *Id.* at *26.

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at *26. The Court also concluded "because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting.*" *Id.* at *26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at *27.

The "no-waiver" policy. The Court held that there was not a no-waiver policy considering all the testimony and factual evidence. In particular, the Court pointed out that a waiver was in fact granted in connection with the same bid letting at issue in this case. *Id* at *27. The Court found that IDOT granted a waiver of the DBE participation goal for another construction contractor on a different contract, but under the same bid letting involved in this matter. *Id.*

Thus, the Court held that Dunnet Bay's assertion that IDOT adopted a "no-waiver" policy was unsupported and contrary to the record evidence. *Id*. at *27. The Court found the undisputed facts established that IDOT did not have a "no-waiver" policy, and that IDOT did not exceed its federal authority because it did not adopt a "no-waiver" policy. *Id.* Therefore, the Court again concluded that any challenge by Dunnet Bay on this factor failed pursuant to the *Northern Contracting* decision.

IDOT's decision to reject Dunnet Bay's bid based on lack of good faith efforts did not exceed IDOT's authority under federal law. The Court found that IDOT has significant discretion under federal regulations and is often called upon to make a "judgment call" regarding the efforts of the bidder in terms of establishing good faith attempt to meet the DBE goals. *Id.* at *28. The Court stated it was unable to conclude that IDOT erred in determining Dunnet Bay did not make adequate good faith efforts. *Id.* The Court surmised that the strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is that its DBE participation was under 9 percent while other bidders were able to reach the 22 percent goal. *Id.* Accordingly, the Court concluded that IDOT's decision rejecting Dunnet Bay's bid was consistent with the regulations and did not exceed IDOT's authority under the federal regulations. *Id.*

The Court also rejected Dunnet Bay's argument that IDOT failed to provide Dunnet Bay with a written explanation as to why its good faith efforts were not sufficient, and thus there were deficiencies with the reconsideration of Dunnet Bay's bid and efforts as required by the federal regulations. *Id.* at *29. The Court found it was unable to conclude that a technical violation such as to provide Dunnet Bay with a written explanation will provide any relief to Dunnet Bay. *Id.* Additionally, the Court found that because IDOT rebid the project, Dunnet Bay was not prejudiced by any deficiencies with the reconsideration. *Id.*

The Court emphasized that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. *Id.* at *24. Because the decision on reconsideration as to good faith efforts did not exceed IDOT's authority under federal law, the Court held Dunnet Bay's claim failed under the *Northern Contracting* decision. *Id.*

Dunnet Bay lacked standing to raise an equal protection claim. The Court found that Dunnet Bay was not disadvantaged in its ability to compete against a racially favored business, and neither IDOT's rejection of Dunnet Bay's bid nor the decision to rebid was based on the race of Dunnet Bay's owners or any class-based animus. *Id* at *29. The Court stated that Dunnet Bay did not point to any other business that was given a competitive advantage because of the DBE goals. *Id.* Dunnet Bay did not cite any cases which involve plaintiffs that are similarly situated to it - businesses that are not at a competitive disadvantage against minority-owned companies or DBEs - and have been determined to have standing. *Id*. at *30.

The Court concluded that any company similarly situated to Dunnet Bay had to meet the same DBE goal under the contract. *Id.* Dunnet Bay, the Court held, was not at a competitive disadvantage and/or unable to compete equally with those given preferential treatment. *Id.*

Dunnet Bay did not point to another contractor that did not have to meet the same requirements it did. The Court thus concluded that Dunnet Bay lacked standing to raise an equal protection challenge because it had not suffered a particularized injury that was caused by IDOT. *Id.* at *30. Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* Also, based on the amount of its profits, Dunnet Bay did not qualify as a small business, and therefore, it lacked standing to vindicate the rights of a hypothetical white-owned small business. *Id*. at *30. Because the Court found that Dunnet Bay was not denied the ability to compete on an equal footing in bidding on the contract, Dunnet Bay lacked standing to challenge the DBE Program based on the Equal Protection Clause. *Id.* at *30.

Dunnet Bay did not establish equal protection violation even if it had standing. The Court held that even if Dunnet Bay had standing to bring an equal protection claim, IDOT still is entitled to summary judgment. The Court stated the Supreme Court has held that the "injury in fact" in an equal protection case challenging a DBE Program is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Id.* at *31. Dunnet Bay, the Court said, implied that but for the alleged "no-waiver" policy and DBE goals which were not narrowly tailored to address discrimination, it would have been awarded the contract. The Court again noted the record established that IDOT did not have a "no-waiver" policy. *Id.* at *31.

The Court also found that because the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons, it does not appear Dunnet Bay can assert a viable claim. *Id.* at *31. The Court stated it is unaware of any authority which suggests that Dunnet Bay can establish an equal protection violation even if it could show that IDOT failed to comply with the regulations relating to the DBE Program. *Id.* The Court said that even if IDOT did employ a "no-waiver policy," such a policy would not constitute an equal protection violation because the federal regulations do not confer specific entitlements upon any individuals. *Id*. at *31.

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id*. at *51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT's DBE Program. But, the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at *31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is entitled to summary judgment on Dunnet Bay's claims under the Equal Protection Clause and under Title VI.

Conclusion. The Court concluded IDOT is entitled to summary judgment, holding Dunnet Bay lacked standing to raise an equal protection challenge based on race, and that even if Dunnet Bay had standing, Dunnet Bay was unable to show that it would have been awarded the contract in the absence of any violation. *Id.* at *32. Any other federal claims, the Court held, were foreclosed by the *Northern Contracting* decision because there is no evidence IDOT exceeded its authority under federal law. *Id.* Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.

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 8-9 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. Estepp*, 95 F.3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity must demonstrate it had a compelling interest in "remedying the effects of past or present racial discrimination." *Id*., *quoting Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 *quoting*, *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion).

The Court significantly noted that: "There is no 'precise mathematical formula to assess the quantum of evidence that rises to the *Croson* 'strong basis in evidence' benchmark.'" 615 F.3d 233 at 241, *quoting Rothe Dev. Corp. v. Department of Defense,* 545 F.3d 1023, 1049 (Fed.Cir. 2008). The Court stated that the sufficiency of the State's evidence of discrimination "must be evaluated on a case-by-case basis." *Id*. at 241. (internal quotation marks omitted).

The Court held that a state "need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.

615 F.3d 233 at 241, *citing Concrete Works*, 321 F.3d at 958. “Instead, a state may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *Id*. at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion). The Court stated that we “further require that such evidence be ‘corroborated by significant anecdotal evidence of racial discrimination.’” *Id*. at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

The Court pointed out that those challenging race-based remedial measures must “introduce credible, particularized evidence to rebut” the state’s showing of a strong basis in evidence for the necessity for remedial action. *Id*. at 241-242, *citing Concrete Works*, 321 F.3d at 959. Challengers may offer a neutral explanation for the state’s evidence, present contrasting statistical data, or demonstrate that the evidence is flawed, insignificant, or not actionable. *Id*. at 242 (citations omitted). However, the Court stated “that mere speculation that the state’s evidence is insufficient or methodologically flawed does not suffice to rebut a state’s showing. *Id*. at 242, *citing Concrete Works*, 321 F.3d at 991.

The Court held that to satisfy strict scrutiny, the state’s statutory scheme must also be “narrowly tailored” to serve the state’s compelling interest in not financing private discrimination with public funds. 615 F.3d 233 at 242, *citing Alexander*, 95 F.3d at 315 (*citing Adarand*, 515 U.S. at 227).

Intermediate scrutiny. The Court held that courts apply “intermediate scrutiny” to statutes that classify on the basis of gender. *Id*. at 242. The Court found that a defender of a statute that classifies on the basis of gender meets this intermediate scrutiny burden “by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id*., *quoting Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Court noted that intermediate scrutiny requires less of a showing than does “the most exacting” strict scrutiny standard of review. *Id*. at 242. The Court found that its “sister circuits” provide guidance in formulating a governing evidentiary standard for intermediate scrutiny. These courts agree that such a measure “can rest safely on something less than the ‘strong basis in evidence’ required to bear the weight of a race- or ethnicity-conscious program.” *Id*. at 242, *quoting Engineering Contractors*, 122 F.3d at 909 (other citations omitted).

In defining what constitutes “something less” than a ‘strong basis in evidence,’ the courts, … also agree that the party defending the statute must ‘present [ ] sufficient probative evidence in support of its stated rationale for enacting a gender preference, *i.e.*,…the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations.” 615 F.3d 233 at 242 *quoting Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on “reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions.” *Id*. at 242 *quoting Hogan*, 458 U.S. at 726.

Plaintiff’s burden. The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff “has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance.” *Id*. at 243, *quoting West Virginia v. U.S. Department of Health & Human Services*, 289 F.3d 281, 292 (4th Cir. 2002).

Statistical evidence. The Court examined the State's statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and women-owned businesses actually won in a market and the amount of subcontracting dollars they would be expected to win given their presence in that market. 615 F.3d 233 at 243. The Court found that the study grounded its analysis in the "disparity index," which measures the participation of a given racial, ethnic, or gender group engaged in subcontracting. *Id*. In calculating a disparity index, the study divided the percentage of total subcontracting dollars that a particular group won by the percent that group represents in the available labor pool, and multiplied the result by 100. *Id*. The closer the resulting index is to 100, the greater that group's participation. *Id*.

The Court held that after *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and women-owned businesses. *Id*. at 243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally "courts consider a disparity index lower than 80 as an indication of discrimination." *Id*. at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. *Id*.

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis "describes the probability that the measured disparity is the result of mere chance." 615 F.3d 233 at 244, *quoting Eng'g Contractors*, 122 F.3d at 914. The consultant considered the finding of two standard deviations to demonstrate "with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present." *Id*., *citing Eng'g Contractors*, 122 F.3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central NCDOT office in Raleigh, North Carolina. 615 F.3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and women-owned businesses during the 5-year period ending in June 2003. (The study was published in 2004). *Id*. at 244.

The Court found that the use of data for centrally-awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the NCDOT divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not accurate. 615 F.3d 233 at 244, n.6. These data were not relied upon in forming the opinions relating to the study. *Id*. at 244, n. 6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant

that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id*. at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id*. at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id*. The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id*. For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id*. The Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id*.

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id*.

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id*.

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id*. These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id*.

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than "vendor data." 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors.

Id. The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id*. at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence," and that the plaintiff Rowe presented no viable alternative for determining availability. *Id*. at 246-247, *citing Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id*. The Court concluded plaintiff did not offer any contrary evidence. *Id*.

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under $500,000 was not a function of capacity. *Id*. at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at $500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id*. at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id*. at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – "surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors' reduced utilization of these groups during the suspension." *Id*. at 248, *citing Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued "strongly supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.") The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id*. at 248.

Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the

anecdotal evidence showed an informal "good old boy" network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id*. at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id*.

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id*. at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id*.

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the "good old boy network" affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id*. at 249.

The Court rejected the plaintiffs' contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State's "unverified" anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it "is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions." 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id*. at 249. The Court rejected plaintiffs' argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. *Id*. at 249. It was noted that the samples of the minority groups were randomly selected. *Id*. The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id*. at 249.

Strong basis in evidence that the minority participation goals were necessary to remedy discrimination. The Court held that the State presented a "strong basis in evidence" for its conclusion

that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors." 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State's data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. *Id*. at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id.* at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id*.

Thus, the Court held the State's evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State's anecdotal evidence of discrimination against these two groups sufficiently supplemented the State's statistical showing. *Id*. The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id*. at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id*. The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id*. at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

Narrowly tailored. The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State's compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

Neutral measures. The Court held that narrowly tailoring requires "serious, good faith consideration of workable race-neutral alternatives," but a state need not "exhaust [ ] … every conceivable race-neutral alternative." 615 F.3d 233 at 252 *quoting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id*. at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of $500,000 or less; and the Department contracts

for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id*. at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, *citing* 49 CFR § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id*.

The Court concluded that despite these race-neutral efforts, the study demonstrated disparities continue to exist in the utilization of African American and Native American subcontractors in state-funded highway construction subcontracting, and that these “persistent disparities indicate the necessity of a race-conscious remedy.” 615 F.3d 233 at 252.

Duration. The Court agreed with the district court that the program was narrowly tailored in that it set a specific expiration date and required a new disparity study every five years. 615 F.3d 233 at 253. The Court found that the program’s inherent time limit and provisions requiring regular reevaluation ensure it is carefully designed to endure only until the discriminatory impact has been eliminated. *Id*. at 253, *citing Adarand Constructors v. Slater*, 228 F.3d at 1179 (*quoting United States v. Paradise*, 480 U.S. 149, 178 (1987)).

Program’s goals related to percentage of minority subcontractors. The Court concluded that the State had demonstrated that the Program’s participation goals are related to the percentage of minority subcontractors in the relevant markets in the State. 615 F.3d 233 at 253. The Court found that the NCDOT had taken concrete steps to ensure that these goals accurately reflect the availability of minority-owned businesses on a project-by-project basis. *Id.*

Flexibility. The Court held that the Program was flexible and thus satisfied this indicator of narrow tailoring. 615 F.3d 233 at 253. The Program contemplated a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals, and that the good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. *Id*. The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. *Id*. The Court found there was a lenient standard and flexibility of the “good faith” requirement, and noted the evidence showed only 13 of 878 good faith submissions failed to demonstrate good faith efforts. *Id*.

Burden on non-MWBE/DBEs. The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

Overinclusive. The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to

obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

In sum, the Court held that the statutory scheme is narrowly tailored to achieve the State's compelling interest in remedying discrimination in public-sector subcontracting against African American and Native American subcontractors. *Id*. at 254.

Women-owned businesses overutilized. The study's public-sector disparity analysis demonstrated that women-owned businesses won far more than their expected share of subcontracting dollars during the study period. 615 F.3d 233 at 254. In other words, the Court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects. *Id*. The Court found the public-sector evidence did not evince the "exceedingly persuasive justification" the Supreme Court requires. *Id.* at 255.

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women subcontractors in the general construction industry statewide and in the Asheville, North Carolina area. 615 F.3d 233 at 255. However, because the study did not provide a t-test analysis on the private-sector disparity figures to calculate statistical significance, the Court could not determine whether this private underutilization was "the result of mere chance." *Id*. at 255. The Court found troubling the "evidentiary gap" that there was no evidence indicating the extent to which women-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id*. at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id*. In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id*.

The Court pointed out that it did not suggest that the proponent of a gender-conscious program "must always tie private discrimination to public action." 615 F.3d 233 at 255, n. 11. But, the Court held where, as here, there existed substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program. *Id*. at 255, n. 11.

Moreover, the Court found the state failed to establish the amount of overlap between general construction and road construction subcontracting. 615 F.3d 233 at 256. The Court said that the dearth of evidence as to the correlation between public road construction subcontracting and private general construction subcontracting severely limits the private data's probative value in this case. *Id*.

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id*. Thus, the Court held that the State failed to present sufficient evidence to support the Program's current inclusion of women subcontractors in setting participation goals. *Id*.

Holding. The Court held that the state legislature had crafted legislation that withstood the constitutional scrutiny. 615 F.3d 233 at 257. The Court concluded that in light of the statutory scheme's flexibility and responsiveness to the realities of the marketplace, and given the State's strong evidence of discrimination again African American and Native American subcontractors in public-sector subcontracting, the State's application of the statute to these groups is constitutional. *Id.* at 257. However, the Court also held that because the State failed to justify its application of the statutory scheme to women, Asian American, and Hispanic American subcontractors, the Court found those applications were not constitutional.

Therefore, the Court affirmed the judgment of the district court with regard to the facial validity of the statute, and with regard to its application to African American and Native American subcontractors. 615 F.3d 233 at 258. The Court reversed the district court's judgment insofar as it upheld the constitutionality of the state legislature as applied to women, Asian American and Hispanic American subcontractors. *Id*. The Court thus remanded the case to the district court to fashion an appropriate remedy consistent with the opinion. *Id*.

Concurring opinions. It should be pointed out that there were two concurring opinions by the three Judge panel: one judge concurred in the judgment, and the other judge concurred fully in the majority opinion and the judgment.

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 Virdi. *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, unrebutted support for Denver's initial burden. *Id*. at 989-90, *citing Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it "brought the cold [statistics] convincingly to life").

Summary. The court held the record contained extensive evidence supporting Denver's position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. *Id*. at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver's evidence, the court stated CWC was required to "establish that Denver's evidence did not constitute strong evidence of such discrimination." *Id*. at 991, *quoting Concrete Works II,* 36 F.3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver's evidence. Rather, it must present "credible, particularized evidence." *Id*., *quoting Adarand VII,* 228 F.3d at 1175. The court held that CWC did not meet its burden. CWC *hypothesized* that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own marketplace disparity study controlling for the disputed variables and presented no other evidence from which the court could conclude that such variables explain the disparities. *Id*. at 991-92.

Narrow tailoring. Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. *Id*. at 992**.**

The court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II.* The court reversed the grant of summary judgment on the compelling-

interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found Concrete Works did not challenge the district court's conclusion with respect to the second prong of *Croson's* strict scrutiny standard — *i.e.*, that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id*. at 992, *citing Concrete Works II,* 36 F.3d at 1531, n. 24.

The court concluded that the district court lacked authority to address the narrow tailoring issue on remand because none of the exceptions to the law of the case doctrine are applicable. The district court's earlier determination that Denver's affirmative-action measures were narrowly tailored is law of the case and binding on the parties.

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 supplment 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 percent, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id*. Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility's Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id*.

The Court noted it ruled in 1983 that the MBEA was constitutional, see *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983). *Id*. Subsequently, the United States Supreme Court in two landmark decisions applied the criteria of strict scrutiny under which such "racially preferential set-asides" were to be evaluated. *Id*. (*see City of Richmond v. J.A. Croson Co*. (1989) and *Adarand Constructors, Inc. v. Pena* (1995), citation omitted.) The Court noted that the decision in *Keip* was a more relaxed treatment accorded to equal protection challenges to state contracting disputes prior to *Croson*. *Id*. at 733-734.

Strict scrutiny. The Court found it is clear a government has a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice. *Id*. at 734-735, *citing Croson*, 488 U.S. at 492. But, the Court stated "statistical disparity in the proportion of contracts awarded to a particular group, standing alone does not demonstrate such an evil." *Id*. at 735.

The Court said there is no question that remedying the effects of past discrimination constitutes a compelling governmental interest. *Id*. at 735. The Court stated to make this showing, a state cannot rely on mere speculation, or legislative pronouncements, of past discrimination, but rather, the Supreme Court has held the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was a passive participant in private industry's discriminatory practices. *Id*. at 735, *quoting Croson*, 488 U.S. at 486-92.

Thus, the Court concluded that the linchpin of the *Croson* analysis is its mandating of strict scrutiny, the requirement that a program be narrowly tailored to achieve a compelling government interest, but above all its holding that governments must identify discrimination with some specificity before they may use race-conscious relief; explicit findings of a constitutional or statutory violation must be made. *Id*. at 735, *quoting Croson*, 488 U.S. at 497.

Statistical evidence: compelling interest. The Court pointed out that proponents of "racially discriminatory systems" such as the MBEA have sought to generate the necessary evidence by a variety of means, however, such efforts have generally focused on "mere underrepresentation" by showing a lesser percentage of contracts awarded to a particular group than that group's percentage in the general population. *Id.* at 735. "Raw statistical disparity" of this sort is part of the evidence offered by Ohio in this case, according to the Court. *Id*. at 736. The Court stated however, "such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court, particularly in a context such as contracting, where special qualifications are so relevant." *Id*.

The Court said that although Ohio's most "compelling" statistical evidence in this case compared the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio, which the Court noted provided stronger statistics than the statistics in *Croson*, it was still insufficient. *Id*. at 736. The Court found the problem with Ohio's statistical comparison was that the percentage of minority-owned businesses in Ohio "did not take into account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts." *Id*.

The Court held the statistical evidence that the Ohio legislature had before it when the MBEA was enacted consisted of data that was deficient. *Id*. at 736. The Court said that much of the data was severely limited in scope (ODOT contracts) or was irrelevant to this case (ODOT purchasing contracts). *Id*. The Court again noted the data did not distinguish minority construction contractors from minority businesses generally, and therefore "made no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size." *Id*. The Court also pointed out the program was not narrowly tailored, because the state conceded the AGC showed that the State had not performed a recent study. *Id*.

The Court also concluded that even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. *Id*. at 736. "If MBEs comprise 10 percent of the total number of contracting firms in the state, but only get 3 percent of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete." *Id.* at 736.

The Court stated the only cases found to present the necessary "compelling interest" sufficient to justify a narrowly tailored race-based remedy, are those that expose "pervasive, systematic, and obstinate discriminatory conduct. …" *Id*. at 737, *quoting Adarand*, 515 U.S. at 237. The Court said that Ohio had made no such showing in this case.

Narrow tailoring. A second and separate hurdle for the MBEA, the Court held, is its failure of narrow tailoring. The Court noted the Supreme Court in *Adarand* taught that a court called upon to address the question of narrow tailoring must ask, "for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting …." *Id*. at 737, *quoting Croson*, 488 U.S. at 507. The Court stated a narrowly-tailored set-aside program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate and must be linked to identified discrimination. *Id*. at 737. The Court said that the program must also not suffer from "overinclusiveness." *Id*. at 737, *quoting Croson*, 515 U.S. at 506.

The Court found the MBEA suffered from defects both of over and under-inclusiveness. *Id*. at 737. By lumping together the groups of Blacks, Native Americans, Hispanics and Orientals, the MBEA may well provide preference where·there has been no discrimination, and may not provide relief to groups where discrimination might have been proven. *Id.* at 737. Thus, the Court said, the MBEA was satisfied if contractors of Thai origin, who might never have been seen in Ohio until recently, receive 10 percent of state contracts, while African-Americans receive none. *Id*.

In addition, the Court found that Ohio's own underutilization statistics suffer from a fatal conceptual flaw: they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state's 1,180 MBEs. *Id*. at 737. The Court said there was no examination of whether contracts are being awarded to minority firms who have never sought such preference to take advantage of the special minority program, for whatever reason, and who have been awarded contracts in open bidding. *Id*.

The Court pointed out the district court took note of the outdated character of any evidence that might have been marshaled in support of the MBEA, and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. *Id*. at 737-738. The MBEA, the Court noted, has remained in effect for twenty years and has no set expiration. *Id*. at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id*. at 737.

Finally, the Court mentioned that one of the factors *Croson* identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. *Id*. at 738. The Court concluded the historical record contained no evidence that the Ohio legislature gave any consideration to the· use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas. *Id*. at 738.

The district court had found that the supplementation of the state's existing data which might be offered given a continuance of the case would not sufficiently enhance the relevance of the evidence to justify delay in the district court's hearing. *Id*. at 738. The Court stated that under *Croson*, the state must have had sufficient evidentiary justification for a racially-conscious statute in *advance* of its passage. *Id*. The Court said that *Croson* required governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Id*. at 738.

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id*. at

738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id*. at 739.

The court was mindful of the fact it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was "not reconcilable" with the Ohio Supreme Court's decision in *Ritchie Produce*, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).

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 percent of all city contracts. 199 F.3d at 208. *Id*. The 5 percent goal was not based on any objective data. *Id*. at 209. Instead, it was a "guess" that was adopted by the City. *Id*. The goal was later increased to 15 percent because it was found that 10 percent of businesses in Mississippi were minority-owned. *Id*.

After the MBE Program's adoption, the City's Department of Public Works included a Special Notice to bidders as part of its specifications for all City construction projects. *Id*. The Special Notice encouraged prime construction contractors to include in their bid 15 percent participation by subcontractors certified as Disadvantaged Business Enterprises (DBEs) and 5 percent participation by those certified as WBEs. *Id*.

The Special Notice defined a DBE as a small business concern that is owned and controlled by socially and economically disadvantaged individuals, which had the same meaning as under Section 8(d) of the Small Business Act and subcontracting regulations promulgated pursuant to that Act. *Id*. The court found that Section 8(d) of the SBA states that prime contractors are to presume that socially and economically disadvantaged individuals include certain racial and ethnic groups or any other individual found to be disadvantaged by the SBA. *Id*.

In 1991, the Mississippi legislature passed a bill that would allow cities to set aside 20 percent of procurement for minority business. *Id*. at 209-210. The City of Jackson City Council voted to implement the set-aside, contingent on the City's adoption of a disparity study. *Id*. at 210. The City conducted a disparity study in 1994 and concluded that the total underutilization of African-American and Asian-American-owned firms was statistically significant. *Id*. The study recommended that the City implement a range of MBE goals from 10-15 percent. *Id*. The City, however, was not satisfied with the study, according to the court, and chose not to adopt its conclusions. *Id*. Instead, the City retained its 15 percent MBE goal and did not adopt the disparity study. *Id*.

W.H. Scott did not meet DBE goal. In 1997 the City advertised for the construction of a project and the W.H. Scott Construction Company, Inc. (Scott) was the lowest bidder. *Id*. Scott obtained 11.5 percent WBE participation, but it reported that the bids from DBE subcontractors had not been low bids and, therefore, its DBE-participation percentage would be only 1 percent. *Id*.

Although Scott did not achieve the DBE goal and subsequently would not consider suggestions for increasing its minority participation, the Department of Public Works and the Mayor, as well as the City's Financial Legal Departments, approved Scott's bid and it was placed on the agenda to be approved by the City Council. *Id*. The City Council voted against the Scott bid without comment. Scott alleged that it was told the City rejected its bid because it did not achieve the DBE goal, but the City alleged that it was rejected because it exceeded the budget for the project. *Id*.

The City subsequently combined the project with another renovation project and awarded that combined project to a different construction company. *Id*. at 210-211. Scott maintained the rejection of his bid was racially motivated and filed this suit. *Id*. at 211.

District court decision. The district court granted Scott's motion for summary judgment agreeing with Scott that the relevant Policy included not just the Special Notice, but that it also included the MBE Program and Policy document regarding MBE participation. *Id*. at 211. The district court found that the MBE Policy was unconstitutional because it lacked requisite findings to justify the 15 percent minority-participation goal and survive strict scrutiny based on the 1989 decision in the *City of Richmond, v. J.A. Croson Co. Id.* The district court struck down minority-participation goals for the City's construction contracts only. *Id*. at 211. The district court found that Scott's bid was rejected because Scott lacked sufficient minority participation, not because it exceeded the City's budget. *Id.* In addition, the district court awarded Scott lost profits. *Id.*

Standing. The Fifth Circuit determined that in equal protection cases challenging affirmative action policies, "injury in fact" for purposes of establishing standing is defined as the inability to compete on an equal footing in the bidding process. *Id*. at 213. The court stated that Scott need not prove that it lost contracts because of the Policy, but only prove that the Special Notice forces it to compete on an unequal basis. *Id*. The question, therefore, the court said is whether the Special Notice imposes an obligation that is born unequally by DBE contractors and non-DBE contractors. *Id.* at 213.

The court found that if a non-DBE contractor is unable to procure 15 percent DBE participation, it must still satisfy the City that adequate good faith efforts have been made to meet the contract goal or risk termination of its contracts, and that such efforts include engaging in advertising, direct solicitation and follow-up, assistance in attaining bonding or insurance required by the contractor. *Id.* at 214. The court concluded that although the language does not expressly authorize a DBE contractor to satisfy DBE-participation goals by keeping the requisite percentage of work for itself, it would be nonsensical to interpret it as precluding a DBE contractor from doing so. *Id.* at 215.

If a DBE contractor performed 15 percent of the contract dollar amount, according to the court, it could satisfy the participation goal and avoid both a loss of profits to subcontractors and the time and expense of complying with the good faith requirements. *Id.* at 215. The court said that non-DBE contractors do not have this option, and thus, Scott and other non-DBE contractors are at a competitive disadvantage with DBE contractors. *Id.*

The court, therefore, found Scott had satisfied standing to bring the lawsuit.

Constitutional strict scrutiny analysis and guidance in determining types of evidence to justify a remedial MBE program. The court first rejected the City's contention that the Special Notice should not be subject to strict scrutiny because it establishes goals rather than mandate quotas for DBE

participation. *Id.* at 215-217. The court stated the distinction between goals or quotas is immaterial because these techniques induce an employer to hire with an eye toward meeting a numerical target, and as such, they will result in individuals being granted a preference because of their race. *Id.* at 215. The court also rejected the City's argument that the DBE classification created a preference based on "disadvantage," not race. *Id.* at 215-216. The court found that the Special Notice relied on Section 8(d) and Section 8(a) of the Small Business Act, which provide explicitly for a race-based presumption of social disadvantage, and thus requires strict scrutiny. *Id.* at 216-217.

The court discussed the *City of Richmond v. Croson* case as providing guidance in determining what types of evidence would justify the enactment of an MBE-type program. *Id.* at 217-218. The court noted the Supreme Court stressed that a governmental entity must establish a factual predicate, tying its set-aside percentage to identified injuries in the particular local industry. *Id.* at 217. The court pointed out given the Supreme Court in *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson's* evidentiary burden is satisfied. *Id.* at 218. The court found that disparity studies are probative evidence for discrimination because they ensure that the "relevant statistical pool," of qualified minority contractors is being considered. *Id.* at 218.

The court in a footnote stated that it did not attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* "strong basis in evidence" benchmark. *Id.* at 218, n.11. The sufficiency of a municipality's findings of discrimination in a local industry must be evaluated on a case-by-case basis. *Id.*

The City argued that it was error for the district court to ignore its statistical evidence supporting the use of racial presumptions in its DBE-participation goals, and highlighted the disparity study it commissioned in response to *Croson*. *Id.* at 218. The court stated, however, that whatever probity the study's findings might have had on the analysis is irrelevant to the case, because the City refused to adopt the study when it was issued in 1995. *Id.* In addition, the court said the study was restricted to the letting of prime contracts by the City under the City's Program, and did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool, in the City's construction projects. *Id.* at 218.

The court noted that had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, the outcome of the decision might have been different. *Id.* at 219. Absent such evidence in the City's construction industry, however, the court concluded the City lacked the factual predicates required under the Equal Protection Clause to support the City's 15 percent DBE-participation goal. *Id.* Thus, the court held the City failed to establish a compelling interest justifying the MBE program or the Special Notice, and because the City failed a strict scrutiny analysis on this ground, the court declined to address whether the program was narrowly tailored.

Lost profits and damages. Scott sought damages from the City under 42 U.S.C. § 1983, including lost profits. *Id.* at 219. The court, affirming the district court, concluded that in light of the entire record the City Council rejected Scott's low bid because Scott failed to meet the Special Notice's DBE-participation goal, not because Scott's bid exceeded the City's budget. *Id.* at 220. The court, therefore, affirmed the award of lost profits to Scott.

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 percent owned by "socially and economically disadvantaged" persons. "Socially and economically disadvantaged" persons are, in turn, defined as "individuals who have ... been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* The Third Circuit found in *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990, 999 (3d Cir.1993) (*Contractors II*), this definition "includes only individuals who are both victims of prejudice based on status and economically deprived." Businesses majority-owned by racial minorities (minority business enterprises or MBEs) and women are rebuttably presumed to be DBEs, but businesses that would otherwise qualify as DBEs are rebuttably presumed not to be DBEs if they have received more than $5 million in City contracts. *Id.* at 591-592.

The Ordinance set participation "goals" for different categories of DBEs: racial minorities (15%), women (10%) and handicapped (2%). *Id.* at 592. These percentage goals were percentages of the total dollar amount spent by the City in each of the three contract categories: vending contracts, construction contracts, and personal and professional service contracts. Dollars received by DBE *subcontractors* in connection with City financed prime contracts are counted towards the goals as well as dollars received by DBE *prime* contractors. *Id.*

Two different strategies were authorized. When there were sufficient DBEs qualified to perform a City contract to ensure competitive bidding, a contract could be let on a sheltered market basis—i.e., only DBEs will be permitted to bid. In other instances, the contract would be let on a non-sheltered basis—i.e., any firm may bid—with the goals requirements being met through subcontracting. *Id.* at 592 The sheltered market strategy saw little use. It was attempted on a trial basis, but there were too few DBEs in any given area of expertise to ensure reasonable prices, and the program was abandoned. *Id.* Evidence submitted by the City indicated that no construction contract was let on a sheltered market basis from 1988 to 1990, and there was no evidence that the City had since pursued that approach. *Id.* Consequently, the Ordinance's participation goals were achieved almost entirely by requiring that prime contractors subcontract work to DBEs in accordance with the goals. *Id.*

The Court stated that the significance of complying with the goals is determined by a series of presumptions. *Id.* at 593. Where at least one bidding contractor submitted a satisfactory Schedule for Participation, it was presumed that all contractors who did not submit a satisfactory Schedule did not exert good faith efforts to meet the program goals, and the "lowest responsible, responsive contractor" received the contract. *Id.* Where none of the bidders submitted a satisfactory Schedule, it was presumed that all but the bidder who proposed "the highest goals" of DBE participation at a "reasonable price" did not exert good faith efforts, and the contract was awarded to the "lowest, responsible, responsive contractor" who was granted a Waiver and proposed the highest level of DBE

participation at a reasonable price. *Id.* Non-complying bidders in either situation must rebut the presumption in order to secure a waiver.

Procedural History. This appeal is the third appeal to consider this challenge to the Ordinance. On the first appeal, the Third Circuit affirmed the district court's ruling that the Contractors had standing to challenge the set-aside program, but reversed the grant of summary judgment in their favor because UMEA had not been afforded a fair opportunity to develop the record. *Id.* at 593 citing, *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991) (*Contractors I*).

On the second appeal, the Third Circuit reviewed a second grant of summary judgment for the Contractors*. Id., citing, Contractors II,* 6 F.3d 990. The Court in that appeal concluded that the Contractors had standing to challenge the program only as it applied to the award of construction contracts, and held that the pre-enactment evidence available to the City Council in 1982 did "not provide a sufficient evidentiary basis" for a conclusion that there had been discrimination against women and minorities in the construction industry. *Id. citing*, 6 F.3d at 1003. The Court further held, however, that evidence of discrimination obtained after 1982 could be considered in determining whether there was a sufficient evidentiary basis for the Ordinance. *Id.*

In the second appeal, 6 F.3d 990 (3d. Cir. 1993), after evaluating both the pre-enactment and post-enactment evidence in the summary judgment record, the Court affirmed the grant of summary judgment insofar as it declared to be unconstitutional those portions of the program requiring set-asides for women and non-black minority contractors. *Id.* at 594. The Court also held that the 2 percent set-aside for the handicapped passed rational basis review and ordered the court to enter summary judgment for the City with respect to that portion of the program. *Id.* In addition, the Court concluded that the portions of the program requiring a set-aside for black contractors could stand only if they met the "strict scrutiny" standard of Equal Protection review and that the record reflected a genuine issue of material fact as to whether they were narrowly tailored to serve a compelling interest of the City as required under that standard. *Id.*

This third appeal followed a nine-day bench trial and a resolution by the district court of the issues thus presented. That trial and this appeal thus concerned only the constitutionality of the Ordinance's preferences for black contractors. *Id.*

Trial. At trial, the City presented a study done in 1992 after the filing of this suit, which was reflected in two pretrial affidavits by the expert study consultant and his trial testimony. *Id.* at 594. The core of his analysis concerning discrimination by the City centered on disparity indices prepared using data from fiscal years 1979–81. The disparity indices were calculated by dividing the percentage of all City construction dollars received by black construction firms by their percentage representation among all area construction firms, multiplied by 100.

The consultant testified that the disparity index for black construction firms in the Philadelphia metropolitan area for the period studied was about 22.5. According to the consultant, the smaller the resulting figure was, the greater the inference of discrimination, and he believed that 22.5 was a disparity attributable to discrimination. *Id.* at 595. A number of witnesses testified to discrimination in City contracting before the City Council, prior to the enactment of the Ordinance, and the consultant testified that his statistical evidence was corroborated by their testimony. *Id.* at 595.

Based on information provided in an affidavit by a former City employee (John Macklin), the study consultant also concluded that black representation in contractor associations was disproportionately low in 1981 and that between 1979 and 1981 black firms had received no subcontracts on City-financed construction projects. *Id.* at 595. The City also offered evidence concerning two programs instituted by others prior to 1982 which were intended to remedy the effects of discrimination in the construction industry but which, according to the City, had been unsuccessful. *Id.* The first was the Philadelphia Plan, a program initiated in the late 1960s to increase the hiring of minorities on public construction sites.

The second program was a series of programs implemented by the Philadelphia Urban Coalition, a non-profit organization (Urban Coalition programs). These programs were established around 1970, and offered loans, loan guarantees, bonding assistance, training, and various forms of non-financial assistance concerning the management of a construction firm and the procurement of public contracts. *Id.* According to testimony from a former City Council member and others, neither program succeeded in eradicating the effects of discrimination. *Id.*

The City pointed to the waiver and exemption sections of the Ordinance as proof that there was adequate flexibility in its program. The City contended that its 15 percent goal was appropriate. The City maintained that the goal of 15 percent may be required to account for waivers and exemptions allowed by the City, was a flexible goal rather than a rigid quota in light of the waivers and exemptions allowed by the Ordinance, and was justified in light of the discrimination in the construction industry. *Id.* at 595.

The Contractors presented testimony from an expert witness challenging the validity and reliability of the study and its conclusions, including, *inter alia*, the data used, the assumptions underlying the study, and the failure to include federally-funded contracts let through the City Procurement Department. *Id.* at 595. The Contractors relied heavily on the legislative history of the Ordinance, pointing out that it reflected no identification of any specific discrimination against black contractors and no data from which a Council person could find that specific discrimination against black contractors existed or that it was an appropriate remedy for any such discrimination. *Id.* at 595 They pointed as well to the absence of any consideration of race-neutral alternatives by the City Council prior to enacting the Ordinance. *Id.* at 596.

On cross-examination, the Contractors elicited testimony that indicated that the Urban Coalition programs were relatively successful, which the Court stated undermined the contention that race-based preferences were needed. *Id.* The Contractors argued that the 15 percent figure must have been simply picked from the air and had no relationship to any legitimate remedial goal because the City Council had no evidence of identified discrimination before it. *Id.*

At the conclusion of the trial, the district court made findings of fact and conclusions of law. It determined that the record reflected no "strong basis in evidence" for a conclusion that discrimination against black contractors was practiced by the City, non-minority prime contractors, or contractors associations during any relevant period. *Id.* at 596 *citing*, 893 F.Supp. at 447. The court also determined that the Ordinance was "not 'narrowly tailored' to even the perceived objective declared by City Council as the reason for the Ordinance." *Id.* at 596, *citing*, 893 F. Supp. at 441.

Burden of Persuasion. The Court held affirmative action programs, when challenged, must be subjected to "strict scrutiny" review. *Id.* at 596. Accordingly, a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a "passive participant;" race-based preferences cannot be justified by reference to past "societal" discrimination in which the municipality played no material role. *Id.* Moreover, the Court found the remedy must be tailored to the discrimination identified. *Id.*

The Court said that a municipality must justify its conclusions regarding discrimination in connection with the award of its construction contracts and the necessity for a remedy of the scope chosen. *Id.* at 597. While this does not mean the municipality must convince a court of the accuracy of its conclusions, the Court stated that it does mean the program cannot be sustained unless there is a strong basis in evidence for those conclusions. *Id.* The party challenging the race-based preferences can succeed by showing either (1) the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) there is no "strong basis in evidence" for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. *Id.*

The Third Circuit noted it and other courts have concluded that when the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination. *Id.* at 597. Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not "fit" the identified discrimination. *Id.*

Ultimately, however, the Court found that plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred. *Id.* at 597. This means that the plaintiffs bear the burden of persuading the court that the race-based preferences were not intended to serve the identified compelling interest or that there is no strong basis in the evidence as a whole for the conclusions the municipality needed to have reached with respect to the identified discrimination and the necessity of the remedy chosen. *Id.*

The Court explained the significance of the allocation of the burden of persuasion differs depending on the theory of constitutional invalidity that is being considered. If the theory is that the race-based preferences were adopted by the municipality with an intent unrelated to remedying its past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else. *Id.* at 597. As noted in *Contractors II*, the Third Circuit held the burden of persuasion here is analogous to the burden of persuasion in Title VII cases. *Id.* at 598, *citing*, 6 F.3d at 1006. The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important. *Id.*

The Court said the situation is different when the plaintiff's theory of constitutional invalidity is that, although the municipality may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen

have no strong basis in evidence. In such a situation, when the municipality comes forward with evidence of facts alleged to justify its conclusions, the Court found that the plaintiff has the burden of persuading the court that those facts are not accurate. *Id.* The ultimate issue as to whether a strong basis in evidence exists is an issue of law, however. The burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue. *Id.*

The Court held the district court's opinion explicitly demonstrates its recognition that the plaintiffs bore the burden of persuading it that an equal protection violation occurred. *Id.* at 598. The Court found the district court applied the appropriate burdens of production and persuasion, conducted the required evaluation of the evidence, examined the credited record evidence as a whole, and concluded that the "strong basis in evidence" for the City's position did not exist. *Id.*

Three forms of discrimination advanced by the City. The Court pointed out that several distinct forms of racial discrimination were advanced by the City as establishing a pattern of discrimination against minority contractors. The first was discrimination by prime contractors in the awarding of subcontracts. The second was discrimination by contractor associations in admitting members. The third was discrimination by the City in the awarding of prime contracts. The City and UMEA argued that the City may have "passively participated" in the first two forms of discrimination. *Id.* at 599.

A. The evidence of discrimination by private prime contractors. One of the City's theories is that discrimination by prime contractors in the selection of subcontractors existed and may be remedied by the City. The Court noted that as Justice O'Connor observed in *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 percent set-aside for black contractors in the subcontracting market. *Id.*

Here, as in *Croson*, the Court stated "[t]o a large extent, the set aside of subcontracting dollars seems to rest on the unsupported assumption that white contractors simply will not hire minority firms." *Id.* at 606, *citing*, 488 U.S. at 502 . Here, as in *Croson*, the Court found there is no firm evidentiary basis for believing that non-minority contractors will not hire black subcontractors. *Id.* Rather, the Court concluded the evidence, to the extent it suggests that racial discrimination had occurred, suggested discrimination by the City's Procurement Department against black contractors who were capable of

bidding on prime City construction contracts. *Id.* To the considerable extent that the program sought to constrain decision making by private contractors and favor black participation in the subcontracting market, the Court held it was ill-suited as a remedy for the discrimination identified. *Id.*

The Court pointed out it did not suggest that an appropriate remedial program for discrimination by a municipality in the award of primary contracts could never include a component that affects the subcontracting market in some way. *Id.* at 606. It held, however, that a program, like Philadelphia's program, which focused almost exclusively on the subcontracting market, was not narrowly tailored to address discrimination by the City in the market for prime contracts. *Id.*

B. The amount of the set–aside in the prime contract market. Having decided that the Ordinance is overbroad in its inclusion of subcontracting, the Court considered whether the 15 percent goal was narrowly tailored to address discrimination in prime contracting. *Id.* at 606. The Court found the record supported the district court's findings that the Council's attention at the time of the original enactment and at the time of the subsequent extension was focused solely on the percentage of minorities and women in the general population, and that Council made no effort at either time to determine how the Ordinance might be drafted to remedy particular discrimination—to achieve, for example, the approximate market share for black contractors that would have existed, had the purported discrimination not occurred. *Id.* at 607. While the City Council did not tie the 15 percent participation goal directly to the proportion of minorities in the local population, the Court said the goal was either arbitrarily chosen or, at least, the Council's sole reference point was the minority percentage in the local population. *Id.*

The Court stated that it was clear that the City, in the entire course of this litigation, had been unable to provide an evidentiary basis from which to conclude that a 15 percent set-aside was necessary to remedy discrimination against black contractors in the market for prime contracts. *Id.* at 607. The study data indicated that, at most, only 0.7 percent of the construction firms qualified to perform City-financed prime contracts in the 1979–1981 period were black construction firms. *Id.* at 607. This, the Court found, indicated that the 15 percent figure chosen is an impermissible one. *Id.*

The Court said it was not suggesting that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides. It well may be that some premium could be justified under some circumstances. *Id.* at 608. However, the Court noted that the *only* evidentiary basis in the record that appeared at all relevant to fashioning a remedy for discrimination in the prime contracting market was the 0.7 percent figure. That figure did not provide a strong basis in evidence for concluding that a 15 percent set-aside was necessary to remedy discrimination against black contractors in the prime contract market. *Id.*

C. Program alternatives that are either race–neutral or less burdensome to non–minority contractors. In holding that the Richmond plan was not narrowly tailored, the Court pointed out, the Supreme Court in *Croson* considered it significant that race-neutral remedial alternatives were available and that the City had not considered the use of these means to increase minority business participation in City contracting. *Id.* at 608. It noted, in particular, that barriers to entry like capital and bonding requirements could be addressed by a race-neutral program of city financing for small firms and could be expected to lead to greater minority participation. Nevertheless, such alternatives

were not pursued or even considered in connection with the Richmond's efforts to remedy past discrimination. *Id.*

The district court found that the City's procurement practices created significant barriers to entering the market for City-awarded construction contracts. *Id.* at 608. Small contractors, in particular, were deterred by the City's prequalification and bonding requirements from competing in that market. *Id.* Relaxation of those requirements, the district court found, was an available race-neutral alternative that would be likely to lead to greater participation by black contractors. No effort was made by the City, however, to identify barriers to entry in its procurement process and that process was not altered before or in conjunction with the adoption of the Ordinance. *Id.*

The district court also found that the City could have implemented training and financial assistance programs to assist disadvantaged contractors of all races. *Id.* at 608. The record established that certain neutral City programs had achieved substantial success in fulfilling its goals. The district court concluded, however, that the City had not supported the programs and had not considered emulating and/or expanding the programs in conjunction with the adoption of the Ordinance. *Id.*

The Court held the record provided ample support for the finding of the district court that alternatives to race-based preferences were available in 1982, which would have been either race neutral or, at least, less burdensome to non-minority contractors. *Id.* at 609. The Court found the City could have lowered administrative barriers to entry, instituted a training and financial assistance program, and carried forward the OMO's certification of minority contractor qualifications. *Id.* The record likewise provided ample support for the district court's conclusion that the "City Council was not interested in considering race-neutral measures, and it did not do so." *Id.* at 609. To the extent the City failed to consider or adopt these alternatives, the Court held it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors. *Id.*

The Court found it particularly noteworthy that the Ordinance, since its extension, in 1987, for an additional 12 years, had been targeted exclusively toward benefiting only minority and women contractors "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* at 609. The City's failure to consider a race-neutral program designed to encourage investment in and/or credit extension to small contractors or minority contractors, the Court stated, seemed particularly telling in light of the limited classification of victims of discrimination that the Ordinance sought to favor. *Id.*

Conclusion. The Court held the remedy provided by the program substantially exceeds the limited justification that the record provided. *Id.* at 609. The program provided race-based preferences for blacks in the market for subcontracts where the Court found there was no strong basis in the evidence for concluding that discrimination occurred. *Id.* at 610. The program authorized a 15 percent set-aside applicable to all prime City contracts for black contractors when, the Court concluded there was no basis in the record for believing that such a set-aside of that magnitude was necessary to remedy discrimination by the City in that market. *Id.* Finally, the Court stated the City's program failed to include race-neutral or less burdensome remedial steps to encourage and facilitate greater participation of black contractors, measures that the record showed to be available. *Id.*

The Court concluded that a city may adopt race-based preferences only when there is a "strong basis in evidence for its conclusion that [the] remedial action was necessary." *Id.* at 610. Only when such a basis exists is there sufficient assurance that the racial classification is not "merely the product of unthinking stereotypes or a form of racial politics." *Id.* at 610. That assurance, the Court held was lacking here, and, accordingly, found that the race-based preferences provided by the Ordinance could not stand. *Id.*

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, 0.7

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*.

Thc 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*. at1530. 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 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 percent of the available firms and Asian–American, Pacific–Islander, and "other" minorities represented .12 percent of the available firms, and that these firms received no City contracts during the years 1979 through 1981. The Court did not believe these numbers were large enough to create a triable issue of discrimination. The mere fact that .27 percent of City construction firms—the percentage of all of

these groups combined—received no contracts does not rise to the "significant statistical disparity" . *Id.* at 1008.

B. Anecdotal evidence. Nor, the Court found, does it appear that there was any anecdotal evidence of discrimination against construction businesses owned by people of Hispanic or Asian–American descent*. Id.* at 1008. The district court found "there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts," *Id*. at 1008, *quoting,* 735 F.Supp. at 1299, and there was no evidence of any witnesses who were members of these groups or who were Hispanic. *Id.*

The Court recognized that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian–American persons did not eliminate the possibility of discrimination against these firms. *Id.* at 1008. The small number itself, the Court said, may reflect barriers to entry caused in part by discrimination. *Id.* But, the Court held, plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. *Id.*

Conclusion on compelling government interest. The Court found that nothing in its decision prevented the City from re-enacting a preference for construction firms owned by Hispanic, Asian–American, or Native American persons based on more concrete evidence of discrimination. *Id*. In sum, the Court held, the City adduced enough evidence of racial discrimination against Blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test. *Id.*

Narrowly Tailored. The Court then decided whether the Ordinance's racial preference was "narrowly tailored" to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Id.* at 1008. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective "race-neutral measures," such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance. *Id.*

The City contended it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. *Id.* It relied on the affidavits of City Council President and former Philadelphia Urban Coalition General Counsel who testified regarding the race-neutral precursors of the Ordinance—the Philadelphia Plan, which set goals for employment of minorities on public construction sites, and the Urban Coalition's programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. *Id.* The Court found the information in these affidavits sufficiently established the City's prior consideration of race-neutral programs to withstand summary judgment. *Id*. at 1009.

Unlike the Richmond Ordinance, the Philadelphia Ordinance provided for several types of waivers of the 15 percent goal. *Id.* at 1009. It exempted individual contracts or classes of contracts from the Ordinance where there were an insufficient number of available minority-owned businesses "to ensure adequate competition and an expectation of reasonable prices on bids or proposals," and

allowed a prime contractor to request a waiver of the 15 percent requirement where the contractor shows he has been unable after "a good faith effort to comply with the goals for DBE participation." *Id.*

Furthermore, as the district court noted, the Ordinance eliminated from the program successful minority businesses—those who have won $5 million in city contracts. *Id.* Also unlike the Richmond program, the City's program was geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs "within the Philadelphia Standard Metropolitan Statistical Area." *Id.* The Court noted other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored*. Id.*

The Court said a closer question was presented by the Ordinance's 15 percent goal. The City's data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. The Court found that the goal need not correspond precisely to the percentage of available contractors. *Id. Croson* does not impose this requirement, the Third Circuit concluded, as the Supreme Court stated only that Richmond's 30 percent goal inappropriately assumed "minorities [would] choose a particular trade in lockstep proportion to their representation in the local population." *Id., quoting,* 488 U.S. at 507.

The Court pointed out that imposing a 15 percent goal for each contract may reflect the need to account for those contractors who received a waiver because insufficient minority businesses were available, and the contracts exempted from the program. *Id*. Given the strength of the Ordinance's showing with respect to other *Croson* factors, the Court concluded the City had created a dispute of fact on whether the minority preference in the Ordinance was "narrowly tailored." *Id*.

Gender and intermediate scrutiny. Under the intermediate scrutiny standard, the gender preference is valid if it was "substantially related to an important governmental objective." *Id,* at 1009.

The City contended the gender preference was aimed at the "important government objective" of remedying economic discrimination against women, and that the 10 percent goal was substantially related to this objective. In assessing this argument, the Court noted that "[i]n the context of women-business enterprise preferences, the two prongs of this intermediate scrutiny test tend to converge into one." *Id.* at 1009. The Court held it could uphold the construction provisions of this program if the City had established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the 10 percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was "a product of analysis rather than a stereotyped reaction based on habit." *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.*, But, the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id*. at 1011.

The Court concluded the evidence offered by the City regarding women-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id*. at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance*. Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination *Id.* at 1011.

Handicap and rational basis. The Court then addressed the 2 percent preference for businesses owned by handicapped persons. *Id.* at 1011. The district court struck down this preference under the rational basis test, based on the belief according to the Third Circuit, that *Croson* required some evidence of discrimination against business enterprises owned by handicapped persons and therefore that the City could not rely on testimony of discrimination against handicapped individuals. *Id., citing* 735 F.Supp. at 1308. The Court stated that a classification will pass the rational basis test if it is "rationally related to a legitimate government purpose," *Id., citing*, *Cleburne,* 473 U.S. at 440.

The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in *Heller v. Doe,* 509 U.S. 312–43 (1993), indicating that "a [statutory] classification" subject to rational basis review "is accorded a strong presumption of validity," and that "a state ... has no obligation to produce evidence to sustain the rationality of [the] classification." *Id.* at 1011. Moreover, "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* at 1011.

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Court held the 2 percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id*. at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force*. Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negativing every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts*. Id.* at 1012. Therefore, the Court reversed the district court's grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue*. Id.*

Holding. The Court vacated the district court's grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian–American, or Native American persons or women, and remanded the case for further proceedings and a trial in accordance with the opinion.

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 5 percent preference given Local Business Enterprises ("LBEs") and the 5 percent preference given MBEs and WBEs. *Id*. The ordinance defined "MBE" as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. "WBE" was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed $14 million. *Id*.

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id*. at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC's constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id*. at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interesting in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities' legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id*. at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review." *Id*. at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id*. at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id*. at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id*. And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id*. at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id*. at 1414. Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id*. at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id*. Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id*. For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id*. The Ninth Circuit stated than 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 5 percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id*. at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id*.

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id*. The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id*.

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id*. at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of

"minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id*. at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id*. This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id*. Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id*.

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id*. at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id*. Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id*. Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id*. at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id*. at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. *Id*. at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id*. The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id*. at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

Recent District Court Decisions

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 4 percent of the value of a contract. *Id*. Kossman did not present evidence that he ever bid on more than 4 percent of a Houston contract. *Id*. In addition, the court stated the fact the MWBE program placed *some* burden on Kossman is insufficient to support the conclusion that the program is not nearly tailored. *Id*. The court concurred with the Magistrate Judge's observation that the proportional sharing of opportunities is, at the core, the point of a remedial program. *Id*. The district court agreed with the Magistrate Judge's conclusion that the MWBE program is nearly tailored.

Native-American-owned businesses. The study found that Native-American-owned businesses were utilized at a higher rate in Houston's construction contracts than would be anticipated based on their rate of availability in the relevant market area. *Id*. at *4. The court noted this finding would tend to negate the presence of discrimination against Native Americans in Houston's construction industry. *Id*.

This Houston disparity study consultant stated that the high utilization rate for Native Americans stems largely from the work of two Native-American-owned firms. *Id*. The Houston consultant suggested that without these two firms, the utilization rate for Native Americans would decline significantly, yielding a statistically significant disparity ratio. *Id*.

The Magistrate Judge, according to the district court, correctly held and found that there was insufficient evidence to support including Native Americans in the MWBE program. *Id*. The court approved and adopted the Magistrate Judge explanation that the opinion of the disparity study consultant that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, is not evidence of the need for remedial action. *Id*. at *5. The district court found no equal-protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms. *Id*. Therefore, the utilization goal for businesses owned by Native Americans is not supported by a strong evidentiary basis. *Id*. at *5.

The district court agreed with the Magistrate Judge's recommendation that the district court grant summary judgment in favor of Kossman with respect to the utilization goal for Native-American-owned business. *Id*. The court found there was limited significance to the Houston consultant's opinion that utilization of Native-American-owned businesses would drop to statistically significant levels if two Native-American-owned businesses were ignored. *Id*. at *5.

The court stated the situation presented by the Houston disparity study consultant of a "hypothetical non-existence" of these firms is not evidence and cannot satisfy strict scrutiny. *Id*. at *5. Therefore, the district court adopted the Magistrate Judge's recommendation with respect to excluding the utilization goal for Native-American-owned businesses. *Id*. The court noted that a preference for Native-American-owned businesses could become constitutionally valid in the future if there were sufficient evidence of discrimination against Native-American-owned businesses in Houston's construction contracts. *Id*. at *5.

Conclusion. The district court held that the Memorandum & Recommendation of the Magistrate Judge is adopted in full; Houston's motion to exclude the Kossman's proposed expert witness is granted; Kossman's motion for summary judgment is granted with respect to excluding the utilization goal for

Native-American-owned businesses and denied in all other respects; Houston's motion for summary judgment is denied with respect to including the utilization goal for Native-American-owned businesses and granted in all other respects as to the MWBE program for other minorities and women-owned firms. *Id*. at *5.

Memorandum and Recommendation by Magistrate Judge, dated February 17, 2016, S.D. Texas, Civil Action No. H-14-1203.

Kossman's proposed expert excluded and not admissible. Kossman in its motion for summary judgment solely relied on the testimony of its proposed expert, and submitted no other evidence in support of its motion. The Magistrate Judge (hereinafter "MJ") granted Houston's motion to exclude testimony of Kossman's proposed expert, which the district court adopted and approved, for multiple reasons. The MJ found that his experience does not include designing or conducting statistical studies, and he has no education or training in statistics or economics. *See*, MJ, Memorandum and Recommendation ("M&R") by MJ, dated February 17, 2016, at 31, S.D. Texas, Civil Action No. H-14-1203. The MJ found he was not qualified to collect, organize or interpret numerical data, has no experience extrapolating general conclusions about a subset of the population by sampling it, has demonstrated no knowledge of sampling methods or understanding of the mathematical concepts used in the interpretation of raw data, and thus, is not qualified to challenge the methods and calculations of the disparity study. *Id.*

The MJ found that the proposed expert report is only a theoretical attack on the study with no basis and objective evidence, such as data r or testimony of construction firms in the relative market area that support his assumptions regarding available MWBEs or comparative studies that control the factors about which he complained. *Id.* at 31*.* The MJ stated that the proposed expert is not an economist and thus is not qualified to challenge the disparity study explanation of its economic considerations. *Id.* at 31. The proposed expert failed to provide econometric support for the use of bidder data, which he argued was the better source for determining availability, cited no personal experience for the use of bidder data, and provided no proof that would more accurately reflect availability of MWBEs absent discriminatory influence. *Id.* Moreover, he acknowledged that no bidder data had been collected for the years covered by the study. *Id*.

The court found that the proposed expert articulated no method at all to do a disparity study, but merely provided untested hypotheses. *Id.* at 33. The proposed expert's criticisms of the study, according to the MJ, were not founded in cited professional social science or econometric standards. *Id.* at 33. The MJ concludes that the proposed expert is not qualified to offer the opinions contained in his report, and that his report is not relevant, not reliable, and, therefore, not admissible. *Id.* at 34.

Relevant geographic market area. The MJ found the market area of the disparity analysis was geographically confined to area codes in which the majority of the public contracting construction firms were located. *Id.* at 3-4, 51. The relevant market area, the MJ said, was weighted by industry, and therefore the study limited the relevant market area by geography and industry based on Houston's past years' records from prior construction contracts. *Id.* at 3-4, 51.

Availability of MWBEs. The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its

public dollars do not finance racial discrimination. *Id*. at 52-53. Here, the study defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. *Id*. at 3-4, 53. Those parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and MWBEs that had been utilized in Houston's construction contracting over the last five and one-half years. *Id*. at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. *Id.* at 6, 53.

Kossman produced no evidence that the availability estimate was inadequate. *Id.* at 53. Plaintiff's criticisms of the availability analysis, including for capacity, the court stated was not supported by any contrary evidence or expert opinion. *Id.* at 53-54. The MJ rejected Plaintiff's proposed expert's suggestion that analysis of bidder data is a better way to identify MWBEs. *Id.* at 54. The MJ noted that Kossman's proposed expert presented no comparative evidence based on bidder data, and the MJ found that bidder data may produce availability statistics that are skewed by active and passive discrimination in the market. *Id.*

In addition to being underinclusive due to discrimination, the MJ said bidder data may be overinclusive due to inaccurate self-evaluation by firms offering bids despite the inability to fulfill the contract. *Id.* at 54. It is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. *Id.* The MJ concluded that the law does not require an individualized approach that measures whether MWBEs are qualified on a contract-by-contract basis. *Id.* at 55.

Disparity analysis. The study indicated significant statistical adverse disparities as to businesses owned by African Americans and Asians, which the MJ found provided a *prima facie* case of a strong basis in evidence that justified the Program's utilization goals for businesses owned by African Americans, Asian-Pacific Americans, and subcontinent Asian Americans. *Id.* at 55.

The disparity analysis did not reflect significant statistical disparities as to businesses owned by Hispanic Americans, Native Americans or non-minority women. *Id*. at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id*. at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id*. at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by 50 percent when they no longer benefitted from remedial goals. *Id*. at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the period as a whole. *Id*. at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id*. at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id*.

The MJ rejected Plaintiff's argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that contracted with Houston by industry and those available in the relevant market by industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston's awarding of construction contracts and to reach constitutionally sound results. *Id*.

Anecdotal evidence. Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. *Id.* at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. *Id.* at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. *Id.* The court rejected any requirement that the anecdotal evidence be verified and investigated. *Id.* at 59.

Regression analyses. Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id*. The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60. Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id*. at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

Narrow Tailoring factors. The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a

variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston's race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for MWBEs for up to 4 percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to meet contract goals or MWSBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*

The MJ concluded that the 34 percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on non-minorities. *Id.* at 62. The burden on non-minority SBEs, such as Kossman, is lessened by the 4 percent substitution provision. *Id.* at 62. The MJ noted another district court's opinion that the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 62.

Holding. The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native-American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.

28. H. B. Rowe Corp., Inc. v. W. Lyndo Tippett, North Carolina DOT, et al., 589 F. Supp.2d 587 (E.D.N.C. 2008), affirmed in part, reversed in part, and remanded, 615 F.3d 233 (4th Cir. 2010)

In *H.B. Rowe Company v. Tippett, North Carolina Department of Transportation, et al*. ("*Rowe*"), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina "affirmative action" program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

Background. In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff's bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate "good faith efforts" to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff's bid included 6.6 percent WBE

participation, but no MBE participation. The bid was rejected after a review of plaintiff's good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT's MWBE Program "largely mirrors" the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id*. An individual target for MBE participation was set for each project. *Id*.

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id*. The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippett. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by

women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina's MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, *et seq*. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id*. NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id*.

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C .Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT "dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of 'good faith' attempts to do so." 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in Croson made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587*, citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina's road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program's suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, "based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination." 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C.

Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id*. at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (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 .3d 950 (10th Cir. 2003). *See* discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the "plaintiffs") brought suit against Engineering Contractors Association (the "County"), the former County Manager, and various current County Commissioners (the "Commissioners") in their official and personal capacities (collectively the "defendants"), seeking to enjoin the same "participation goals" in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit's decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise ("CSBE") program for construction contracts, "but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services." *Id*. at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively "MBE/WBE"). *Id*. The MBE/WBE programs applied to A&E contracts in excess of $25,000. *Id*. at 1312. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id*. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id*. The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id*. at 1313. However, the district court found "the participation goals for the three MBE/WBE programs challenged … remained unchanged since 1994." *Id*.

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id*. at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the "County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services." The final report further stated "Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures." *Id*. at 1315. The district court also found that the Commissioners were

informed that "there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers then there was in contract construction." *Id*. Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id*.

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id*. at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id*. at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present "a strong basis of evidence" indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id*. at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the "gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective." *Id*. at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present "sufficient probative evidence" of discrimination. *Id*. (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a "last resort." *Id*.

The County presented both statistical and anecdotal evidence. *Id*. at 1318. The statistical evidence consisted of Dr. Carvajal's report, most of which consisted of "post-enactment" evidence. *Id*. Dr. Carvajal's analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id*. The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id*. Dr. Carvajal used the phone book, a list compiled by 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 percent and 3 percent, respectively. *Id.* The court denied the motion for summary judgment as to the plaintiff's facial attack on the constitutionality of the Ordinance, concluding that there existed "a dispute of

material fact as to whether the enactment of the Ordinance was adequately supported by a factual record of unlawful discrimination properly remediable through race- and gender-based affirmative action." *Id.*

The City appealed the entry of the December injunction to the United States Court of Appeals for the Fourth Circuit. In addition, the City filed a motion for stay of the injunction. *Id.* In support of the motion for stay, the City contended that AUC lacked organizational standing to challenge the Ordinance. The court held the plaintiff satisfied the requirements for organizational standing as to the set-aside goals established by the City for 1999. *Id.*

The City also contended that the court erred in failing to forebear from the adjudication of this case and of the motion for summary judgment until after it had completed an alleged disparity study which, it contended, would establish a justification for the set-aside goals established for 1999. *Id.* The court said this argument, which the court rejected, rested on the notion that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.*

Therefore, because the City offered no contemporaneous justification for the 1999 set-aside goals it adopted on the authority of the Ordinance, the court issued an injunction in its 1999 decision and declined to stay its effectiveness. *Id.* Since the injunction awarded complete relief to the AUC, and any effort to adjudicate the issue of whether the City would adopt revised set-aside goals on the authority of the Ordinance was wholly speculative undertaking, the court dismissed the case without prejudice. *Id.*

Facts and Procedural History. In 1986, the City Council enacted in Ordinance 790 the first city-wide affirmative action set-aside goals, which required, *inter alia*, that for all City contracts, 20 percent of the value of subcontracts be awarded to Minority–Owned Business Enterprises ("MBEs") and 3 percent to Women–Owned Business Enterprises ("WBEs"). *Id.* at 615. As permitted under then controlling Supreme Court precedent, the court said Ordinance 790 was justified by a finding that general societal discrimination had disadvantaged MWBEs. Apparently, no disparity statistics were offered to justify Ordinance 790. *Id.*

After the Supreme Court announced its decision in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), the City convened a Task Force to study the constitutionality of Ordinance 790. *Id.* The Task Force held hearings and issued a Public Comment Draft Report on November 1, 1989. *Id.* It held additional hearings, reviewed public comments and issued its final report on April 11, 1990, recommending several amendments to Ordinance 790. *Id.* The City Council conducted hearings, and in June 1990, enacted Ordinance 610, the law under attack in this case. *Id.*

In enacting Ordinance 610, the City Council found that it was justified as an appropriate remedy of "[p]ast discrimination in the City's contracting process by prime contractors against minority and women's business enterprises...." *Id.* The City Council also found that "[m]inority and women's business enterprises ... have had difficulties in obtaining financing, bonding, credit and insurance;" that "[t]he City of Baltimore has created a number of different assistance programs to help small businesses with these problems ... [but that t]hese assistance programs have not been effective in either remedying the effects of past discrimination ... or in preventing ongoing discrimination." *Id.*

The operative section of Ordinance 610 relevant to this case mandated a procedure by which set-aside goals were to be established each year for minority and women owned business participation in City contracts. *Id.* The Ordinance itself did not establish any goals, but directed the Mayor to consult with the Chief of Equal Opportunity Compliance and "contract authorities" and to annually specify goals for each separate category of contracting "such as public works, professional services, concession and purchasing contracts, as well as any other categories that the Mayor deems appropriate." *Id.*

In 1990, upon its enactment of the Ordinance, the City established across-the-board set-aside goals of 20 percent MBE and 3 percent WBE for all City contracts with no variation by market. *Id.* The court found the City simply readopted the 20 percent MBE and 3 percent WBE subcontractor participation goals from the prior law, Ordinance 790, which the Ordinance had specifically repealed. *Id.* at 616. These same set-aside goals, the court said, were adopted without change and without factual support in each succeeding year since 1990. *Id.*

No annual study ever was undertaken to support the implementation of the affirmative action program generally or to support the establishment of any annual goals, the court concluded, and the City did not collect the data which could have permitted such findings. *Id.* No disparity study existed or was undertaken until the commencement of this law suit. *Id.* Thus, the court held the City had no reliable record of the availability of MWBEs for each category of contracting, and thus no way of determining whether its 20 percent and 3 percent goals were rationally related to extant discrimination (or the continuing effects thereof) in the letting of public construction contracts. *Id.*

AUC has associational standing. AUC established that it had associational standing to challenge the set-aside goals adopted by the City in 1999. *Id.* Specifically, AUC sufficiently established that its members were "ready and able" to bid for City public works contracts. *Id.* No more, the court noted, was required. *Id.*

The court found that AUC's members were disadvantaged by the goals in the bidding process, and this alone was a cognizable injury. *Id.* For the purposes of an equal protection challenge to affirmative action set-aside goals, the court stated the Supreme Court has held that the " 'injury in fact' is the inability to compete on an equal footing in the bidding process ..." *Id.* at 617, *quoting Northeastern Florida Chapter*, 508 U.S. at 666, and *citing Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995).

The Supreme Court in *Northeastern Florida Chapter* held that individual standing is established to challenge a set-aside program when a party demonstrates "that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id.* at 616 *quoting*, *Northeastern*, 508 U.S. at 666. The Supreme Court further held that once a party shows it is "ready and able" to bid in this context, the party will have sufficiently shown that the set-aside goals are "the 'cause' of its injury and that a judicial decree directing the city to discontinue its program would 'redress' the injury," thus satisfying the remaining requirements for individual standing. *Id. quoting Northeastern*, at 666 & n. 5.

The court found there was ample evidence that AUC members were "ready and able" to bid on City public works contracts based on several documents in the record, and that members of AUC would have individual standing in their own right to challenge the constitutionality of the City's set-aside

goals applicable to construction contracting, satisfying the associational standing test. *Id.* at 617-18. The court held AUC had associational standing to challenge the constitutionality of the public works contracts set-aside provisions established in 1999. *Id.* at 618.

Strict scrutiny analysis. AUC complained that since their initial promulgation in 1990, the City's set-aside goals required AUC members to "select or reject certain subcontractors based upon the race, ethnicity, or gender of such subcontractors" in order to bid successfully on City public works contracts for work exceeding $25,000 ("City public works contracts"). *Id.* at 618. AUC claimed, therefore, that the City's set-aside goals violated the Fourteenth Amendment's guarantee of equal protection because they required prime contractors to engage in discrimination which the government itself cannot perpetrate. *Id.*

The court stated that government classifications based upon race and ethnicity are reviewed under strict scrutiny, citing the Supreme Court in *Adarand*, 515 U.S. at 227; and that those based upon gender are reviewed under the less stringent intermediate scrutiny. *Id.* at 618 , *citing United States v. Virginia*, 518 U.S. 515, 531 (1996). *Id.* "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Id.* at 619, *quoting Adarand*, 515 U.S. at 227. The government classification must be narrowly tailored to achieve a compelling government interest. *Id. citing Croson*, 488 U.S. at 493–95. The court then noted that the Fourth Circuit has explained:

> The rationale for this stringent standard of review is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims.... While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome.

Id. at 619, *quoting Maryland Troopers Ass'n, Inc. v. Evans*, 993 F.2d 1072, 1076 (4th Cir.1993) (citation omitted).

The court also pointed out that in *Croson*, a plurality of the Supreme Court concluded that state and local governments have a compelling interest in remedying identified past and present race discrimination within their borders. *Id.* at 619, *citing Croson*, 488 U.S. at 492. The plurality of the Supreme Court, according to the court, explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself, and to prevent the public entity from acting as a " 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by allowing tax dollars "to finance the evil of private prejudice." *Id.* at 619, *quoting Croson*, 488 U.S. at 492. Thus, the court found *Croson* makes clear that the City has a compelling interest in eradicating and remedying *private discrimination* in the *private subcontracting* inherent in the letting of City construction contracts. *Id.*

The Fourth Circuit, the court stated, has interpreted Croson to impose a "two step analysis for evaluating a race-conscious remedy." *Id.* at 619 *citing Maryland Troopers Ass'n*, 993 F.2d at 1076. "First, the [government] must have a 'strong basis in evidence for its conclusion that remedial action [is] necessary....' 'Absent searching judicial inquiry into the justification for such race-based measures,

there is simply no way of determining what classifications are … in fact motivated by illegitimate notions of racial inferiority or simple racial politics.' " *Id.* at 619, *quoting Maryland Troopers Ass'n*, 993 F.2d at 1076 (*citing Croson*).

The second step in the Croson analysis, according to the court, is to determine whether the government has adopted programs that " 'narrowly tailor' any preferences based on race to meet their remedial goal." *Id.* at 619. The court found that the Fourth Circuit summarized Supreme Court jurisprudence on "narrow tailoring" as follows:

> The preferences may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own. The numerical goals must be waivable if qualified minority applications are scarce, and such goals must bear a reasonable relation to minority percentages in the relevant qualified labor pool, not in the population as a whole. Finally, the preferences may not supplant race-neutral alternatives for remedying the same discrimination.

Id. at 620, *quoting Maryland Troopers Ass'n*, 993 F.2d at 1076–77 (citations omitted).

Intermediate scrutiny analysis. The court stated the intermediate scrutiny analysis for gender-based discrimination as follows: "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *Id.* at 620, *quoting Virginia*, 518 U.S. at 531, 116. This burden is a "demanding [one] and it rests entirely on the State." *Id.* at 620 *quoting Virginia*, 518 U.S. at 533.

Although gender is not "a proscribed classification," in the way race or ethnicity is, the courts nevertheless "carefully inspect[ ] official action that closes a door or denies opportunity" on the basis of gender. *Id.* at 620, *quoting Virginia*, 518 U.S. at 532-533. At bottom, the court concluded, a government wishing to discriminate on the basis of gender must demonstrate that its doing so serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 620, *quoting Virginia*, 518 U.S. at 533 (citations and quotations omitted).

As with the standards for race-based measures, the court found no formula exists by which to determine what evidence will justify every different type of gender-conscious measure. *Id.* at 620. However, as the Third Circuit has explained, "[l]ogically, a city must be able to rely on less evidence in enacting a gender preference than a racial preference because applying Croson's evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny." *Id.* at 620, *quoting Contractors Ass'n*, 6 F.3d at 1010.

The court pointed out that the Supreme Court has stated an affirmative action program survives intermediate scrutiny if the proponent can show it was "a product of analysis rather than a stereotyped reaction based on habit." *Id.* at 620, *quoting Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 582–83 (1990)(internal quotations omitted). The Third Circuit, the court said, determined that "this standard requires the City to present probative evidence in support of its stated rationale for the [10% gender set-aside] preference, discrimination against women-owned contractors." *Id.* at 620, *quoting Contractors Ass'n*, 6 F.3d at 1010.

Preenactment versus postenactment evidence. In evaluating the first step of the Croson test, whether the City had a "strong basis in evidence for its conclusion that [race-conscious] remedial action was necessary," the court held that it must limit its inquiry to evidence which the City actually considered before enacting the numerical goals. *Id.* at 620. The court found the Supreme Court has established the standard that preenactment evidence must provide the "strong basis in evidence" that race-based remedial action is necessary. *Id.* at 620-621.

The court noted the Supreme Court in *Wygant*, the plurality opinion, joined by four justices including Justice O'Connor, held that a state entity "must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." *Id.* at 621*, quoting Wygant*, 476 U.S. at 277.

The court stated that because of this controlling precedent, it was compelled to analyze the evidence before the City when it adopted the 1999 set-aside goals specifying the 20 percent MBE participation in City construction subcontracts, and for analogous reasons, the 3 percent WBE preference must also be justified by preenactment evidence. *Id.* at 621.

The court said the Fourth Circuit has not ruled on the issue whether affirmative action measures must be justified by a strong basis in preenactment evidence. The court found that in the Fourth Circuit decisions invalidating state affirmative action policies in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir.1994), and *Maryland Troopers Ass'n, Inc. v. Evans*, 993 F.2d 1072 (4th Cir.1993), the court apparently relied without comment upon post enactment evidence when evaluating the policies for *Croson* "strong basis in evidence." *Id*. at 621, n.6, *citing Podberesky*, 38 F.3d at 154 (referring to post enactment surveys of African–American students at College Park campus); *Maryland Troopers*, 993 F.2d at 1078 (evaluating statistics about the percentage of black troopers in 1991 when deciding whether there was a statistical disparity great enough to justify the affirmative action measures in a 1990 consent decree). The court concluded, however, this issue was apparently not raised in these cases, and both were decided before the 1996 Supreme Court decision in *Shaw v. Hunt*, 517 U.S. 899, which clarified that the *Wygant* plurality decision was controlling authority on this issue. *Id.* at 621, n.6.

The court noted that three courts had held, prior to *Shaw*, that post enactment evidence may be relied upon to satisfy the *Croson* "strong basis in evidence" requirement. *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir.1994), *cert. denied*, 514 U.S. 1004, 115 S.Ct. 1315, 131 L.Ed.2d 196 (1995); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir.1992); *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir.1991). *Id.* In addition, the Eleventh Circuit held in 1997 that "post enactment evidence is admissible to determine whether an affirmative action program" satisfies Croson. *Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 911–12 (11th Cir.1997), *cert. denied*, 523 U.S. 1004 (1998). Because the court believed that *Shaw* and *Wygant* provided controlling authority on the role of post enactment evidence in the "strong basis in evidence" inquiry, it did not find these cases persuasive. *Id.* at 621.

City did not satisfy strict or intermediate scrutiny: no disparity study was completed or preenactment evidence established. In this case. the court found that the City considered no evidence in 1999 before promulgating the construction subcontracting set-aside goals of 20 percent for MBEs and 3 percent for WBEs. *Id.* at 621. Based on the absence of any record of what evidence the

City considered prior to promulgating the set-aside goals for 1999, the court held there was no dispute of material fact foreclosing summary judgment in favor of plaintiff. *Id.* The court thus found that the 20 percent preference is not supported by a "strong basis in evidence" showing a need for a race-conscious remedial plan in 1999; nor is the 3 percent preference shown to be "substantially related to achievement" of the important objective of remedying gender discrimination in 1999, in the construction industry in Baltimore. *Id.*

The court rejected the City's assertions throughout the case that the court should uphold the set-aside goals based upon statistics, which the City was in the process of gathering in a disparity study it had commissioned. *Id.* at 622. The court said the City did not provide any legal support for the proposition that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.* The in process study was not complete as of the date of this decision by the court. *Id.* The court thus stated the study could not have produced data upon which the City actually relied in establishing the set-aside goals for 1999. *Id.*

The court noted that if the data the study produced were reliable and complete, the City could have the statistical basis upon which to make the findings Ordinance 610 required, and which could satisfy the constitutionally required standards for the promulgation and implementation of narrowly tailored set-aside race-and gender conscious goals. *Id.* at 622. Nonetheless, as the record stood when the court entered the December 1999 injunction and as it stood as of the date of the decision, there were no data in evidence showing a disparity, let alone a gross disparity, between MWBE availability and utilization in the subcontracting construction market in Baltimore City. *Id.* The City possessed no such evidence when it established the 1999 set-aside goals challenged in the case. *Id.*

A percentage set-aside measure, like the MWBE goals at issue, the court held could only be justified by reference to the overall availability of minority- and women-owned businesses in the relevant markets. *Id.* In the absence of such figures, the 20 percent MBE and 3 percent WBE set aside figures were arbitrary and unenforceable in light of controlling Supreme Court and Fourth Circuit authority. *Id.*

Holding. The court held that for these reasons it entered the injunction against the City on December 1999 and it remained fully in effect. *Id.* at 622. Accordingly, the City's motion for stay of the injunction order was denied and the action was dismissed without prejudice. *Id.* at 622.

The court held unconstitutional the City of Baltimore's "affirmative action" program, which had construction subcontracting "set-aside" goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

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%) 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 buisnesses 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 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE.

Plaintiffs submitted to OMWBE Orion's application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.

OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

District Court decision. The district court held OMWBE did not act arbitrarily or capriciously when it found the presumption that Taylor was socially and economically disadvantaged was rebutted because of insufficient evidence he was either Black or Native American. By requiring individualized

determinations of social and economic disadvantage, the court held the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

Void for vagueness claim. Plaintiffs asserted that the regulatory definitions of "Black American" and "Native American" are void for vagueness. The district court dismissed' the claims that the definitions of "Black American" and "Native American" in the DBE regulations are impermissibly vague.

Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State. Plaintiffs' claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations' requirement that the state make decisions based on race, the district court held were constitutional.

The Ninth Circuit on appeal affirmed the District Court. The Ninth Circuit held the district court correctly dismissed Taylor's claims againt 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 Memornadum 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 10 percent of total contract volume in the State's transportation contracting industry. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study's comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

The post-2005 decline in participation by DBEs. The Ninth Circuit was unable to affirm the district court's order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender- based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 9, *quoting Western States*, 407 F.3d at 999 ("If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination."); *id.* at 1001 ("The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs."). *Id.*

The Ninth Circuit also cited to the U.S. DOT statement made to the Court in *Western States*. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting*, U.S. Dep't of Transp., *Western States Paving Co. Case* Q&A (Dec. 16, 2014) ("In calculating availability of DBEs, [a state's] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.").

Anecdotal evidence of discrimination. The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting, Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) ("While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."); and *quoting, Croson*, 488 U.S. at 509 ("[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to Mountain West's case, it concluded that the record provides an inadequate basis for summary judgment in Montana's favor. 2017 WL 2179120 at *3.

Conclusion. The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court.

Mountain West, 2017 WL 2179120 at *4 (9th Cir.), Memorandum, May 16, 2017, at 11. 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 initial Enterprise ("DBE") program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans' DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans' DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans' substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans' program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans' DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

Court Applies *Western States Paving Co. v. Washington State DOT* decision. In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects*. Id*. at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id*. Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT's program because it was not narrowly tailored. *Id*., citing *Western States Paving Co*., 407 F.3d at 990-995, 999-1002.

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for "narrow tailoring":

"(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination." Id. 1191, citing Western States Paving Co., 407 F.3d at 997-998.

Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id*. at 1191.

Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California's transportation contracting industry. *Id*. The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a "disparity index." *Id*. An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id*. An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id*. at 1191. The Court stated: "Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and women-owned businesses should be expected to receive 13.5 percent of contact dollars from Caltrans administered federally assisted contracts." *Id*. at 1191-1192.

The Court said the research firm "examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction)." *Id*. at 1192.

The Court pointed out a key difference between federally funded and state funded contracts is that race-conscious goals were in place for the federally funded contracts during the 2002–2006 period, but not for the state funded contracts. *Id*. at 1192. Thus, the Court stated: "state funded contracts functioned as a control group to help determine whether previous affirmative action programs skewed the data." *Id*.

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans' administrative districts, and computed aggregate disparities based on statewide data. *Id*. at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian–Pacific, and Native American firms. *Id*. However, the research firm found that there were not substantial disparities for these minorities in *every* subcategory of contract. *Id*. The Court noted that the disparity study also found substantial disparities in utilization of women-owned firms for some categories of contracts. *Id.* After publication of the disparity study, the Court pointed out the research firm calculated disparity indices for all women-owned firms, including female minorities, showing substantial disparities in the utilization of all women-owned firms similar to those measured for white women. *Id*.

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm's findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id*.

Caltrans' DBE Program. Caltrans concluded that the evidence from the disparity study supported an inference of discrimination in the California transportation contracting industry. *Id*. at 1192-1193.

Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian–Pacific American-, Native American-, and women-owned firms. *Id*. The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. *Id*.

Caltrans submitted its proposed DBE program to the USDOT for approval, including a request for a waiver to implement the program only for the four identified groups. *Id*. at 1193. The Caltrans' DBE program included 66 race-neutral measures that Caltrans already operated or planned to implement, and subsequent proposals increased the number of race-neutral measures to 150. *Id*. The USDOT granted the waiver, but initially did not approve Caltrans' DBE program until in 2009, the DOT approved Caltrans' DBE program for fiscal year 2009.

District Court proceedings. AGC then filed a complaint alleging that Caltrans' implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans' DBE program. The district court on motions of summary judgment held that Caltrans' program was "clearly constitutional," as it "was supported by a strong basis in evidence of discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. *Id*. at 1193.

Subsequent Caltrans study and program. While the appeal by the AGC was pending, Caltrans commissioned a new disparity study from BBC to update its DBE program as required by the federal regulations. *Id*. at 1193. In August 2012, BBC published its second disparity report, and Caltrans concluded that the updated study provided evidence of continuing discrimination in the California transportation contracting industry against the same four groups and Hispanic Americans. *Id*. Caltrans submitted a modified DBE program that is nearly identical to the program approved in 2009, except that it now includes Hispanic Americans and sets an overall goal of 12.5 percent, of which 9.5 percent will be achieved through race- and gender-conscious measures. *Id*. The USDOT approved Caltrans' updated program in November 2012. *Id*.

Jurisdiction issue. Initially, the Ninth Circuit Court of Appeals considered whether it had jurisdiction over the AGC's appeal based on the doctrines of mootness and standing. The Court held that the appeal is not moot because Caltrans' new DBE program is substantially similar to the prior program and is alleged to disadvantage AGC's members "in the same fundamental way" as the previous program. *Id*. at 1194.

The Court, however, held that the AGC did not establish associational standing. *Id*. at 1194-1195: The Court found that the AGC did not identify any affected members by name nor has it submitted declarations by any of its members attesting to harm they have suffered or will suffer under Caltrans' program. *Id*. at 1194-1195. Because AGC failed to establish standing, the Court held it must dismiss the appeal due to lack of jurisdiction. *Id*. at 1195.

Caltrans' DBE Program held constitutional on the merits. The Court then held that even if AGC could establish standing, its appeal would fail. *Id*. at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id*. at 1195-1200.

The Court stated that race-conscious remedial programs must satisfy strict scrutiny and that although strict scrutiny is stringent, it is not "fatal in fact." *Id*. at 1194-1195 (quoting *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 237 (1995) (*Adarand III*)). The Court quoted *Adarand III*: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id. (*quoting *Adarand III*, 515 U.S. at 237.)

The Court pointed out that gender-conscious programs must satisfy intermediate scrutiny which requires that gender-conscious programs be supported by an 'exceedingly persuasive justification' and be substantially related to the achievement of that underlying objective. *Id.* at 1195 (citing *Western States Paving,* 407 F.3d at 990 n. 6.).

The Court held that Caltrans' DBE program contains both race- and gender-conscious measures, and that the "entire program passes strict scrutiny." *Id*. at 1195.

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 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. 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 contacting markets. *Id*. at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and Gross Seed also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, *citing* 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and

determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id*. The precipitous drop in DBE participation when no race-conscious methods were employed, the court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id*. On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like Sherbrooke, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (*See* district court opinions discussed *infra*.).

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 percent disparity between minority enterprise availability and utilization was not overwhelming evidence, the court stated it was significant. *Id.*

It was made more significant by the evidence showing that discriminatory factors discourage both enterprise formation of minority businesses and utilization of existing minority enterprises in public contracting. *Id.* at 1173. The court said that it would be "sheer speculation" to even attempt to attach a particular figure to the hypothetical number of minority enterprises that would exist without discriminatory barriers to minority DBE formation. *Id.* at 1173, *quoting, Croson,* 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers, the court found was nevertheless

relevant to the assessment of whether a disparity was sufficiently significant to give rise to an inference of discriminatory exclusion. *Id.* at 1174.

d. Results of removing affirmative action programs. The court took notice of an additional source of evidence of the link between compelling interest and remedy. There was ample evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears. *Id.* at 1174. Although that evidence standing alone the court found was not dispositive, it strongly supported the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination. *Id.* "Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." *Id*. at 1174, *quoting*, *Croson,* 488 U.S. at 509 (Op. of O'Connor, J.) (citations omitted).

In sum, on the basis of the foregoing body of evidence, the court concluded that the government had met its initial burden of presenting a "strong basis in evidence" sufficient to support its articulated, constitutionally valid, compelling interest. *Id.* at 1175, *citing, Croson,* 488 U.S. at 500 (quoting *Wygant,* 476 U.S. at 277).

Adarand's rebuttal failed to meet their burden. Adarand, the court found utterly failed to meet their "ultimate burden" of introducing credible, particularized evidence to rebut the government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. *Id.* at 1175. The court rejected Adarand's characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous "disparity studies" cited by the government and its amici curiae as supplemental evidence of discrimination. *Id.* The evidence cited by the government and its amici curiae and examined by the court only reinforced the conclusion that "racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation's contracting markets." *Id.*

The government's evidence permitted a finding that as a matter of law Congress had the requisite strong basis in evidence to take action to remedy racial discrimination and its lingering effects in the construction industry. *Id.* at 1175. This evidence demonstrated that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises—both discussed above—were caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at 1176. Congress was not limited to simply proscribing federal discrimination against minority contractors, as it had already done. The court held that the Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice. *Id*. at 1176.

The court also rejected Adarand's contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. *Id*. at 1176. If Congress had valid evidence, for example that Asian–American individuals are subject to

discrimination because of their status as Asian–Americans, the court noted it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. *Id.* "Race" the court said is often a classification of dubious validity—scientifically, legally, and morally. The court did not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." *Id.* at 1176, note 18, *citing,* 15 U.S.C. § 637(d)(3)(C).

The court stated that it was not suggesting that the evidence cited by the government was unrebuttable. *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). Thc 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 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. Mr. Taylor acknowledged that he grew up thinking of himself as Caucasian, but asserted that in his late 40s, when he realized he had Black ancestry, he "embraced his Black culture." *Id.* at *2.

In 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as a MBE under Washington State law. *Id.* at *2. In the application, Mr. Taylor identified himself as Black, but not Native American. *Id.* His application was initially rejected, but after Mr. Taylor appealed the decision, OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law. *Id.* at *2.

In 2014, Plaintiffs submitted, to OMWBE, Orion's application for DBE certification under federal law. *Id.* at *2. His application indicated that Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification submitted with the federal application. *Id*. Considered with his initial submittal were the results from the 2010 genetic ancestry test that estimated that he was 90 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. *Id.* Mr. Taylor submitted the results of his father's genetic results, which estimated that he was 44 percent European, 44 percent Sub-Saharan African, and 12 percent East Asian. *Id.* Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray, identified as a "Negro," who was around 86 years old, with no other supporting documentation to indicate she was an ancestor of Mr. Taylor. *Id.* at *2.

In 2014, Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. *Id.* at *3. OMWBE also found that even if there was sufficient evidence to find that Mr. Taylor was a member of either of these racial groups, "the presumption of disadvantage has been rebutted," and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*

Mr. Taylor appealed the denial of the DBE certification to the USDOT. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Id.* at **3-4. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.*, U.S. District Court for the Western District of Washington case number 15-5267 BHS. In 2015, the USDOT affirmed the denial of Orion's DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE's decision. *Id.* at *4.

This case was filed in 2016. *Id.* at *4. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) "Discrimination under 42 U.S.C. § 1983" (reference is made to Equal Protection), (C) "Discrimination under 42 U.S.C. § 2000d," (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49 C.F.R. § 26.5 are void for vagueness. *Id*. Plaintiffs seek damages, injunctive relief: ("[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE's representatives ... and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE," and a declaration the "definitions of 'Black American' and 'Native American' in 49 C.F.R. § 26.5 to be void as impermissibly vague,") and attorneys' fees, and costs. *Id.*

OMWBE did not act arbitrarily or capriciously in denying certification. The court examined the evidence submitted by Mr. Taylor and by the State Defendants. *Id.* at **7-12. The court held that OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence that he was a member of either the Black or Native American groups. *Id.* at *8. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.* at *9. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a "member of a designated disadvantaged group," the court stated Mr. Taylor "must demonstrate social and economic disadvantage on an individual basis." *Id.* Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.*

In making these decisions, the court found OMWBE considered the relevant evidence and "articulated a rational connection between the facts found and the choices made." *Id*. at *10. By requiring individualized determinations of social and economic disadvantage, the Federal DBE "program requires states to extend benefits only to those who are actually disadvantaged." *Id., citing, Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was "actually disadvantaged" or when it denied Plaintiff's application. *Id.*

The U.S. DOT affirmed the decision of the state OMWBE to deny DBE status to Orion. *Id.* at **10-11.

Claims for violation of equal protection. To the extent that Plaintiffs assert a claim that, on its face, the Federal DBE Program violates the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at **12-13. The Ninth Circuit has held that the Federal DBE Program, including its implementing regulations, does not, on its face, violate the Equal Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). *Id.* The Western States Court held that Congress had evidence of discrimination against women and minorities in the national transportation contracting industry and the Federal DBE Program was a narrowly tailored means of remedying that sex and raced based discrimination. *Id.* Accordingly, the court found race-based determinations under the program have been determined to be constitutional. *Id.* The court noted that several other circuits, including the Seventh, Eighth, and Tenth have held the same. *Id.* at *12*, citing, Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 936 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota*

Dep't of Transportation, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000).

To the extent that Plaintiffs assert that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at *12. Plaintiffs argue that, as applied to them, the regulations "weigh adversely and disproportionately upon" mixed-race individuals, like Mr. Taylor. *Id*. This claim should be dismissed, according to the court, as the Equal Protection Clause prohibits only intentional discrimination. *Id.* Even considering materials filed outside the administrative record, the court found Plaintiffs point to no evidence that the application of the regulations here was done with an intent to discriminate against mixed-race individuals, or that it was done with racial animus. *Id.* Further, the court said Plaintiffs offer no evidence that application of the regulations creates a disparate impact on mixed-race individuals. *Id.* Plaintiffs' remaining arguments relate to the facial validity of the DBE program, and the court held they also should be dismissed. *Id.*

The court concluded that to the extent that Plaintiffs base their equal protection claim on an assertion that they were treated differently than others similarly situated, their "class of one" equal protection claim should be dismissed. *Id.* at *13. For a class of one equal protection claim, the court stated Plaintiffs must show they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Plaintiffs, the court found, have failed to show that Mr. Taylor was intentionally treated differently than others similarly situated. *Id.* at *13. Plaintiffs pointed to no evidence of intentional differential treatment by the Defendants. *Id.* Plaintiffs failed to show that others that were similarly situated were treated differently. *Id.*

Further, the court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment. *Id.* at *13. Both the State and Federal Defendants according to the court, offered rational explanations for the denial of the application. *Id.* Plaintiffs' Equal Protection claims, asserted against all Defendants, the court held, should be denied. *Id.*

Void for vagueness claim. Plaintiffs assert that the regulatory definitions of "Black American" and both the definition of "Native American" that was applied to Plaintiffs and a new definition of "Native American" are void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments' due process clauses. *Id.* at *13.

The court pointed out that although it can be applied in the civil context, the Seventh Circuit Court of Appeals has noted that in relation to the DBE regulations, the void for vagueness "doctrine is a poor fit." *Id.* at *14, *citing, Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 947–48 (7th Cir. 2016). Unlike criminal or civil statutes that prohibit certain conduct, the Seventh Circuit noted that the DBE regulations do not threaten parties with punishment, but, at worst, cause lost opportunities for contracts. *Id.* In any event, the court held Plaintiffs' claims that the definitions of "Black American" and of "Native American" in the DBE regulations are impermissibly vague should be dismissed. *Id.*

The court found the regulations require that to show membership, an applicant must submit a statement, and then if the reviewer has a "well founded" question regarding group membership, the

reviewer must ask for additional evidence. 49 C.F.R. § 26.63 (a)(1). *Id.* at *14. Considering the purpose of the law, the court stated the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit. *Id.*

The definition of "socially and economically disadvantaged individual" as a "citizen ... who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to their individual qualities," the court determined, gives further meaning to the definitions of "Black American" and "Native American" here. *Id.* at *14. "Otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity." *Id.* at *14, *quoting, Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005).

The court held plaintiffs also fail to show that these terms, when considered within the statutory framework, are so vague that they lend themselves to "arbitrary" decisions. *Id.* at *14. Moreover, even if the court did have jurisdiction to consider whether the revised definition of "Native American" was void for vagueness, the court found a simple review of the statutory language leads to the conclusion that it is not. *Id.* The revised definition of "Native Americans" now "includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiian." *Id., citing,* 49 C.F.R. § 26.5. This definition, the court said, provides an objective criteria based on the decisions of the tribes, and does not leave the reviewer with any discretion. *Id.* The court thus held that Plaintiffs' void for vagueness challenges were dismissed. *Id.*

Claims for violations of 42 U.S.C. §2000d against the State Defendants. Plaintiffs' claims against the State Defendants for violation of Title VI (42 U.S.C. § 2000d), the court also held, should be dismissed. *Id.* at *16. Plaintiffs failed to show that the State Defendants engaged in intentional impermissible racial discrimination. *Id.* The court stated that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* The court pointed out the DBE regulations' requirement that the State make decisions based on race has already been held to pass constitutional muster in the Ninth Circuit. *Id.* at *16, *citing, Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). Plaintiffs made no showing that the State Defendants violated their Equal Protection or other constitutional rights. *Id.* Moreover, Plaintiffs, the court found, failed to show that the State Defendants intentionally acted with discriminatory animus. *Id.*

The court held to the extent the Plaintiffs assert claims that are based on disparate impact, those claims are unavailable because "Title VI itself prohibits only intentional discrimination." *Id.* at *17, *quoting, Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). The court therefore held this claim should be dismissed. *Id.* at *17.

Holding. Therefore, the court ordered that Plaintiffs' Motion for Partial Summary Judgment was: Denied as to the federal claims; and Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD.

In addition, the Federal Defendants' Motion for Summary Judgment on the Administrative Procedure Act, Equal Protection, and Void for Vagueness Claims was Granted; and the claims asserted against the Federal Defendants were Dismissed.

The State Defendants' Cross Motion for Summary Judgment was Granted as to Plaintiffs claims against the State Defendants for violations of the APA, Equal Protection, Void for Vagueness, 42 U.S.C. § 1983, and 42 U.S.C. § 2000d, and those claims were Dismissed. *Id.* Also, the court held the State Defendants' Cross Motion for Summary Judgment was Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD. *Id.*

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 0.81 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 F3d 57, 2016 WL 4719049 (D.C. Cir. 2016), cert. denied, 2017 WL 1375832 (2017), affirming on other grounds, Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 107 F.Supp. 3d 183 (D.D.C. 2015).

In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at *1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id* *1. Businesses owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.*, *quoting* 15 U.S.C. § 627(a)(5).

The Section 8(a) statute is race-neutral. The court rejected Rothe's allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id* *1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA's *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id* *2, *citing* 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id* at *2. The court stated the statute "readily survives" the rational basis

scrutiny standards. *Id* *2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id.*

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id* *2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id* *2.

The court found that the definition of the term "socially disadvantaged" does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id* *3. On its face, the court stated the term envisions a individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id.* The court said that the statute definition of the term "social disadvantaged" does not provide for preferential treatment based on an applicant's race, but rather on an individual applicant's experience of discrimination. *Id* *3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered "socially disadvantaged." *Id* *3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id.*

The court pointed out that the SBA's implementation of the statute's definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id* *4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA's implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id* *4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id* *5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner's experience of discrimination. *Id* *6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id.*

The court noted that the Supreme Court and this court's discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id* *8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id*. at *7.

The SBA statute does not trigger strict scrutiny. The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id* *10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id* *9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id.* The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id.*

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id* *10. Instead, the court considered whether the statute is supported by a rational basis. *Id.* The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id* *10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id.* Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id* *11. The statutory scheme, the court said, is rationally related to that end. *Id.*

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

Other issues. The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id* *11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id.*

Dissenting Opinion. There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id* *12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id* *13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id* *16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id* *22.

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 disadvantages 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 relief upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing* to *Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id*.

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether Croson's evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress "should be able to rely on the most recently available data so long as that data is reasonably up-to-date." 545 F.3d at 1039. The Federal Circuit affirmed the district court's conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id*.

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it "must be proven to have been before Congress prior to enactment of the racial classification." 545 F.3d at 1039, *quoting Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id*. at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD "which Congress was emphatically not required to make." *Id*. at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the "government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy." 545 F.3d at 1040, footnote 11 *quoting Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors 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 percent of contract actions, 93 percent of dollars awarded, and in which 92.2 percent of non-8(a) minority-owned SDBs are registered. *Id*. Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe's contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at *10. The court found convincing the expert's response to Rothe's critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert's reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, *citing DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, *citing DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants' additional expert's testimony as admissible in connection with that expert's review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id*. at *11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at *12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id*. The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

Plaintiff's expert's testimony rejected. The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at *13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred methodology for conducting disparity studies "appears to be well outside of the mainstream in this particular field." *Id.* at *14. The expert's methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

The Section 8(a) Program is constitutional on its face. The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. *Id.* at *15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at *17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at *17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government's initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action – specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at *17, *citing DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at *17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at *18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to 2-5 percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; *citing DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at *18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from

which an inference of discriminatory exclusion could arise. *Id.* at *18. The court concurred with the *DynaLantic* court's conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe's argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id*. at *19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at *19. The court pointed out that any person may present credible evidence challenging an individual's status as socially or economically disadvantaged. *Id.* The court said that Rothe's argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the "narrowness" of the narrow-tailoring mandate relates to the relationship between the government's interest and the remedy it prescribes. *Id.*

Conclusion. The court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government's racial classification, the purported need for remedial action is supported by strong and unrebutted 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 5 percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id*. Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id*. DoD has established a goal of awarding approximately 2 percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at *3. The Section 8(a) program allows the SBA, "whenever it determines such action is necessary and appropriate," to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a "sole source" basis (i.e., reserved to one firm) or on a "competitive" basis (i.e., between two or more Section 8(a) firms). *DynaLantic, at *3-4; 13 CFR 124.501(b).*

Plaintiff's business and the simulation and training industry. DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic at *5.*

Compelling interest. The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." DynaLantic*,* at *9*.* First, the government must "articulate a legislative goal that is properly considered a compelling government interest." *Id*. *quoting Sherbrooke Turf v. Minn. DOT.,* 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, "the government must demonstrate 'a strong basis in evidence' supporting its

conclusion that race-based remedial action was necessary to further that interest." *DynaLantic,* at *9, *quoting Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to DynaLantic to present "credible, particularized evidence" to rebut the government's "initial showing of a compelling interest." *DynaLantic,* at *10 *quoting Concrete Works of Colorado, Inc. v. City and County of Denver,* 321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, *citing Rothe Dev. Corp. v. U.S. Dep't of Def.* ("*Rothe III* "), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a "passive participant." *DynaLantic*, at *11. The Court rejected *DynaLantic's* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, *citing Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 *quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 492 (1995), and Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of "discriminatory barriers" to "fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts." *DynaLantic, at *11, quoting Adarand VII,* 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a "passive participant" in private discrimination in the relevant industries or markets. *DynaLantic,* at *11, *citing Concrete Works IV,* 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic,* at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic,* at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id*. The Court then followed the 10th Circuit Court of Appeals' approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the

formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic,* at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or "old boy" business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic,* at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id*.

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic,* at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id*.

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic,* at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic,* at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic,* at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic,* at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic,* at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.,* 963 F.2d 420 (D.C. Cir. 1992) "require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination." *DynaLantic,* at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic,* at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program

is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic,* at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic,* at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic,* at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic,* at *31. The Court stated that the government has therefore "established that there are at least some circumstances where it would be 'necessary or appropriate' for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic,* at *31, *citing* 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff's facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic,* at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic,* at *31, n. 13.

Rejection of DynaLantic's rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic,* at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government's initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic,* at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a "passive participant" when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic,* at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic,* at *35, *citing Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id, citing Croson,* 488 U.S. 500. Accordingly, the Court stated that DynaLantic's claim that the government must independently verify the evidence presented to it is unavailing. *Id. DynaLantic,* at *35.

Also in terms of DynaLantic's arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic,* at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id*. The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic,* at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic,* at *35. In short, the Court found that DynaLantic's "general criticism" of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic,* at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic,* at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic,* at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different area. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic,* at *37. Second, it provided "forceful" evidence of discriminatory barriers to minority business development. *Id*. Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id*. The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id*.

As-applied challenge. *DynaLantic* also challenged the SBA and DoD's use of the Section 8(a) program as applied: namely, the agencies' determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic,* at *37. Significantly, the Court points out that the federal Defendants "concede that they do not have evidence of discrimination in this industry." *Id.* Moreover, the Court points out that the federal Defendants admitted that there "is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry." *DynaLantic,* at *38. The federal Defendants also admit that they are "unaware of any discrimination in the simulation and training industry." *Id*. In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic,* at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic,* at *38. The Court concludes that the federal Defendants' position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court's decision in *Croson,* as well as the Federal Circuit's decision in *O'Donnell Construction Company,* which adopted *Croson's* reasoning. *DynaLantic,* at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic,* at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson's* evidentiary requirement to show an inference of discrimination. *DynaLantic,* at *39, *citing Croson*, 488 U.S. 501. The Court rejects the federal government's position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic,* at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic,* at *40, *citing Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic,* at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic,* at *40.

The Court recognized that legislation considered in *Croson, Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic,* at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id*.

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic,* at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic,* at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic,* at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id*.

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic,* at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic,* at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic,* at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic,* at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic,* at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic,* at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic,* at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic,* at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than 5 percent of contract dollars, are facially constitutional. *DynaLantic,* at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to 2-5 percent of government contracts in industries including but not limited to construction. *Id*. The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic,* at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic,* at *48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id*. The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds $250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic,* at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United Status and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the sum of $1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

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.

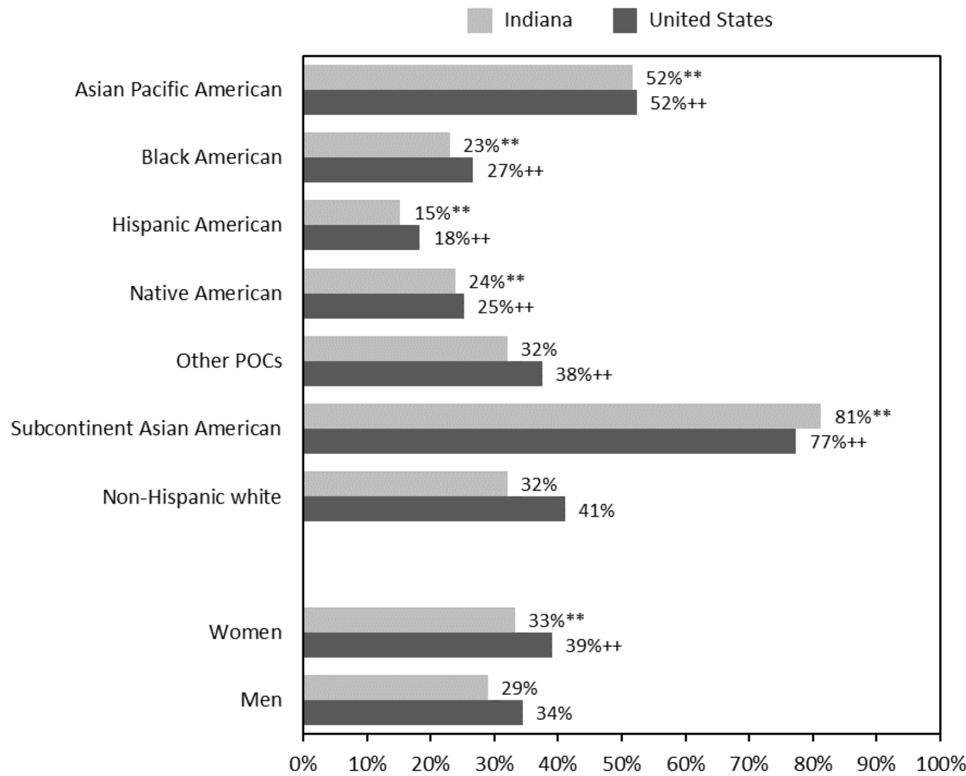
APPENDIX C.
Quantitative Analyses of Marketplace Conditions

BBC Research & Consulting (BBC) conducted extensive quantitative analyses of marketplace conditions in Indiana to assess whether persons of color (POCs), women, and POC- and woman-owned businesses face any barriers in the local construction; professional services; and non-professional services, goods, and supplies industries. BBC examined local marketplace conditions in four primary areas:

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

Appendix C 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

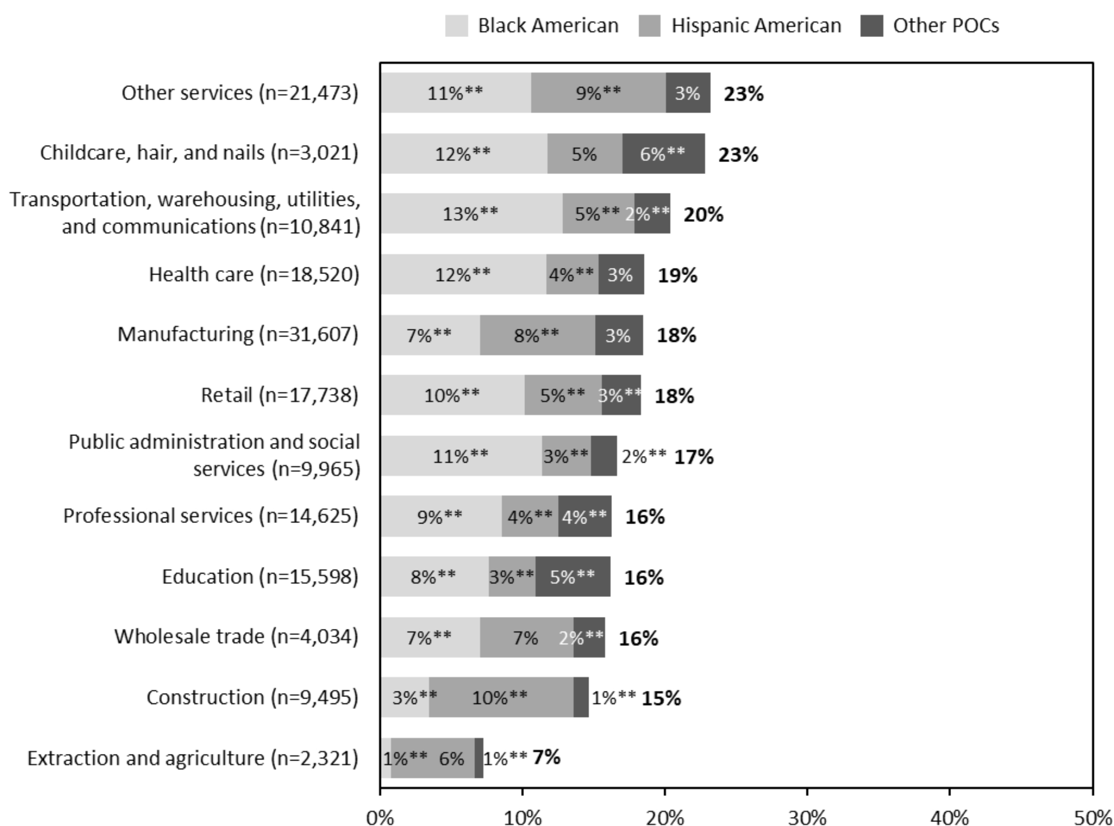


Note: **, ++ Denotes that the difference in proportions between the POC group and white Americans (or between women and men) is statistically significant at the 95% confidence level for Indiana and the United States, respectively.

Source: BBC 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 white Americans working in Indiana, smaller percentages of Black Americans, Hispanic Americans, and Native Americans have four-year college degrees.

Figure C-2.
Percent representation of POCs in various industries in Indiana, 2014-2018



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

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

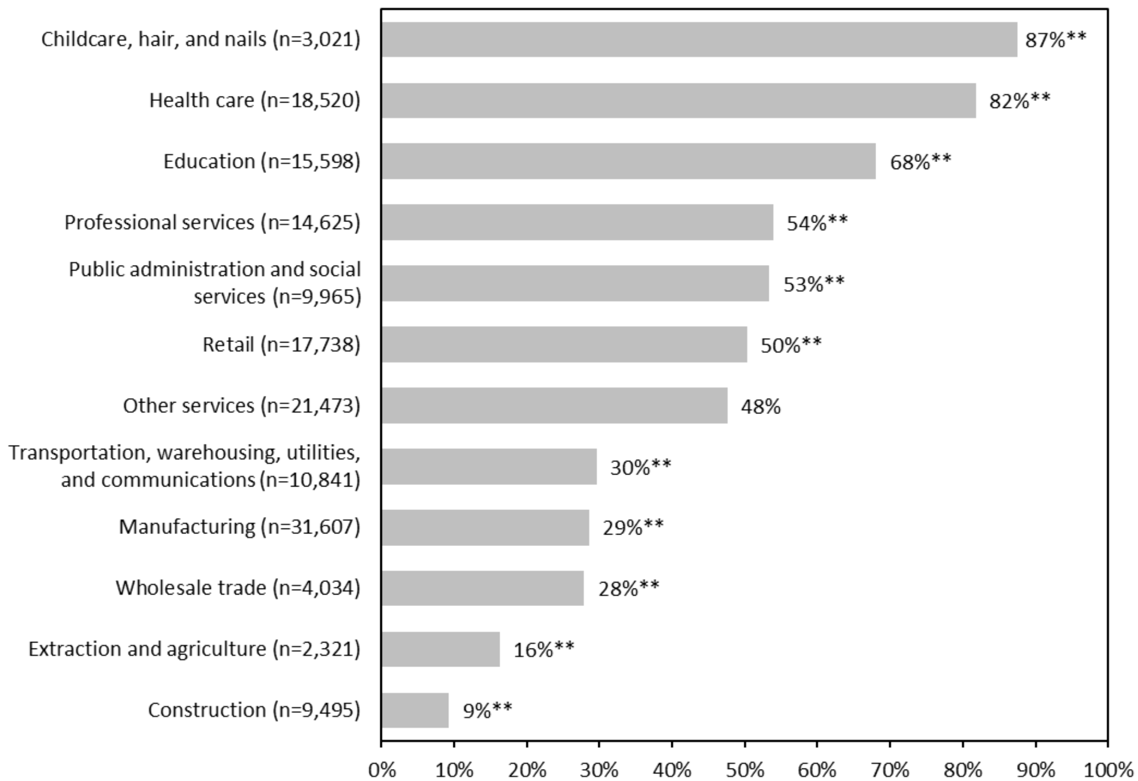
Other race POCs include Asian Pacific Americans, Native Americans, Subcontinent Asian Americans, and POCs of other races and ethnicities.

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 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 POC workers are other services; childcare, hair, and nails; and transportation, warehousing, utilities, and communications. Industries in Indiana with the lowest representations of POC 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 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 wholesale trade, 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)	Non-prof. svcs, goods, and supplies (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 POCs	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 %**

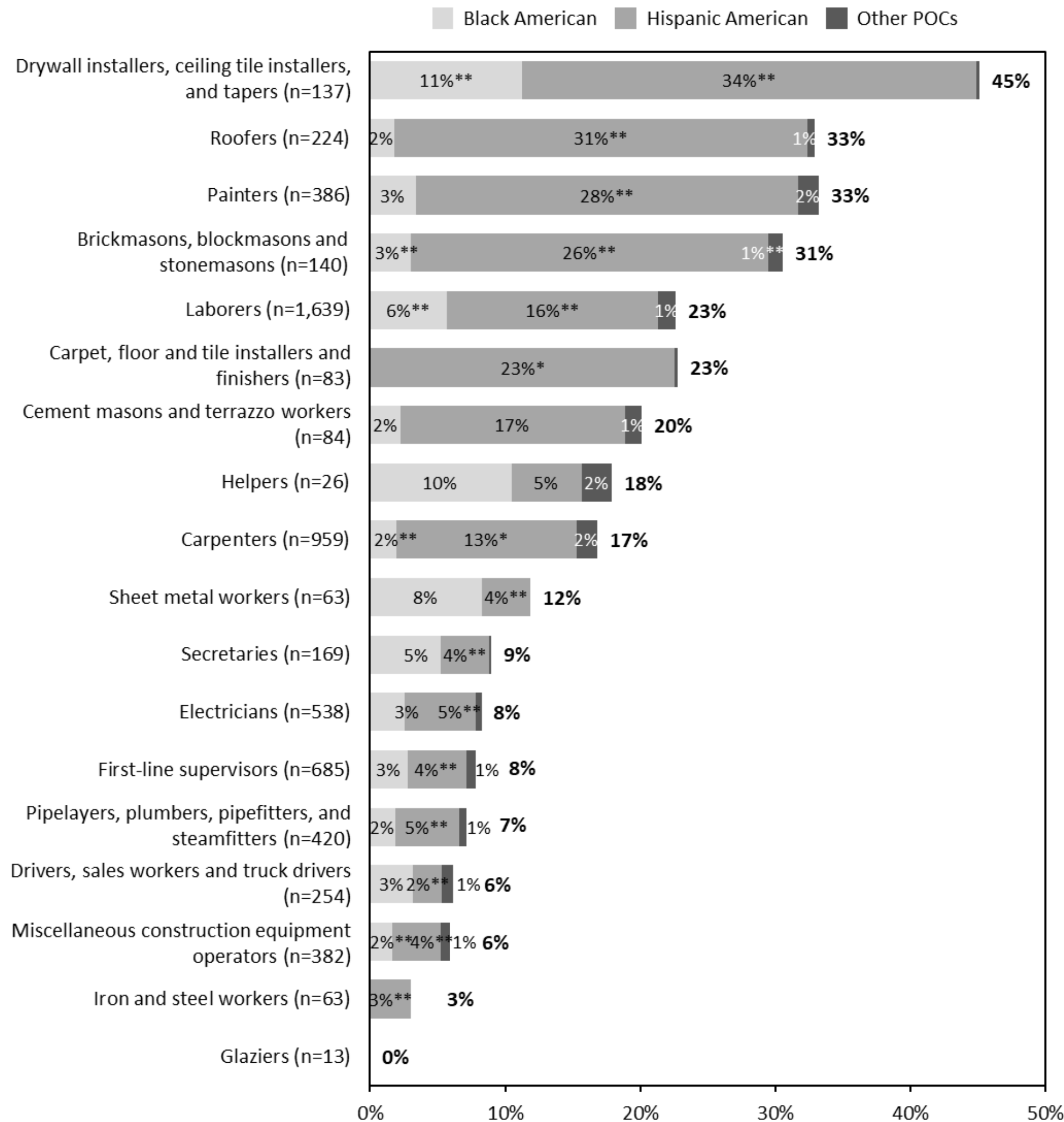
United States	All Industries (n= 7,743,859)	Construction (n= 472,930)	Professional Services (n= 580,595)	Non-prof. svcs, goods, and supplies (n= 536,543)
Race/ethnicity				
Asian Pacific American	4.9 %	1.8 % **	6.7 % **	4.4 % **
Black American	12.5 %	5.9 % **	10.2 % **	13.5 % **
Hispanic American	17.0 %	28.0 % **	10.5 % **	20.7 % **
Native American	1.2 %	1.3 % **	0.9 % **	1.0 % **
Other POCs	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 %**

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 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 non-professional services, goods, and supplies industry than all industries considered together.

Figure C-5.
Percent representation of POCs in selected construction occupations in Indiana, 2014-2018



Note: *, ** Denotes that the difference in proportions between POC workers in the specified occupation and all construction occupations considered together is statistically significant at the 90% or 95% confidence level, respectively.

The representation of POCs among all Indiana construction workers is 3% for Black American, 10% for Hispanic Americans, and 16% for other race POCs.

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

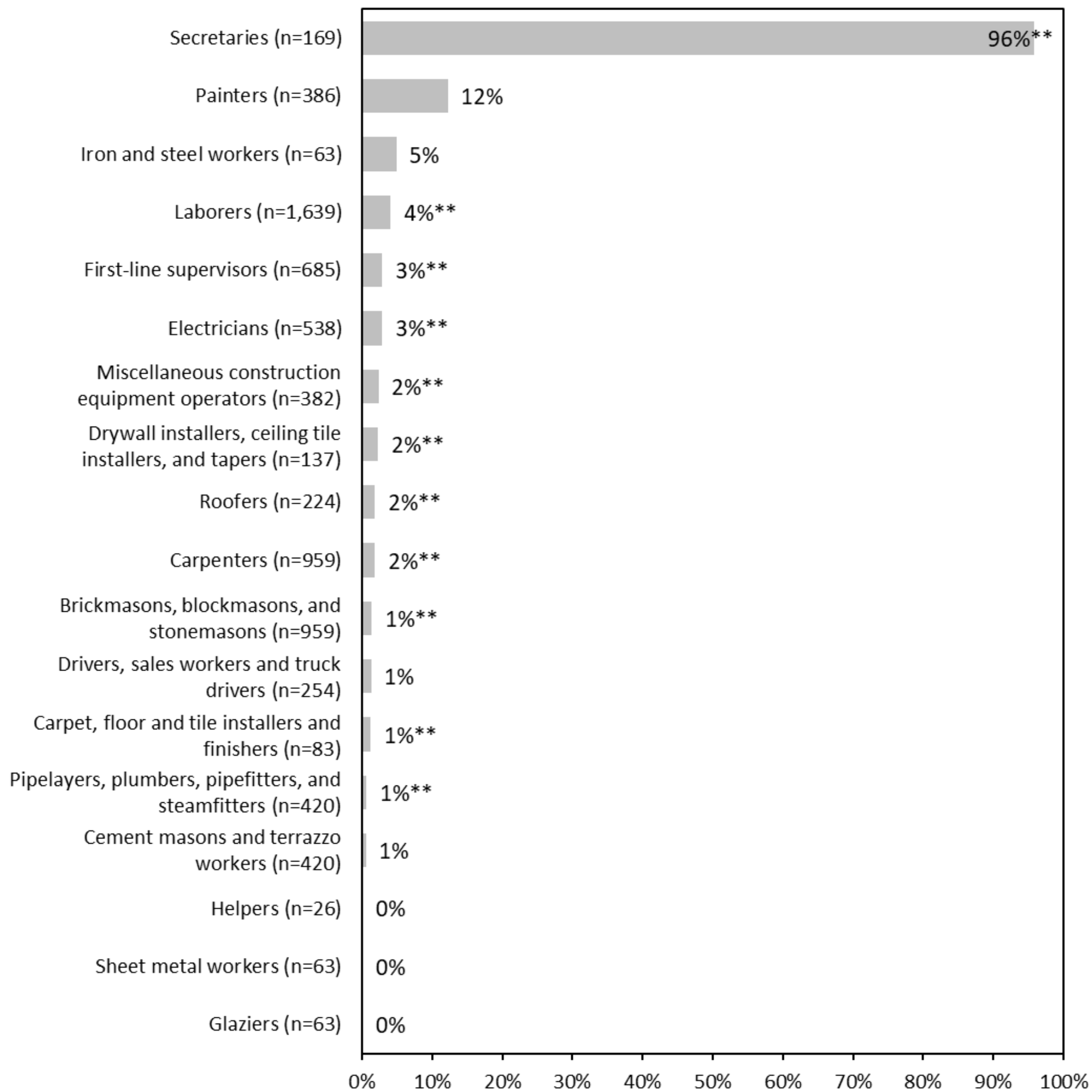
Plasterers and stucco masons are not depicted, because none were found in the study area sample.

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 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 POC workers in Indiana are drywall installers, ceiling tile installers, and tapers; roofers; and painters. The construction occupations with the lowest representations of POC workers in Indiana are miscellaneous construction equipment operators, iron and steel workers, and glaziers.

Figure C-6.
Percent representation of women in selected construction occupations in Indiana, 2014-2018



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 from 2014-208 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 POC group and white Americans (or between women and men) 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:

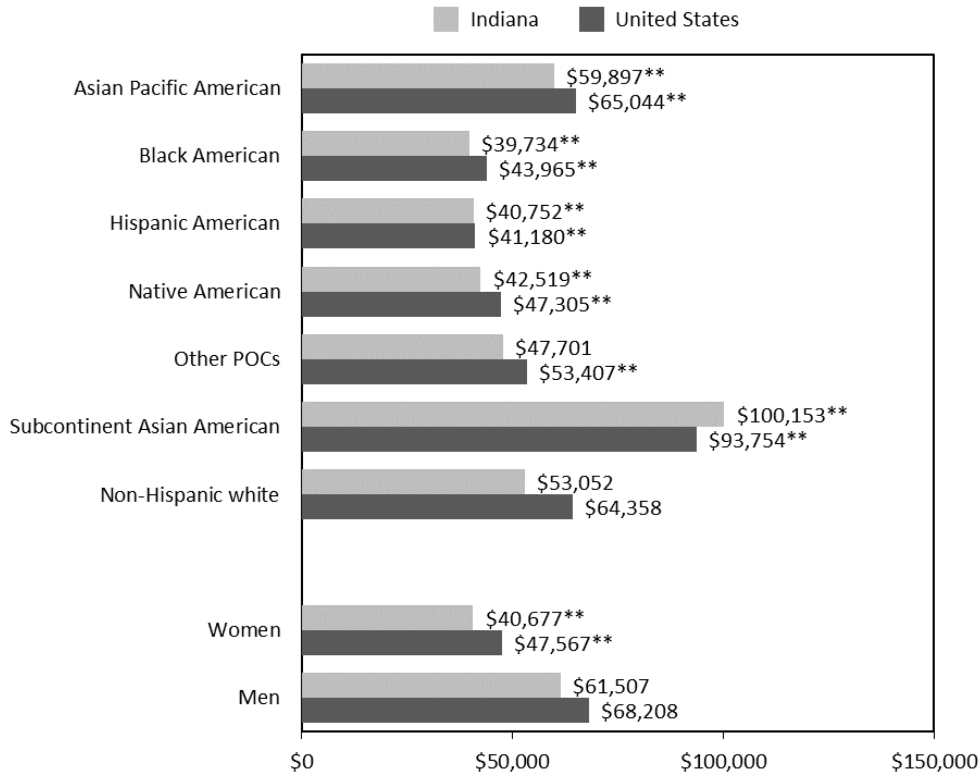
BBC from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: http://usa.ipums.org/usa/.

	Construction	Professional Services	Non-prof. svcs, goods, and supplies
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 POCs	0.0 % †	14.4 % †	0.0 % †
Subcontinent Asian American	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 %

United States	Construction	Professional Services	Non-prof. svcs, goods, and supplies
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 POCs	5.5 % **	5.2 %	1.9 % **
Subcontinent Asian American	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 %

Figure C-7 indicates that smaller percentages of Black Americans, Hispanic Americans, and Native Americans than white Americans work as managers in the Indiana construction industry. Similarly, smaller percentages of Black Americans, Hispanic Americans, and Native Americans than white Americans work as managers in the Indiana professional services industry. Finally, a smaller percentage of Black Americans than white Americans work as managers in the Indiana non-professional services, goods, and supplies industry. A smaller percentage of women than men work as managers in the Indiana construction; professional services; and non-professional services, goods, and supplies 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 white Americans (for POC groups), or from men (for women) at the 95% confidence level for Indiana and the United States as a whole, respectively.

Source: BBC 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 white Americans, Black Americans, Hispanic Americans, Native Americans, and other race POCs 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 regression includes 92,789 observations.

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

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

*, ** Denotes statistical significance at the 90% and 95% confidence levels, respectively.

The referent for each set of categorical variables is as follows: white Americans 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.

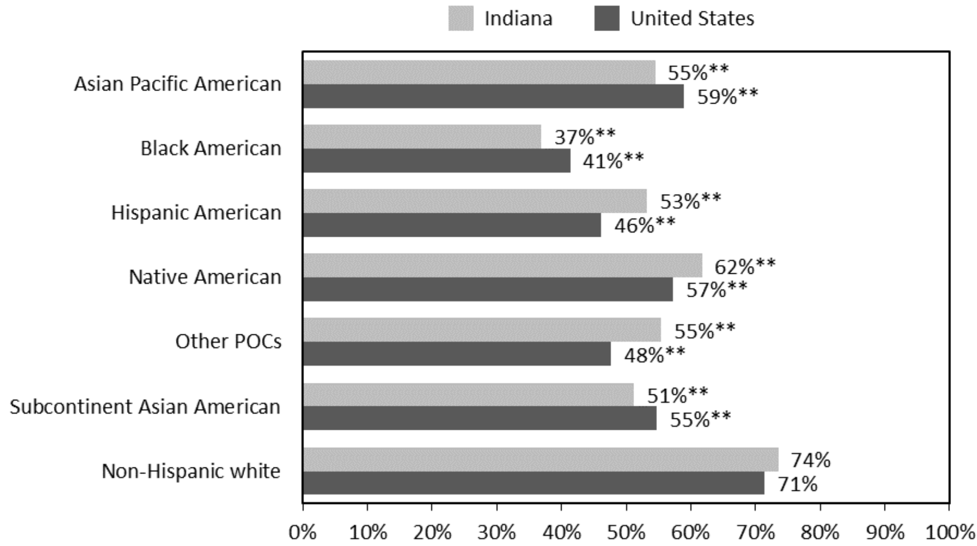
Source:

BBC 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 POCs	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 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 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



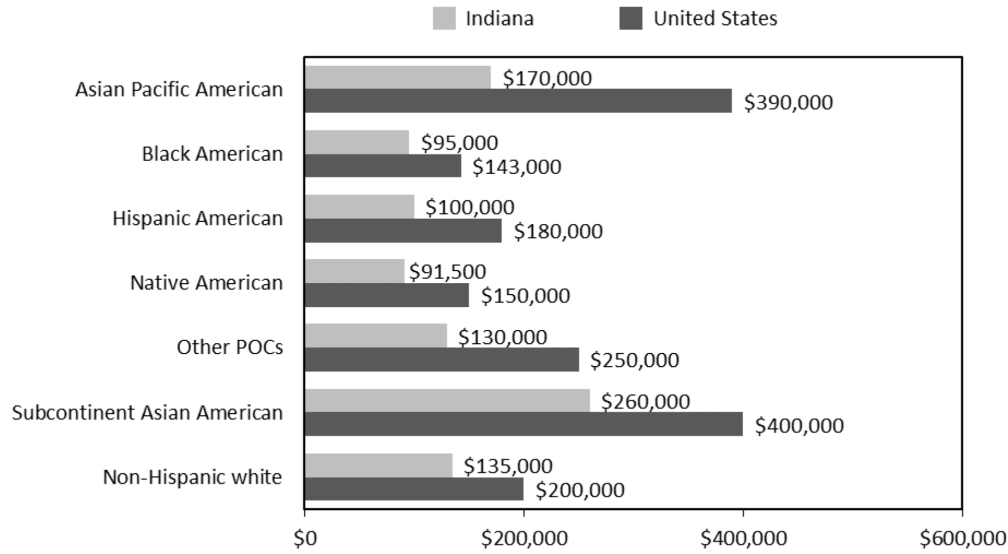
Note: The sample universe is all households.

**, ++ Denotes statistically significant differences from white Americans at the 95% confidence level for Indiana and the United States as a whole, respectively.

Source: BBC 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 white Americans, smaller percentages of Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, Subcontinent Asian Americans, and other race POCs 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 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 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.

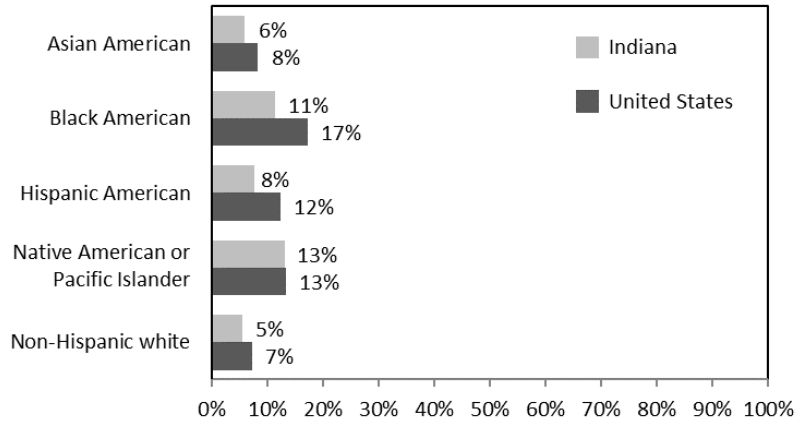


Figure C-12 indicates that Black Americans, Hispanic Americans, and Native Americans or Pacific Islanders in Indiana are denied conventional home purchase loans at higher rates than white Americans.

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.

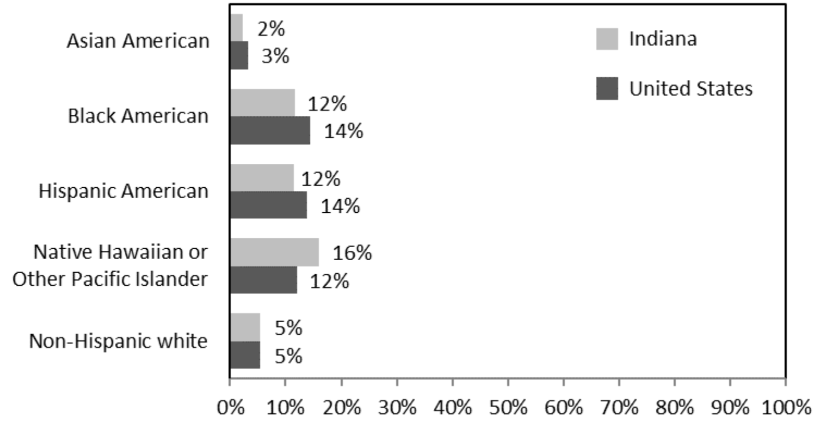


Figure C-13 indicates that Black Americans, Hispanic Americans, and Native American or Pacific Islanders in Indiana are awarded subprime conventional home purchase loans at greater rates than white Americans.

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 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 from 2003 Survey of Small Business Finance.

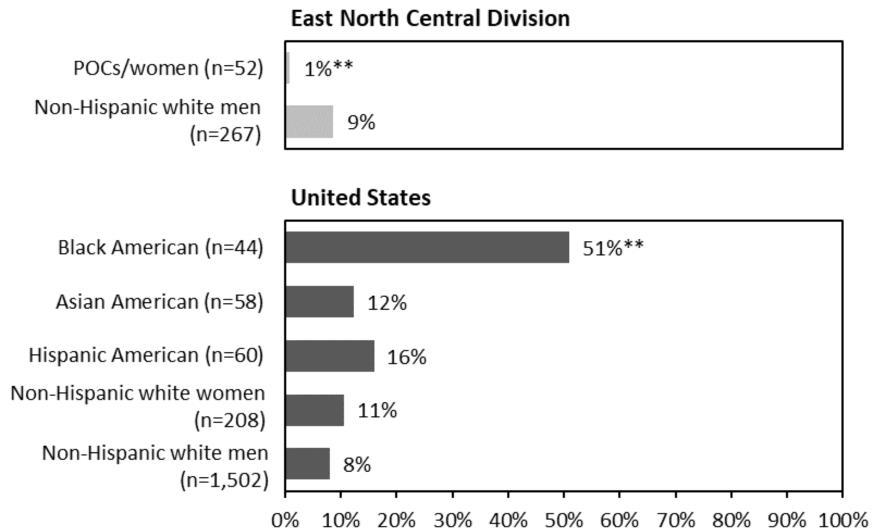


Figure C-14 indicates that in 2003, POC- and woman-owned businesses in the East North Central Division were denied business loans at a lower rate than businesses owned by white men. In the United States as a whole, Black American-owned businesses were denied business loans at greater rates than businesses owned by 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 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 from 2003 Survey of Small Business Finance.

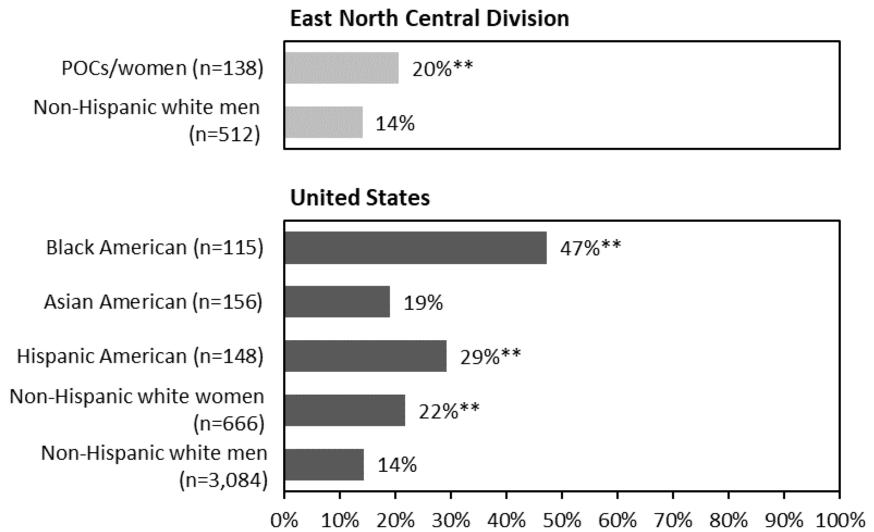


Figure C-15 indicates that in 2003, POC- and woman-owned businesses in the East North Central Division were more likely than businesses owned by white men to not apply for business loans due to a fear of denial. In addition, Black American-, Hispanic American-, and white woman-owned businesses in the United States were more likely than businesses owned by 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 white men (for POC groups and women) at the 95% confidence level.

The East North Central Division consists of Indiana, Illinois, Michigan, Ohio, and Wisconsin.

Source:

BBC from 2003 Survey of Small Business Finance.

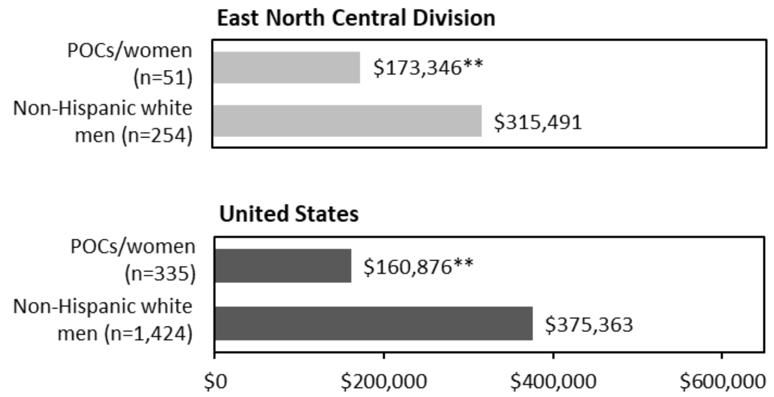


Figure C-16 indicates that, in 2003, POC- and woman-owned businesses in the East North Central Division and the United States who received business loans were approved for loans that were worth less than loans received by businesses owned by white men.

Figure C-17.
Business ownership rates in study-related industries in Indiana and the United States, 2014-2018

Note:

*, ** Denotes that the difference in proportions between the POC group and white Americans or between women and men is statistically significant at the 90% and 95% confidence level, respectively.

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

Source:

BBC 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/.

Indianapolis	Construction	Professional Services	Non-prof. svcs, goods, and supplies
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 POCs	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 %
All individuals	**22.4 %**	**12.2 %**	**7.5 %**

United States	Construction	Professional Services	Non-prof. svcs, goods, and supplies
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 POCs	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 %
All individuals	**22.7 %**	**14.8 %**	**9.4 %**

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 Americans working in the Indiana professional services industry exhibited lower rates of business ownership than white Americans. 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 non-professional services, goods, and supplies industry exhibited a lower rate of business ownership than white Americans.

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, white Americans for the race variables, and men for the gender variable.

Source:

BBC 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 POCs	-0.6024
Subcontinent Asian American	0.4410
Women	-0.2350 **

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
	Actual	Benchmark	(100 = Parity)
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, BBC 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 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 white women own construction businesses in Indiana at a rate that is 72 percent that of similarly-situated white men (i.e., white men who share the same personal characteristics).

Figure C-20.
Predictors of business ownership in professional services in Indiana, 2014-2018

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 POCs	-0.0856	
Subcontinent Asian American	-0.5180	**
Women	-0.1326	**

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, white Americans for the race variables, and men for the gender variable.

Source:

BBC 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.

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 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
	Actual	Benchmark	(100 = Parity)
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, BBC 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 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 white Americans (i.e., white Americans who share the same personal characteristics). Similarly, women own professional services businesses in Indiana at a rate that is 84 percent that of similarly-situated men.

Figure C-22.
Predictors of business ownership in non-professional services, goods, and supplies 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, white Americans for the race variables, and men for the gender variable.

Source:

BBC 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 POCs	0.0000	†
Subcontinent Asian American	0.5882	
Women	0.1041	**

Figure C-22 indicates that being a POC or a woman is not statistically related to lower rates of owning non-professional services, goods, and supplies 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.

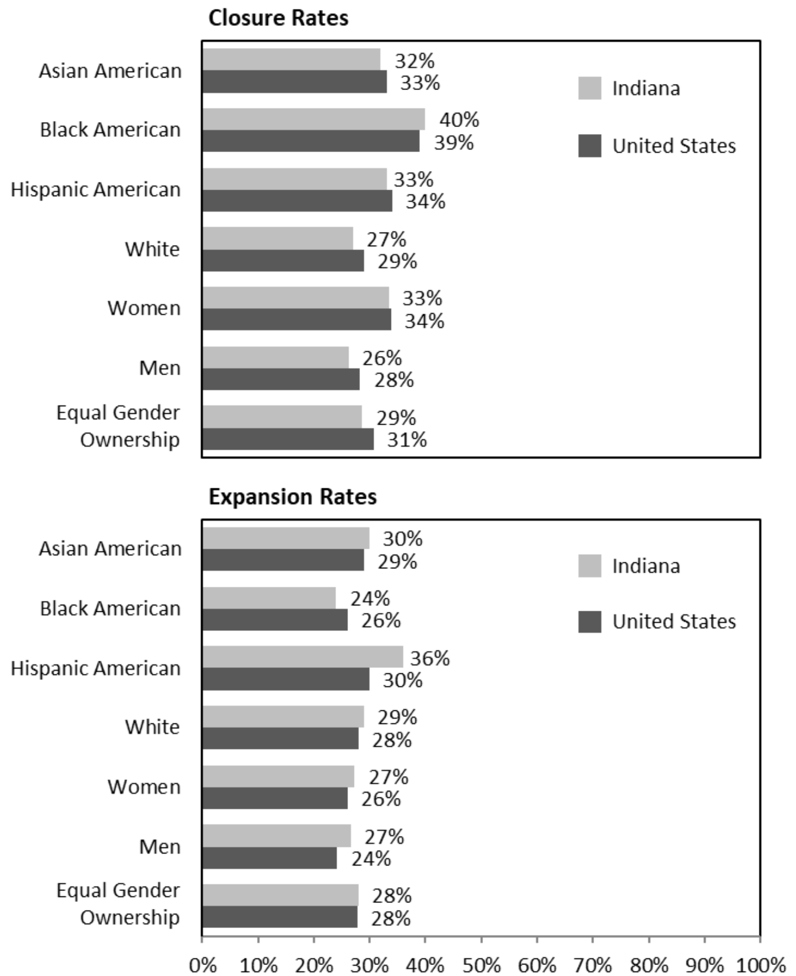
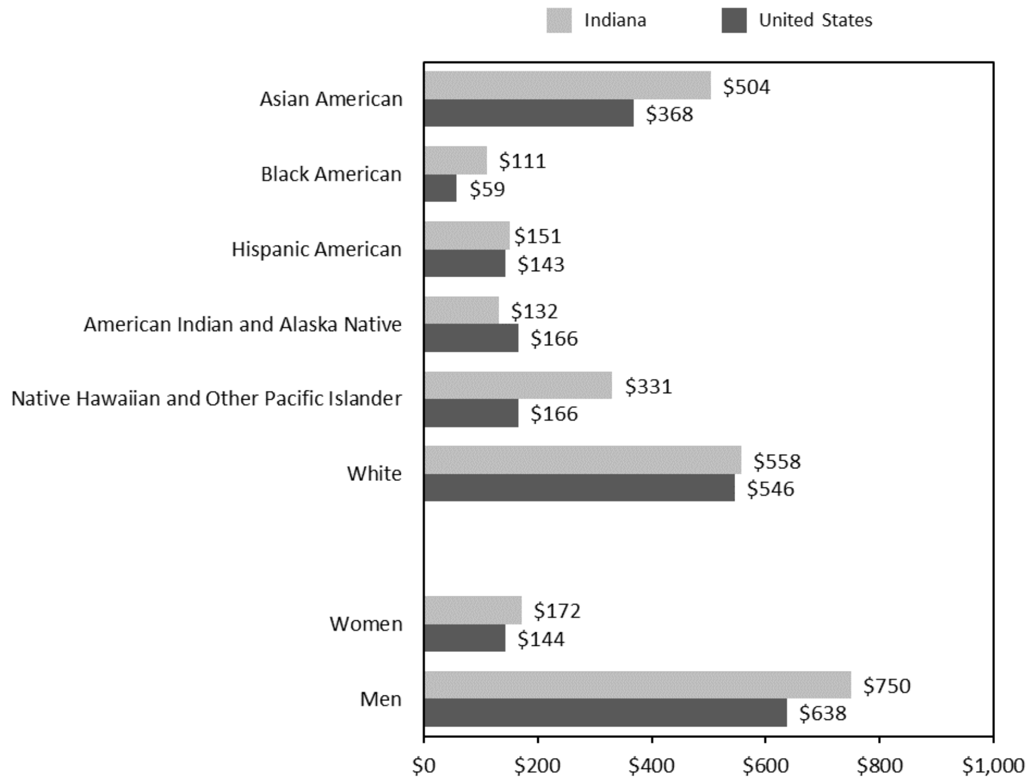


Figure C-23 indicates that Asian American-, Black American-, and Hispanic American-owned businesses in Indiana show higher closure rates than white American-owned businesses. Woman-owned businesses in Indiana show higher closure rates than businesses owned by men. In addition, Black American-owned businesses 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

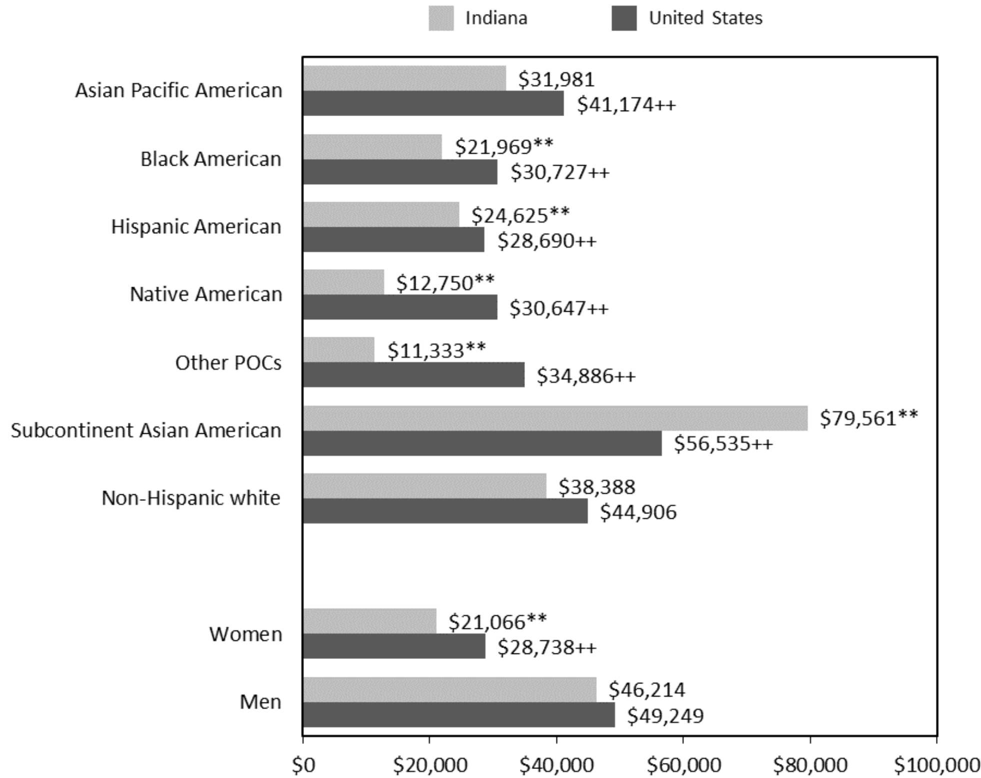


Note: Includes employer and non-employer firms.
Does not include publicly traded companies or other firms not classifiable by race/ethnicity and gender.

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 white American-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 aged 16 and older who reported positive earnings. All amounts in 2017 dollars.

**, ++ Denotes statistically significant differences from white Americans (for POC groups) and from men (for women) at the 95% confidence level for Indiana and the United States as a whole, respectively.

Source: BBC 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 POC-owned businesses in Indiana earn less on average than the owners of 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

Variable	Exponentiated Coefficient
Constant	707.648 **
Age	1.140 **
Age-squared	0.999 **
Married	1.232 **
Speaks English well	1.145 **
Disabled	0.592 **
Less than high school	0.757 **
Some college	1.038 **
Four-year degree	1.305 **
Advanced degree	1.813 **
Asian Pacific American	1.068 **
Black American	0.826 **
Hispanic American	1.050 **
Native American	0.701 **
Other POCs	1.012
Subcontinent Asian American	1.157 **
Women	0.529 **

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 aged 16 and older 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, white Americans for the race variables, and men for the gender variable.

Source:

BBC 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-26 indicates that, compared to being a white American business owner in Indiana, being a Black American or Native American business owner is related to lower business earnings, even after accounting for various other business and personal characteristics. Similarly, compared to being a male business owner, being a woman business owner is related to lower business earnings.

APPENDIX D.
Anecdotal Information about Marketplace Conditions

Appendix D presents anecdotal information BBC Research & Consulting (BBC) collected from business owners and other stakeholders as part of the 2022 Indiana Department of Transportation (INDOT) Disparity Study and the 2022 Indianapolis Airport Authority (IAA) Disparity Study. Appendix D summarizes the key themes that emerged from those insights, organized into the following sections:

A. **Background on relevant industries** summarizes information about how businesses become established, what products and services they provide, business growth, and marketing efforts;

B. **Ownership and certification** presents information about businesses' statuses as disadvantaged, POC-, and woman-owned businesses; certification processes; and business owners' experiences with the INDOT certification program;

C. **Experiences in the private and public sectors** presents business owners' experiences pursuing private and public sector work;

D. **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 POC- and woman-owned businesses;

E. **Doing business with public agencies** describes business owners' experiences working with or attempting to work with INDOT, IAA, and local agencies and identifies potential barriers to doing work for them;

F. **Marketplace conditions** presents information about business owners' current perceptions of economic conditions in Indiana and what it takes for businesses to be successful;

G. **Potential barriers to business success** describes barriers and challenges businesses face in the local marketplace;

H. **Effects of race and gender** presents information about any experiences business owners have with discrimination in the local marketplace and how it affects POC- or woman-owned businesses;

I. **Business assistance programs** describes business owners' awareness of, and opinions about, business assistance programs and other steps to remove barriers for businesses in Indiana;

J. **Insights regarding race- and gender-based measures** includes business owners' comments about current or potential race- or gender-based programs; and

K. **Other insights and recommendations** presents additional comments and recommendations for INDOT and IAA to consider.

A. Background on Relevant Industries

Part A includes the following information:

1. Business characteristics;
2. Business formation and establishment;
3. Types, locations, and sizes of contracts;
4. Employment size of businesses;
5. Growth of the firm; and
6. Marketing.

1. Business characteristics. The business owners interviewed for the study represented a variety of different business types and business histories, from well-established firms to newly established firms, and worked on small-to-large contracts in the Indiana marketplace. Interviewees described the types of work that their firm performs.

Industry. The study team interviewed 14 construction firms, 10 firms providing professional services, and 1 firm supplying goods and services.

Fourteen firms worked in the construction industry [#1, #2, #3, #4, #6, #7, #8, #9, #11, #17, #18, #23, #24, #25]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "We provide traffic safety service, of course, as the name says to highway contractors or to infrastructure contractors." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "Traffic control, site protection, [and] material supply." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "We do pavement milling." [#3]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "We supply fabricated rebar - so, that's the concrete-reinforcing steel." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "[We are a] milling contractor and trucking company." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "Any kind of storm water or erosion control, which includes silt fence; straw or filter sock; temporary seeding; permanent seeding; trees, shrubs, [and] we do some native." [#8]
- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "Yes, [we do] construction." [#9]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "Construction commercial, contracting, general contracting and some self-performing with commercial construction." [#17]

- The Black American owner of an MBE- and DBE-certified construction firm stated, "We started out as a sub concrete contractor, and presently, [are] wanting to expand into the ready-mix concrete business." [#18]
- The owner of a WBE- and DBE-certified construction firm stated, "[We do] road construction. We offer asphalt mix for sale, so not only our crews, but we will sell to the Indiana Department of Transportation, to local governments, and to other asphalt pavers. Our crews will do the lay down of asphalt, as well as concrete construction, bridge construction, utility work, hauling, and demolition." [#23]
- The owner of a majority-owned construction firm stated, "We're a paving and concrete civil contractor." [#24]
- A representative of a majority-owned construction firm stated, "We make polyvinyl, aluminum fencing, and railing. We do the manufacturing, and then we sell to the two-step and three-step wholesalers, as well as direct installers. We don't do any bidding of the contracts; we just sell to the actual builders." [#25]

Ten firms worked in the engineering and professional services industry [#5, #10, #12, #14, #15, #16, #19, #20, #21, #22]. For example:

- The Black American owner of an MBE- and DBE-certified professional services firm stated, "Engineering and a land surveying firm. Primarily it's a land surveying firm and we brought into it engineering services along with it.” [#5]
- A representative of a woman-owned professional services company stated, "We primarily focus on mechanical, electrical, and plumbing engineering and design work. Beyond that, we occasionally do fire protection and some environmental consulting.” [#10]
- The owner of a majority-owned professional services firm stated, "Mike Halstead Architects, founded in 1993. And we're an architecture firm. We do preservation planning and interiors as well, but we don't have any engineering on staff. We've been in business almost 29 years. Most of our clients, probably 80 percent, are not-for-profits. We also do some commercial and retail.” [#12]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Architectural design and planning.” [#14]
- The Subcontinent Asian American owner of a professional services firm stated, "I offer technology services, project management, or independent verification and validation analysis.” [#15]
- The Black American owner of an MBE-certified professional services firm stated, "No products. Services, being a registered professional engineer, I provide engineering services, particularly structural and civil. I'm a registered civil structural engineer in the state of Indiana, and that's what I've been my whole life since graduating college in 1990 from Purdue University. Primarily, I provide a service to clients; a design service.” [#16]
- A representative of a majority-owned professional services company stated, "We're an engineering and architecture consulting firm.” [#19]

- A representative of a majority-owned professional services firm stated, "Energy services business. Energy and renewable energy improvements.” [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "We are the engineering research company. We do primarily work for the Department of Defense and the Department of Energy.” [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "We offer safety compliance for DOT in state, and we do the FMCSA, which is federal. We do drug services. We do safety training for the drivers. We do orientations, driver hiring. We do audits, state and federal, IRP audits, IRS audits.” [#22]

One firm worked in the goods and services industry [#13]. For example:

- The Black American owner of an MBE-certified goods and services firm stated, "The two items that pertain, I would say - the company, as a whole, we have three different divisions. One is commercial painting, the other is facility maintenance nationwide, and then, residential remodel construction work." [#13]

Years in business. Twenty-three businesses reported their date of establishment. The majority of firms (16 out of 23 that provided years in business) reported that they were well-established businesses; they had been in business for more than ten years. Four out of the 23 businesses had been in business for between five and ten years. Three firms were newly established, having been in business for less than four years.

Three firms reported they had been in business for fewer than four years [#11, #15, #22]. For example:

- The Black American owner of a construction company stated, "I've only been in business since February, and I haven't done any business with INDOT or the IAA. I'm really just small, just doing houses and just small commercial right now. I don't know if I'm really the best person for your study. I just started. I haven't done any big contracts or anything." [#11]
- The Subcontinent Asian American owner of a professional services firm stated, "This company's been in business for one year. I had another company that was in business for 15 years, but I changed it to this particular company. [I] just transferred it over." [#15]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "My company was opened four years ago." [#22]

Four firms reported they had been in business for five to ten years [#3, #6, #16, #17]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "I'm coming up on 10 [years in] August." [#3]
- The owner of a WBE- and DBE-certified construction company stated, "We celebrated our fifth year in October." [#6]
- The Black American owner of an MBE-certified professional services firm stated, "Eight years." [#16]

- The Black American owner of an MBE- and DBE-certified construction firm stated, "I started the business in 2014." [#17]

Sixteen firms reported they had been in business for more than ten years [#1, #2, #4, #5, #7, #8, #9, #10, #12, #13, #14, #19, #20, #23, #24, #25]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "When people ask me, I say I've been doing this for about 40 years since I started my first company in 1984." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "Started in 2002." [#2]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "Since 2005." [#4]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "Since 2009." [#5]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "I started it in 2008, September of 2008." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "I started the business in 2004." [#8]
- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "About 20 years. 2000." [#9]
- A representative of a woman-owned professional services company stated, "Argo incorporated in 1985. Up until two years ago maintained the same ownership." [#10]
- The owner of a majority-owned professional services firm stated, "[Company name] [was] founded in 1993. And we're an architecture firm. We do preservation planning and interiors as well, but we don't have any engineering on staff. We've been in business almost 29 years. Most of our clients, probably 80 percent, are not-for-profits. We also do some commercial and retail." [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "I bought the company in January 2020. The company itself has been in business probably about 15 years." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I have been with the company since 1991. I incorporated in 1995." [#14]
- A representative of a majority-owned professional services company stated, "The business was started in 1956." [#19]
- A representative of a majority-owned professional services firm stated, "Since 2000." [#20]
- The owner of a WBE- and DBE-certified construction firm stated, "Since 2013." [#23]
- The owner of a majority-owned construction firm stated, "We're going on 55 years." [#24]
- A representative of a majority-owned construction firm stated, "I believe we started in 1984, if I'm not mistaken, so, 38." [#25]

2. Business formation and establishment. Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

Three business owners and founders had worked in the industry or a related industry before starting their own businesses. This experience helped founders build up industry contacts and expertise. Businesspeople were often motivated to start their own firms by the prospects of self-sufficiency and business improvement [#3, #15, #16, #22]. Here are some of the founder stories from interviews:

- The owner of a WBE- and DBE-certified construction company stated, "My dad used to own a company that did the same thing that I do. That was my very first job when I was in grade school. It was funny because I wasn't sure if this was the industry I would ever want to go into. Then I came back home and started working in the family business there and decided to take a leap of faith 10 years ago and start my own company. And it's been a wild ride, but that's how I got started." [#3]
- The Subcontinent Asian American owner of a professional services firm stated, "I owned the other company too. But it was registered in New York, so I opened up here and shut the New York one down." [#15]
- The Black American owner of an MBE-certified professional services firm stated, "I worked with a company before I started my company. I didn't just all of a sudden obtain all this experience and knowledge. With the company I worked for before, I had lots of projects up in the northern region of Indiana, and down in the southern region of Indiana." [#16]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Yes. I opened the business four years ago, but I've been in the industry almost 14 years." [#22]

Other motivations. There were also other reasons and motivations for the establishment of their business [#2, #4, #7]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "Well, it's kind of a long story because I originally was supposed to be a silent investor in the business, and I had a partner in the business. And she dropped out about eight years into it because it was clear that she was not an entrepreneur and didn't know enough about how to run a business, even though I tried to help her and get her on the right track. So, she wanted out so, I bought her out, and so, that happened in 2010. And I brought in new management in to actually do the work, and since then, we've grown tremendously. We've been very successful at growing the company and getting contracts and work. That's kind of where we're at today." [#2]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "I'm a lawyer by trade." [#4]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "In 2008, I had a sister-in-law that worked for a truck dealership. 2008 was a rough time, you know, economically and [from a] business hand, there was a truck that was turned in. I guess on repossession that I was able to get a good deal on. So, that was my first truck and I was still teaching so I just would broker on to people [and] the driver would run the truck and he would be dispatched. I would dispatch in the morning or dispatch the afternoon. And I was actually teaching until 2010. At the same time. Slowly got a little bigger. I think I got up to three or four

trucks. Teaching. The summers got shorter where I wasn't able to concentrate on the trucking company for as long as a span of time. So, then I knew that I was at a crossroads like I needed to either give up, give up the business and continue teaching or come quit teaching and try to concentrate on the business. So, I took a year sabbatical. I really grew that year and I really was able to play in contracts with my own and I was able to go and knock-on doors and go to meetings and meet people and really build relationships with contractors and so I never returned to teaching after that so." [#7]

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.

Six firms reported working on contracts with an average value under $100,000 [#11, #13, #16, #17, #19, #22]. For example:

- The Black American owner of a construction company stated, "I mean, currently, I think the biggest contract that I've done so far was a $9,000.00 contract. Just that was a Steak [n'] Shake - a couple of Steak [n'] Shake remodels. But I'm trying to bid on bigger opportunities. I've just [bid] on a Harbor Freight Tools and that was a $200,000.00 job. A typical contract that I do now - maybe $5,000.00, you know? Just a couple of days' worth of work." [#11]
- The Black American owner of an MBE-certified goods and services firm stated, "$20,000.00 to $30,000.00 maybe." [#13]
- The Black American owner of an MBE-certified professional services firm stated, "A typical size for my firm is going to be in that $25,000.00 range." [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "As of now, it's small stuff typically under 20,000. Anywhere from 15,000 to 20,000. We don't do any large stuff at the current time. The contracts we've ever worked on in any consistency hovered around the $50,000.00 range per project. We've gone up higher than that, I'd have to pull up the records. I'm not sure the highest we've done." [#17]
- A representative of a majority-owned professional services company stated, "From a couple thousand dollars a fee to a couple million dollars a fee. It depends on the project and the client. The average is around $30,000.00 to $50,000.00 in fees." [#19]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Hundred and fifty to two hundred." [#22]

Two firms reported working on contracts with an average value between $100,000 and $500,000 [#3, #8]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "[I can do] a one-day job that's $3,000 to a, you know, [months-long] $1,000,000 contract. Obviously, [$1,000,000 contract] don't come around all that often. I think the most recent one I bid on and I didn't get it, was about $400,000 worth of work, but. So, it's a wide range, but I bid on anything that I get a quote request for, I'll send a quote out for." [#3]

- The owner of a WBE- and DBE-certified construction company stated, "I usually won't bid anything less than $2,500.00 to $3,000.00. But the price is up; it's more than that now. A couple hundred thousand, say $250,000.00 maybe." [#8]

Two firms reported working on contracts with an average value between $500,000 and $1.5 million [#2, #23]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "It can be $10,000.00 all the way up to a million. Right now, we are limited - INDOT sets a limit to how much work you can have under contract at any one time, and right now, our limit is $2 million, unless we go to get an audit. If we have an audit, then we can go for more." [#2]
- The owner of a WBE- and DBE-certified construction firm stated, "Probably $1 million." [#23]

Six firms reported working on contracts with an average value between 1.5 and five million dollars [#1, #14, #18, #20, #21, #24]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Anything from 0 - $1000 up to—we just got a large contract which was $2.5 million. So, we are able to do more than that in a single contract. That was a two-year contract." [#1]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "We do a lot of contracts less than $5 million. We have done maybe a few in the $15 million range. And partnered with other companies in the $20 million range." [#14]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "We perform concrete paving at Midway Airport, $5 million. We have opportunities to generate annual revenues of $22 million, supplying ready-mix concrete in regions 4 and 5." [#18]
- A representative of a majority-owned professional services firm stated, "In Indiana, typical size is $3 million to $4 million on average." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "A typical contract by the time everything is said and done with the Department of Defense is going to be somewhere around two million dollars, two and a quarter." [#21]
- The owner of a majority-owned construction firm stated, "It averages about $3 to $4 million on average, [that is a] typical contract." [#24]

One firm reported working on contracts with an average value between ten and fifty million dollars [#12]. For example:

- The owner of a majority-owned professional services firm stated, "$10 million." [#12]

Twelve firms reported working on contracts solely in Indiana, generally within a 100-mile radius [#1, #2, #6, #8, #11, #12, #13, #16, #17, #18, #23, #24]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "It depends on what we do. The work that we're going to have equipment in place for a long period of time, we like to stay within about 70 miles. We have to service it. We have to put up flashing arrow signs on an Interstate 70 miles away and it gets hit in the middle of the night, we need to

be there to replace it. So 70 miles is about it. If we are doing work for engineering companies where we go in and work for a day or two days and leave, we can go statewide." [#1]

- The owner of a WBE- and DBE-certified construction company stated, "Our area is pretty much Indiana." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "We cover the state of Indiana." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "We do not go up in the region, in the Lake County; that's too far. We do go as far as Fort Wayne sometimes. We will go to Evansville if it's a one-off. Evansville is about 3-3.5 hours, Fort Wayne probably close to that. We go into Lafayette and Terra Haute, which is another 3-3.5 hours trip. So, most of the state, but just not the upper probably 10-15-percent; it's just too far for us." [#8]
- The Black American owner of a construction company stated, "I cover the entire 481 - IBEW 481 jurisdiction so, that's pretty much the central 16 - well, there's 16 counties in the center of Indiana. There's a big list, but there are - you know, I do Marion County and the surrounding counties, basically." [#11]
- The owner of a majority-owned professional services firm stated, "We stay in the state of Indiana." [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "Maybe about an hour [radius]." [#13]
- The Black American owner of an MBE-certified professional services firm stated, "Primarily Indiana." [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "We will do outside of our normal. But as far as the norm, we stay within the Indianapolis area, you know, two-hour, hour-and-a-half travel time is probably the most that we really like to do for the northwest, and South Greenwood, or east maybe out to Greenfield, but not too far. Yeah, usually. We've done stuff in Chicago, Ohio, Illinois, but those are just like one-off situations where the customer was local here and had offices or businesses in other parts of the United States, and we chose to travel and add to that to the bill. But we don't do that on a regular basis." [#17]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "In region 4 and 5, but we have done work at Fort Polk, Louisiana." [#18]
- The owner of a WBE- and DBE-certified construction firm stated, "We will typically say within a 75-mile radius." [#23]
- The owner of a majority-owned construction firm stated, "Roughly 75-mile radius of Indianapolis, Indiana." [#24]

Seven firms reported working in the Indiana marketplace and with clients outside of the state [#3, #14, #19, #20, #21, #22, #25]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "I reported work in Florida. I will go anywhere that pays obviously." [#3]

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I was going as far as Baltimore, DC, Kentucky, Ohio, because I couldn't find work here in Indiana. Then things started getting better, where I did start securing work here and I started going after those projects that were farther away less often." [#14]
- A representative of a majority-owned professional services company stated, "We have about 35 offices nationwide and then international offices in London. We go to where the work is. There's not really any geographical limitation." [#19]
- A representative of a majority-owned professional services firm stated, "We're in every state and throughout Canada. Our office in Indiana is in Indianapolis and I cover the whole state of Indiana. That's my designated area." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Like I said, most of our work is with the Department of Defense, so Washington D.C. is typically where these solicitations come from." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "We do all 48 states, 48 states meaning the trucks can only go into 48 states, so those are the states that we cover." [#22]
- A representative of a majority-owned construction firm stated, "We have customers in Oregon, Maine, everywhere in-between, all the way down to Florida, Florida Keys, and Hawaii. We've gone overseas, but we really try not to do that, because it just isn't a good thing for us." [#25]

4. Employment size of businesses. The study team asked business owners about the number of people that they employed and if firm size fluctuated. The majority of businesses (18 of 23 who reported employment numbers) had between one and 50 employees. The study team reviewed official size standards for small businesses but decided on the below categories because they are more reflective of the small businesses we interviewed for this study.

The majority (10 of 23) of businesses had 1-10 employees [#8, #9, #10, #14, #15, #16, #17, #18, #21, #22]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "Eight full-time and two part-time [employees]." [#8]
- A representative of a woman-owned professional services company stated, "We have five, and then we have a number of moonlight employees. We've kind of changed our business at the onset of COVID." [#10]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I have three full-time employees and two part-time employees." [#14]
- The Subcontinent Asian American owner of a professional services firm stated, "[I have] just one [employee]." [#15]
- The Black American owner of an MBE-certified professional services firm stated, "[I have] one full-time employee, which is myself. I bring on consultants as needed, depending on the size of the project." [#16]

- The Black American owner of an MBE- and DBE-certified construction firm stated, "Right now, I only have three." [#17]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "Presently, the core personnel is six. We plan to institute a recruiting and training program to supply trained personnel for the operation of ready-mix concrete plants." [#18]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "We have, if you count everybody in terms of part-time and full-time, we have about eight employees active." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "I have three." [#22]

Four interviewees reported that their businesses had 11-25 employees [#4, #5, #12, #13]. For example:

- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "If you count me, there are 21 of us, and without me, there are 20." [#4]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "Currently it's 14 [employees]." [#5]
- The owner of a majority-owned professional services firm stated, "[I have] eighteen [employees]." [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "There's probably about 6 full time and then 20 or so contractors." [#13]

Four businesses had 26-50 employees [#3, #6, #23, #24]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "We are seasonal, but when we get into full swing [we are] at somewhere around 35 [employees], just depending on our workload." [#3]
- The owner of a WBE- and DBE-certified construction company stated, "We are weather-related and we do layoff and we hover between 40 and 45 [employees]." [#6]
- The owner of a WBE- and DBE-certified construction firm stated, "[I have] thirty-four [employees]." [#23]
- The owner of a majority-owned construction firm stated, "We got roughly 40 in the office and anywhere from 150 to 200 employees, in the peak time of summer, out in the field." [#24]

Two businesses had 51-100 employees [#1, #7]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "It varies seasonally. We have eight staff in the office and then we have—that includes me—and then we have between 40 and 60 depending on the time of year and the job. And they are all union employees working out on the runway." [#1]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "I would say 70 to 73 [employees] with mechanics then. Office and everything." [#7]

Three interviewees indicated that their firm had more than 100 employees [#19, #20, #25]. For example:

- A representative of a majority-owned professional services company stated, "We have 700 employees." [#19]
- A representative of a majority-owned professional services firm stated, "[I have] 1,400 [employees]." [#20]
- A representative of a majority-owned construction firm stated, "I wanna say we just crossed over 600 [employees]." [#25]

5. Growth of the firm. Business owners and managers mentioned the growth of the firm over time [#2, #5, #6, #7, #8, #9, #10, #12, #19, #20, #23, #24, #25]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "We've been steadily growing between 20 and 30 percent a year." [#2]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "It's been a growing company since I became partner and pretty much picking up, it's been a growing company." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "We have grown." [#6]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "I started it in 2008, September of 2008 with just two trucks, come right now we are up to 65 trucks so [we have grown]." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "But it has increased. When we first started, we were approved for $300,000.00 with INDOT, now we're approved for $2.5 million." [#8]
- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "Oh, I do about $500,000.00 a year." [#9]
- A representative of a woman-owned professional services company stated, "We primarily stay fairly consistent. I think at the high point we may have had nine or ten full-time employees with a handful of moonlight employees to do overflow work and other scope of work that we do." [#10]
- The owner of a majority-owned professional services firm stated, "Increased. Reputation, referral-based work, and probably the economy." [#12]
- A representative of a majority-owned professional services company stated, "We've increased. We attribute it to doing good work and fostering trust with our clients to provide good work." [#19]
- A representative of a majority-owned professional services firm stated, "Increased I think some of it is focus of becoming more energy efficient, having more energy efficient buildings, trying to get a handle on the utilities and the utilities costs that continue to keep rising in Indiana and throughout all states. Then some incentives in regard to renewable energy, whether it's solar or lighting improvements, things like that, that have really pushed the industry to look at savings opportunities and longer life of equipment." [#20]

- The owner of a WBE- and DBE-certified construction firm stated, "I would [say]- well obviously we've increased, because we've added employees, but yeah, we've increased. The state-driven program of through Community Crossings that offers money to local, small governments has been a pretty big driver for us." [#23]
- The owner of a majority-owned construction firm stated, "No, a lot of that has to do with experienced help to get this work done. We could probably do a lot more, but we've stabilized the certain revenue. Just not enough help out there and that goes for not only self-performed work, but when we go to sub out disciplines. They don't have enough people either." [#24]
- A representative of a majority-owned construction firm stated, "Increased. I don't know. I've never seen a company grow like this. It's baffling to me, so, I can't really say. Good quality, I suppose?" [#25]

6. Marketing. Business owners and managers mentioned how they marketed their firms, many noting the importance of online marketing and word-of-mouth referrals [#1, #5, #6, #8, #11, #13, #14, #15, #17, #18, #19, #20, #21, #22, #23, #24, #25]. For example:

- The Black American owner of an MBE- and DBE-certified professional services firm stated, "We have a business developer who is kind of going out and I [do] teaming. Aside from our website and stuff like that, the only thing we can do is business development and getting with other prime contractors and hope they will team with us to be able to look for jobs." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "We did take advantage of the website design that CEI [offered], which was free of charge, to DBEs from INDOT. Also, another big - so basically a one-page letter planner, [I] forget what they refer to it. It's basically a one-page document that kind of highlights: Who you are, what you're about, all of those selling points and that is a very nicely designed letter, that again see I this service that INDOT offers to put together free of charge. That was called a 'capability statement.' They refer to it as a capability statement. It lists your you know, NAICs codes and things like that. So, marketing in regard to that, those are [it on] my end going to any event." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "I don't. Because I don't want to do residential. I still get some calls. I have not updated that website." [#8]
- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "We have a website. We just printed new business cards that have a QR code on the back that links to our website so that's a key marketing thing. But in order for business cards to be effective, you've got to get out of the office and meet some people and hand them out. So, they are not as effective as they used to be. And the Internet helps." [#1]
- The Black American owner of a construction company stated, "I've got a website. When I first got the website, it was just the entry level website. I just increased my package so then, I can get in front of more people, but I've also been a part of Home Advisor, and Angie's List or whatever. Now I'm really getting tired of, and I plan on quitting one soon because that's where I'm saying I'm getting bad leads and I'm having to pay for those leads. A lot of times, what the people want is not even what they've indicated on the service so then, I get charged extra money for nothing. But anyway, I do the website and Angie's List, but then, also, word of mouth and people that I've known over the years. I've been an electrician and I was on a service van for Miller Reeds for four or five years so, I've had other customers and put my name out there. A lot of people know

me. I haven't had any of my old customers reach out to me other than one, but that word of mouth. I've gotten referrals from multiple people that I've dealt with in the past." [#11]

- The Black American owner of an MBE-certified goods and services firm stated, "On the commercial painting side, we don't really do any marketing. It's all bid work. We're on bid lists so, there's no marketing there. On the maintenance side - commercial maintenance side - we do have to run ad campaigns nationwide to get new customers. Same thing on the home remodel side. It's more relationship based." [#13]

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I have been working for so long that it's word of mouth a lot in the private sector. I get a lot of contractors that call me for their projects in the private sector, so I don't do much marketing - I don't do any marketing in the private sector; it's all word of mouth and people that know me." [#14]

- The Subcontinent Asian American owner of a professional services firm stated, "I haven't needed to market it because I've had people seek me out for contracts. I've never had to market." [#15]

- The Black American owner of an MBE- and DBE-certified construction firm stated, "It's crazy. I've never really spent a lot of money on marketing [or] expensive advertising spots. In construction, I found out you really don't have to market yourself so much to the owner as you do to the general contractor, if you're a sub. Because you're only being able to be a sub because you can't financially back it. Marketing to the owner, you really don't [need to]. The owner doesn't [know] who does the job. It's just the lowest bid. You have to market yourself to people in the industry. You sign up on [websites], and you take a look at what jobs are out there, and then you just submit an interest to the person listed as [the one] who is bidding [on] the job. Let's say, for example, they are doing a remodel, and it's on Reprographics. You say, they've got some work that I think we can do. You look through the documents and bid, and say, great. All these guys are bidding on it. Let me reach out to them and ask if I can submit a bid. You have to do the homework yourself to go after it and knock on doors. I don't really know what avenues there are to market yourself other than obviously the MBE websites out there, and people. The majority [of people], are wasting their time sending stuff to cover the state. I think those things do sometimes materialize. Before [someone] called me and asked [if we are] doing some things, like some toll boxes and stuff up in Northern Indiana, we went and looked at [the job]. I think that our costs were too high for travel. We didn't get the job. Other than that, I don't really know, other than word of mouth on smaller projects just [to] people who know you. I don't pay to advertise in Industry Literature magazine; subscribe to I guess local affiliations and stuff like that. It just seems like that's a lot of push for money. I choose to donate more money to CLB or MLK Center, or things that are working towards causes I believe in. Sometimes that'll turn into business because someone similarly promotes you on their in-house website. People reach out to you to do maybe a deck remodel or something at home. We're not heavy residential. I mean we'll do it, but don't really spend much money marketing in other avenues that I'm really not for sure I could work." [#17]

- The Black American owner of an MBE- and DBE-certified construction firm stated, "From historical operations; work that we've performed in the past is a track record that we are referred to other contractors by our past history. Then we receive bid invitations. Sometimes we receive 35 opportunities in one day. That comes from our contacts with Engineers News Record and Dodge Reports and things along those lines." [#18]

- A representative of a majority-owned professional services company stated, "We market ourselves by the individuals that do the work. We have a seller-doer model, and each individual is responsible for interfacing with clients and making clients aware of what we do and building those relationships. Once those relationships are built and we get those opportunities to work on projects, the biggest thing that we can do that we subscribe to in our marketing efforts is to complete high-quality work that sets the standard." [#19]
- A representative of a majority-owned professional services firm stated, "Really [we market] through different organizations like the Association of Indiana Counties; AIM, which is for cities and towns; organizations; Indiana Association of County Commissioners are different organizations; the Indiana Sheriffs Association is another one. Just different types of organizational chambers. Sometimes getting involved in the chambers. And networking can be helpful." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "We market ourselves on the contracts that we get awarded, and typically that has led to other follow-on contracts on similar topics or even new ones that we have that we have been able to cultivate." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "My firm itself; we're word of mouth. We don't really advertise. Drivers talk about us, good or bad. Owner operators talk about us. They come to us. Usually, if you're marketing, I've noticed that they won't touch us. They just send me the ads from the other companies. [Other] companies, they send them to me, and then I'm like, 'Oh, God, why are you sending me this? We keep getting these,' and they get annoyed. Marketing in this industry's kind of hard, because the state - the compliance industry as far as corporations, 80 percent of them fails within the first 2 years. If you last two years and above, then you really don't even need to market yourself. But if we do, it's usually we have our [unintelligible], or we have our website up. We're on Google and stuff like that. Usually, mine are walk-in basis or word of mouth." [#22]
- The owner of a WBE- and DBE-certified construction firm stated, "Facebook. We also have a website. Because most of our work comes from bid work we're really not trying to get outside sales, we just have to watch for that work to be put out for bid." [#23]
- The owner of a majority-owned construction firm stated, "We actually don't. We do all public work, competitive bid type work. We've got a website and our emblems are on all our trucks. We got people who will call us, private homeowners. Can you do our driveway for us or whatever? We're not spending a bunch of money on marketing." [#24]
- A representative of a majority-owned construction firm stated, "I'm not really sure. I know marketing does something over there, and they send people out that show the builders and the installers how to properly build and put together our stuff, how to tie it into existing buildings and even so far as down to the architects, so that the architects could design what they need to design around what they're [going to] use our product for. I don't know if that's the primary source of marketing; I know we do other types of marketing, too, but I don't know what exactly is entailed in it." [#25]

B. Ownership and Certification

Business owners and managers discussed their experiences with INDOT's certification program and other local certification programs. This section captures their comments on the following topics:

1. INDOT and other certification statuses;
2. Advantages of certification;
3. Disadvantages of certification;
4. Experiences with the certification process; and
5. Comments on other certification types.

1. INDOT and other certification statuses. Business owners discussed their certification status with INDOT and other local certifying agencies and shared their opinions about why they did or did not seek certification. For example:

Seventeen firms interviewed confirmed they were certified as DBE, MBE, or WBE [#1, #2, #3, #4, #5, #6, #7, #8, #9, #13, #14, #16, #17, #18, #21, #22, #23]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "We are certified as a DBE with INDOT as well as an MBE with the Indiana Department of Administration and also the city of Indianapolis. With this company I've been certified since 2005 which makes that what, 16 or 17 years. I had a prior company that I sold to a public company in 1999 and that company was certified for 17 years. So, I've been in the program for a long time." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "Certified WBE, DBE, with the state." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "DBE and WBE." [#3]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "We are a disadvantage business enterprise under INDOT." [#4]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "We are a DBE with INDOT." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "With INDOT since 2017." [#6]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "[We are a] DBE, WBE, and MBE." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "We are "DBE/DWBE." [#8]
- The Black American owner of an MBE-certified goods and services firm stated, "It would be minority business certification for the city and state." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I'm certified with the state and the city, Women and Minority Business Enterprise, as well as with INDOT Disadvantaged Business Enterprise. Yes, I am certified with INDOT as a DBE." [#14]

- The Black American owner of an MBE- and DBE-certified construction firm stated, "MBE with the City of Indianapolis, and a DBE with the state, INDOT." [#18]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "We're a certified small business, minority-owned and veteran-owned." [#21]
- The owner of a WBE- and DBE-certified construction firm stated, "We are a certified DBE through INDOT. We are certified WBE through the IDOA and we hold a WBENC certification as well. The DBE through INDOT was issued in June of 2019." [#23]

One firm interviewed was not certified but was in the process of applying [#11]. For example:

- The Black American owner of a construction company stated, "I don't have any certifications currently with the state or city other than just filing for articles of organization, filing with the secretary of state. But I am currently in the process of getting or trying to get my minority certification with the city of Indianapolis, actually. I got the application submitted a week ago, a week and a half ago, and now, I'm actually on the list for the XB contractors, but I'm in red, signifying that I haven't been approved yet. So, as soon as they go through all that process, I will be approved. There's no doubt in my mind I'll be approved. I mean, it's just I might have another piece of paperwork that I might have to turn in or something. I don't know. It's just a matter of time. And then, at that time, I will then reach out and try to do more public sector work." [#11]

Three business owners and managers explained why their firms had not pursued certification. Many uncertified firms were unaware of the certification or its benefits [#15, #19, #AV]. For example:

- A representative of a woman-owned professional services company stated, "We have been a service-connected veteran-owned company for many years. Our owner was drafted into Vietnam back in 1970 or 1971. I believe he served for several years in the Army; was injured during that time. Later, when he formed Argo Consulting Engineers, we went many years as not recognized as a minority vendor. Somewhere in the middle or the late '90s, one of our clients encouraged us to become recognized as a veteran-owned company because of [the owner's] past service. He had been for a number of years, and we had been recognized as a veteran-owned company right up until the point when [the owner] passed away. Presently, [his] wife is considering becoming recognized as a woman-owned business, because she is the majority stockholder in the corporation." [#10]
- The Subcontinent Asian American owner of a professional services firm stated, "Yeah, I was trying to do that certification where you get points for being a business in Indiana and hiring Indiana people. The website was so terrible I couldn't join that." [#15]
- A representative of a majority-owned professional services company stated, "None of the DBE certifications …. We are an employee-owned company." [#19]
- A representative of a majority-owned construction company stated, "I'm thinking about changing ownership to a minority- and woman-owned business. I'm part-Cherokee and I'm going to investigate that fact. Also, my wife owns 49 percent of the company, and I'm thinking about having my daughter become a 10-percent owner." [#AV172]

2. Advantages of certification. Interviewees discussed how DBE/MBE/WBE certification is advantageous and has benefited their firms. Business owners and managers described the increased

business opportunities brought by certification [#2, #3, #4, #5, #6, #7, #8, #10, #12, #13, #17, #18, #23]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "Because we're DBE they have a goal percentage that they have to meet there's no question unless they just can't find somebody, they have to meet their DBE goals. So, we wouldn't be getting that much work if we didn't have that certification." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "I think the benefits of it is that it that it makes it, it makes people have to at least consider working with you. When I first started, this industry I've been around it my whole life. But you see the same people, you know it's the same male population out there. And if you if they had not created this program and allowed us to have the opportunity to at least at least get these people to say I need to look outside the box, you know or work on you know it's taken me 10 years to establish some of these relationships with people or have somebody give me a chance. But had these programs not existed, I don't think I would be where I am right now and I don't think that we would be able to pull other people up, you know. I'm not near the DBE that I would like to be or hit, you know, just business-wise, hit where I want to be because eventually, I want to be the, you know, some of these mentors that I've had and gained and things like that. I want to be able to pass that on to other. People in our industry, other DBEs. I think if these programs weren't as strong as they as they were it would, you know, keeps people out. It makes it even tougher. And then you say, well, what's the point?" [#3]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "I's been a benefit to the extent that there's some requirement that we be used. So yes, it's been a benefit. Like I said, my gut feeling is that if we didn't have the certifications, if there weren't the certification requirements, that we wouldn't get a lot of the work we get. That's what I'm hoping to change. I'm hoping that our customers can start looking at us rather as a partner, a rebar partner, rather than a minority rebar partner." [#4]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "It has been a benefit because it allows us the opportunity for all the primes to see us. Before I had the DBE with INDOT the primes - you know, you can send your numbers to them but they're not really looking at them. But at least with the DBE they know they need DBE, so they might look at your numbers and say, 'Oh, maybe we can use them for these services.' It kind of gives us the opportunity to be noticed out there and give us the opportunity that once we've been noticed to perform the work. Also if they like you then you build that - so that's all part of the relationship that I'm talking about." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "The benefit is that prime contractors have a responsibility to meet a certain goal." [#6]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "I think there's a huge advantage to the DBE certification. I guess it would just be the opportunity to do to have and to have the opportunity to do the work and be a subcontractor come with the percentages that INDOT puts in there for the DBE." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "The state requires them, like on each job it will have the percent of DBE or WBM or all the other ones. So, the state

requires them to meet those goals. Sometimes I'm sure we get jobs that other people may not be able to get that are not DBEs or WBEs." [#8]

- A representative of a woman-owned professional services company stated, "Maybe on a few projects, but for the most part, no. It's something more on a résumé that we would share if somebody asked us. But I don't think it really improved too much, because we were already established by the time that was available. Now there are a few projects, yes, we did benefit from having that status." [#10]
- The owner of a majority-owned professional services firm stated, "I would assume if you're a civil engineer or a civil contractor, road contractor, there would be advantages. But I don't think there are as an architect." [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "Utilizing that - I haven't really had any advantages yet at all in probably the year-year and a half of having it. It's not benefited my company very much at all." [#13]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "Yes and no. I think more times than not, no. Some of the advantages of being on the MBE is there are requirements put in place for certain jobs, whether it be city, state, or even at the airport that have requirements. We're on that list to help meet that requirement. I think that's good that it forces people to look at us or make an attempt, which is great." [#17]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "To be placed on notice that you are available for your line of work." [#18]
- The owner of a WBE- and DBE-certified construction firm stated, "There should be. You know my thought process behind this and why I spent a lot of time and a lot of money to earn that certification was to get my foot in on INDOT projects to learn the processes and to be able to gain some sub work where they may not normally use a company like mine, however, that has not been the case." [#23]

3. Disadvantages of certification. Interviewees discussed the downsides to certification [#8, #9, #13, #14, #16, #17, #22, #23, #AV]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "Filling out all the paperwork." [#8]
- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "It was too much problems to get it." [#9]
- The Black American owner of an MBE-certified goods and services firm stated, "Yeah. I can't say, really, that I've experienced that. I would say just that the opportunity, maybe, just hasn't been there, you know? I don't know we're submitting a bid and seeing that the use of my organization as a certified minority business has been even put into context, you know? So, I don't even know how useful having the MBE cert has been to me in submitting bids that require MBE participation." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Well, the certification and recertification process is very simple. I have always been able to easily get that done, but I feel like I'm wasting my time every year I do it. But every now and then someone will ask if I'm DBE and I say, 'Okay, I guess I'll go ahead and recertify.' But it doesn't do

me any good. It seems to be a waste of my time. I don't know if there's disadvantages; it's just using my time.” [#14]

- The Black American owner of an MBE-certified professional services firm stated, "Well, it did not materialize, and it still hasn't. Honestly, it hasn't. With that said, I'm not going to say that was the reason I really didn't dive into exploring the opportunities that having my MBE status identified, or dive into how that can help me expand my business or get projects, so I really just never got into it. Not saying it won't help or it can't help, obviously I think it can, but I just have not witnessed it myself personally.” [#16]

- The Black American owner of an MBE- and DBE-certified construction firm stated, "The downside is you get flooded with e-mails that are pretty much junk e-mails because no one is really e-mailing - well, there's not enough people e-mailing you that are really looking for you to do the work. You spend a lot of administrative time responding to e-mails. We just quit responding. Or the phone calls. 'Hi, I'm so-and-so. We're bidding on this project.' I said, 'Where did you get my name?' 'Oh, we got it from the MBE,' where it be city, or state, or whatever. 'Okay. Great.' I alluded to them in the beginning of the conversation, a lot of this comes in hindsight. The walkthrough has already been done. The RFP has been out for 30 days, and there's no real intention. If anything, it just being on the list increases your amount of administrative costs that communicated as a company professional without being a professional and just ignoring people. You want to respond to communications coming into your company and take a look at maybe something that may materialize to something that wants it. How do you find that needle in the haystack when there are so many waste of time e-mails coming in? I don't think the MBE, and maybe I'm not utilizing it effectively as I should to get these relationships. I think there's a lot of meetings that are coming across from the city that they advertised to attend, and you know, that takes time to go out there. But again, the vast majority of these primes are non-MBE companies that are only using or seem like using the MBE list to check off the good faith cheap to turn it back in. You almost have to have a person designated to filling out the MBE paperwork to renew it. It's just ridiculous. I could see if it was the onset, but man, the renewal. I'm not renewing that because I tried to renew it, and he was there, and I talked to him on the phone. I said, 'I'm trying to understand why you're asking for this information that you've already received, like the deed to my property, and all this stuff. I said, man, all that stuff is in the packet when I first applied.” [#17]

- The Black American owner of a WBE- and DBE-certified professional services firm stated, "I have not seen any benefits to being certified, no. The people that are certified that get the disadvantages or get the woman-owned business get the bottom of the barrel. They put a certain amount off to the side for them, but it's not coherent to the rest of the bids if that makes sense. They say, 'Okay, you have to have this kinda business, and you get paid this amount,' but it's not comparable to the other bids. Most of the bids I've seen comparable, they're actually a little bit lower than the actual noncertified people. That's just my opinion and what I've seen. I don't see what being certified has done anything for me. If I definitely wanted to go, I wouldn't go as a certified. I've learned that in the last year.” [#22]

- The owner of a WBE- and DBE-certified construction firm stated, "I'm still not understanding the certification. I thought that it would help me penetrate the market as a female and get experience through INDOT as a sub on an INDOT project. However, the larger primes will not use our company because we are nonunion.” [#23]

- A representative of a majority-owned professional services company stated, "No direct experience with INDOT. Trying to get INDOT does not recognize State. They only will recognize the United States Dept. of Affairs Federal, will not talk to me unless I had the Federal. Starting a business is extremely difficult and getting work easy. Ex: difficult to start a veteran business is extremely difficult or challenging. A lot of audits." [#AV2019]

4. Experiences with the certification process. Businesses owners shared their experiences with INDOT's certification processes [#1, #2, #3, #5, #6, #7, #8, #14, #18, #22]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Let's go back to the very beginning, 1984. At that time, we didn't have the DBE program. We only had the MBE program. And there were parts of being certified that were a lot easier because as the certification process became more sophisticated in the last 40 years, a lot more paperwork. But if you'd done the things that you should be doing in any business to be successful, record keeping, et cetera, you're going to have that paperwork in pretty close proximity so you can submit the application regularly. But in the modern day, like in 2005 on, to get certified and to operate, having done it once before, it was not that difficult. But I can imagine it would be very challenging for somebody starting a new company. In fact, I've had several people that I've mentored that have started new companies to work specifically for INDOT and entities like INDOT and I understand the challenges. I don't want to be flippant here, but we are established, we are a mature company. So, I don't want to make it easier. I just want to make sure it's fair. And I think for the most part it is. It's been a task switching over to the electronic side. And their certification process is cumbersome. But I don't really have a problem. It's just a lot. It would be nice if there was a refresher course for mature companies in the DBE world to help us all make sure we stay on top of our certifications." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "we're certified as a DBE, but we're architects and we're also historic architects. And we submitted to be - because you have to fill out forms and, you know, submit to be approved to do that type of work. Well, when I did that, they said, 'Well, you can only pick one.' I said, 'Why? Why can't I go for regular architecture and go for historic preservation? I'm both.' 'Well, you can only pick one.' I'm like, 'But you're not telling me why. That doesn't make any sense. I'm both. I can do a regular building and I can do a historic building. I have qualifications for both.' 'No. You can only pick one.' So, I would go back to INDOT and say, 'You know, this is silly - especially for a small firm like mine. Why shouldn't I be able - 'because they're not all historic projects or they're not all new construction projects. And it would give more opportunity to compete for more work if they let me apply for more than one. I think INDOT's pretty thorough, they do on-site reviews, so they want to make sure that you're the person in charge and you're running the place and you're there and you know what's going on." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "It wasn't terrible for me, but it's a lot of work, you know, it's a lot of work. It's a lot of paperwork and for these, you know. For people starting out, it's a lot, you know, and then every year you have to remember to keep him up. You have to there, there's paperwork, you have to send in. And if you don't, then you can lose your status. And that's, you know, hard for, especially for a small business, you know, trying because all of us didn't get a checkbook to start up our business. As you know, we all had to do it on our own. That's the hard part about it all, I guess. I think INDOT compared to the other states does it does a fabulous job big pat on the back to them, you know on our tap you can go on there

now and you know it, it's electronic which is hard for some people who can't navigate around the computer. But I think that in that doesn't good job with you know I went to Ace, went up right before I started. I went, there was a Public Library down here and they had a meeting and they went through all of it with you and back then it was a paper application. But they went through it and told you how you had to have all your stuff to get it and get certified and all that. And that was that was wonderful and helped me and it helped me meet them. And you know, when they call me or whatever, I could put a face with the name. So. So that was really, really wonderful too I thought." [#3]

- The Black American owner of an MBE- and DBE-certified professional services firm stated, "It was a tough process." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "I think that the agencies all being very thorough with you know their application process and you know making sure that things make sense. They were very thorough, you know, with my application right to the point that like I said it, it went to court, and I was fighting for that. But they were relying on a lot of false information from my competitors. And I know that because they were in the hearings, right? That's one way that they were very thorough in making sure that I was not a front. I would hope that they're doing that same and have that same level of intensity in regard to all applications. I don't know if that's accurate or not, but it absolutely still happens, and those front companies get through so." [#6]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "It was a lot of paperwork and then it was a lot of paperwork to turn in and the Interviewing process. I remember it being stressful. It was ten years ago, though. I remember it being a stressful time for me. I don't feel like they just hand them out. I feel like you have to. You have to prove yourself, which isn't a bad thing so." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "Initially it was very difficult. I mean they wanted so much stuff, but they want to make sure that you're legitimate too, and that you're really doing the work; that you're not just saying you are and somebody else is doing it. But now I think it's every three years with the 'W' and you submit - but you don't have to submit everything like you did at the beginning, just updates. And then the 'D' you have a form you fill out annually and send to them." [#8]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Well, the certification and recertification process is very simple. I have always been able to easily get that done, but I feel like I'm wasting my time every year I do it. But every now and then someone will ask if I'm DBE and I say, 'Okay, I guess I'll go ahead and recertify.' But it doesn't do me any good. It seems to be a waste of my time. I would say the first time is probably the most difficult time other than that and renewing. If you have no change of ownership, I think it's fairly easy. After that point I think it's about the same. I think the first process is the most difficult, with all the tax information. And now that I have an accountant and all that in place, I just send them over my taxes, and it's done. I don't think it's very difficult." [#14]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "It's very liberal. We were certified in some of the southern states. We were certified in Mississippi, prior to Katrina. All of them are based upon your home state. We were certified in Kentucky and Tennessee and Georgia, Alabama; we did perform work. That's why we're interested in

performing work in regions 4 and 5. We did a lot of work in Illinois, Pekin, Peoria, Springfield, and Chicago." [#18]

- The Black American owner of a WBE- and DBE-certified professional services firm stated, "They're faster. INDOT is faster than most of the other agencies, but I'm not reaping any benefits from it." [#22]

Five businesses owners described their experiences with the certification process in negative terms [#2, #4, #9, #15, #23]. Their comments included:

- The owner of a WBE- and DBE-certified construction company stated, "There's one in particular who we compete with that they were certified as a DBE because they're a woman-owned business and they were certified on their first application when I applied, they wouldn't let me be certified until I got my ATSA certification because they said you really - if you're going to do traffic control you have to have this certification and my partner had just left and she had that certification and I didn't have it. So, they wouldn't give me my certification until I had that, but I know for a fact that they let the other company get it without the certification and it wasn't until a couple years later that they finally got the certification. So, it's just you know they were a bigger company and I think I don't know, I think they had better contacts so they just let them slide but little old me, I couldn't slide." [#2]

- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "It was arduous, and I felt like it was heavy-handed. Again, I come from Chicago, where maybe they don't do enough due diligence. Every three or four years there's some article in the newspaper about somebody being a front and going to jail. So, maybe my view of it, my perspective is a little skewed. But I just felt like it was way overly heavy-handed, and at the end of the day, you had two Black guys who bought a company from a Black guy, and it took us seven months to get - or it took us four months to get recertified, and that was after they gave us an intent to deny certification, and we had to withdraw and reapply. they were never really that forthcoming about what the process was or why we were being denied initially. It was just - yeah, I mean, it was just - it was tough." [#4]

- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "It was too much problems to get it. I think it's too much paperwork. I don't think it was very helpful, no." [#9]

- The Subcontinent Asian American owner of a professional services firm stated, "Yeah, I was trying to do that certification where you get points for being a business in Indiana and hiring Indiana people. The website was so terrible I couldn't join that." [#15]

- The owner of a WBE- and DBE-certified construction firm stated, "In our instance I have a partner and so I own the majority of the business, but it probably cost me $20,000.00 to get my DBE certification through INDOT in attorney fees and appeals, because I actually feel like they discriminated against me because I didn't have previous construction experience, however, I had been working with this construction company since 2013, so that's six years until I got my DBE certification. I was hounded because I was married and my money to start the business came through a joint account. It was a very daunting process and it cost me a lot of money and time to earn the certification, that essentially doesn't really do anything for me, because these larger

companies won't work with me anyway because I'm nonunion. We had no trouble with the IDOA certification, nor with the WBENC, it was only INDOT." [#23]

Recommendations for improving the certification process. Interviewees recommended a number of improvements to the certification process and shared their thoughts on certifications and the certification process [#1, #2, #3, #4, #5, #6, #7, #8, #9, #10, #12, #13, #14, #16, #17, #18, #22, #23]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "let's go back to the very beginning, 1984. At that time, we didn't have the DBE program. We only had the MBE program. And there were parts of being certified that were a lot easier because as the certification process became more sophisticated in the last 40 years, a lot more paperwork. But if you'd done the things that you should be doing in any business to be successful, record keeping, et cetera, you're going to have that paperwork in pretty close proximity so you can submit the application regularly. But in the modern day, like in 2005 on, to get certified and to operate, having done it once before, it was not that difficult. But I can imagine it would be very challenging for somebody starting a new company. In fact, I've had several people that I've mentored that have started new companies to work specifically for INDOT and entities like INDOT and I understand the challenges. I don't want to be flippant here, but we are established, we are a mature company. So, I don't want to make it easier. I just want to make sure it's fair. And I think for the most part it is. It's been a task switching over to the electronic side. And their certification process is cumbersome. But I don't really have a problem. It's just a lot. It would be nice if there was a refresher course for mature companies in the DBE world to help us all make sure we stay on top of our certifications." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "Well, it would be much simpler if everybody followed the state certification. I think the city certification is a waste of time and a lot of people don't go after it because it's too much work and they could save a lot of money if the city if they got rid of that whole minority and women office business development blah blah blah. They pay a lot of people to do something that all they would have to do is take the state certification. Because the state certifies W, N, M, and D. And the application is pretty much the same, but the city won't recognize WBENC certification, which is a national certification for woman-owned businesses they refuse to recognize that which makes no sense. There's another one they won't use - oh NMSDC, it's National Minority Supplier Development Council. Again, it's a national certification and the city won't recognize it and I said, 'Well why won't you recognize that?' And they said, 'Because you pay for it.' And I said, 'Yeah you pay for it, and they do more in depth because they have a bigger staff and they do more in-depth research, so it's a better certification.' And they said, 'Well we just don't do it.' I think it's ridiculous…. I think INDOT's pretty thorough, they do on-site reviews, so they want to make sure that you're the person in charge and you're running the place and you're there and you know what's going on. … we're certified as a DBE, but we're architects and we're also historic architects. And we submitted to be - 'cause you have to fill out forms and, you know, submit to be approved to do that type of work. Well, when I did that, they said, 'Well, you can only pick one.' I said, 'Why? Why can't I go for regular architecture and go for historic preservation? I'm both.' 'Well, you can only pick one.' I'm like, 'But you're not telling me why. That doesn't make any sense. I'm both. I can do a regular building and I can do a historic building. I have qualifications for both.' 'No. You can only pick one.' So, I would go back to INDOT and say, 'You know, this is silly - especially for a small firm

like mine. Why shouldn't I be able - ' 'cause they're not all historic projects or they're not all new construction projects. And it would give more opportunity to compete for more work if they let me apply for more than one. because we're DBE they have a goal percentage that they have to meet there's no question unless they just can't find somebody, they have to meet their DBE goals. So, we wouldn't be getting that much work if we didn't have that certification. " [#2]

- The owner of a WBE- and DBE-certified construction company stated, "I think the benefits of it is that it that it makes it, it makes people have to at least consider working with you. When I first started, this industry I've been around it my whole life. But you see the same people, you know it's the same male population out there. And if you if they had not created this program and allowed us to have the opportunity to at least at least get these people to say I need to look outside the box, you know or work on you know it's taken me 10 years to establish some of these relationships with people or have somebody give me a chance. But had these programs not existed, I don't think I would be where I am right now and I don't think that we would be able to pull other people up, you know. I'm not near the DBE that I would like to be or hit, you know, just business-wise, hit where I want to be because eventually, I want to be the, you know, some of these mentors that I've had and gained and things like that. I want to be able to pass that on to other. People in our industry, other DBEs. I think if these programs weren't as strong as they as they were it would, you know, keeps people out. It makes it even tougher. And then you say, well, what's the point? It wasn't terrible for me, but it's a lot of work, you know, it's a lot of work. It's a lot of paperwork and for these, you know. For people starting out, it's a lot, you know, and then every year you have to remember to keep him up. You have to there, there's paperwork, you have to send in. And if you don't, then you can lose your status. And that's, you know, hard for, especially for a small business, you know, trying because all of us didn't get a checkbook to start up our business. As you know, we all had to do it on our own. That's the hard part about it all, I guess. I think INDOT compared to the other states does it does a fabulous job big pat on the back to them, you know on our tap you can go on there now and you know it, it's electronic which is hard for some people who can't navigate around the computer. But I think that in that doesn't good job with you know I went to Ace, went up right before I started. I went, there was a Public Library down here and they had a meeting and they went through all of it with you and back then it was a paper application. But they went through it and told you how you had to have all your stuff to get it and get certified and all that. And that was that was wonderful and helped me and it helped me meet them. And you know, when they call me or whatever, I could put a face with the name. So. So that was really, really wonderful too I thought." [#3]

- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "it's been a benefit to the extent that there's some requirement that we be used. So yes, it's been a benefit. Like I said, my gut feeling is that if we didn't have the certifications, if there weren't the certification requirements, that we wouldn't get a lot of the work we get. That's what I'm hoping to change. I'm hoping that our customers can start looking at us rather as a partner, a rebar partner, rather than a minority rebar partner." [#4]

- The Black American owner of an MBE- and DBE-certified professional services firm stated, "It has been a benefit because it allows us the opportunity for all the primes to see us. Before I had the DBE with INDOT the primes - you know, you can send your numbers to them but they're not really looking at them. But at least with the DBE they know they need DBE, so they might look at your numbers and say, 'Oh, maybe we can use them for these services.' It kind of gives us the

opportunity to be noticed out there and give us the opportunity that once we've been noticed to perform the work. Also, if they like you then you build that - so that's all part of the relationship that I'm talking about. It was a tough process" [#5]

- The owner of a WBE- and DBE-certified construction company stated, "the benefit is that prime contractors have a responsibility to meet a certain goal. I think that the agencies all being very thorough with you know their application process and you know making sure that things make sense. They were very thorough, you know, with my application right to the point that like I said it, it went to court, and I was fighting for that. But they were relying on a lot of false information from my competitors. And I know that because they were in the hearings, right? That's one way that they were very thorough in making sure that I was not a front. I would hope that they're doing that same and have that same level of intensity in regard to all applications. I don't know if that's accurate or not, but it absolutely still happens, and those front companies get through so." [#6]

- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "I think there's a huge advantage to the DBE certification. I guess it would just be the opportunity to do to have and to have the opportunity to do the work and be a subcontractor come with the percentages that INDOT puts in there for the DBE. It was a lot of paperwork and then it was a lot of paperwork to turn in and the Interviewing process. I remember it being stressful. It was ten years ago, though. I remember it being a stressful time for me. I don't feel like they just hand them out. I feel like you have to. You have to prove yourself, which isn't a bad thing so." [#7]

- The owner of a WBE- and DBE-certified construction company stated, "The state requires them, like on each job it will have the percent of DBE or WBM or all the other ones. So, the state requires them to meet those goals. Sometimes I'm sure we get jobs that other people may not be able to get that are not DBEs or WBEs. Filling out all the paperwork Initially it was very difficult. I mean they wanted so much stuff, but they want to make sure that you're legitimate too, and that you're really doing the work; that you're not just saying you are and somebody else is doing it. But now I think it's every three years with the 'W' and you submit - but you don't have to submit everything like you did at the beginning, just updates. And then the 'D' you have a form you fill out annually and send to them." [#8]

- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "Yeah. I think the certification part is really bad how to prove you're Chinese, you know? I have my passport. That's it. You know? And beyond that it's really hard to; there's no way you can prove it. You know, that's a very simple thing, but if you make me to prove it it's hard. That's not very good thing, you know? Yeah, they should make something easier and also quicker. Like me, you know, the passport says I'm Chinese. I'm Asian, Chinese. That should be enough. Because that's the federal government already approved that. Why do they do that? First of all I've got passport from China. You know, even with that they should make it easier for you if you are the minority or if of Chinese origin. That's easy to determine. Instead of if you want some paperwork to prove this or that, you know, it's really kind of hard to prove." [#9]

- A representative of a woman-owned professional services company stated, "No, I think with some of the veteran paperwork were some challenges, just because they wanted to dig into our corporation bylaws and basically tear our bylaws apart when we were signing up to be a veteran-owned through the federal government. That was always a pain in the neck. But for the

local, the State of Indiana, City of Indianapolis, it wasn't so bad. It was on the federal side that was actually difficult." [#10]

- The owner of a majority-owned professional services firm stated, "I would assume if you're a civil engineer or a civil contractor, road contractor, there would be advantages. But I don't think there are as an architect." [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "Utilizing that - I haven't really had any advantages yet at all in probably the year-year and a half of having it. It's not benefited my company very much at all. Yeah. I can't say, really, that I've experienced that. I would say just that the opportunity, maybe, just hasn't been there, you know? I don't know we're submitting a bid and seeing that the use of my organization as a certified minority business has been even put into context, you know? So, I don't even know how useful having the MBE cert has been to me in submitting bids that require MBE participation." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "No, I think it's fine the way it is. I would say if you're not going to use people don't waste their time, though. I mean sometimes we do these things and people get all up in arms and then they start giving you proposals, but then we end up wasting a whole bunch of time with people that aren't going to use you. I'd rather not get the proposal if it's just paperwork for you, because it is time-consuming for us." [#14]
- The Black American owner of an MBE-certified professional services firm stated, "Well, it did not materialize, and it still hasn't. Honestly, it hasn't. With that said, I'm not going to say that was the reason I really didn't dive into exploring the opportunities that having my MBE status identified, or dive into how that can help me expand my business or get projects, so I really just never got into it. Not saying it won't help or it can't help, obviously I think it can, but I just have not witnessed it myself personally." [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "I just that wasn't readily available even though the MBE stuff is there, and everybody said, 'Hey, you need to be certified.' I didn't want to do it right away. I own another business, and it took me forever to certify that one because I didn't want people using it because my certification. I wanted you to use it because of the ability for us to get to work. Now if there's resources out there that help level the playing field because we can't get opportunities, then we'll take a look at those." [#17]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "I think somewhere in the past you had to be certified for your category in order to bid an upcoming project, a 30-day preapproval, or a 90 day preapproval. I think that should be deleted. If you're certified, you should be able to bid something with a short-term notice." [#18]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "They could make the bids comparable to the ones that aren't certified. They need to make it simpler, 'cause a lotta people - they have to contract people to help them get through the application process. I know as far as the woman-owned business, a lot of the women that I know that own businesses, they've actually had to pay extra money to be certified so somebody could help them do it. They just need a lot less paperwork, a lot less detail, because the details that they want from us, some of the details that they want, it's pointless. The bottom line is if you're 100 percent owner of a business or you hold 80 percent stake in it, it shouldn't be that hard to process a woman-owned business." [#22]

- The owner of a WBE- and DBE-certified construction firm stated, "They probably see a lot of fraud in the industry, so I understand why they go in-depth before granting that certification, however, I think that they need to rework their process. What the exact right answer is I can't tell you. I can only tell you that my experience of getting my certification was very daunting. Well as I've said before I know that they probably deal with a lot of fraud, however, I think that every case should be taken in differently and I kind of felt that I was just lumped in a group because I had a partner." [#23]

5. Comments on other certification types. Interviewees shared several comments about other certification programs [#1, #2, #22]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "I don't think it's as bad with INDOT as it is with the other two entities: IDOA and the City of Indianapolis. They are sorely understaffed. The new people they have on board I don't think really even understand the process. So, it's hard to get an answer." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "I did try to apply for 8(a) certification, well I did that before they actually had a city WBE I went to the state office here and said, 'Hey I want to apply for 8(a),' and they said, 'Why?' And I said, 'Well because I'm a woman own business.' And they said, 'Well you don't qualify that's only for minorities?' And I went, 'Really and I'm not a minority.' They said, 'No.' So, years later they started accepting women into the 8(a) program and I tried to apply again, and I actually used a consultant to try to help get through all the crappy paperwork and they told me I could not apply for 8(a) because I owned two businesses and I said, 'What difference does that make?' And they said, 'Well you just can't do that.' And I said, okay and so I didn't apply either one. be clearer on the up front if you own two businesses you can't apply for 8(a). I'm like why? I own 100 percent of both, why I couldn't call it one conglomerate and they said no, no you can't do that because you wouldn't be paying enough attention to either business. And I'm like okay, and 10 years later guess what? My two businesses are fine." [#2]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "No. It is difficult. The HUBS one, no, but the woman-owned business one, that's difficult. If you mess up one thing, it's declined. They don't talk to you, nothing. The process is longer. There's so much more work that's involved with it. It's almost not worth it, to be honest. You can be a woman-owned business and not be certified but still get the same amount of contracts at the end of the day." [#22]

C. Experiences in the Private and Public Sectors

Business owners and managers discussed their experiences with the pursuit of public- and private-sector work**.** Section C 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. Experiences doing work in the public and private sectors;
5. 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 [#2, #4, #6, #8, #13, #14, #16, #17, #21, #22, #23, #24, #25]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "It depends on what public projects come along because we have done work with different public agencies GSA, Indianapolis Housing Agency, it just depends on the project." [#2]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "This is something we've been trying to change. The company we bought was probably 90 percent public sector. We took a snapshot today. I would say we're closer to 75 percent public sector. Obviously, we would love to get to 50/50, but Rome was not built in a day." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "I did see because of the pandemic private sector, holding off doing. You know, I mean obviously we focus on, you know, parking lots and resurface of parking lots and those types of things. And I think that those companies because how they their businesses were affected some of them did hold off doing those projects be because of that but because the public sector has been so busy." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "We used to do more private. I can say back in 2008, when people couldn't pay their mortgages, they were not buying landscaping or trees. We had some of our own trees and we gave that up simply because they weren't buying them. If they couldn't pay the mortgage, they were not going to buy a tree, so we bulldozed a lot of the trees that we had. So, we shifted gears then and went with the public sector, because Indiana's been great at having a lot of money they're putting into roads." [#8]
- The Black American owner of an MBE-certified goods and services firm stated, "Yeah. I would say it was all - has been private sector work so far." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "No, I've always had a constant flow of private work. It's higher around December, January, February, and March, because contractors are trying to get ready for their summer work, so I get a lot of calls during that time from general contractors building small office buildings to small retails to commercial homes, things along those ends, that we can do fairly quickly." [#14]
- The Black American owner of an MBE-certified professional services firm stated, "Oh, I'm going to always trend toward private sector work. It's more lucrative, and the turnover is faster. There are not as many hoops to jump through when it's time to get paid." [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "I think the private sector is more what of we've gravitated towards" [#17]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "No, it's kind of sporadic, you know. In other words, there are many years were primarily would be we were doing 100 percent government work. There's been other years where we were doing work for private companies. The ratio was 90 percent public and ten percent private." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Oh, forward. It's not getting away from it; it's going more toward it." [#22]

- The owner of a WBE- and DBE-certified construction firm stated, "I wouldn't say there's any trend in particularly, but you know again with the state-driven CCMG, the Community Crossings Program that really puts a lot of work out there to bid for the public sector." [#23]
- The owner of a majority-owned construction firm stated, "Then after 2020, we totally shifted back into doing the majority of our work through the public sector." [#24]
- A representative of a majority-owned construction firm stated, "It's been more of a trend away [from private]. I think cost of our quality, investments versus our competition who is willing to cut those corners." [#25]

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.

Four business owners or managers explained that their firms only engaged in private sector work [#11, #12, #13, #16]. For example:

- The Black American owner of a construction company stated, "That is correct. Now, I've been registered with Sam and then, also, I'm registered with the city of Indianapolis as a vendor, but it seems like the work that I've been busy doing other work now so, I haven't really been looking at too much of their work opportunities, but the work that I was seeing that was coming through, it was kind of hit and miss for electrical so, I haven't really attempted to go after any of that work. But then, also, I know that I wanted to have my minority certification, and as soon as I get that, I imagine that I'll start doing work for the city and government a little more. Well, I'll start." [#11]
- The owner of a majority-owned professional services firm stated, "Zero public and a hundred percent private." [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "Mostly, I would say, we haven't done too much work at all. It's all been from the private sector." [#13]
- The Black American owner of an MBE-certified professional services firm stated, "I've done very little work with the public sector. Most of my work is with the private sector." [#16]

One business manager explained that their firms only engaged in public sector work. [#24]. For example:

- The owner of a majority-owned construction firm stated, "We don't do a whole lot of private. About 99 percent of our business is public work." [#24]

For four firms, the largest proportion of their work was in the private sector [#9, #17, #22, #25]. For example:

- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "Most of them are restaurants; I set up restaurants." [#9]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "I think the private sector is more what of we've gravitated towards." [#17]

- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Well, I'm gonna say 80/20, 80 private, 20 they're corporations. The other ones, they're auditors or people from the state that will call me. Other than that, no. Other grants and stuff we go for. It's not worth it if you put all the effort in it, you put all the time in it, and usually it's like they don't even get to you, so why even do it?" [#22]
- A representative of a majority-owned construction firm stated, "I'm probably not a good judge of that, but I'm going to guesstimate that we're easily 75 percent private." [#25]

For fifteen firms, the largest proportion of their work was in the public sector [#1, #2, #3, #4, #5, #6, #7, #8, #10, #12, #14, #15, #20, #21, #23]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Ninety-eight percent [public]." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "The majority of our work is with INDOT, so, we're bidding, as a subcontractor on road construction projects." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "I'd say about 90/10. I don't think it varies all that much. I think in my, in my work, there's just a lot more public sector work." [#3]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "This is something we've been trying to change. The company we bought was probably 90 percent public sector. We took a snapshot today. I would say we're closer to 75 percent public sector. Obviously, we would love to get to 50/50, but Rome was not built in a day." [#4]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "We're about 60/40, 60 in the public, 40 in the private." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "[We do] 80% public, 20% private." [#6]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "I concentrate on the public work. I guess you would say city, state. INDOT work." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "The majority of it is INDOT. We don't do residential. It's too hard to deal with people. We do commercial." [#8]
- A representative of a woman-owned professional services company stated, "Right now we're more in the public sector. We have a handful of clients that are private, but I'd say the bulk of our income are probably the public sector." [#10]
- The owner of a majority-owned professional services firm stated, "[Company name] [was] founded in 1993. And we're an architecture firm. We do preservation planning and interiors as well, but we don't have any engineering on staff. We've been in business almost 29 years. Most of our clients, probably 80 percent, are not-for-profits. We also do some commercial and retail." [#12]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I'd probably say 70-percent public and 30-percent private." [#14]

- The Subcontinent Asian American owner of a professional services firm stated, "About 90-percent [public].” [#15]
- A representative of a majority-owned professional services firm stated, "I'm going to say 90-percent is public, 10-percent is private.” [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "We are primarily a defense contractor and we have done some work for some other companies. I would say that typically our split will be about 90 percent from the public and ten percent from the private.” [#21]
- The owner of WBE- and DBE-certified construction firm stated, "Probably 75 percent public, with 25 percent private.” [#23]

One firm 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 [#19]. For example:

- A representative of a majority-owned professional services company stated, "Let's say it's 50/50 because I don't know, and we work a lot for both as a company. Maybe it's 50/50 or 60 percent private and 30 percent public. There's not a big disparity between the two. It depends on what fails and who calls us. We'll work for anybody and so we kind of often look at - we're often more focused on what the failure is. Is it a concrete building or is it a steel building kind of thing? And it does matter who owns it." [#19]

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 Indiana [#2, #3, #4, #14, AV]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "I think on the private side a lot of owners don't specifically go after women and minority-owned firms, it's more the public sector does. Some of the bigger companies like Lilly has the diversity goals, but not everybody does. So, there's some corporations that they don't even think about it they just do rely on kind of their old boy context, like who would you use and oh I'll use this person and things kind of happen like that." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "I feel like in the private sector is wet. It's more of like the 'Good Old Boys' type thing. You know, if somebody has a relationship, you're not, you know, at least in the public sector working with like INDOT work and things like that. There are goals. There are people who head up these companies that are saying everybody needs to have a fair shake on this. And I think that's wonderful in the private sector work, it doesn't matter. You know, it's sometimes, you know, there might be two people quoting somebody and they're gonna give it to whoever they want anyway. And it just is what it is. So, nobody really cares about the price, I guess sometimes." [#3]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "we do almost zero private work in Indiana. Not being from here, this company doesn't have a longstanding history of doing private work anywhere in the state of Indiana. The only reason we've been successful is that pipeline to Chicago." [#4]

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I have been working for so long that it's word of mouth a lot in the private sector. I get a lot of contractors that call me for their projects in the private sector, so I don't do much marketing - I don't do any marketing in the private sector; it's all word of mouth and people that know me." [#14]
- A representative of a woman-owned construction company stated, "We've had pretty positive experiences across the board. As far as the public sector, the bids are pretty accessible through various websites. In terms of the private sector, we have a good ability to network, so there's a lot of word-of-mouth business that we receive, seeing as we have employees that have been." [AV5]

Six business owners or managers expressed that it is easier to get work in the private sector. Many noted the benefits of personal relationships, the difference in process, and the ease of finding work as reasons they see getting work in the private sector as easier [#2, #5, #12, #14, #16, #19]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "I think it's more rules on the public side. There's more rules that you have to contend with. On the private side, you're working with one entity and you kind of go in and, 'Okay. This is what we're gonna do.' I think it's much easier." [#2]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "It's a relationship that you can get with your clients, meaning the private sector. Once you do that relationship with them, even though you're still bidding against other people, but most of the time they tend to go with you because maybe they like your product that you give to them and stuff like that. That's the, as I said, the nature of the business." [#5]
- The owner of a majority-owned professional services firm stated, "We don't do public work, haven't for a long time, so I don't have any recent experiences. And obviously, we've got - we've been successful in the private sector. I wouldn't say there's any huge barriers once you're established. It's just about competing with other architects and trying to avoid projects where the owner has invited five or more architects. It's just not worth it because someone's going to lower their fee to get the work, so what's the point? For example, recently we got an RFP from the Indianapolis Marion County Public Library and there were a hundred architects and engineers on the e-mail. What are your chances of getting that job? And why would you spend any time replying? It's not worth it." [#12]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I would say the private sector is about the same, 'cause I've been in business so long I still get several calls a week asking me to work on this project or that project." [#14]
- The Black American owner of an MBE-certified professional services firm stated, "[Private is easier to get] because more private people call me than public people call me." [#16]
- A representative of a majority-owned professional services company stated, "The private sector is much more streamlined as far as contracts and approvals. The public sector is much more bureaucratic in that sense." [#19]

Nine business owners or managers elaborated on the challenges associated with pursuing public sector work [#2, #12, #AV]. Their comments included:

- The owner of a WBE- and DBE-certified construction company stated, "Yeah, I think public work is harder to get. Everybody has their own way they want things submitted their own forms, their own rules. Very often it's more open bid it's not invited bid. So, you're working with a lot more competition on the public side and again they're looking for a lot of experience. So, they talk diversity on the public side, but they're limited by the amount of experience they're asking for." [#2]
- The owner of a majority-owned professional services firm stated, "We don't do public work, haven't for a long time, so I don't have any recent experiences. And obviously, we've got - we've been successful in the private sector. I wouldn't say there's any huge barriers once you're established. It's just about competing with other architects and trying to avoid projects where the owner has invited five or more architects. It's just not worth it because someone's going to lower their fee to get the work, so what's the point? For example, recently we got an RFP from the Indianapolis Marion County Public Library and there were a hundred architects and engineers on the e-mail. What are your chances of getting that job? And why would you spend any time replying? It's not worth it." [#12]
- A representative of a majority-owned construction company stated, "Working with INDOT or IAA means they want a low bid price which we don't like to do." [AV1]
- A representative of a woman-owned construction company stated, Too much paperwork finding qualified employees is really hard." [AV36]
- A representative of a majority-owned construction company stated, "Often there is not enough time in the bid process, for example, we get a request for work, and they want it done in a week, and we can't do it that quickly-- schedule deadlines, more paperwork than private sector the changing economy and technology and regulatory climate." [AV51]
- A representative of a woman-owned construction company stated, "In the past we have not been able to secure the work because of the minority participation. It is also very hard to do all the paperwork required for government work. INDOT is not too bad, but government work is crazy. They need to do something about making permits easier to obtain. We are also having --supply chain issues, hard to get needed supplies. There is also too much bureaucracy--you now need permits for everything and that doesn't need to be done." [AV76]
- A representative of a Black American-owned construction company stated, "Don't like working with government agencies: red tape, low fees, adsorbent demands, low bid contactors getting financial support from banks, they loan people with money, and don't loan people with little money." [AV94]
- A representative of a Black American-owned professional services company stated, "A barrier for entering public sector work is not being able to get in touch with the people who make the hiring decisions. There is no follow-up system." [AV205]
- A representative of a majority-owned construction company stated, "Too many regulations and paperwork. Pretty competitive, and right now supply issue and availability is difficult." [AV2032]

One business owner described public sector work as easier or saw more opportunities in this sector [#21]. For example:

- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "We have really not sought out private work. Those people came to us to ask us to do things for them because they were familiar with the work we were doing for the government. We were really not marketing in the private sector." [#21]

Two business owners or managers noted that it is not easier to get work in one sector as compared to the other [#24, #25]. For example:

- The owner of a majority-owned construction firm stated, "I wouldn't say easier. We just got more of an edge of this public stuff is what we do, and we have our costs down. We're better suited for that." [#24]
- A representative of a majority-owned construction firm stated, "I don't know that it's easier. The public sector has a lot more red tape to it, so it's a more lengthy process. And once again, you get back to, if you don't know exactly who and when to speak with people, you can lose out on those contracts just because you didn't get your whatever done by this cutoff time." [#25]

4. Experiences doing work in the public and private sectors. Business owners and managers commented on what it's like to do work with public and private sector clients in Indiana.

Three business owners or managers discussed their experiences doing work in the private sector [#14, #20, #25]. Their comments included:

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "It's higher around December, January, February, and March, because contractors are trying to get ready for their summer work, so I get a lot of calls during that time from general contractors building small office buildings to small retails to commercial homes, things along those ends, that we can do fairly quickly." [#14]
- A representative of a majority-owned professional services firm stated, "Sometimes I think it's more difficult. At least in my business it is, so I tend to stay away from it. It's easier for me to be able to deal a lot of the times on these public projects than it is with the private sector." [#20]
- A representative of a majority-owned construction firm stated, "Yeah, it's gotta be easier doing it for the private sector." [#25]

Six business owners or managers discussed their experiences doing work in the public sector [#3, #12, #14, #23, #24, #25]. Their comments included:

- The owner of a WBE- and DBE-certified construction company stated, "The work itself, though, is it essentially the same work." [#3]
- The owner of a majority-owned professional services firm stated, "Yeah, [timely payment]'s an issue. That was one of the problems I had when we did the public work." [#12]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Oh, definitely. Within the Black community - the Black community and normally the people that

come to me, their pockets aren't as deep, and they can't afford the percentage or the price that the state or the city sector could pay. So, we end up - in order to get the work, we end up reducing our price to, number two, help them along, and number three, just to keep working on some of these projects. We don't make a profit on most of those projects. A lot of times we just try to break even more so, 'cause we still have the same insurance, we have the same - software costs the same amount. And my employees sometimes even cost more. So, it's not like I would be making a profit by doing those jobs, but they have come to me over the time when I didn't have any work, so I'd still feel I'm obligated to help the community to some extent." [#14]

- The owner of a WBE- and DBE-certified construction firm stated, "Once you have the work the requirements from the state are overwhelming." [#23]
- The owner of a majority-owned construction firm stated, "Yeah, it's easier to do it for the public side of things. It goes back to the INDOT pay items and you know you're gonna get paid for what you do out there. There are so many changes with both, but on the private side, you almost have to argue everything out beforehand. And the way schedules are, and it just seems like it's more of a difficult situation on the private side." [#24]
- A representative of a majority-owned construction firm stated, "Once again, the red tape involved with dealing with governmental agencies in order to win the contracts and being slowed down by other contract workers that maybe haven't been able to keep up to speed with the way they were supposed to have done their things before you can do yours." [#25]

4. Differences between public and private sector work. Business owners and managers commented on key differences between public and private sector work.

Sixteen business owners and managers highlighted key differences between public and private sector work [#1, #3, #12, #13, #14, #16, #17, #19, #20, #21, #22, #23, #24, #25, #AV]. Their comments included:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "That's a good question. Public sector you always got to be low. You've got to be the low bidder, even if you are a DBE, you've got to be low. In the private world, you can negotiate better. It's easier to negotiate." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "Private sector is a lot less paperwork." [#3]
- The owner of a majority-owned professional services firm stated, "That's the main reason why I don't do public work. You end up with generally the agencies looking for low fee, high expectations, and you end up getting low bid contractors, and it's just not worth it. Most public agencies require the traditional design-bid-build scenario, and they have to take the lowest qualified bidder. And they get performance bonds and payment bonds. It's just a different world. And you end up with low bidder, and that's usually the worst bidder Not really. I think in either sector you've got to start out doing the small projects to earn the right to do the bigger projects. I'm assuming that's the same as in the public sector. The private sector, I think, is a more respectful partnership between architect, contractor, and owner. Public work is all about low bid, and so I think those are the two biggest differences." [#12]

- The Black American owner of an MBE-certified goods and services firm stated, "Not really. I would say almost everything we've done has been private so, I haven't really had the opportunity to do any sort of public sector work. I'd like to. That's kind of where I've wanted to dive in and actually do either - as a sub or a prime, whatever - to be able to bid directly to the city or state and do that work." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I would say as far as volume I get a lot of work from the private sector. But as far as value I get more work from the public because I can do five private projects and they won't bring in as much as one public project. Private - normally general contractors don't want to waste time doing specifications, so it is a little bit timesaving there, and they don't need all the fine line details; they know how they're going to detail it. So, we do save some time in that aspect of it. Of course, the public, we have to have very specific specifications and we have to have consultants' contracts and we have to deal with consultants a lot of times. On the private sector we'll deal with consultants that we use quite a bit, and a lot of times a handshake if we've been working together for so long. Yes, because sometimes in the public sector we aren't told who to use, but you kind of are told who to use." [#14]
- The Black American owner of an MBE-certified professional services firm stated, "It's about the same. For what I do and what I'm brought on to do, it's the same." [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "I think the private sector is more what of we've gravitated towards just because there were - not necessarily because of the oversight. I think the budgetary constraints were on public sector. A lot of the public jobs are really low-cost, low margins, low profit, high risk, and then high paperwork, high regulation. High cost. We typically stayed in the private sector just because there wasn't as many hoops to jump through. There was some obviously safety requirements, and OSHA requirements. That just is a no-brainer. But it seemed like the money was higher, a better return on your investment of time and resources in the private sector than public. But I think the opportunities were the same and were there. It's just that we chose to capitalize more on the private sector. But from what I observed, public, I think it's still that the demand on both sides is still the same. I don't think anything really has changed. I think the type of work has changed, but the demand for work in general is still the same." [#17]
- A representative of a majority-owned professional services company stated, "The past couple years with the public sector has, especially like universities have decreased the amount of work they were doing and now are starting to ramp back up. The private sector ramped up a lot quicker than the public sector after the COVID impact." [#19]
- A representative of a majority-owned professional services firm stated, "I think it's always harder in the private sector than it is with the public sector in our business. So ever since I've been with the firm public environment seems to be more inviting to what we do, rather than some of the private industry. I think the State for public works projects I think it's anything over $150,000.00 you have to go through a formal bid process. I think in today's market that number should be higher than that, given what we're seeing with inflation and some of the costs. It hasn't been updated in several years. In my experience I'd say yes, [finding subcontractors in the public sector vs private is different]. In my experience it's tougher in the private. Some people would say 'I can't believe you're saying that' but that's just how it is with our market. I think because in the public sector there's so much out there about transparency and you've got to do this, and

you've got to provide this, and provide that to people that are bidding. I think that in a lot of cases it's been beat down in the culture that you have to be able to provide this." [#20]

- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Oh yeah. Doing business with the private sector is a lot easier than doing business with the government. A lot simpler too. You don't have to contend with all those government regulations, and audits, and reports, and things that you have to normally do for the government." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Private, I'm getting about 80 percent. It's easier, even though I do contracts when I sign up with these companies, and I make them do contracts with me. It's an easier process to do it that way then go through the state, 'cause you're waiting on the bid. You're waiting for this. You're waiting for that. You're counting on it, whereas the other way around, you're right in their face, and they're giving it to you right. They're either going to give it to you, or they're not. The time to get the contract and the money, and the time of payment, and the time you have to put in to get the contract; whereas you just talk to somebody face to face, on the phone, or e-mail them, and you get it right away." [#22]
- The owner of a WBE- and DBE-certified construction firm stated, "The state requirements and paperwork are very daunting for a smaller company. You know we personally don't have somebody designated to do all the paperwork requirements that we have. So, it's very tough for us when we are the prime on an INDOT project, because the requirements are just so huge." [#23]
- The owner of a majority-owned construction firm stated, "For the most part in the public, you got an engineer that comes up with a bunch of pay items and you build the job for those pay items. The private world is more of the lump sum. If you missed anything on your plans or they try to get you cornered with change orders, there's more procedures in the public arena that protects us. When we do the work, we get paid for it. I did a lot of fighting for money in the private world." [#24]
- A representative of a majority-owned construction firm stated, "Well, yeah. When you're doing something private sector, it's going to be somebody's putting a fence around their inground pool, or they're fencing in their yard or putting deck railing on. And when you start to go out to the public sector instead, then that's gonna be larger contracts with larger demands. The only thing I can really think of is just, in order to make the same profit levels within the private, you have to just do that much more volume. Because your profit margin is sometimes smaller than it is with public. I don't know that it's easier. The public sector has a lot more red tape to it, so it's a more lengthy process. And once again, you get back to, if you don't know exactly who and when to speak with people, you can lose out on those contracts just because you didn't get your whatever done by this cutoff time." [#25]
- A representative of a Black American-owned construction company stated, "They're a government. municipality and there's a bureaucracy which we don't have to put up with in the private sector, but that's expected." [AV37]
- A representative of a majority-owned construction company stated, "High level regulation, paperwork, multiply layers of management to oversee projects. I think Indiana economy is booming, there is lots of opportunity with construction project." [AV2029]

5. Profitability. Business owners and managers shared their thoughts on and experiences with the profitability of public and private sector work.

Two business owners perceived public sector work as more profitable [#14, #24]. For example:

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "The private sector pockets aren't as deep as the city and state work, so we end up working a lot harder for a marginal number of pay." [#14]
- The owner of a majority-owned construction firm stated, "Our margins are better on the public side of things. It just seems like it's a better - somebody gets in a niche and knowing how to do the work and dealing with all the bureaucracy of it. It's a little bit easier on the public side." [#24]

Seven business owners and managers perceived private sector work as more profitable [#1, #2, #6, #12, #16, #21, #22]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Profitability is always better [in the private sector]." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "Well, if it's a government project for [the architectural side of house] you have to follow their guidelines for - you almost have to do an audit. You can't set your hourly rates they are set by your overhead and profit and so they do the calculations for you, and they say this is your hourly rate, this is what you have to bill. And on the [construction] side the rates are set by prevailing wage. Now, on a private project we can set our own rates across the board We can say okay we're charging $100.00 an hour or we're charging $150.00 an hour. It's more about if you're competitive or not." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "On the trucking side, I would say it's the same across the board. On milling, I would say private is more profitable than public because of volume." [#6]
- The owner of a majority-owned professional services firm stated, "Yeah. For example, in the private sector our fees are probably eight percent. In the public sector, I think the last project we did, I think our fees were six percent." [#12]
- The Black American owner of an MBE-certified professional services firm stated, "Oh, I'm going to always trend toward private sector work. It's more lucrative, and the turnover is faster. There are not as many hoops to jump through when it's time to get paid. I'm not sure. I don't get into them, but I know when you look at the overall dollar amount; just as a casual observer, what we're talking about, the budget for public work is a lot bigger than private work, at least the work that I do. It's a scenario where maybe because I'm not going out there marketing for that public work, and I'm not getting that big public work, I only get called in when something goes awry. For me, my fee and dollar amount for that public work is going to be less than what I'm getting in the private sector." [#16]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Oh, absolutely. The private businesses are a lot more profitable. Because the government has budgetary requirements that limit the amount of profit that you can have. In the private sector, there's no such limit." [#21]

- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Number one, the payout, it comes quicker, whereas if you're waiting for the state and government, you got a 30-day payout. There are all these procedures. You invoice 'em, and it's immediate payment. There's no hold. The time you waste trying to get money from the state or trying to get the bids and contracts from the state and the government, versus getting 'em directly from the customer; that alone makes that profitable. I can wait weeks on a bid. I can get a customer in front of me and get ten customers in the time I'm trying to get one bid." [#22]

Five business owners did not think profitability differed between sectors [#3, #4, #6, #19, #23]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "On the trucking side, I would say it's the same across the board. On milling, I would say private is more profitable than public because of volume." [#6]

D. Doing Business as a Prime Contractor or Subcontractor

Part D 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;
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.

Ten firms reported that they primarily work as subcontractors but on occasion have served as prime contractors. Most of these firms serve mainly as subcontractors due to the nature of their industry, the workload associated with working as a prime, the benefits of subcontracting, or their specialized expertise [#1, #2, #3, #5, #7, #8, #13, #15, #16, #17]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "We are a subcontractor primarily." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "The majority of our work is with INDOT, so, we're bidding, as a subcontractor on road construction projects." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "This past year, I didn't work as a as a prime at all." [#3]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "Yeah If you're working with prime and they have to choose whose numbers they're going to choose, so you are at their mercy as a sub. It's not like you get a consistent prime, that you know that it will always be going with you or something like that on the job." [#5]

- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "I'm always a sub." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "Almost always the subcontractor. I just don't feel comfortable being a prime. I understand this pretty well, and I think this is all I'm going to do." [#8]
- The Black American owner of an MBE-certified goods and services firm stated, "Never really as a prime. It always as a sub. That's just where I experienced that. I wouldn't necessarily - we haven't - painting doesn't, a lot of the times, doesn't come up to the prime level so, we just bid directly to a general contractor who holds the contract. No. I haven't yet. Again, I may be MBE, but I haven't really solicited any others because I haven't had a need to." [#13]
- The Subcontinent Asian American owner of a professional services firm stated, "More as a sub, because I don't necessarily have procurement or contract vehicles with states." [#15]
- The Black American owner of an MBE-certified professional services firm stated, "I would say I'm more a subcontractor because it's rare that a project would only need my services as a professional civil structural engineer. Typically, you're going to need your architect, your mechanical, your plumbing, your electrical, and I'll get called in. Either the architect is calling, or the client will hire me direct. But, if he hires me direct, does that mean I'm a prime? I'm not sure. In more cases than not, because I get more work with architects than I do with direct clients. I mean, more architects will call me and say, 'Hey, [interviewee], can you help us out with the structural or with the civil,' so I'm more of a sub than I am a prime." [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "Or being a sub? I'd say sub at the time when I was busy, I'd say a prime has probably 40 percent, 60 percent of the time, I'm a sub. Forty percent of the time. Thirty percent prime, 70 percent sub because it's hard to be a prime because just there's not enough bankroll unless I take out a loan. I guess I could always do that, but I don't like to." [#17]

Nine firms reported that they usually or always work as prime contractors or prime consultants [#2, #10, #12, #14, #20, #21, #22, #23, #24]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "Pretty much all the work that we're doing [on the architecture side], we're the prime which makes it harder because we're competing against a lot of other primes and the other primes don't like to use us as a sub, because at times we're competing against them. Even though they ask for teams to be diverse, the other architects won't use me because I'm their competition. Even though there's not very many woman-owned businesses they could use me, but they typically don't because they don't want to compete." [#2]
- A representative of a woman-owned professional services company stated, "We typically work in the consulting world, so we're typically on as a prime entity." [#10]
- The owner of a majority-owned professional services firm stated, "I'd say 90 percent [prime]. Why? Because I'm in control of my own fate." [#12]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I would say we're prime 90-percent of the time. Mainly because of my private clients and also my architect on call services, a lot of them are going to call me directly, and I am the prime and I

would hire the consultants under me. And they aren't big enough really at that scale to have another architect. I would say that's why the percentage is that high.” [#14]

- A representative of a majority-owned professional services firm stated, "I'm going to say 75-percent or 70-percent. We're usually leading the project 'cause we're a big firm. Maybe 30-percent as a subcontractor on a project.” [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Most of the time, we act as our own prime. There's been a couple of instances where we subcontracted to the one prime. I would say 99 percent of the time, we are the prime.” [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "For my company to get into it, it's about 90 percent as prime. We're barely ever subcontracted unless it's for a clearing house or something like that. If it's something that the company doesn't offer, then they'll come to me.” [#22]
- The owner of a WBE- and DBE-certified construction firm stated, "Probably 90 percent of the time we are prime. Sub work, but again we're nonunion so the bigger construction companies are almost all union, and they will not use us.” [#23]
- The owner of a majority-owned construction firm stated, "Probably 70/30; 70 on the prime side. There's a lot of work out there that has all our disciplines in it. That takes up the 70 percent of the pie. The other 30 is a handful of other disciplines.” [#24]

Four firms that the study team interviewed reported that they work as both prime contractors and as subcontractors, depending on the nature of the project [#9, #11, #15, #19]. For example:

- The Black American owner of a construction company stated, "No. I do work as a subcontractor. I've been - there's a solar company that I've been doing the AC work for - the electrical side - and then there was a couple of general contractors that I've done work for. Now, with that being said, I'm doing the work for general contractors at the house level, and it seems like they want to pay me pennies. I've decided I'm not working for one of the general contractors." [#11]
- The Subcontinent Asian American owner of a professional services firm stated, "In some cases, sub, and some cases prime." [#15]
- A representative of a majority-owned professional services company stated, "That's hard for me to answer because we do it both ways so often and it depends on the project. We don't seek to do one over the other. We want to do what's right for the project and client." [#19]

Two firms explained that they do not carry out project-based work as subcontractors or prime contractors [#4, #25]. For example:

- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "We're just the material supplier." [#4]
- A representative of a majority-owned construction firm stated, "We don't do the contract work; we do the manufacturing that then we sell to the contractors. I don't know how to answer that question." [#25]

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.

Four firms that serve as prime contractors explained why they do or do not hire subcontractors [#1, #12, #21, #22]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "For non-INDOT work, yes, we have. For airports, up until this year, we didn't own a water blaster. We just got one. And when we are doing traffic control in airports where they are extending a runway link, they will make you take all the markings off by water blasting and move temporary markings up 1000 feet and repaint temporary markings. Remove those when they are done and put the new markings up. So, we've hired subcontractors to do water blasting but we can't do that, so we had to buy one." [#1]
- The owner of a majority-owned professional services firm stated, "Subcontract? Very rarely. Only if we're just so busy we can't keep up or it's a little project we really don't want to do. We'll just refer someone else who's smaller and needs the work." [#12]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "So, the primes don't have that technology. We have it. When we bid to the government, the primes do not compete on that because they don't have the technology we do. We wind being the prime, and we have subcontracted with primes to do work for us." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "No. I don't. I can't trust it. This industry, you make one wrong move, it could be a $10,000.00 fine for my customers or even the person I'm working with, and I don't want that to fall back on me." [#22]

Ten firms that the study team interviewed discussed their work with certified subcontractors and explained why they hire certified subs [#1, #2, #14, #16, #17, #19, #20, #21, #23, #24]. Their comments included:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "We would if they were out there. But from what we know about the market, there's not a lot of - there's some DBE's, there some women out there. But there's not a lot of MBE companies doing pavement work. That's usually where we end up subcontracting." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "We sub all the consultants and sometimes we've teamed with another woman-owned, minority-owned architectural firm and we've gone together to go after something. … You know Ivy Tech's all about diversity, right? So, we put in 100 percent diverse team we have MBE engineers, we have a service-disabled veteran owned business, we're the WBE. So, the whole team is a diverse selection. We haven't heard back if we're gonna get the project. Supposedly, they have some special funding that requires a minimum percentage of participation. So that's why we went in at 100 percent, but they haven't announced if we got an interview or not. But it's another case where everybody talks diversity, but when it comes down to it, they don't select based on diversity. … We are definitely a proponent of diversity we typically will go in with a very diverse team, but I am selective in that there's a few that I favor because we've worked with them before

and they've done a good job I know a lot of people through NAWBO, National Association of Women Business Owners. I've met people at the diversity fairs. Sometimes I've had to Google and say okay I'm looking for a service-disabled veteran owned business and I actually got on SAM.gov because there was a project that was out there for a set aside for service-disabled veterans, but they wanted them to have a percentage of WBE. So, I contacted a local company that is service disabled, I found them through the SAM.gov website and I called them, and I said, 'Hey it's a set aside for your specific industry set of service disabled and you do engineering, would you put me on as your architectural consultant because they're also asking for other XPEs?' So, they did, we don't know if we got anything, but they went ahead and did that. So, there's lots of ways to find them, there's the city list, they have a list of certified vendors. The state has a list of certified vendors, SAM.gov has a list. I mean the lists are out there if anyone wants to find them and they shouldn't use it as an excuse, oh we couldn't find anybody because you can always find somebody. … I don't think we've ever subbed to a DBE, it's always been M or V or another W. DBEs generally are only for federal work, so like the federal government requires you to use but the city and state don't recognize them… except for INDOT." [#2]

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Always. I solicit those services first. Yeah, 'cause I know how hard it is. I always go to those companies first, some of the bigger ones and some of the smaller ones, based on the responsibility required." [#14]
- The Black American owner of an MBE-certified professional services firm stated, "Oh yeah, certainly. It's going to be somebody like me that I'm going to bring on. All the time. Every time there is an opportunity for me to have a sub, that's how I do it. That's what I'm going to do." [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "My first thing is, one, diversity, and I guess trying to find out the interview and the company talking to them, their moral fiber or their brand, and what they're doing, and why, how they got started, and of course, the quality of work and being able to perform the job as required." [#17]
- The representative of a majority-owned professional services company stated, "Yes, so long as they have the expertise that we're looking for. As I mentioned we have an MBE program that we've identified some MBE firms that align well with what we do and how we do it and we've been kind of training them to align even more with us in that effect. Through our network of talking with people and seeking those people out, knowing that the investment in disadvantaged firms and helping train them to become good competition is a good long-term goal." [#19]
- The representative of a majority-owned professional services firm stated, "I don't want to use the word 'rarely' because it's more than you probably think. Again, it comes down to relationship. If you see an MBE or a veteran's requirement that's in a project, in an RFP or RFQ, we're always asking the owner, 'Hey, do you have any preference? Is there somebody that you've worked with in the past that you like?' Really gauging what we hear from them to go after who we're going to have bid or be part of our team as an MBE, a WBE, or a veteran … [Working with disadvantaged subs vs non-disadvantaged subs]'s a mixed bag of tricks; I've had some good and bad. Yeah, I've had some good and some bad." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "The size of our business and the size of our contract exempts us from having to repair and execute the subcontracting plan that has specific requirements for minorities are set aside.

We normally don't do that. We use the procurement process as a competitive means to find someone that has the capability. We qualify the suppliers in terms of the capabilities to do what's required. Then we issue the RFP to a minimum of two, but typically we do three to five depending on what the work is. Sometimes they turn out to be minority- or women-owned businesses, and sometimes they don't. It is not a criterion that we use specifically to select subcontractor. It's a function of the complexity of the work that is being done. We have worked with both, with some disadvantaged and others that are not. We were satisfied with their work. I don't have any qualms about giving a contract to a minority or disadvantaged firm of some sort, you know, as long as they have a good record with us, or they have the capability. So far, we have not had problems, though we're not at all adverse to doing that." [#21]

- The owner of a WBE- and DBE-certified construction firm stated, "If we don't know them already and then also if you're listed as a prime, if you've registered the bid at INDOT job as a prime a lot of them will send you a quote automatically, but again there is a list on the INDOT website. … Well, it depends on the project. You know INDOT has a requirement, so you're required to get a certain percentage. Private it would be based on what type of work they do and the price of their work. Sometimes if you can't find enough, again and we're in a rural area, so if you can't find enough you know yeah it would change because they may be super high priced, but if I can't find anymore and I can't use my own credits, then I have to pay the higher price for them, so that makes my bid number go up. … Well because the disadvantaged if it's a certain project they know that you have to use them, so they'll add whatever they want and if you're the prime you got to have it and if they're non-disadvantaged you don't have to use them, so you could say, 'Well that's fine, but I'm not going to use you, you know, any further or on the next project.'" [#23]

- The owner of a majority-owned construction firm stated, "Yes, every state and city job that we bid, we typically put an advertisement in the papers. We do have builders that change advertisement. We do it on every job or, I should say, every city job. It's required or the goals a requirement. You're trying to get the most qualified people out there and trying to meet that goal." [#24]

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 [#3, #12, #14, #16, #17, #19, #20, #23, #24]. Prime contractors shared the methods used to find subcontractors and the factors considered when selecting a subcontractor. For example:

- The owner of a WBE- and DBE-certified construction company stated, "[It's] more relationships than your price though, because sometimes your price can be there, but if you don't have the relationship, they're just gonna call up whoever else and say, hey, can you lower your price or your price? It you're not low right now. Would you like to take another look at it, you know?" [#3]

- The owner of a majority-owned professional services firm stated, "[Subcontractors]'re usually friends. People I went to school with." [#12]

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Based on the task at hand. I have contractors that - MEPs, or mechanical, electrical, plumbing contractors I will hire based on their experience. I have one that I hire from doing education-type work and if I'm doing high office-end type work. But if I'm doing clubhouses or something smaller, studios, I will hire another contractor that's more specialized in that arena. I have different contractors or subs based on the service that I'm providing or the client that I'm providing it to. I don't know if I seek out the disadvantaged firms, because most of them are not minority firms. I would say that I seek out the minority firms because they seek me out and I know of them because they've sent me their information and they've had a conversation with me. I try to use them as often as I can on my solicitations. I think they [disadvantaged subs] work very hard to get it right, so I've had no problems. I mean I've been doing this a long time and I've been using some of the same firms for 20 years. And some of them have gotten large, so they're not small firms anymore." [#14]
- The Black American owner of an MBE-certified professional services firm stated, "Well, it's typically going to be based on the project. I've only done this for three or four projects over the last eight years. It's going to be somebody I've worked with in the past. I hate to say it, but somebody like me that's going to be small, that's going to be kind of on their own, and going to be a minority that understands the business, and I've worked with them in the past. I know they know what they're doing, and I've had good relationships with them, so that's going to be my method. For example, if I'm doing a job in East Chicago and I need an electrical engineer to help me with a project in East Chicago, I've worked with a ton of electrical engineers up there, so I'm going to seek out an electrical engineer in that area to help me design the project electrically." [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "Well, the times that I've been a prime, I've selected the subs based off of work history with them and quality of work. Then also I've looked at the diversity within that company, if they are - when I reach out and say, all right, I need a mechanical guy. I say let's take a look at my minority list and see who's out there and reach out them and call and talk to them and ask what work they've done and invite them out to take a look at the project if they want to take a look at it. This is on the onset. We make numerous trips out to the job, but I should probably be more organized and do everybody at one time. But I didn't. I bring them out or I talk to them on the phone and find out. Usually, it's a couple referrals of somebody I'm working with that they use a company based off their experience and longevity in the industry, and willingness to work with you on the job being a small person and extend you the comfortability of being paid." [#17]
- The representative of a majority-owned professional services company stated, "Based on their expertise and the quality of their work." [#19]
- The representative of a majority-owned professional services firm stated, "Qualifications. Reputation that they have out in the industry. Sometimes it can be a pricing structure that they may have over somebody else. Sometimes it may be a relationship that they have in a specific account that can be beneficial, that the owner has requested that that subcontractor be part of your bid and to be included in it. A lot of times they'll just tell you, 'Hey, I'd like to have this firm involved,' and include them in as part of your team. Happens all the time." [#20]
- The owner of a WBE- and DBE-certified construction firm stated, "Usually, it's price driven, with the exception of when you're bidding INDOT projects you have to have a certain percentage, so

the minority bids that come in versus the bids from regular customers usually are not apples-to-apples. So, the minority, using the minority percentage may add you know ten percent to your overall number." [#23]

- The owner of a majority-owned construction firm stated, "One barrier is a recurring thing - knowing if a DBE has got their paperwork and qualified and renewed all their stuff. The city of Indianapolis, they have their list and 60 days from you having to renew, they'll take you off the list. We'll talk to some of the contractors and they're like, 'Well, we didn't even know we was off the list yet. We're good to go to do work. We're in the renewal process. Go ahead and use us.' I have to make those calls. … Lowest qualified bid. It's competitive bid. We've got certain disciplines of work that I track control. We've got three or four people that are all pretty competitive, people we wanna work with. That goes for several of the disciplines: electrical, erosion control. We get enough for our workload. I know there's a lot of them guys that are passing on work now. They're saying they're too full for the '22 season. That gets back to sometimes you just don't bid work 'cause you don't have any subs." [#24]

Seven prime contractors discussed the tools and methods they use to find subcontractors [#1, #14, #19, #20, #21, #23, #24]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Just industry. We know everybody. We go to trade association meetings. We go to the trade shows. We just hear about it. This guy has got a machine. He will do the work for you. We get three or four quotes. It's not hard to find people, subcontractors." [#1]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "No, subcontractors normally contact me to give me their references, so I have several in our Rolodex, per se, that I will call on to solicit their interest in submitting with us. The city has a list of all of those firms and other services, so I know. And it's a small world; we know most of the MEPs and we know most of the IT individuals, all the minorities as well, so that's not very difficult. The only thing is that the newer companies, it's more difficult to know them because we just have not heard of them or they may not have solicited to us." [#14]
- A representative of a majority-owned professional services firm stated, "Really, it's word of mouth. Talking to the owners and things like that to determine who they may be and who their preferred and who they feel comfortable working with. A lot of times that or past experience that we may have working with a firm, that there's a good relationship. So that's pretty much it." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Most of the time, we go through the Internet or simply with companies that we know that we have worked with in the past, we have a multiple, for instance, machine shops, and we have houses that do particular types of research. We do that. Sometimes we partner universities. We will issue a subcontract to a university to assist in some of the research efforts." [#21]
- The owner of a WBE- and DBE-certified construction firm stated, "There is a listing of minorities that minority companies on the INDOT website that we will look through. But mainly I mean it's really word-of-mouth." [#23]
- The owner of a majority-owned construction firm stated, "Most of them are in the same network of doing the city and state work. They see a job to bid, and they go ahead and prepare a bid. If

they wanna do the work and it meets the schedule, then they send most of the plan holders a bid." [#24]

Primes discussed the effect working in the public or private sector has on their decision to hire subcontractors [#19, #20, #21, #23, #24]. For example:

- A representative of a majority-owned professional services company stated, "MBE, WBE It depends on the project. We typically solicit them for public projects more. But we do have a couple private projects where we've worked together. The public sector has more ancillary benefit that motivation, to create that motivation. A lot of times we can do all of the work that is being asked but we bring on an MBE to train them so that they can also do the same work that we can do. But it's a long-term investment in creating a more diverse market." [#19]
- A representative of a majority-owned professional services firm stated, "I think because in the public sector there's so much out there about transparency and you've got to do this, and you've got to provide this, and provide that to people that are bidding. I think that in a lot of cases it's been beat down in the culture that you have to be able to provide this. Yeah, I see more in the public than private industry, by far. But I think a lot of it is the perception that they want the elected officials and the public to see that they're open to those types of organizations." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Well, because it is a government procurement for the most part, we have a requirement to have multiple bids. It has to be a competitive procurement under federal regulation. We have to put out an RFP, and then we have to go through a process where we select the winner based on the preset requirements that we have prior to issuing the RFP. Oh, absolutely. The private sector typically for commercial work don't have the requirements that the federal government does. It's a lot less labor-intensive to do work in the private sector than it is in the public sector." [#21]
- The owner of a WBE- and DBE-certified construction firm stated, "Not typically, it depends if there's a minority percentage requirement." [#23]
- The owner of a majority-owned construction firm stated, "I don't do a second-tier sub [for private work]. I perform my work and the general contractor on those private jobs will hire everything else out. Private typically we don't have any requirements. There's all so many subs out there and most of them are experienced. They've been around and we know the process as far as the front end of bidding stuff. Then everything once the job goes into getting billed. Most of the time, as far as soliciting and getting bids, it's not cumbersome. What is cumbersome though, is whenever there's no scope of work out there for what they're requiring. For example, if the city of Indianapolis has got a three percent veteran requirement on it. There are only two or three veterans that own companies that do what we do. It's impossible to meet that requirement and it's the same way; the state does it a little different. They'll have a DB requirement that's just straight across the board, whether you're a woman-owned, or minority-owned, veteran owned, disabled. They'll turn that around on specific jobs. They've got certain funding requirements that they'll break out just like the city does. I've got a job here that I had absolutely no participation on one of the disciplines. It was because of that. There's nobody out there." [#24]

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 [#1, #19, #2, #20]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Performance. They promise you one thing and then they don't show up. When I'm working for another guy and I've got to get the work done, I've signed the contract. And then you hire somebody who's going to show up and do the work for you and they don't show up. Hard to ever use them again unless there's a good reason." [#1]
- A representative of a majority-owned professional services company stated, "The quality of their work and expertise." [#19]
- The owner of a WBE- and DBE-certified construction company stated, "I mean if I've worked with somebody, and they did a good job I will most likely use them again. We found an MBE engineer right now that I really like, and they've done a good job for us, and they've been responsive so I will probably continue to use them. Like I said this other engineer didn't have a good experience with, so probably won't go in with them again." [#2]
- A representative of a majority-owned professional services firm stated, "They do what they say they're going to do. And they're really in it for the right reasons. They're good people, they're good subs, and they do what they say they're going to do. They follow through." [#20]

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.

Two subcontractors mentioned the helpful role INDOT's or IAA's programs play in finding work [#4, #8]. For example:

- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "Because we're on that DBE list, we're gonna get invitations to bid, and through those invitations to bid, we leverage personal relationships to try to get additional work from that same group of customers." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "The state has a list of who's approved for bids, and I just go down the list. Before we were faxing all of them, which took a lot of time. And nobody does faxes anymore. I asked if we couldn't do those electronically, if they would put the person's e-mail address on. They started doing that a year or two ago. So much easier. I just do them all at one time; everybody gets it that I'm bidding with. I don't bid with everybody. And I send them out and then I have a record of who I've bid with. I send them as a blind copy, though; I don't let people know who I've bid with. I don't let other primes know who I bid with." [#8]

Four 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 [#2, #6, #21, #24]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "A lot of people know us now. We're well known in the community." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "But now you know, being our fifth year, you have primes that reach out." [#6]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Well, there are programs that are very large that require our technology, but our technology is only part of a subsystem of on overall system. For that particular weapons system, then we team up with a prime to provide our part of the system that we can do. Well, because they were aware of our capabilities, and so they had other projects that were in the private sector that were compatible with our capabilities and our technology." [#21]
- The owner of a majority-owned construction firm stated, "Yes, we do a lot of bridge work. The prime will come in, build a bridge, then we pave it to get the road finished. That gets back to about the 30 percent of our volume. That's what we do." [#24]

Thirteen interviewees said that they get much of their work through prior relationships with or past work performed for primes. They emphasized the important role building positive professional relationships plays in securing work [#2, #3, #4, #5, #7, #9, #11, #12, #13, #14, #19, #25, #AV]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "We know most of the primes I mean, if there's anybody coming into the marketplace that I haven't heard of them, we'll call 'em." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "You have your main asphalt contractors that you work for. So even though you know they may have an office down here and they may have an office up in the northern part of the state, we there's only, you know, a handful of big asphalt companies in the states. So, you kind of have the same customers you know, so it's nice to be able to service." [#3]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "We have plenty of longstanding and existing customers asking us for quotes." [#4]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "The prime would let us know that 'Hey, we're bidding this job. Are you interested in being a construction engineer on it?' … these primes, they don't know you, so you want to get a job with them and you're building - you do the job site, and you do a good job and also you are with the foremen and they like you, they like your work ethics and everything, that part of the building relationship is what happens. I will give you an example. When we started, they were giving us some challenges, but then when they realized we were capable of doing it, now we're doing almost I would say 30, 20-percent of all their jobs, stuff like that, if not 50. I don't know. But it's a relationship that we built, and we hope we can still continue to do that work for them." [#5]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "I work really hard to provide a good customer service. I always answer the phone. I try to have a good driver is on, you know good drivers on each job and everything, so it's all about building the relationship and. Doing good on one project in order to get the next project. You know you're only as good as you are on the current project." [#7]

- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "Oh, that's also referrals. Some people just throw it to me, yeah, I can do it, things like that. I'm Chinese, so mostly it's like a job in the Asian community, you know, we give each other referrals." [#9]
- The Black American owner of a construction company stated, "It's been, just like I said, these general contractors have reached out to me to bid on different work. And once they - if they like my bid, they have me come out and do it. I don't know." [#11]
- The owner of a majority-owned professional services firm stated, "Again, most of our contractor friends keep us alerted to big items, and so we're generally aware of all the different material delays, things like that, price increases, issues with certain subcontractors. Most of our ten or so general contractors we do a lot of work with and like to work with - they keep us updated on a lot of those issues. It's generally general contractors who want to do a design-build process, and we only do that with contractors who we've done a lot of work with over the years and trust. Unfortunately, it is becoming more and more of the market, but we try to avoid it. But sometimes the projects are too good to pass up." [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "Besides Indeed and our network of people, not really Just through the work that we'd done in the past. Just identifying who they are through that is kind of how we've done it in the past. We've never necessarily really did go out and look for GCs that we never worked for before. Continuing to work with the ones that we've worked with before and then, sending bids to people that we haven't worked with has been always good. Just initially sending a bid to people we've never worked with has been successful in gaining new customers that way." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Yes, I have a few that I have a relationship with. But a lot of times if I'm not very successful, after a few times going after projects with me they tend to lose interest. And my projects are far in between versus their projects, so they tend to want to work with firms that are actually getting more work than I'm getting." [#14]
- The representative of a majority-owned professional services company stated, "Through our network of people who know us." [#19]
- The representative of a majority-owned construction firm stated, "Primarily, it's word of mouth, from what I understand." [#25]
- A representative of a majority-owned construction company stated, "Consultants use the same people over and over, we rarely get put on a project." [AV96]

Ten business owners reported that they actively research upcoming projects and market to prime contractors. Those businesses reported that they research upcoming projects and sometimes identify prime contractors using online and other resources. Some firms then contact the prime contractor directly to discuss their services [#2, #9, #11, #13, #14, #19, #20, #21, #23, #24]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "I mean if we know that there's a project happening then a lot of times I know on the architectural side. I know because we may have competed for the architecture on it. So, I know that even if we don't get it that there's gonna be construction. I'll either call the contractor and say, 'Hey is their site protection

on this job? What can we do ...?' And get in touch with them directly on that, but a lot of people know us now." [#2]

- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "I go to the company website. I Googled them on the government website; the federal opportunities, FBO, FederalBusinessOpportunities.gov, looking for bids." [#9]
- The Black American owner of a construction company stated, "Well, I do, and I don't … three of those have come from the Angie's List and Home Advisor. The first one that I'm really upset with is actually a guy that I went to school with and they're a minority contractor also, but they're Mexican. I thought that our relationship would be a little bit better, and it is what it is. They're happy with my work, but not happy to pay me. I can't afford to keep working with him. That was just like a word-of-mouth thing. They knew me before. So, now I have - I am part of this other software that I'm actually gonna cancel here in the next month, but I've been a part of this Construct Connect software. It's too expensive and I haven't seen any return from 'em so, I'm gonna quit with them. I can see that it would be great. It's a great tool to have, it's just I don't have the time because I'm still doing the work. And if I can't put the time into this, then I'm not gonna get out what I want to. But, anyway, it does put me in front of different prime contractors that have reached out to me and, like I said, that system has put me in front of that store crafters - prime contractor that was building the Harbor Freight tools that I was telling you that I just did. So, I'm kind of put in front of them that way, but with that being said, you're supposed to be registered and have all these prequalifying factors loaded into their system, which I don't have loaded into there. Most of those prime contractors are not reaching out to me because they don't have my history of bigger work and different things. So, it's a no-win situation." [#11]
- The Black American owner of an MBE-certified goods and services firm stated, "Besides Indeed and our network of people, not really… Continuing to work with the ones that we've worked with before and then, sending bids to people that we haven't worked with has been always good. Just initially sending a bid to people we've never worked with has been successful in gaining new customers that way." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "As far as marketing, I'm basically doing all the marketing myself. A lot of people know me, so I would e-mail them every now and then and just bring them up to task on what we've been working on and how we might be able to assist them on their future projects. So, I'm the person that's doing most of the marketing for the firm, and of course I don't get to everyone… I'm not privy to a lot of the work that's out there. I don't even hear about it. A lot of times I just - every three months or so I will solicit from my list of clients and inquire if they have opportunities. I would say 90-percent of the time I don't hear about opportunities." [#14]
- A representative of a majority-owned professional services company stated, "[We find primes] through our doer-seller model." [#19]
- A representative of a majority-owned professional services firm stated, "A lot of times when I see bids come out, I'll call a lot of different contractors that I know that may go after that type of work, and I will just reach out to them and say, 'Hey, do you see an opportunity for us to be part of this team? I've looked at the request for proposals and qualifications and there's a component for this and that that I think that we'd be really good at. I think we'd complement your team and I'd like to see if you'd be interested and have us be part of your proposal.'" [#20]

- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Part of the process of the SBIR, the Small Business Innovation Research and the Small Business Technology Transition program have the primes scanning all the all the small businesses that are bidding these programs because that technology is something that the primes need and want. They don't have it themselves, and they're not agile or cost-effective enough to do it as well as a small business could. In that regard, we have contacts with the big primes in the aerospace sector." [#21]
- The owner of a WBE- and DBE-certified construction firm stated, "So, we will look at the registered bidder lists and send asphalt mix quotes or hauling quotes. So yeah, we will do what other DBE companies do as well." [#23]
- The owner of a majority-owned construction firm stated, "Typically, look at the state advertisement, and I'll find bridge work. That's the same way with the city of Indianapolis, who uses a company to put everything online. That's how I find the stuff." [#24]

Eight business owners and managers discussed how they find, decide to utilize, and work with second tier subcontractors [#1, #3, #8, #19, #2, #20, #24, #25]. Examples of their comments included:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "we can't subcontract INDOT work. They don't allow secondary subcontractors." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "You're not allowed to be a sub and sub work." [#3]
- The owner of a WBE- and DBE-certified construction company stated, "We do all our own work. First of all, subs are not allowed to have subs for INDOT work. But we don't anyway; we do all our own. We have all our own equipment and people, and we do all our own." [#8]
- A representative of a majority-owned professional services company stated, "If we do its very rare." [#19]
- The owner of a WBE- and DBE-certified construction company stated, "We're not allowed to subcontract [to a second-tier sub]. So, we can't subcontract any of our work to anybody else. So, for instance, we can't subcontract pavement market. We don't have a big truck for pavement markets. So, it would be really advantageous if they would let us subcontract that because we're the ones who have to coordinate it anyway. So, why not let us subcontract? You don't have to count it in our work or as a DBE, but still, let us do that, because I just don't understand what that rule has anything to do with anything. So, what if we subcontract part of it? If you're not gonna count it, don't count it, but let us coordinate that. So, like, for instance, a job trailer - we can't - there's been projects where they wanted a job trailer on site and it would have been easier - it'd be easy for us to rent that from somebody and put it in with our bid, but we can't subcontract that because we don't own the trailer. It's just a silly rule. I don't understand where it ever came from. I mean, that, to me, is a barrier, because you're trying to build your business and offer other things, and if you could start doing things like that, then maybe you could get to the point where you could afford to buy a pavement marking truck." [#2]
- The owner of a majority-owned construction firm stated, "There'll be a second-tier sub for us. Typically, we don't hire a third-tier sub." [#24]

- A representative of a majority-owned construction firm stated, "I don't think we use any specific tools, just knowledge, and I'm sure there's some sort of testing that's involved, especially with the welding. Because we have to, since we do produce for public, we have to go through certain testing levels at testing agencies, to make sure that our welds hold up to whatever breaking points or in order to maintain your certifications. 'Cause we have to have, and I don't know what they are, but, like, our multifamily railing systems that would go up on patios of apartment complexes, they have to withstand certain breaking strengths and certain bending strengths and have to pass all those certifications. We have to have the certifications in place before we can win those contracts. Well, we don't; the contractor we're selling the product to has to have that." [#25]

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.

Eight business owners and managers indicated that they prefer to work with prime contractors who are good business partners and pay promptly [#1, #6, #8, #11, #12, #14, #19, #23]. Examples of their comments included:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Well, that guy who stiffed me for the ten jobs. He wrote us in for it and then didn't use us and didn't even tell us. I mean, come on." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "While you're doing the work or they're easier primes to work with than others. Yes. And I would say that's all relationship. Is it because I'm a DBE and a woman-owned business that folks don't want to develop the relationship? Or is it just that I'm a new business and any but I don't know that answer? I can't speak on behalf of them. Is it hard to land business and gain trust from prime contractors? Yes. Is it because we're still only five years old? Or is it because we're woman-owned business that I can't answer. I can't speak on that on their terms. But it's hard I take into consideration different pricing matrices in regard to different primes. Meaning, I'd maybe price, you know, Prime X prime Y at this rate and I price another prime at a higher rate because they tend to not have their traffic control setup as well or, you know, just different things like that that make our job harder to do the work. So, I priced that differently. But to say I rule out any particular prime contractor I've not at this point ruled anybody out." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "We'll work with anybody. But like I said, if somebody doesn't pay us then I stop bidding with them. There are people I do not work with, and it's almost all over lack of payment." [#8]
- The Black American owner of a construction company stated, "I'm not gonna do any work for him anymore because he wants to pay me pennies and then, he wants to fight and wheel and deal and negotiate on every quote that I put in for him. I'm not - it cost what it cost. I'm giving you my best price the first time. Then, they just try to beat me down and it's like, 'I can't make any money with you.' I wish I could be in front of the right people and work with the right people as opposed to these other people who are trying to count pennies on everything." [#11]
- The owner of a majority-owned professional services firm stated, "Because I've worked with them enough times that I trust them." [#12]

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Yes, I have a few that I have a relationship with. But a lot of times if I'm not very successful, after a few times going after projects with me they tend to lose interest. And my projects are far in between versus their projects, so they tend to want to work with firms that are actually getting more work than I'm getting." [#14]
- A representative of a majority-owned professional services company stated, "I hesitate to say that there's primes we won't work with but there are primes that we recognize greater challenge working with an adjust accordingly." [#19]
- The owner of a WBE- and DBE-certified construction firm stated, "Well, they know that we do good work and we're a minority-owned minority company, so they call for a quote." [#23]

Subcontractors discussed the effect working in the public or private sector has on their decision or ability to work with certain primes [#2, #5, #24]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "Usually the INDOT primes are usually specifically road construction that's normally all that they do. So, we're getting that because they have to have a percentage of DBE on their contract, they have to meet that percentage. So, on the public side they don't necessarily have to meet it. Sometimes for city and state they want W and so that's how we get so on the private side they're counting us as a W. On other cases on the public side, they don't care they just want the site protection and it's kind of a bonus that we're a W and they can count us." [#2]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "Not really, not in the private. Mostly the only time I've been considered to even can is because of the credentials is one is pretty much in the public sector. The private nobody really needs that kind of certification for doing it." [#5]
- The owner of a majority-owned construction firm stated, "Typically, you get invited on the private stuff. There's no invite or there's no newspaper advertisements or any of that." [#24]

E. Doing Business with Public Agencies

Interviewees discussed their experiences attempting to get work and working for public agencies. Section E 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. INDOT's and IAA's bidding and contracting processes.

1. General experiences working with public agencies in Indiana. Interviewees spoke about their experiences with public agencies in Indiana.

Four business owners mentioned experiences working with or attempting to get work with public agencies in Indiana and in other places [#1, #10, #19, #24]. Their comments included:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Westfield, Carmel, Indianapolis Airport Authority." [#1]

- A representative of a woman-owned professional services company stated, "Yeah, we worked for the City before. We've worked for the public school systems for 20 years; for IPS. Back then when we worked for them, great pay, good jobs, did very well." [#10]
- A representative of a majority-owned professional services company stated, "The state of Indiana, Department of Administration, the city of Indianapolis and various cities, locales, school corporations, IAA, INDOT. That seems like a pretty comprehensive list." [#19]
- The owner of a majority-owned professional services firm stated, "City of Indianapolis has got a little more - they're a minority. You typically don't meet a lot of the goals on them just because we don't have the subs out there. They've got veterans and disabled requirements on them, and they're not subcontractors to fill that percentage of work. What will end up happening is they'll go through a process of questions and good faith efforts that take a little bit longer to get a job awarded." [#24]

Twelve business owners described the best contracting and procurement policies they have experienced while working with or attempting to get work with public agencies [#1, #2, #3, #12, #14, #15, #19, #20, #22, #23, #24, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "The town of Shadeland is the easiest. They are just like go do it, send me a bill. They never have a problem. As you get down there in Indianapolis where you've got more competitors, then they get a little tougher spec wise and performance wise because my competitors are mad because they didn't get the work and then they are calling up saying hey, they forgot to put a stop mark in this intersection or whatever. That's just human nature. We get that." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "We've got one right now that we've submitted on and they said, 'It's definitely gonna be quality-based' and I think that's what - any government entity should do quality-based selection. And I hope that most private clients would, too. Well, I know the Indiana Commission for Women and Minorities has been trying to get all the major universities to meet their participation goals and they haven't. And the easiest way for them to meet their goals is to do it on the professional services side, because it's not a bid situation. Because if you do low bid, you're not always gonna get participation, but if you do it on a quality base selection you can pretty much cherry pick who you want on professional services. IAA is very accessible. If I want to call up people that work for IAA and have a meeting with them, they'll meet with me, they'll talk to me, they'll tell me what's coming up. They're very good at returning phone calls. INDOT, it's like we're INDOT we don't have to do that, we don't have to talk to the peon, and I just think they're not helping anybody by doing that." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "Indianapolis - They do great because they put everything on a reprographics, of course, is fabulous all their plans or state, you know, I mean, you can pretty much go pull up plans and you know what you're gonna find, which is nice because some of these cities and towns it's, you know, it takes me longer to work up, you know, one of those jobs just thumbing through all the all the paperwork and the quality of the stuff they put out there." [#3]

- The owner of a majority-owned professional services firm stated, "I think the Indiana Department of Public Works was probably the easiest. But that was because I gave the governor money." [#12]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "IDOA, they do every now and then send out requests for professional services along with all the others. I think that was the most open process that I have seen come out of this state. They send everyone the solicitation and you submit on the solicitation. And I have been successful on a few of those, because everyone is submitting on those and they get to see everyone's submittal, versus not seeing a lot of the other solicitations. I think that when I first got my first Park project, I guess it almost 14-15 years ago, they were easy to work with. It was one of my first projects with them and they had confidence in what we were doing, what we explained, and they were just easy to work with. All the others are more difficult because as a minority company you can't make one mistake. You would make one by - I don't care if it's a minor mistake, you're basically thrown out with the bathwater - you're the baby that's been thrown out with the bathwater. I would just say it's just difficult to find out the correct person to talk to, even if you inquired. Well, you start with the information that you're given. I guess when I first started out there were a lot of city outreach events. That made it a lot easier because you can see the person, they say what they do, and then you can go and talk to them afterwards to maybe get some type of rapport with them. State has an outreach event that they I guess have every year as well, so we go through that process with them as well. And I've gotten some work that way, because like I said, networking is very important, and so I did some similar work with the Department of Natural Resources that is similar to the project that we do with Parks. So that was an easy mesh as far as my capabilities were concerned, that we had general experience. We did work on a few projects with them. Keeping up with those guys and getting opportunity is just something totally different." [#14]
- The Subcontinent Asian American owner of a professional services firm stated, "I heard it from another source, and so I came in as a sub. The experience was very good working for FFSA." [#15]
- A representative of a majority-owned professional services company stated, "The best experience I've had with attempting to get work is when the people evaluating the proposals are focused on the right things and I've detailed what I think the right things are. I think it's and at least in the work that we do, right, is focusing on the expertise and the quality of the services you're going to get for tackling some very challenging problems. When the focus is on money only for the type of services, we provide its very disheartening. I think IAA and the state of Indiana are pretty good at - I mean they have to consider money because it's tax dollars. But they also recognize that the investment of spending money on a good quality expert will save money in the long term potentially, most likely. But I find that like the cities and school corporations focus a lot on the dollar." [#19]
- A representative of a majority-owned professional services firm stated, "You know, I think when you deal with Indiana counties or cities and towns, they always have public meetings. So, you could go to a council meeting at a city, like the City of Noblesville. I can go to a council meeting, and I can learn about what's going on in their community, different bids that are going out. I can go on their websites. But a lot of times I'll attend meetings. That's even the same way in the county market. I can always go to a public meeting, and I can always ask elected officials or

department heads about opportunities that are out there in the market. Yeah, I think a lot of it comes down to transparency, comes down to the people that they have in that organization, and making sure that it's a good, qualified process. There's a lot of good people that work in the public sector that have good intent and you see it. They're all over the state. But then you've got a few bad apples too that it's just like anything else in life.” [#20]

- The Black American owner of a WBE- and DBE-certified professional services firm stated, "The state police, we've had some good outcomes with working with them as far as the drivers and stuff on the road, and if we have questions or whatever, but not as far as obtaining work. We don't have any good avenues and outcomes with that. We've just never had anything. I mean, the auditors that I know will come to me, but as far as bidding out, no, we haven't had any.” [#22]
- The owner of a WBE- and DBE-certified construction firm stated, "The Public Works is easier. They're just process is not as rigorous, but they're prequalification process is rigorous.” [#23]
- The owner of a majority-owned construction firm stated, "Everybody pretty well puts out an advertisement and all of us get some sort of paper or an email from these guys. It's all an even playing field. I actually like the front-end policies of state and local governments. They do a good job getting out their bids that's straightforward.” [#24]
- A representative of a majority-owned construction company stated, "We have worked with INDOT and IAA for over 20 years--The only difficulty we see with IAA is that the various companies bidding on their work are much more inexperienced than we are, and they can't finish the work properly. INDOT has more stringent requirements and higher standards. They have more hurdles in order to be eligible to work for them. The commercial sector is robust, but the public works sector is an extremely competitive market in that it is very price driven, and it has very exacting standards and not much room for error." [AV13]

Eight business owners described the worst contracting and procurement policies they have experienced while working with or attempting to get work with public agencies [#2, #6, #14, #19, #20, #21, #22, #24]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "Some of it's good and some of it's very confusing and it doesn't work. For instance, on the airport, we're doing a space planning submission and I had looked at it said, 'Oh, you know, the due date for questions is today.' And I saw 4:00. Well, I didn't notice that it said 4:00 AM. And so, we went to put my questions in today and it said 4:00 AM. And I'm like, 'Who would ask for questions by the AM?' I said, 'I thought it was gonna be PM. I mean, why didn't they just make it the 24th? It makes no sense.' So, I e-mailed the person - 'cause there was a contact - and I haven't heard back, but I'm asking if it should have been PM and it was just a typo. I don't know. And I don't know how to submit the questions. There's nothing on there that I could find that says, 'Submit the questions.' So, some of those are very confusing, and they're difficult to use. Well, I think DNR is not real easy to find out. I mean you have to search out - DNR is Department of Natural Resources, you really have to make a concerted effort to find anything from them. If it's a bigger project like the state fair coliseum, we knew that was going on, but we specifically got invited to that from the prime contractor. I'm trying to think of other - I think it's harder SAM.gov - government project, federal government projects and I think a lot of people complain about their website that it's really hard to navigate, it's hard to understand, it's hard to find stuff.” [#2]

- The owner of a WBE- and DBE-certified construction company stated, "I would say any local municipality is exceptionally challenging. I typically only find it 'cause they they're they post that in newspapers and unless you're on a district mailing distribution list, you don't know about it unless the prime is telling you about it. Now, once you find out about the first one then you can usually reach out to those local municipalities and say, hey, do you have a mailing list? Some of them do. Some of them don't. So, then it's just constantly trying to." [#6]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "All the others are more difficult because as a minority company you can't make one mistake. You would make one by - I don't care if it's a minor mistake, you're basically thrown out with the bathwater - you're the baby that's been thrown out with the bathwater. I would just say it's just difficult to find out the correct person to talk to, even if you inquired. It's just hard to say. Those are the project managers I worked with on the project, but when I solicit for any newer work then they say, 'I'm not the person to talk to.' Well, who is the person to talk to? Then you don't hear back from them. It's just kind of hard to just know the person that is the decision-maker. And then again, I understand that I'm a small business and I just may not be - and I can't follow every little nuance here or there, so I could be at fault for some of this, not knowing the right person as well. I'm not putting that on them 100-percent, for sure." [#14]
- A representative of a majority-owned professional services company stated, "I would say that the school corporations are challenging to learn about their work opportunities and maybe to a second degree like the cities can be challenging. Indianapolis is pretty good but Carmel and some of these other cities can be a little challenging knowing what's coming down the pipeline for them." [#19]
- A representative of a majority-owned professional services firm stated, "Yeah, I've seen it. I don't see it as much now as to what I used to see, especially with the state prisons, when I'd see work being advertised or bid on that. I think there's a lot of manipulation there. A lot. I've personally seen it. It makes me not want to ever go after some of those bids. All I really want is I want a fair shot. That's all I ever want. If you give me a fair shot and I lose it on there, I'm fine with that. I don't like the games that get played and manipulation by some people, and they're especially in the Department of Corrections. Just the Department of Corrections, I think in my opinion. And we talk about it all the time, myself, and other vendors, about how challenging it seems like Department of Corrections are. And a lot of my work that I do, I've done a lot of Correctional work, but they have their favorites and the people there at the State, some of those State people have been there a long time. I personally don't think that you get a fair shot. And like I said, all I really want is I just want a fair shot. If I don't get it because my numbers or my qualifications aren't there, then so be it, but I just want a fair shot. If I'm going to invest my money and my time in putting proposal together that could cost me $50,000.00 or $60,000.00 to put a proposal together, I want to know that I'm getting a fair shot. And a lot of times there I don't feel like I get a fair shot. I would say the Department of Corrections. To me I think they're probably one of the most difficult because there's been people that have been there for a long period of time, and they get engaged in what they've been doing for years, and they have relationships. They really work hard to make sure that they get the people that they want in there. I understand too, there's got to be a comfort level with those people. I get it, but there's good, qualified firms that are out there and everybody wants to know that they're going to get a fair shot." [#20]

- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Yeah. That would be IEDC because they were, they had a program one time where they had a budget specifically set aside to provide matching funds for small businesses that received grants from the government or for small business innovation research contracts from the government. The state would match it on one-to-one dollars. And later on, that changed to 50 cents on the dollar, and then they would only do it during certain phases of the program at much reduced amount. And then they changed the focus from there, from that, using that purpose to try and bring venture capitalists to fund some startups primarily in the software side of the house or life sciences. More so software right now than anything else. That's why we have not continued to do business with them." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "The safety training facilities Indiana does offer, and they do offer quite a few. They don't want to let you through the door, 'cause I can offer services that they can't offer. Because they go by textbook and I go by actual what's going on, they don't wanna intertwine, because it's not in their agendas or their syllabuses. So, it's almost impossible. I can get certified for substance abuse, drug, and alcohol clearinghouse. I can be a TPA, but the training issues like Indiana DOT or even having the guys that're out there with the flags and your guys' state trucks and stuff like that; they won't give us any part of that." [#22]
- The owner of a majority-owned construction firm stated, "Most of the time, whenever I have a question on my bid, if we are low bid, it's just working through all the XBE requirements. There's a ton of post-bid stuff that you gotta do 'cause of city. Not necessarily the state. You've got a list you fill out electronically before you bid something, and you send in quotes the day after the bid. It's a little less stringent on the INDOT side of things. All these other municipalities have a retainage. They'll hold ten percent or whatever it is till you get 50 percent of the job, or all the job, done. You're always waiting on money." [#24]

Three business owners described their experiences getting paid by public agencies in Indiana [#7, #12, #19]. For example:

- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "We've had the opportunity to work with some pretty good size contractors, so I don't know how you know the Airport or INDOT. I wouldn't even know how they pay or how quickly they pay, but I seem to always get paid in a timely manner." [#7]
- The owner of a majority-owned professional services firm stated, "I don't know how you get around that other than speed up the payment process. But I'm not sure how to do that. You would have to be inside the public agency to figure that out." [#12]
- A representative of a majority-owned professional services company stated, "I've never been disappointed with the process for payment. As long as you do what's asked it comes when expected." [#19]

2. Barriers and challenges to working with public agencies in Indiana. Interviewees spoke about the challenges they face when working with public agencies in Indiana.

Eight business owners highlighted the length and large size of projects and communication with decision makers as challenges, especially for small, disadvantaged firms [#9, #12, #14, #15, #17, #20, #21, #22]. For example:

- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "I ran into some problems with the Air Force because I have so many people I try to use, you couldn't get them in the base, because they may have a background or problems. You know, even if they have the type of the tickets of a few years ago, that still keeps them from getting the IDS for getting in the base. That's a very big problem." [#9]
- The owner of a majority-owned professional services firm stated, "No, I don't think it's challenging to find out about what work they have. The challenge is whether or not you want to do the work. I know the City of Indianapolis has a website; you can go on and look at all of their RFPs that are out there. I'm sure the other agencies do too. It just doesn't interest me. I think the most challenging part is that they're sending out an RFP and there are 20 different firms submitting a response, and the chances of getting the work are so slim it's just not worth it." [#12]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "The city has so many different departments underneath their umbrella, and I've tried calling a few of them and they, of course, are not going to give you the time of day. The state has a few under their umbrella as well. I think I've over the years tried several of them to try and get a meeting and you just can't get anywhere with them, because they indicate they're not going to meet with every person that calls. I would say the state is challenging. They're all about the same; you can't get through to them." [#14]
- The Subcontinent Asian American owner of a professional services firm stated, "It's difficult. The state requires a lot more paperwork than is necessary. Indiana is not as daunting as New York or California." [#15]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "I don't think we're big enough to do stuff with INDOT. A lot of that stuff seems major even as a sub. Most of that stuff was highway and road-type stuff, and we don't do a lot of that." [#17]
- A representative of a majority-owned professional services firm stated, "Sometimes they won't make up their own specifications. A lot of times they'll work with somebody they feel comfortable with and ask them to give them specifications on a specific RFP or RFQ. Then they'll use those and sometimes that will create an unfair advantage to others that are trying to bid [on] it. Sometimes the state or county, city or town may not realize they're really doing it. I think sometimes when you get up into, oh, again, like county, City of Gary, places like that, sometimes those are a little bit more difficult because in my opinion they already have decided who is going to be getting that work. You need to understand this too, I'm an elected official too, and I've been an elected official since 2013. I understand the politics really well and I've learned a lot, because I sit on both sides." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "The kinds of things that we do are really not all that compatible with requirements than an agency like INDOT would do. They don't buy the weapon systems." [#21]

- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Well, the BMV. We've definitely tried to work with them. We tried to work with the union. That's not happening. Training facilities like the government-owned training facilities. We try to offer them services or try to work with them to help them or them help us. It doesn't work. There's always a line drawn there. Like I said, a lot of transportation. Many people we mainly work with are auditors from the state or the IRP, BMV, transferring title, stuff like that. Most of it is audits, so that's the main people we try to get, unless we're trying to get a grant or we're trying to get a training license so I can literally be a trainer for the safety compliance industry. They don't have those yet. They have schools, but they don't have the people that are on the forefront, because no schooling can really teach you [what] the people on the forefront are doing, because everything changes so quickly. They won't let me think that we've had a barrier there. You can't even process. If I am training somebody, it has to be with me. I can't go through a training facility. I can't get certified as a trainer because what they're training you in the school versus what's really going on is changing so quickly, by the time you get done with the school, there are new things already in process that they haven't trained the certified safety-compliance people or trainers." [#22]

3. INDOT's and IAA's bidding and contracting processes. Interviewees shared a number of comments about INDOT's and IAA's contracting and bidding processes.

Twelve business owners described their experiences working with or attempting to get work with INDOT specifically [#1, #3, #4, #5, #8, #10, #12, #14, #22, #23, #24, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "There's a seminar coming up next week online from, I can't remember if it's INDOT or IDOA. They're going to teach us where to find opportunities in the market. I get these emails from IDOA or INDOT all the time telling me about jobs that are bidding. They are very incomplete. If you only relied on what they sent us, we'd never get anything. You've got to get in there on the INDOT website or other websites and you got to figure it out yourself." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "I think they both do a great job as far as I goes, I mean you know where to find all the plans, you know how to find the information from a DBE standpoint, you know. It's just explaining to the DBE's where to find that information, you know, and that it consistently will show up on their websites." [#3]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "It's been fine. Like I said, that's, fortunately or unfortunately, kind of the lifeblood of what we do. Most of our jobs come through those INDOT let ins and our customers who bid through the INDOT. We have longstanding relationships with them. I sent out when we had eight quotes for tomorrow's let ins, and I sent those eight quotes out to I think eight or nine different customers. So, we generally do pretty good on the INDOT let ins." [#4]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "I know most of them get posted like in Indianapolis and INDOT, they will post those opportunities for you. We have a website you can go and know what the jobs are, so they're doing a great job." [#5]

- The owner of a WBE- and DBE-certified construction company stated, "I bid my work, so I mean I might bid 15-20 jobs; depends on how many are on INDOT. I don't know how to tell you that because I have to bid everything I get. It's not like I just go out and look for jobs; I do bids." [#8]
- A representative of a woman-owned professional services company stated, "Yes, we've done some roadwork. We used to do some civil work back years ago, but it was usually as a sub to somebody else. Usually, they came to us. They actually pursued us. And it was back when we actually were recognized as a veteran-owned company. Very low. We haven't done any work for INDOT through contractors in probably three years." [#10]
- The owner of a majority-owned professional services firm stated, "I think for us getting the work with INDOT wasn't the hard part. It's working with INDOT that's the hard part. They're just - as far as I'm concerned, they're the worst bureaucracy in the state. And I've interfaced with them several times on other projects too where we weren't working directly with them, but yeah, I don't have anything good to say about them." [#12]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "You do not hear about professional services. You will not hear about it. If you hear about it, I would say 90-percent of the time it's already too late, because someone has already been soliciting for services for that particular RFQ and you're wasting your time. I would say 90-percent of them that you do see you're wasting your time because they just have to put them out because of - what's the word - requirements. They have to solicit them because of requirements. But as far as you getting it, you're wasting your time. And I find that for most of them. And the other half you don't hear about anyway. I think it should be open and fair, like a lot of states have started doing different from Indiana. Indiana you don't hear about professional services because they don't want to receive 120 proposals. I can understand that too, but if it's federal or state money that's how it should be. And not given to the political party that paid for your information early on so they could have their team ready when the RFP or RFQ did come out. So, I don't have the answer to that; I just think it should be more open to all professional services versus a few professional services that have their pulse on the purchasing department to know when a certain project is being led. I've been registered with INDOT for 26 years and I have not received one project from them. And I've also been told that they don't do architecture, but you do see architecture projects every now and then. And I presented to them as well in my services and what we do, and I was told in the interview that they don't use architects. So, you tend to not waste your time with people that tell you they aren't going to use you. Yes, I've definitely tried to work with the Indiana Department of Transportation. They basically told me that they didn't use architects. I've given a few interviews with them over the years through their outreach events and they just say they have no use to meet with me any further. I have submitted - I never see INDOT solicitations other than bidding, and we don't bid. Architects don't bid as professional services. I've always gone to the outreach meetings, I've given presentations when I can, so I've had no success with INDOT whatsoever, even though I've been DBE for 26 years." [#14]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "I've tried to work with 'em. It just doesn't work. The Indiana Department of Transportation we've tried. I mean, even with the auditors in the South trying to do a subcontract through them or even get into the door; they don't let it happen. They have a barrier against us, I guess." [#22]
- The owner of a WBE- and DBE-certified construction firm stated, "Now I will say INDOT's bidding is very difficult to use. It took me a lot of phone calls and a lot of studying to accurately

use that. I still have to go back to my notes to get into that system. It's not very user friendly. INDOT is very difficult to obtain your prequalification and get your aggregate and that's to bid on certain work. The prequalification through the public work, for public works projects, so the prequalification through I don't know if it through the IDOA or the Public Works Division they have a requirement that you have to do I think five jobs that are in excess of either $350,000.00 or $500,000.00. We've only done three INDOT projects so far in our company's history and we are not allowed to utilize our DBE credits, which essentially handicaps us because we're in a rural area and you know if I can't use my own that I've bid out to other people, I'm not saying we would use the whole thing, but if I bid out work to other construction companies, we should be able to use that as a credit. INDOT has started to lump certain jobs together, to bid them out as one. That leaves out all of the smaller construction companies. So, there may be three bridge structures, we actually did one like this. It was they took three structures and lumped them into one contract. So luckily our aggregate number for prequal was enough, but I know several companies that that just disqualifies them from bidding on work. Well, it's their bidding software and their prequal requirements. Well, I wouldn't have been able to do it without help from somebody that has bidded before I can tell you that. I don't really know. I mean we've been in business since 2013 and we didn't bid our first INDOT job until two years ago." [#23]

- The owner of a majority-owned construction firm stated, "INDOT does a really good job of - if you've got all your DV requirements and it's within an engineer's estimate - and they've got rules for all these bids. If a number falls in that range, they usually award it pretty quick; two weeks. You know you got the job The majority of them are INDOT, Indianapolis; all your towns. Getting an advertisement, pulling plans. The way they do it is straightforward. Most of the time, whenever I have a question on my bid, if we are low bid, it's just working through all the XBE requirements. There's a ton of post-bid stuff that you gotta do 'cause of city. Not necessarily the state. You've got a list you fill out electronically before you bid something, and you send in quotes the day after the bid. It's a little less stringent on the INDOT side of things." [#24]
- A representative of a majority-owned construction company stated, "None issues at IAA. With INDOT it is hard to break down the barriers of existing relationships they have with their consultant. Many of the contractors we use are having trouble finding qualified people for their work force." [AV53]

Twelve business owners described their experiences working with or attempting to get work with IAA specifically [#1, #2, #4, #6, #10, #14, #17, #18, #19, #24, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "For non-INDOT work, yes, we have. For airports, up until this year, we didn't own a water blaster. We just got one. And when we are doing traffic control in airports where they are extending a runway link, they will make you take all the markings off by water blasting and move temporary markings up 1000 feet and repaint temporary markings. Remove those when they are done and put the new markings up. So, we've hired subcontractors to do water blasting but we can't do that, so we had to buy one." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "Some of it's good and some of it's very confusing and it doesn't work. For instance, on the airport, we're doing a space planning submission and I had looked at it said, 'Oh, you know, the due date for questions is today.' And I saw 4:00. Well, I didn't notice that it said 4:00 AM. And so, we went to put my

questions in today and it said 4:00 AM. And I'm like, 'Who would ask for questions by the AM?' I said, 'I thought it was going to be PM. -Why didn't they just make it the 24th? It makes no sense.' So, I e-mailed the person - because there was a contact - and I haven't heard back, but I'm asking if it should have been PM and it was just a typo. I don't know. And I don't know how to submit the questions. There's nothing on there that I could find that says, 'Submit the questions.' So, some of those are very confusing, and they're difficult to use. The airport has weird barriers. We did a water fill barrier, but the airport has purple ones that are real short, they're very odd. They're short and they're long and they've asked us a few times to bid on it, but the issue is they don't use them that often and we don't have anywhere to store them. So, we could bid on them, but they would have to store them because we have nowhere to put them, because our other barriers go in and out all the time, so we don't need a lot of space to store them. And so, we haven't found it to be - it's kind of been cost prohibitive to bid on that Well with IAA they have a special certification called ACDBE, which is Airport Concession DBE, okay? So as a DBE I qualify for that, so I have that certification, and what it's supposed to do is enable me to work with the concessioners at the airport, but what happens is those are national companies that come in from out of town and they bring their designers with them. Well, the airport could easily say, hey we want somebody local. We want boots on the ground, so you need to team with one of our approved vendors to get the job done. It would save them money because they wouldn't have to have their consultants fly all the way in to watch things during construction and it would give our community some income from that. But they go, well we can't, we can't do that. I'm like yes you can, you can write that into your lease, that's a simple fix. You can say if you're going to be here and you're going to be a vendor here you need to - hire whoever you want ACDBE that's from here, you get to choose but you have to use somebody. Because otherwise I don't know if anybody, I guess they track it - I don't know that any ACDBE has gotten any work at all, but I guess you'd have to ask them if they'd tracked any because I'm not aware of any. … Oh, insurance… And I don't know if that's one of your questions, but in this recent RFP that's out, they want bodily injury of up to $10 million insurance. And they also want automobile up to $10 million - $5 million-$10 million. There's two different limits depending on where you're at. And they used to call it 'Air Side' and 'Land Side' and they didn't define - they call it something different now and they didn't define what it was. So, that was going to be one of my questions. 'Does AOA mean 'Air Side'? Does it mean 'Land Side'? I don't understand what you're doing.' But that's a barrier to small business - to have that much insurance. And for professional services, that's silly. I mean, I understand if you're doing hard construction, you need higher limits, but the prime should have the higher limit - which they said it would be the prime - but sometimes, you can bid on things at the airport that are smaller projects, but to have that kind of insurance is a barrier. This was in our P4 design services. So, I'm not even doing construction and they're telling me I have to have that much insurance. So, it's a barrier even for me if they're going to require that amount of insurance because I don't have it right now. I'd have to go get it. And all I'm doing is professional services. I'm not building anything. So, that was my question. Should that have been - did thy just copy that from what they used for contractors, you know, and then, they put in the professional services? So, that is going to be a barrier. I could probably get it, but a firm smaller than mine probably doesn't want to pay for that much extra insurance. The only thing I would say about IAA is the insurance, because they have insurance limits in this last RFP, I'm not sure that's really what they wanted, but it seems pretty high, and I think for smaller companies it would be difficult." [#2]

- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "It was fine. -Two or three of our longstanding customers asked us for the quote." [#4]
- A representative of a woman-owned professional services company stated, "Once you understand how they work it's been great to work for the Airport. In 1986 - I forget how the listing came around. There was a solicitation for professional services. Our company approached with a proposal, and we were accepted, and the Airport liked the type of work that we produced for them and extended the original contract to do additional services. They just liked what we did back in '86 and essentially, we haven't left." [#10]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Now as far as IAA I have - before they changed administration, I was rewarded at least seven projects. I mean we were working on IAA back-to-back. And then change of administration, new people and starting over again, and then I was not as successful. And then I had that one bad experience with one of the newer people that discouraged us to go after any more IAA projects. But I recently submitted with another team on a solicitation with IAA because I was not willing to go after it as being prime. I haven't heard if we were successful in that; I don't think we were." [#14]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "I'd say it was harder. It wasn't necessarily anything that was too overly complicated. I do think the process, and for which they decide to do stuff takes a long time. I understand why, and so that's why it doesn't -bother us. It just makes it harder to judge if it's going to happen or not. We'll quote a job, and it make take forever. They want you to quote it now and you get out there and you spend all that time voting it. Then they only meet twice a month or something to decide to aware projects. Then it seems like it doesn't ever materialize fast enough. It seems like it's always, the lowest bidder. From then but it seems like it's always again the lowest bidder that gets the job. There's a lot of requirements to operate on that platform out there. It's hard for me as a prime or even as a sub, subbing it out some of it to another sub because of time constraints and being busy that want to work out on that environment and airport authority. We had subcontractors we needed to do something out there, and they outright said no because it's at the airport. They said, 'No, it's too much red tape. It's too much pain in the neck. We don't want to deal with it.' I said, 'Well, I'm the one dealing with the red tape and paying for it, and all you have to do is show up and do the job.' They still, they won't do it. For me, I think the girls out there in the diversity department work hard to make sure that diversity is being done on the onset. Whether it's being done all the way through, I don't know. The projects that we've done out there the past have been good projects. A couple of office remodels, a drywall repair, a building, interior demo, trees cut down, things like that. -There was nothing complicated about the project managers for the airport authority or barriers that I think they put in my place that would prevent me from doing the work. It feels more acceptance that they want you to do the work, especially as an MBE. Like I said, I don't do a lot out there. I haven't really actively sought work out there. Actually just because of manpower, it hasn't been strong enough to do anything." [#17]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "Most of anything at the airport is great to work with." [#18]
- A representative of a majority-owned professional services company stated, "I think IAA would top the list for me. They're pretty transparent about what opportunities are coming." [#19]

- The owner of a majority-owned construction firm stated, "The airport authority does have a leg of safety and once you're behind what they call the fence for security and everything, that's a challenge. You're EMR comes into play on some of that. The requirement's a little bit lower than these other municipalities." [#24]
- A representative of a majority-owned construction company stated, "We have worked with INDOT and IAA for over 20 years--The only difficulty we see with IAA is that the various companies bidding on their work are much more inexperienced than we are, and they can't finish the work properly. INDOT has more stringent requirements and higher standards. They have more hurdles in order to be eligible to work for them. The commercial sector is robust, but the public works sector is an extremely competitive market in that it is very price driven, and it has very exacting standards and not much room for error." [#AV13]
- A representative of a majority-owned construction company stated, "We have had trouble getting work from IAA. We have tried to get work from them but have not been successful. We are having trouble expanding our business due to lack of finding qualified employees." [#AV24]
- A representative of a majority-owned construction company stated, "No INDOT work, but will work for IAA." [#AV2014]

Eight business owners described their experiences getting paid by INDOT specifically [#2, #5, #8, #10, #20, #23, #24, #AV]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "IAAs good on payments but yeah, the problem with INDOT is because we're a sub we're the last to get paid and if the inspector is behind in their work, they can extend that by two to three months if they don't get caught up on their pay apps." [#2]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "So far we haven't had an issue because if we're doing jobs with INDOT- if INDOT pays within ten days or so they have to pay us. So far there hasn't been any issues on that." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "Sometimes INDOT pays extremely slow. We did a job last September and we still haven't been paid for it. They don't get the jobs off the books very fast. Usually, we're at the end of the jobs because we seed and that's the last thing before they hand the keys to the people. But it seems like they keep those jobs on - I might get a DVE3 form, which is a release saying that I got this much money for the prime. I might get it two years after the job is finished. That's when I found out that the state keeps all of my jobs on until that two years maybe, after we've finished the job. That causes problems because it says I've got money there for jobs. It limits my $2.5 million. Does that make sense to you? The state doesn't get them off. When the job is done - I think it's done, I take it off my books. The other thing is they leave money on there even if we don't do that work. Maybe the state decided they only wanted to do 1,000 yards of seeding and it was supposed to be 3,000 or something. So that money stays on like I'm going to get that money. I'm not. It detracts from how much business I can get with the state. I can't go over $2.5 million. You see what I'm saying? By the state, right. But to me, I don't see why, because the seeding I told you we haven't been paid for from September last year. They've not sent me a DBE3, which I won't sign anyway, because they haven't paid me the rest of my money. I may not get that form for another year yet, even after they pay me. I don't know why the state keeps those on there." [#8]

- A representative of a woman-owned professional services company stated, "Really slow pay. Really, really slow pay." [#10]
- A representative of a majority-owned professional services firm stated, "No, I think they've always been pretty good payment-wise. At least my experience they have. But like I said, I think that it's keeping an open mind to other technologies that are out there that could create efficiencies. I just think that they get locked in on old-school technologies and they don't really want to investigate what other things are out there a lot of times. I think because of that sometimes they fall behind." [#20]
- The owner of a WBE- and DBE-certified construction firm stated, "There are no issues with the payment methods, it's just the paperwork requirement." [#23]
- The owner of a majority-owned construction firm stated, "It goes back to the INDOT pay items and you know you're going to get paid for what you do out there It's most definitely INDOT [that makes it easy to get paid]. You get a good inspector that's on the pay quantities and you guys are on the same page with how the job's getting billed. They'll pay you twice a month and there's no retainage on it either. That's the nice thing about the state." [#24]
- A representative of a woman-owned construction company stated, "We had a contract with INDOT Crawfordsville that involved a lot of escort work, and the scheduling was complicated. Even after we did schedule, the people would come back and were unsure we did the work even though we did. We had trouble getting paid. They were on an extremely tight budget which we understood, and we wound up eating the costs in some areas. This was no reason to take as long as they did to pay us." [#AV28]

Two business owners described their experiences getting paid by IAA specifically [#2, #19]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "IAAs good on payments but yeah, the problem with INDOT is because we're a sub we're the last to get paid and if the inspector is behind in their work, they can extend that by two to three months if they don't get caught up on their pay apps." [#2]
- A representative of a majority-owned professional services company stated, "We did have some slow payments from the IAA due to their contracting or their budgetary cycle where we had performed accepted work prior to the new budget taking affect and therefore they needed to delay payment until the new budget took effect." [#19]

Nine business owners shared recommendations as to how INDOT, IAA, or other public agencies could improve their contract notification or bid process [#1, #3, #5, #6, #7, #8, #12, #19, #2, #20, #22, #23, #24, #25]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "I don't know what the problems have been that are causing INDOT to lose so many good people, but they've lost some significant leaders in the Crawfordsville district, and I don't know why. I heard rumors but I don't want to repeat them. They're just rumors. But the Crawfordsville district has lost several good area engineers who went private sector. Something is going on. They were always the best place to work." [#1]

- The owner of a WBE- and DBE-certified construction company stated, "Don't put it on the DBE to say yes, I've been paid on time. Put it on the prime to say hey, send me a copy of the check that you sent them. You know if you're if you're looking at it that way. If prompt payment because the Federal Highway requires that, then instead of putting it on the DBE to say yes, we got paid when we really didn't get paid. But you don't want to get the get into it with the prime contractor that maybe one of your, you know, handful of customers." [#3]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "The only hinder sometimes that we get is these prime contractors, when they get it, they don't let us know that 'Hey, we got it. We're using you.' Then probably in about a month or two and they send you a contract and you're like, 'Oh shoot, I didn't know I had this.' Then your schedule is kind of - you know, you're trying to make way and put this around. If you're talking about a hinder, I guess that's one thing that if we can get INDOT or something like once they choose who they're going to use as a sub they should send out a quick e-mail to the sub and say, 'Hey, we're not even using you as a DBE' or just whatever sub they're going to use for the project, they should send us something real quick and say, 'We're going to use you in this project' so we know this project is coming. You see what I'm saying?" [#5]
- The owner of a WBE- and DBE-certified construction company stated, "I do think some of the efforts that INDOT is making like on the on the payment verification being electronic versus the DBE-3 form. I think that's a good method. I think they're one step shy and making sure that it's completely thorough and that is taking it a step further. And although that subcontract came at verification on ITAP does require the DBE to say that they've been paid that, they need to take it a step further and say, OK, now who has the DBE then paid? … on milling, I can't sub a sub. So, there is nobody else that would have been paid right? I can't bring another milling contractor in and do the work that I bid. OK, that can happen on trucking. That can happen and you can bring other haulers in on your job and use them as what they call a broker but on the new ITAP system, it doesn't capture that information. And then I'm just in my head I'm like, well then how are they going to uphold the one-to-one ratio because what has to happen when you use a broker? When I sub-any hauling, I have to make sure I'm keeping every dollar that DWD did on that job, I can broker a dollar for non-DBE, right? And that's necessary because the volume of trucking that's on some of these jobs. There isn't a hauler in this state that has enough trucks, right. So, you have to utilize other forces. But on this new system, see on the DBE 3 form that was captured, but it was all manual. But now they've taken it to ITAP, which is a fabulous thing because then they could keep an eye on the when subs are getting paid and that you know, you asked me earlier about how quick we were getting paid and those types of things. They can keep an eye on that but they're not capturing who haulers are then paying. So then how then, how are they going to capture the one-to-one ratio that we're all held to? So then that front piece like you're talking about can be disguised on the new system. Because all that DBE is verifying is that they got paid. Does that make sense what I'm saying? So, I'm concerned. I'm hopeful that in another version of ITAP that they'll capture that information. I haven't seen it yet. They just rolled it out this last year, right? That is something that I've been wanting to express to INDOT that I'm concerned because of the front companies out there, they could never - they could always stay at 5 trucks if they've got, you know, a 20 truck, non-DBE on their back in that one-to-one ratio is not kept and that that information isn't gonna be captured." [#6]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "The only thing is as a sub that I would like to know is if you do have problems getting payment

who do we contact? You know, 'cause, I feel like with there's so many people with INDOT and with, you know, the Airport Authority. If you're not getting payment, then who would you contact? I guess just knowing 'cause I, we, I mean there's been times, on the Airport Authority where I had trouble getting payment from somebody and I just, I didn't even know who to contact in regard to that." [#7]

- The owner of a WBE- and DBE-certified construction company stated, "That's one of the problems, is the April 30th date for everybody, because it slows the state up in getting them processed, and it's difficult for people like me to get all the information to the state people quickly. And have my tax return done, personal one, and my business tax return done, and get it to them in time for them to preview it and get it approved by April 30th. But again, they told me that was the state legislature date. Somebody needs to talk to them and get them to spread it out." [#8]
- The owner of a majority-owned professional services firm stated, "You could give a certain portion of work to every architect in the state. Or you could base it on design competitions. Or… Yeah, those are probably the only two ways that aren't impacted by politics. I don't think they can do it any other way. It's all public information. If you want to track it down, you can find it. Besides, most of their work is for engineering firms, civil engineers. I think there's a general perception out there that some of the public agencies are bullies and it's their way or the highway and they're just going through the motions. I think that's a big hurdle, particularly at INDOT. I would think one of the things you might consider, since most of INDOT are engineers, is get more community liaisons or people who are a little more user-friendly to represent the organization." [#12]
- A representative of a majority-owned professional services company stated, "With IAA I would say my one comment for improvement is to recognize that when a project exceeds the, when a project goes beyond the budget cycle that there should be a mechanism for funding that project even though the budget cycle hasn't yet started anew if that makes sense." [#19]
- The owner of a WBE- and DBE-certified construction company stated, "I think it would be good for - especially on the like, IAA side - it would be good to have review after the fact with someone who maybe didn't get shortlisted or didn't get the project. It would be good for them to kind of explain why they picked somebody over somebody else and what they could have done better to sell themselves. for starting businesses, it would be good to have that feedback to know what they could do better." [#2]
- A representative of a majority-owned professional services firm stated, "You know, I think to be open more and sit down with some of the industry leaders, that they're seeing what's being done in other states and the success of some of those things in other states and what's been done and using some of that experience to look into creative and more efficient alternatives. Really having an open mind." [#20]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "They need to open up the certification levels a little more. If the state took the time to see what we could offer instead of dismissing us at the door, that would be easier. With our industry, they dismiss us out the door. We don't even make it through the door. If they would just come in - when you go into, say, they get audited on all their paperwork or whatever. If they would come in and audit - not audit us but come in and see what we're doing and see what the outcome of

what we're doing is versus what they're doing is, and maybe meet in the middle and be a little open-minded, I think that would make it easier." [#22]

- The owner of a WBE- and DBE-certified construction firm stated, "Well, you either need to redo your prequal the way they determine your prequalification numbers, or they need to not lump them in as one, because like I said you're just essentially weeding out all of the smaller companies from bidding on that work. I wouldn't even know where to begin. … I was going to say you know INDOT can't force a prime to use a sub if they're not union, it's just that prevents most smaller companies from working as a sub on an INDOT project." [#23]
- The owner of a majority-owned construction firm stated, "It all comes back to that having good inspection to get the pay items figured out and get that settled." [#24]
- A representative of a majority-owned construction firm stated, "If you want more people to apply to try to get the bids, you'd wanna limit the red tape." [#25]

F. Marketplace Conditions

Part F summarizes business owners and managers' perceptions of Indiana's marketplace. It focuses on the following three topics:

1. Current marketplace conditions;
2. Effects of COVID-19 on businesses and industries; and
3. Keys to business success.

1. Current marketplace conditions. Interviewees offered thoughts on the marketplace across the public and private sectors, and what it takes to be a competitive business. They also commented on changes in the Indiana marketplace that they have observed over time

Four interviewees described the marketplace as increasingly competitive [#3, #5, #AV]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "I took a big hit. Uh, just this past year. Really. You know, you bid on things, you know, sometimes it can be a year in advance of when you're working, you know, or eight or nine months ahead of time of when a job actually get started, but I had the worst year I've ever had this past year, so I would relate that to the pandemic. You know, even if there just wasn't as much work out there and there's a lot of competition and in in my field, so it hurt. a lot of cities and towns, you know, they, they, the, it's called a community crossings. I don't know if you've heard the community crossing grants and things like that. You know, they put those on hold for a whole year. So, a lot of that funding just wasn't available. So that just makes the piece of the pie, you know, it just gets smaller, and you still have the same amount of people trying to so." [#3]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "I mean as a land surveyor we get probably another 10 or so, 10-12 companies, land surveying companies all around Fort Wayne here, at least in in Indiana." [#5]
- A representative of a majority-owned construction company stated, "We have worked with INDOT and IAA for over 20 years--The only difficulty we see with IAA is that the various companies bidding on their work are much more inexperienced than we are, and they can't

finish the work properly. INDOT has more stringent requirements and higher standards. They have more hurdles in order to be eligible to work for them. The commercial sector is robust, but the public works sector is an extremely competitive market in that it is very price driven, and it has very exacting standards and not much room for error." [AV13]

- A representative of a majority-owned construction company stated, "The market here is very competitive and, in our case, we have plenty of competition. The market has been very solid; however, a challenge has been finding engineering professionals in Indiana." [AV130]

Forty-five interviewees observed that marketplace conditions were generally improving, especially for small and disadvantaged businesses [#6, #12, #13, #16, #17, #18, #19, #21, #22, #AV]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "And the Indianapolis Metro area, I think in regard to the line of work that we are going after and that's hauling and milling, I would say on the hauling side there it's the demand is unprecedented right now because of the major projects that are going on in this area. So in regard to that side of the business You know it's at levels that, like I said, haven't been seen ever. I've heard this from Prime contractors. I've heard that, you know, even material getting rock, making asphalt all of those things. It's a ripple effect because of these major projects. I would say level of work is very high at this moment." [#6]
- The owner of a majority-owned professional services firm stated, "I would say low interest rates have opened up the market to more construction and development." [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "We've increased over the past couple of years. Definitely." [#13]
- The Black American owner of an MBE-certified professional services firm stated, "I would say it has increased. If I look at my bottom line of amount of contacts awarded and the amount of work completed, it has increased significantly the last three years." [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "I think the market, itself, has been good. I think construction in our industry, overall, has fared very well. You can drive around and see the number of projects that are going on just here in the city alone. Obviously, I don't have anything to compare it to other than where I live. But just there's been a lot of demands, a lot of requests for quotes and pricing on certain things that come across the board, usually from the state MBE. Which I'm sure there will be other questions about that in general." [#17]
- A representative of a majority-owned professional services company stated, "I think that the investments that are happening in the local market are certainly contributing to our success. A second factor, again with the context that our firm investigates and repairs failures of buildings, is the lack of quality construction in a number of sectors of the market over the past decade or so since 2008, is now starting to show itself because now we're investigating and repairing a lot of poorly conceived quality construction over the past decade or past two decades. the building code is going on about a decade old without any updates. That is trending a lot slower than other markets. There's focus on continuing to build things but there's not focus on improving the standards in our market for what the quality of those things should be." [#19]

- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "It has increased slightly. I would say probably maybe 10 percent or so over the last five or six years. Probably I would say it has to do with the previous administration and their push increased defense spending." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "It's increased. We've gotten at least a 20 percent increase every year. I think this year we've gotten actually a 30 percent increase, but it's not been from the state side or the federal side. It's been from the local companies." [#22]
- A representative of a majority-owned construction company stated, "We've never worked with them. It's favorable because interest rates have continued to stay low." [AV4]
- A representative of a majority-owned construction company stated, "We have had no problems with them. I think opportunities are big and growing in this area." [AV26]
- A representative of a majority-owned construction company stated, "We generally don't work with them. We are very busy right now. We are at capacity." [AV29]
- A representative of a majority-owned construction company stated, "We do most of our work with INDOT. The market is very good." [AV31]
- A representative of a majority-owned construction company stated, "We do a lot of work for INDOT, however IAA doesn't have a need for services we offer. Barriers would be IAA doesn't have a need for our services. There's much money in transportation budgets, it's a good climate for starting a transportation business. Only barriers would be figuring out how to start it up, which we have gotten past." [AV32]
- A representative of a Black American-owned construction company stated, "The only barrier is the size of the contracts offered, which are typically too small to pursue. I think it's a great place to do business. In our industry, we're related to infrastructure and there's a market now that is very good and looks like it's good for the next several years. There's funding that's been provided by the Federal Government." [AV43]
- A representative of a majority-owned construction company stated, "Problems getting resolutions sitting for 3 or 4 months as sub consultant doing work, project needs to go forward, but takes 6 months or more to get change order, and after 6 months then submit to prime consultant. Delays in contracting approvals hurts labor cost until contract is done. Think Indiana well run state, opportunities good, and believe more opportunity in commercial private area as well if we learn that skill as well." [AV48]
- A representative of a majority-owned construction company stated, "All the work we have done for INDOT, and other state agencies has been successful. We're booked 9 months out now. The job market is very good. Being able to get work is good. In the past 5 years alone just in our area, there has been a growth of 20 different fence companies." [AV101]
- A representative of a majority-owned construction company stated, "Workplace very positive, we are growing." [AV102]
- A representative of a majority-owned construction company stated, "Work is plentiful from both INDOT and IAA. Thank you!" [#AV104]

- A representative of a woman-owned construction company stated, "We love business in Indiana. We have a good pipeline of deals going." [AV106]
- A representative of a majority-owned construction company stated, "We have more work than we can handle, so it's pretty decent." [AV108]
- A representative of a majority-owned construction company stated, "There is plenty of work, no major problems." [AV124]
- A representative of a majority-owned construction company stated, "There is plenty of opportunity for work for the next 10 years." [AV125]
- A representative of a Native American-owned construction company stated, "The work is not a problem. We are really busy. The issue is obtaining materials and getting the work done on time. We have to get really creative." [AV126]
- A representative of a majority-owned construction company stated, "The marketplace is good, plenty of work. Drastic price increases of materials, and labor shortages, and equipment shortages." [AV129]
- A representative of a woman-owned construction company stated, "Starting a business in Indiana is easy. There's a lot of business in Indiana. There's a lot of room for everybody." [AV132]
- A representative of a majority-owned construction company stated, "Plenty of work, difficult obtaining materials and very volatile pricing." [AV136]
- A representative of an Asian Pacific American-owned goods and services company stated, "I've got work coming out of my ears. I keep telling younger engineers that if you want to go out on your own, do it now. The marketplace is filled with work. I'm turning down two to three jobs a week because I have so much work." [AV154]
- A representative of a majority-owned construction company stated, "It's a great place to work and live." [AV163]
- A representative of a majority-owned construction company stated, "It is extremely busy right now which is good for us." [AV167]
- A representative of a majority-owned construction company stated, "Indiana is a fantastic place to grow a business." [AV170]
- A representative of a majority-owned construction company stated, "In our industry, business is quite robust." [AV171]
- A representative of a majority-owned goods and services company stated, "Fairly strong, just concerned with what the economy is doing." [AV186]
- A representative of a Black American woman-owned professional services company stated, "Indiana is a very favorable state to do business with." [AV206]
- A representative of a woman-owned professional services company stated, "Currently the market is good with lots of activity. There is issue of employees not being able to find work and wondering how long workload is going to continue." [AV2011]

- A representative of a majority-owned construction company stated, "I think the work is there if you want to go after it." [AV2016]
- A representative of a woman-owned professional services company stated, "Really busy right now. Home remodeling, building etc. Things on the up and improving." [AV2020]
- A representative of a woman-owned construction company stated, "Very easy to do right now." [AV2024]
- A representative of a majority-owned construction company stated, "High level regulation, paperwork, multiply layers of management to oversee projects. I think Indiana economy is booming, there is lots of opportunity with construction project." [AV2029]
- A representative of a Black American-owned goods and services company stated, "The marketplace is great for small businesses right now. Many of them are minority-owned." [AV2030]
- A representative of a majority-owned construction company stated, "Found it to pretty easy." [AV2039]
- A representative of a majority-owned professional services company stated, "The market is more favorable now than it has been in the last 5 or 6 years." [AV2042]
- A representative of a majority-owned construction company stated, "There is a lot of work available." [AV2043]
- A representative of a majority-owned construction company stated, "Fairly positive. Business good, and quite a lot of work, hard to find good employees." [AV2045]
- A representative of a majority-owned construction company stated, "Good opportunity for growth and expansion." [AV2048]

Four interviewees observed that marketplace conditions were in decline [#AV]. For example:

- A representative of a majority-owned construction company stated, "I haven't pursed any opportunities, don't know where to start low economic depressed area, hard to charge any amount to make money here." [AV91]
- A representative of a majority-owned construction company stated, "Not very many people are buying." [AV207]
- A representative of a woman-owned construction company stated, "Concerned with direction the economy is going." [AV2017]
- A representative of a majority-owned construction company stated, "Hope that economy improves." [AV2035]

2. Effects of COVID-19 on businesses and industries. Interviewees offered a variety of thoughts about current marketplace conditions across the public and private sectors in light of the COVID-19 pandemic. Interviewees shared their experiences applying for and receiving programs to reduce the impact of COVID-19 on their businesses. Other firms described the type of support that would be most beneficial to their type of business during this time.

Ten interviewees discussed the effects of COVID-19 on their industry [#1, #4, #8, #13, #16, #17, #19, #20, #21, #22]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Right now, INDOT is so shorthanded and there's so much work going on that a change order paperwork goes to the bottom of the pile on a project manager/engineer's desk. So, they usually don't do change orders right away. It might take them 90 days just to write the change order and then it has to go up the chain. Depending on how much the change order is for, it has to go up the chain of demand in INDOT through the area engineers, sometimes to the district engineer. And then maybe even the central office to get approved. Then it comes back down and then they can create an estimate. And then the estimate gets paid in 30 to 60 days. That's just one job but I would say we probably have 20 jobs that are in that situation right now where the state just doesn't have the people to do the change orders or people who are supposed to, they are just lazy. They just don't want to do it. The state will pay them over time to work overtime. They are already making wages that aren't standard so a lot of them quit and go to work for contractors and engineering companies. I think in the Crawfordsville district, they've lost several area engineers that went to work for engineering companies or general contractors because it's better working conditions and better pay. That's a problem not just for DBE's, that's a problem for the whole industry." [#1]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "One thing I will say is that INDOT - and you know, we do a lot of INDOT work, a whole lot of INDOT work - INDOT was not at all sympathetic to that fact, and we actually lost a lot of money on a lot of jobs because we did go ahead and perform under the contract that we said we would perform under. But what practically happened is you quote a job, and you don't actually perform it for a period of three, four, five months, and what happens in the steel industry last year - again, don't know how familiar you are, but it had an historic rise in the price of steel. That resulted, for me, in 13 straight monthly price increases, whereas normally there's maybe one, two price increases and maybe one price decrease per year. We endured 13 increases in a row from the first one was November 30, 2020, and the last one was December 1, 2021. We had monthly increases every single month. So, what that did - imagine if I'm selling at 20 percent margin and I quote that in November/December of 2020, and then I don't perform it until March/April of 2021, or May/June of 2021, my margins are gone, and in fact I'm losing money just to perform the contract. But we did choose to perform the contract, and we have tried to go back to some of our customers and say, hey, we need more money. The response has been basically, well, INDOT's not giving us any more money, so we're not giving you any more money. So, as you can imagine, for a small - a little guy like us, that could have put us out of business. I don't know that they could have, because at the end of the day, I'm sure, just like we budgeted to spend a certain amount, INDOT budgeted to spend a certain amount. The only thing INDOT could have done would have been to do change orders on certain of these contracts to release more money to the material suppliers. Is there more money to be released? I have no idea. I would just say if it's a question of who has more money to spare, me or INDOT, I would assume it's INDOT. But I don't know that for a fact. we've just been praying for price stabilization. So, we finally have it, but we now have to dig out of a hole and get a lot of people paid back, including ourselves. So, we need stability in 2021 - either stability or assistance in 2021 - I mean in 2022, to make sure we make it to 2023." [#4]

- The owner of a WBE- and DBE-certified construction company stated, "Recently the price increases. I mean my fertilizer went from $10.50 a bag to $20.00 or more a bag. My feed has doubled. I have jobs that I bid two years ago that still are not finished that I have to go on prices that were way lower than I'm paying now. But that's just in the last four or five months, I guess." [#8]
- The Black American owner of an MBE-certified goods and services firm stated, "Not too familiar with the industry as a whole, but I would say at least for my business." [#13]
- The Black American owner of an MBE-certified professional services firm stated, "This business is up and down. I've been in this business too long. You take the good with the bad, and at some point, it's going to belly out; not permanent." [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "It's hard to get people to come back. I think there were so many opportunities for people to be self-employed somewhat through these apps. Like the grocery store apps. The Uber driving. Lyft. Uber Eats. It gave people a lot of independence and control of their life without having to be tied to a 9:00 to 5:00. I think they took that route over pay. They just said, 'Hey, I have things paid off from the stimulus money or the money that I was able to apply for, for assistance. 'Now I don't need the stress of a 9:00 to 5:00 and work my fingers to the bone when I can just do this. And make less money, but I don't need as much anymore.' I think that kind of displaced a lot of the workforce just because people had more opportunities to do things that controlled their schedule day-to-day. They need to take because kids were sick, or if they needed to run somebody somewhere, they could do it without affecting attendance or job coming down on them. It just gave them more control. I think that's one of the things that caused all that." [#17]
- A representative of a majority-owned professional services company stated, "I think that the trend right now from our perspective is that the construction industry and architectural and engineering industry is very heavy with workload without the sufficient staff to staff it." [#19]
- A representative of a majority-owned professional services firm stated, "Well, just recently obviously the inflation. And the lack of being able to get materials and equipment. The long lead times that we're seeing, supply chain issues have dramatically affected our business as well as our end-use customers that have had to wait significantly longer to get equipment and materials. And then it's obviously increased significant in cost. And then you're also starting to see interest rates to go up too, which I think could hurt the business a little bit more. It could hurt our business a little bit more. People, when they see interest rates go up and they're wanting to finance a project that sometimes can be a deterrent." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Supply chain disruptions No, talking to all the people that are in the same business with us, they have the same issues. Our suppliers across the border are all having issues with lack of employees. Since most of them attribute that to government programs to subsidize people to the point that they find it easier to just stay at home and not work." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Over the last year, it's been the market change in the price of the loads and stuff like that for freight. Once the price of the freight goes down, then it's harder for our companies to afford what we do. They're dropping off, but then their companies are shutting down as well. We've applied for the grants, and they make it impossible, 'cause they say, 'Okay, you can apply if you're minority-,

woman-owned or a corporation.' But if you put in you're a corporation, even though you're woman-owned and you have HUBS, they go by the corporation and not by the woman-owned or the HUBS. Then they disqualify us for it. The last year they've made it really hard to go through the grants to even get a contract through the government or a grant, even though we are qualified in all aspects of manner. Hundred percent. You're getting more private than you are getting from the government or from the states. Like I said, they're closing a lot of their stuff off. The DOT and the FMCSA have closed off a lot of their stuff for the veterans, which I understand, and I get 110 percent. There are other companies out here that're just as qualified to do what they're doing, but we're being cut off. It's making it a little bit harder for us." [#22]

Six 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 [#1, #3, #19, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "It's been a problem and I think the biggest problem is we have workers, our road guys, who they are all over the state; staying in hotels, coming in early, going home late. We don't know what their family situation is. Some of them could be exposed to COVID. They come back into the office or to the shop to get their marching orders from operations. We find out maybe they been exposed and then they've exposed everybody. That's a problem. It's really been bad. We've had almost complete lack of management staff in the office because so many people get exposed. That is a big issue. And then we've had some people who were really, really sick from COVID, too. And of course, you always worry about them. But just getting exposed or potentially exposed has been a problem. [In those situations, we would have to] cancel work. Right now, we are running about six flagger crews or man crews. If one of those guys reports that he was exposed, we can't have him come in and expose everybody. So, we either scramble around and find a way to push the work back a day or we tell the contractor we're just going to have to wait a week or whatever until this guy has got his quarantine over. So that's a problem." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "I took a big hit. Uh, just this past year. Really. You know, you bid on things, you know, sometimes it can be a year in advance of when you're working, you know, or eight or nine months ahead of time of when a job actually get started, but I had the worst year I've ever had this past year, so I would relate that to the pandemic. You know, even if there just wasn't as much work out there and there's a lot of competition and in in my field, so it hurt. a lot of cities and towns, you know, they, they, the, it's called a community crossings. I don't know if you've heard the community crossing grants and things like that. You know, they put those on hold for a whole year. So, a lot of that funding just wasn't available. So that just makes the piece of the pie, you know, it just gets smaller, and you still have the same amount of people trying to so." [#3]
- A representative of a majority-owned professional services company stated, "Our company as a whole decreased staff by about 70 percent. But our Indianapolis office actually maintained our staff without any reduction and have actually fared pretty well. I don't view the impact as permanent. I think that the trend right now from our perspective is that the construction industry and architectural and engineering industry is very heavy with workload without the sufficient staff to staff it." [#19]

- A representative of a majority-owned construction company stated, "We have had trouble getting more opportunities for government and commercial jobs--They tend to go with the big companies with lots of resources that leave us smaller and double minority companies out. Our business was negatively affected by COVID especially in the commercial area. If we didn't have our residential business, we would be suffering." [AV25]
- A representative of a majority-owned construction company stated, "Just trying to hang on right now." [AV151]
- A representative of a majority-owned goods and services company stated, "Everything is slow right now. I am not expanding. I work with 6 crews, and I only have 1 crew that is not working right now. I am sure that things will get better." [AV188]

Five interviewees shared that COVID-19 negatively affected their firm, but things have started to improve [#4, #8, #9, #18, #AV]. For example:

- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "So, 2020, the market was down versus 2019, and then 2021, the market was up." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "We didn't stop because of COVID, if that's what you're asking me." [#8]
- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "I guess it was slowed, stopped for a while. Well, it's just a wait to hold, wait for it getting better." [#9]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "Project schedules were delayed." [#18]
- A representative of a Black American woman-owned professional services company stated, "Its difficult last couple years, but expanding our services." [AV162]

Four interviewees noted that COVID-19 has had little to no effect on their business [#2, #12, #22, #24]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "No, we were not impacted. We work outside so, we actually had growth during the pandemic. And the pandemic was a really good time to do the roads 'cause no one was driving. So, they - INDOT bumped up the amount of projects that they were doing because they knew it was gonna be safer with not as many people on the roads." [#2]
- The Black American owner of a WBE- and DBE-certified goods and services firm stated, "No, it was not. Fortunately, we're in the industry where the corporations need us to uphold their safety. They don't have us, then they usually don't make it in transportation." [22]
- The owner of a majority-owned construction firm stated, "We had some people working remote in the office, but for the most part, no. Pretty well business as usual. We were designated as emergency responders with all the road work, that we didn't have to shut our doors. Our guys were out in the field with all the safety protocol and business as usual." [#24]

Twelve interviewees noted that COVID-19 benefited their business through new ventures, increased work, or the ability to learn new skills [#5, #6, #7, #10, #15, #16, #20, #25, #AV]. For example:

- The Black American owner of an MBE- and DBE-certified professional services firm stated, "COVID, at that time, when it came, the only problem was the employees and the risk of health and stuff like that. But at the same time, we were fortunate enough that in that since we're doing a lot of work with INDOT and INDOT wanted to get a lot of roadwork done because most people weren't traveling and they wanted to get crews on the roads because traffic is a little bit lighter than previous years, so we were fortunate enough to have jobs to keep employees going as well. Did it really have a big impact on the company? I will say no. But we were fortunate." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "We thankfully we were not hindered, and you know having to shut down or anything of that nature." [#6]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "March 2020 was a little scary. I think that there was like two or three weeks there where we had a stall. I guess you would say where contractors really didn't know what to do. And I'm at their mercy. So. March, April were a little iffy and then once INDOT then decided. I think that the between the state of Indiana and INDOT-based thought. OK, well, there's not as much traffic on the road. Let's try to push forward at a quicker speed. Some of these projects so that really spending along like I think that I had a project on 70 downtown that said it along and they made that deadline a faster approaching deadline. And then there was also another 70 job out east that they've lifted time restrictions that we could work at on any time so. Uhm, the first month or two was a little scary. But then, once the state of Indiana gave everyone OK to get on the road, then It was it was a good year after that." [#7]
- A representative of a woman-owned professional services company stated, "We're just as busy as could be, but we've also scaled back, so we're not pursuing as much." [#10]
- The Subcontinent Asian American owner of a professional services firm stated, "It gave me more business, since one of the oversights I do is on COVID-19." [#15]
- The Black American owner of an MBE-certified professional services firm stated, "I would say it has increased. If I look at my bottom line of amount of contacts awarded and the amount of work completed, it has increased significantly the last three years. I guess the easy answer would be, COVID. It's a scenario where people had the opportunity to think about what they want to do from a project standpoint and having that time to map it out. My thought process is, 'Okay. Well, we really want to do this. We've been wanting to do this for some time. Now we've had some time to think about it, we need to go out and get some engineers and some architects and some designers to make this happen.' That's my off-the-cuff thoughts of why it's increased the last three years. I would say I've brought on more consultants, because there is more work than I can handle myself. I would say my big adaption is I don't have any full-time employees, but I brought on more part-time consultant help." [#16]
- A representative of a majority-owned professional services firm stated, "Yeah, it was. But our profits actually went through the roof because I think that is really attributed to there was less travel. Although we still continued to do projects, because we had unoccupied buildings that we could still work in, even though there was nobody there. It didn't affect us like you would think

that it would. Maybe in certain areas such as the medical field, maybe we'd seen a little bit of a decrease in that, just because of the nature of the business during COVID." [#20]

- A representative of a majority-owned construction firm stated, "Positively. We accelerated in growth, rapidly. We were still naturally growing, and we were still naturally projected to grow; we just weren't expected to grow at the rate we did. We far exceeded the expectations, due to Covid." [#25]
- A representative of a majority-owned construction company stated, "no barriers I'm aware of we've been very busy, the last several years has been very good in terms of amount of private and public work." [AV61]
- A representative of a majority-owned construction company stated, "No barriers experienced right now, things are pretty good. Lot of business out there. It is hard to get employees willing to work." [AV62]
- A representative of a majority-owned construction company stated, "Things are busy." [AV120]
- A representative of a majority-owned construction company stated, "There's lots of work out there." [AV123]

Business owners and managers discussed other effects of COVID-19 on their businesses [#1, #4, #6, #10, #13, #14, #17, #18]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "It's been a problem and I think the biggest problem is we have workers, our road guys, who they are all over the state; staying in hotels, coming in early, going home late. We don't know what their family situation is. Some of them could be exposed to COVID. They come back into the office or to the shop to get their marching orders from operations. We find out maybe they been exposed and then they've exposed everybody. That's a problem. It's really been bad. We've had almost complete lack of management staff in the office because so many people get exposed. That is a big issue. And then we've had some people who were really, really sick from COVID, too. And of course, you always worry about them. But just getting exposed or potentially exposed has been a problem." [#1]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "[In] 2020, I couldn't get out of the office. I was stuck here, brand-new owner, didn't have a chance to go shake hands and kiss babies because we were all quarantined to stay in the office." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "We were in the sense of, you know, construction is very paper oriented and there for a while things kind of went paperless because unsure of how, you know, the virus transmitted and those types of things. Obviously, safety protocols with social distancing and making sure people were, you know, had proper tools. Hand sanitizer, those types of things and out in the field. So, it was really just education and changing protocols and processes and communicating consistently with those changes." [#6]
- A representative of a woman-owned professional services company stated, "Well, with the onset of it everybody was sent home and we learned to work remotely. It did lessen the number of

staff that we actually have working full-time. A few of the employees went on to find work somewhere else and are now moonlight employees for us." [#10]

- The Black American owner of an MBE-certified goods and services firm stated, "Just overall bids. Just overall growth. There was not anything to bid on during that time frame. And the ones that were bid on, there was a bunch of other contractors out there as well. Competition went way high because they were looking for extra work. Revenue wise, I'd say we were half of what our normal revenue was for that year." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I would say it decreased. I think the pandemic had a lot to do with it. So, I would say decreased. My profession is a lot of face-to-face in order to secure work. If you're not in their face, it's difficult to get work. I find as being a smaller firm, 'cause you're competing against larger firms that would have more marketing and people in their faces than I would have. So, it's more difficult if we do not have that face-to-face. So, during the pandemic and I would say over the last few years, I have received less work from the city and from the state." [#14]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "Prior to the pandemic, even the year of the pandemic before everyone really started to lay down and not want to come to work, we were, you know, busting at the seams with work. I mean we chose what we wanted to do and did it. Whenever we needed material equipment, or rental equipment, or anything, we were able to get it because everybody was producing. Once the pandemic hit and everything shut down, eventually it caught up to the materials we were using, you know, drywall, steel. It dried up. When the stimulus came out, it seemed like everyone backboned and making sure the economy stayed afoot went south. They just said, 'Hey, I'm gonna let someone else carry the load. I'm just gonna stay home and relax with some of this money.' Maybe take a mental break. I don't know." [#17]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "It's time-consuming expansion from being a sub concrete contractor into expanding into the ready-mix concrete business, so all we could do is bid jobs. We were low on several major projects, but one particular road project in Illinois, farmers didn't want it in their backyard. We had about a $48 million bid going in, but the project didn't go. It was from I55 all the way over to 65 in Indiana." [#18]

3. 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, #6, #8, #12, #13, #16, #17, #19, #20, #21, #22, #23, #24, #25, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Even if you're a DBE and you've got the certifications, contractors really analyze you to see if you do the work. If they hire you to do a job and you don't perform as well as the other companies out there, DBE or non-DBE, you're just not going to get any more work. So, the DBE/MBE world is a benefit, but you still have to perform. If you don't perform, you're just not going to get any more work. That's just the way it is. Now, there are some really good contractors out there that are forward-looking. They understand that they have to help people succeed. And in fact, there are a lot of people in our industry that have that attitude. They will go the extra mile, but they won't go the extra mile forever. So, you really need to be on top of your game. Do what you say you were going to - we always say it like this. We say under promise and over perform." [#1]

- The owner of a WBE- and DBE-certified construction company stated, "That's a variety of variables to be competitive. I think you know attracting, qualified candidates. I mean, our people are our biggest asset. A man and if you don't have qualified people. I don't think you're going to be competitive. The biggest piece, I think up time with your equipment is also something that folks need to certainly understand. Not everybody you know can go out and buy new equipment, but you need to understand what is going to keep your equipment running. You know what contractors hate the most is you know they get you out there, you're ready to do the job and then you break down at 11:00 o'clock. Then also you know just understanding your market, knowing what your costs are and what you can absorb as far as risk and understanding how much profit you need to be successful. Understanding your cost, I mean you, you know, I think that's critical, but a lot of people think being competitive as being the cheapest, and I think it's more than that." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "We have to have the low bid. But we won't do it for free. We have to make sure we're making money. Like I said, I check prices and I go back and see how much it costs me an acre to feed or put down straw blanket. All these prices have been going up, so I have to make sure that I'm competitive, but also that I don't lose money. I've seen people bid and I'm like I don't even know how you can do that. You have to be competitive, but you also have to make money." [#8]
- The owner of a majority-owned professional services firm stated, "Reputation, referral-based work, and probably the economy. I guess that depends. If you're bidding on public work, low bid wins, so you have to cut your fees. I would say in the private sector, reputation and service are the key. I think there's only one thing that you have to worry about as an architect, and that's keeping your clients happy. If they're happy, they'll tell other people. Referral based work is the best work, so just keep your clients happy." [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "I would say, growth-wise, just trying to hire more people for the work. Finding workers would be one problem, and then, some cash flow issues, just because commercial painting stuff takes a long time to get paid on. As you grow, just trying to keep up with that, keep up with cash flow issues and workers. I would say they're two major issues. I'd say, at least in construction, it's pretty much the same across the board. Do good work, do it on time, and find good workers." [#13]
- The Black American owner of an MBE-certified professional services firm stated, "I think the big thing is I see some firms not really having the expertise and the professional staff, just the overall knowledge of the systems of what they're trying to do, so I would say you definitely have to have the right amount of experience and professionalism, registered professionalism, in order to be successful. The factors are you getting opportunities to obtain contracts and do significant work. If you're not doing that, then that lets you know, 'Hey, you've got to make some changes or get some more qualified staff to help you out.'" [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "To really know the cost of what it takes to do the work. Because so many times, the real numbers of the boiled down margins don't show up, and it may not show up for a year. You can - and all the bid processes in this industry is always the lowest bidder, where some industries, it's the most qualified or the person who's going to do the work for the customer or the owner, which would be a better value to them. But nothing really value-driven for true comparison as far as the work. I use that example as if you buy something cheap and it lasts for a short period time, you got to

buy it again. But if you would have bought a more expensive one in the beginning and it lasted longer, and the total value and total cost of ownership of what the project is greater; I'm going that route. I don't think that happens in construction. I think it's always the lowest bidder unless it's a private, and then you can just make a decision of what they want more so than not. Even in the private sector business, there's competition, and everyone races to the bottom to get the job if they're desperate and pricing is there. For us just understanding to be successful, you have to have quality guys that are trained to know how to not only do the work, but how to run the job efficiently without having to be told. Experience. Not only experience, but good experience. I look at it, like my background is in management. When you look at cost on a smooth operation on a project, little things like the guys being efficient when they get to work, not making 15 trips back and forth to the supplier, or Menard's, or Home Depot, but just coming in with a plan, a material list and all that stuff. Being effective and what you do and being aware of what the goals are for the company. Because so many good companies don't operate well because the guys aren't either encouraged or made aware of how important the work that they do has an effect on the company and the hidden costs. Because those hidden costs will show themselves. But down the road. So, you'll bid a job for, three to six months, you're bidding on work. Then you find out later, when you're doing your work, that you're not making any money. That's the hard thing because on the surface, it seems like a lot of money to come in and lot of money is going out. Everybody is working. Everybody is good. But when it slows down, then you start to look at the percentage of jobs. If you're not tracking, you can really lose a lot of money. You have to know what you're doing and be able to work well with people in diverse situations. Being able to take feedback from a well-rounded team, not only from the customer, but I also mean from the employee and from the customer. So many times, people are afraid to tell the customer no, or they're too afraid to do something because they may have consequences later because people don't understand the ramifications of what their decisions are long-term. The owner wants something done and they want it done now. You can't do it. Rather than tell them that, they lie, or they fabricate the truth. 'Well, unfortunately... Well, we'll be there the first part of the week.' They know very well they're not going to be out there. It just wastes so much time and energy administratively keeping these lines of kicking the can down the road relationships when you really need to just say upfront, 'Hey, we're not going to be out there for two weeks,' and then testing the integrity of the relationship and the word. I think a lot of people don't realize how much that cost you financially to run a business inefficiently and no credibility. That's just for me is how it is. I think there's obviously a hundred ways to do it. I'm not experienced 20 years. I'm just only going off my quick observation of the past seven years or eight years we've been in business for this industry." [#17]

- A representative of a majority-owned professional services company stated, "In the line of business we do, which is investigation of failures and repairs, to remain competitive it is non-negotiable that you have to provide high levels of technical quality and not decrease the quality due to other factors, such as time or money." [#19]
- A representative of a majority-owned professional services firm stated, "I think you have to have a good reputation, number one, because this is a people business. So, reputation I think is number one. And that comes with results from your projects, 'cause you're only as good as the last project that you did. And its continued service to the industry, providing good, solid service." [#20]

- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "In order to be competitive, you have to have a great deal of innovation and the capability to carry out the work that you believe you can do. If you pose something, you need to be able to deliver. I think the primary reasons for our 21 years of longevity so far is that we are very careful in matching our capabilities with the requirements of the submissions so that we are not going out of our wheelhouse in order to secure business. You have to match your abilities, and capabilities, and resources with the work that you're purposing to do for the client." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "There's a few factors. One, when we're considered contractors for the DOT for safety, number one, they always displace us, because they consider us contractors. And they think that we're one of those companies that go in, fix the company, and then we just leave the company. Automatically, when we're getting audited, the auditor dismisses us 110 percent, because they already think that 'Okay, we already know you fixed the paperwork before we got here'. If they would give us the advantage and have a more open mind and say, 'Hey, maybe these people are here to help this company and not find the loopholes', I think there would be a better outcome in our businesses as far as safety compliance, and woman-owned businesses would stay open longer, if they wouldn't discount what we're doing. Once they see you're contracted, they automatically discount - they're like, 'Oh, they're contracted. They're not even business owner', when in reality we're actually the people behind there trying to make sure that their drivers are doing what they can do, because the owners don't know what they're doing, as far as that goes. We were the only one there trying to keep everybody in line and everybody safe. When the state says, oh, they're contracted or they talk bad against us to the owners, it takes away from our work. It takes away from our livelihood. It takes away from the safety on the roads because they're not gonna listen to them. Then all of a sudden, it's our fault. Do you see what I'm saying?" [#22]
- The owner of a WBE- and DBE-certified construction firm stated, "Well obviously you have to have the best price, because most of our work is bid work, so it's awarded to the lowest bidder. They take into no effect of the quality of your work. We do very little residential, we do some commercial, but mainly all of our work is bid work, so it's a price in that. I think with commercial work where you can pick who you want, that's obviously going to be the quality of the work that you do. Jobs that are bid you know it's how can you keep your costs down so that you can do work at the lowest cost per unit?" [#23]
- The owner of a majority-owned construction firm stated, "We strive for a certain revenue, and we've got very competitive employees. Got a really good bunch of guys running these crews and can maximize the time out there on jobs and make us more competitive on projects. All comes down to the people. We've got a good core management and good superintendents out in the field that are running these jobs. It's not only dealing with the work, but the headaches of the supply chain stuff going on right now. The more experienced guys that got better connections and with our suppliers seem to make us a little more competitive." [#24]
- A representative of a majority-owned construction firm stated, "We have to stay ahead of what all of our competitors are offering as far as color choices or options, and we also have to stay ahead of them on quality." [#25]

- A representative of a majority-owned construction company stated, "My advice for anyone getting into any business, be careful the market for your product or service is NOT saturated yet. Make sure you have a market for your product or service." [AV145]

G. Potential Barriers to Business Success

Business owners and managers discussed a variety of barriers to business development. Section G presents their comments and highlights 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, equipment, 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 primes or customers;
16. Approval of the work by the prime contractor or customer;
17. Delayed payment, lack of payment, or other payment issues;
18. Size of contracts;
19. Bookkeeping, estimating, and other technical skills;
20. Networking;
21. Electronic bidding and online registration with public agencies;
22. Barriers experienced through the life of a contract;
23. Size of firm; and
24. Other comments about marketplace barriers and discrimination.

1. Obtaining financing. Nineteen 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 [#1, #2, #4, #5, #6, #8, #9, #10, #11, #12, #13, #16, #17, #18, #20, #21, #22, #25, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "It can be daunting. Not to mention, how daunting it can be to start a business when you really don't have many assets and try to get funding. Funding is a big issue. It was for us in our early days of the second company. The first company, not so much but the second company, it was a challenge. So banking regulations are tough. There's not a lot of banks that will loan commercial loans. And the requirements are stringent I don't know if it's much of a barrier as it is in the DBE/MBE world as it is in any other world. Banks won't loan you money until you have a track record, usually a three year track record. So they want to see three years of financials, well done financials. You don't have to be audited but they should have a CPA input. And also they want to see three years on your taxes. Well, taxes are due until March 15 for corporate or April 15 for personal. So you're not going to have your taxes to pass on to somebody else if you are a sub-S Corporation like most of us are. You're not going to be able to submit taxes until April 15 of the third full year you are in business. So if you start the business in June, it ends up being almost 4 years. So that's a requirement for loans. And it gets harder and harder to find banks that are willing to do commercial loans and have a local presence. In Lafayette we have one bank that regularly does commercial loans. That's First Merchants. I'm sure in Indianapolis there's more but it's difficult, very difficult. And I'm not sure that being a DBE helps or hinders either way. I just don't know. But I know it's a time-consuming process So your first three years, you better either have a company who can help you get paid sooner that you are working for or you've got to have some money in your pocket at the start." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "It was a different bank, because I didn't want to have all my eggs in one basket. I didn't [want] the one bank to know everything I did …. So, I went to a different bank. But because they knew I was established already and had a banking relationship and had a business that was profitable, the second bank was more open to bringing us on. … As we grew, they were very good about raising our credit limit as we grew …. I think it's easier in a traffic control company. There's a lot of data out there for traffic control companies and it's a pretty profitable sector. So, I think they knew that. They said, 'Well, you know, traffic control companies' … there's not really any down time. … Good economy, bad economy, everybody's [got to] fix the roads." [#2]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "Obtaining financing is always a barrier for a small company. We don't have the assets." [#4]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "Banks won't give you loans to start a business because they don't trust you [will be] able to establish it. I mean most of it was the trust between the banks. But ever since I've been able to establish the business and with our credit records and everything it hasn't been a problem with obtaining a loan if I need it so far." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "Financing can always be difficult." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "Getting financing is one thing, but managing your money is a big thing. Just because you got a big check yesterday doesn't mean that you don't need to put most of it back, because you're going to need it because

it's a slow pay with the government. Just having the financing and being able to wait a long time to get your money sometimes." [#8]

- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "Obtaining financing [is] okay. We don't have much problem with that." [#9]
- A representative of a woman-owned professional services company stated, "No, we've always been pretty good about being able to get financing. We don't really ever try too hard to find financing. We've had some small business loans, but it's never been difficult for us to get." [#10]
- The Black American owner of a construction company stated, "Also, money. Money is a challenge also. I think the biggest barrier is not having man power and money. Not having the money to just hire somebody to work, even when I'm slow. I don't have enough money to hire somebody for 40 hours a week, because I don't have work for 40 hours a week for somebody else. I think that's my biggest barrier is having the money to just hire somebody and be able to pay them even when I'm not working them just so they'll stay and be dedicated to my company. So, I think it's just a money thing really. It has been a personal experience and it has been problems. I was able to obtain a small amount of financing, but that was enough for me to get a van and get the tools and get started. It wasn't enough for me to actually get a bigger contract or to go after bigger work. I just started to reach out and try to bid bigger contracts in hoping that if I get a contract, maybe a bank would help fund the job until the job is finished and I can get paid. So, yeah, it definitely has been a barrier. I know that it was at first, I had to make sure my credit and everything else was in order, and make sure that I had to have a business plan and everything before I even had the confidence to go into the bank and talk to them. … I had to cash in my annuity also to have money in the game as well. They didn't want to loan me any money without having any … having skin in the game, I guess. That's the words that were used, actually. So, you know, I wasn't working a 40-hour a week job and raising a pretty big family; I wasn't able to save money to start my business. I knew I wanted to start my business. The only way was to, like I said, cash in my annuity and then, I had a little bit of money to put down on different things, and then, the bank was able to back me with a little bit." [#11]
- The owner of a majority-owned professional services firm stated, "I would say the first thing is getting any type of financing from banks. That was impossible. They all said, 'Come back in five or six years once you're established.' I would also say that getting work those first five years was difficult because we didn't have a track record of work to show. In many cases, public entities, require five years' experience. I would say the first five years were the roughest. I don't think you're going to change the banking industry. But that is a big hurdle. Banks are not your friends and they generally won't loan you money unless you've got collateral. And if you have collateral you don't need their money, so it's just a double-edged sword that you can't get around. I don't know if there's any solution to that other than banks being forced to set aside community-based funds for startup businesses and entrepreneurs. I think that's the main reason why most startup businesses fail, is they don't appreciate how tough it's going to be the first two or three years. And they can't get any financing so they eventually just throw in the towel. I think the only other strategy might be to buy an established architecture firm. That makes some sense. But then again, you're not going to get financing to do that, so I don't know. I think it's just a long-haul commitment." [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "I would say, again, back to cash flow … managing cash flow would be a big issue if a winning contract was

there. Just trying to manage the cash flow with that. Getting the finance would definitely be a barrier because you definitely won't blow all your earnings on interest rate. Just mainly finding the right bank, I would say, that would give you the best financing, whether it's short-term or long-term financing." [#13]

- The Black American owner of an MBE-certified professional services firm stated, "No, it really wasn't a problem for me. I can only speak for myself because I started from scratch. I did not go out and purchase a lot of equipment. I did not go out and lease out a big office space. I did not go out and buy a lot of things to start the business. I started the business out of my home and worked up from there. I did not encounter that barrier because I didn't attempt to go out and get funding. I just started from what I had, and I haven't spoken to anybody else about what their barriers were in starting a business, so I'm not sure." [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "But the biggest challenge I think for me, getting started at least, was finding the help and the finances to go after to support the work until the income came in to pay the bills, that kind of period. You just start slow and wear multiple hats." [#17]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "It's always been a problem for minority acquiring financing and bonding. Normally, in a ready-mix concrete operation, you do not have the same requirements. Even though banks should commit to Community Reinvestment Act (CRA) programs, they don't follow up in actually performing that service, whether you're a new operation or whether you've got good equipment or a good track record. Various banks do not want to fund minority operations." [#18]
- A representative of a majority-owned professional services firm stated, "And then you're also starting to see interest rates to go up too, which I think could hurt the business a little bit more …. People, when they see interest rates go up and they're wanting to finance a project that sometimes can be a deterrent." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Yeah, finding the capital to do it. The focus that the state government has placed on matching grants for companies that are starting up has switched from a general industry to more specifically software companies and life sciences. Other companies like ours are no longer on the horizon of the state through Elevate Ventures and IEDC. We have for instance, technology that that is good for advance and efficient and clean energy, however the state does not have any efforts to try and match investors that would be interested in that particular industry. We have to do it on our own because we cannot find financing locally here. Some of the financing that is available elsewhere is not conducive to survival of the company." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Yeah, because a lot of our customers don't get [their] invoice, but they're considered cash-based customers. Then we're not considered financially secure, even though we are." [#22]
- A representative of a majority-owned construction firm stated, "I don't think it's been a problem for us, but I could see it being a problem for some people, depending on how well they manage their [money]." [#25]
- A representative of a Black American-owned construction company stated, "[I] don't like working with government agencies: red tape, low fees, adsorbent demands, low bid contactors

getting financial support from banks, they loan [to] people with money, and don't loan [to] people with little money." [#AV94]

2. Bonding. Public agencies in Indiana typically require firms working as prime contractors on construction projects to provide bid, payment, or performance bonds. Securing bonding was difficult for some businesses and eleven interviewees discussed their perspectives on bonding [#1, #2, #3, #6, #8, #9, #11, #12, #17, #18, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "It can be when you're new. Because a bonding company, the same information that a bank wants is the information a bonding company wants. But a bonding company generally wants more information about performance than a bank does. So they want to know what jobs you've completed. If you're going to get a lot of bonding, you probably need to do job cost accounting which is difficult for small business because it requires a lot of data input from the people who are doing the work. There is a cost. Usually 1 percent of the contract dollar. And you also have to prove you have some expertise in the type of work that you want them to bond. My bonding agent that I used to have told me one time, he said bonding is a very simple process. He said, you and I both row out to the middle of the lake in a boat and if it sinks, we both sink. So the I thought that was a good picture of what bonding is all about. But the amount of stuff you have to supply, it's a lot of stuff. But like I said in the beginning, if you are doing the things you need to be doing as a successful business owner, keeping records, paying your taxes, all that information you should have digitally; in today's world to be able to submit that to the bonding company just like you submitted to INDOT for pre-qual or the IRS for your taxes or for a bank. They are all the same documents." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "We never had to be bonded because we're a subcontractor. So, it's mainly the primes that have to get bonded. I don't know if you know how bonding works. I always thought it was like an insurance policy, that if you defaulted, that the insurance would kick in and pay. But that's not the case. The bonding company comes after you after you default, and they'll take your house, and they'll take all your assets. They'll take everything. And it's just a bad situation. I've seen a couple of companies who were prime go out of business because the bond company went after them directly and it's just not a good situation." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "Bonding. When I first started, you know, there was a lot of paperwork to fill out. My bond rate was very high, you know, for me to bond I have never heard of a bond rate being that high because I would put on my quote. You know, you have to reimburse me from for the expense of that I have to pay out for my bond and I'll never forget he called me up and he said I've never, you know that can't be right. That can't be [the] bond right. I've never ever heard of 1 being that high, and I'm slowly but surely getting that. Getting it down to where it's come, [comparable] to others [in] my competition, but it's still not where my competition is, you know. Why [is] that bond rate was so different? New company is what they say, you know." [#3]
- The owner of a WBE- and DBE-certified construction company stated, "Bonding can always be difficult." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "I have one company that just recently had us get a bond, and they paid for the bond. Anything over $50,000.00 with that

company they said they require a bond. When we did that job at UI Bloomington it was over $600,000.00 and they didn't make us do a bond. We have a relatively good reputation, but like I said, the one company requires a bond that they pay me for. I didn't even know how to get a bond. I contacted my insurance agent and got the bond. We've had 4 agents, and the one we have now is very good. His rates are holding [where] I pay it annually in February, so I get a discount. It's a lot of money to pay out at one time, but I need certificates of insurance. When I send him an e-mail and say, 'I need it' I'll have it within 24 hours and sometimes within ten minutes. He's the best agent I've ever had, and his rates are way better than what we used to have for this other company." [#8]

- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "We have had some difficulties [with bonding requirements], obtaining bonds, etc., yeah. Well, you know, the bond is very expensive. So, pretty expensive to do that. Yeah. I think that's the most difficult thing; the barrier for people to get in, because this job is like a $200,000.00 or $300,000.00, I can do it, but I don't want to put $10,000.00 or $20,000.00 there for a bond, pay the bond first. You know if I don't get anything I lose this. Yeah, you don't want to lose $10,000.00 or $20,000.00 for nothing. That's why I think it keeps a small company to get a bid, to go to the bid, because that's a bigger barrier, you know?" [#9]
- The Black American owner of a construction company stated, "Bonding requirements have not really been an issue. I've got a pretty good insurance agent who's been taking care of all of that for me. I do know that before I actually started my business, I was trying to start two years prior, and I was trying to get bonding. At that point, it was for contract specific performance. I think it was a performance and pay bond or something like that, and I was not going to be able to attain because I hadn't been in business for two years or whatever. But I haven't done any contracts of that size that have required any performance and pay bonds since I've actually started my business. I'd imagine that I might have some problems in the near future, but they should diminish as my business ages, anyway. The barrier for the bonding? I don't really [know]. I'd say just get with a good insurance agent. I don't know how I could actually improve that anyway because most places wouldn't give me a bond, that performance pay bond, if the company hasn't been established for more than two years. So, I would not have any suggestions." [#11]
- The owner of a majority-owned professional services firm stated, "As architects I don't think we ever have to provide bonds. It's E&O insurance, I think, is usually a standard requirement. But that's really not that expensive, so I don't know that that's a barrier. Bonding might be a barrier for contractors but not architects. Yeah. I don't think you should get into it legally and it's not worth the time. And there's no limit; there's no low to low, I've discovered, so you just can't worry about it." [#12]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "Yeah, most of their requirements are for us, that they know that or bonding capabilities. The job was too large or the manpower is too great." [#17]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "It's always been a problem for minority acquiring financing and bonding. Normally, in a ready-mix concrete operation, you do not have the same requirements. Bonding. You have a great variety of outlets for bonding. It also goes back to your track record and can you perform the work professionally. We didn't have problems with that. We had good contacts for bonding." [#18]

- A representative of a minority-owned construction company stated, "The difficulty is to find the insurance they require and the surety bond $50000.00 I feel like our company has gotten looked over because we are minority-owned and the difficulty over the last 3 yrs." [#AV45]

3. Insurance requirements and obtaining insurance. Fifteen business owners and managers discussed their perspectives on insurance [#1, #2, #4, #5, #7, #9, #10, #11, #12, #16, #17, #21, #24, #25, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "So one time we had American States insurance. They just decided we don't want to be in this market anymore so they canceled us. That happens occasionally. You've got to stay on top of your safety because it will affect not only general liability but your workers comp rates. That's probably the biggest one because in the general liability world, they don't really raise your rates for claims until you have a couple big ones. But in the workers comp world, they have this thing called the employer modification rating and if you start to have a lot of injuries for which they are paying claims or days lost, your rates go up astronomically. You want your EMR to be below 1.0. When it starts getting higher, that's going to be a problem. There's a lot of companies out there in the commercial building world, we do some of that type of work, that won't hire you if your EMR is too high. Your safety rating. So insurance is something you've always got to keep your finger on. If you start having too many claims for vehicles or equipment. We've got four different policies. We have a vehicle policy, a work comp policy, an Inland Marine which covers all our equipment while it's stored in our facility, and we have a general liability. Four different companies." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "We did have an accident a couple of years ago and they raised our rates…., and we couldn't get …. There's another piece of insurance - I can't remember what it's called - that some of the big contractors want, and we just said, 'Look. We can't get that. We can't offer that. Everything else we can offer, but we can't offer this.' And no one's turning us down because of insurance. But again, that's in the DBE regulations - that you have to work with people on insurance. So, in that case, they're following regulations because they overlook that little extra piece of insurance that they're asking for. We have ENO insurance as well as liability insurance also and it goes up every year. It doesn't matter if we - this year, we just had to renew and the insurance went up even though last year, we did half the revenues that we did the year before. It still went up. So, it doesn't really matter every year that they don't hardly do anything. They just keep raising the rates. It was in regards to IAA …. And I don't know if that's one of your questions, but in this recent RFP that's out, they want bodily injury of up to $10 million insurance. And they also want automobile up to $5 million-$10 million. There's two different limits depending on where you're at. And they used to call it 'Air Side' and 'Land Side' and they didn't define - they call it something different now …. So, that was [going to] be one of my questions. 'Does AOA mean 'Air Side'? Does it mean 'Land Side'? I don't understand what you're doing.' But that's a barrier to small business to have that much insurance. And for professional services, that's silly. I mean, I understand if you're doing hard construction, you need higher limits, but the prime should have the higher limit - which they said it would be the prime - but sometimes, you can bid on things at the airport that are smaller projects, but to have that kind of insurance is a barrier. This was in our P4 design services. So, I'm not even doing construction and they're telling me I have to have that much insurance. So, it's a barrier even for me if they're [going to] require that amount of insurance because I don't

have it right now. I'd have to go get it. And all I'm doing is professional services. I'm not building anything. So, that was my question …. Did [they] just copy that from what they used for contractors, you know, and then, they put in the professional services? So, that is [going to] be a barrier. I could probably get it, but a firm smaller than mine probably doesn't want to pay for that much extra insurance. The only thing I would say about IAA is the insurance, because they have insurance limits in this last RFP, I'm not sure that's really what they wanted, but it seems pretty high and I think for smaller companies it would be difficult." [#2]

- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "My insurance is not as stringent. Again, because I'm a material supplier, it's probably much easier for me to obtain insurance than it is for some of the trade guys." [#4]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "We do have to carry in that requirement, which is $1 million or $5 million insurance. I mean … we haven't had a problem obtaining it, it's just very expensive." [#5]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "I would say insurance has been a little bit harder with just costs." [#7]
- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "The insurance is okay. It's not bad." [#9]
- A representative of a woman-owned professional services company stated, "We've never had problems obtaining it, it's a little expensive in our industry because we have errors and omissions insurance, along with professional liability and everything else, Workman's Comp, and things." [#10]
- The Black American owner of a construction company stated, "No. I've got a real good insurance agent. He's local and he's been able to take care of all my requests. I've had to get numerous certificates of insurance and I've had workers comp, general liability, and I've got my vehicle insurance. So, I've been dealing with him, and he's been on it. I haven't had any problems with insurance." [#11]
- The owner of a majority-owned professional services firm stated, "Yeah. E&O insurance is not that expensive when you start out." [#12]
- The Black American owner of an MBE-certified professional services firm stated, "Pretty easy. It was a lot easier than I thought it would be, and it was less expensive. It was pretty easy, and it's not as expensive as they make it sound, the professional liability insurance." [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "The only barrier …, well there's a couple of situations I would assume would be barriers. One, the price of insurance sometimes can be a barrier simply because you pay so much for the insurance that it just doesn't make it worth it. My mindset has always been early on from my father making us have insurance on our cars like day one and having probably too much insurance on the limits. Some a little more one-sided than a fact of appreciating insurance. The premium sometimes, one accident can wipe out your premiums. I guess sometimes you look at the job, for example when we do some work, one of our customers that require it to get a permit to do their job, you have to have ten million dollars in liability insurance. Coming out the gate, that was tough because we are a small company, and we're required to have a ten million dollar insurance. Most companies, either residential or small companies in construction, carry a million. Sometimes two, but very

rarely anything above that …. Having a good insurance agent be a friend on the inside to you, and not tell you to take risks but understanding what risks are involved and what options there are to protect yourself from those risks, and what that's going to cost you. What risk may happen that you may not be aware of based off of their experience of being in the industry." [#17]

- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Insurance is sometimes difficult too because, and too a pain because some of the major larger companies sometimes pull out of the market and leave you hanging. You have to scramble to find other people in particular to general liability insurance, those sorts of things because most people don't understand what defense contractor is doing because they don't deal with the defense contractors or the aerospace and defense industry that often. Only those companies that are involved with the large primes would understand that. Then they want to charge you as if you were a large prime. It's more difficult to find a smaller company that will take care of needs for insurance in terms of general liability for instance." [#21]
- The owner of a majority-owned construction firm stated, "Everything's got a price. Everything increases, expense wise, so that's somewhat of a challenge. It's not a barrier. These are all challenges. My vehicle insurance goes up. My liability every year goes up. My EMR goes down. We're a safe company. That ratio keeps going down, but still my insurance keeps going up. That's a challenge." [#24]
- A representative of a majority-owned construction firm stated, "Well, like everybody else, I feel insurance is extremely overpriced for what you have, but it's a necessary evil. I think it boils back to frivolous lawsuits. If our legal system would actually clean house and get rid of frivolous lawsuits, I think the insurance industry wouldn't be slammed as hard, and therefore wouldn't be passing along cost to all of its customers." [#25]
- A representative of a majority-owned construction company stated, "The difficulty is to find the insurance they require and the surety bond $50000.00 I feel like our company has gotten looked over because we are minority-owned and the difficulty over the last 3 yrs. Trying to obtain proper licensing and getting set up to state requirements. A lady at INDOT helped us with getting set up." [#AV45]

4. Factors public agencies consider to award contracts. Eleven business owners and managers discussed their perspectives on the factors public agencies consider when awarding contracts and discuss barriers these factors may present for their firms [#1, #3, #8, #14, #19, #2, #20, #22, #23, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Well, I think the biggest one I can think of is IDOA not keeping on top of their XBE requirements that they put in the contract documents. They say it's a 7 percent goal, but they have [not] held people to that goal. That's a problem for us." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "Most of the public agencies are going to award it based on price, you know. So, there's not really anything I can do as far as I know." [#3]
- The owner of a WBE- and DBE-certified construction company stated, "We have to have the low bid. But we won't do it for free. We have to make sure we're making money. Like I said, I check prices and I go back and see how much it costs me an acre to feed or put down straw blanket. All

these prices have been going up, so I have to make sure that I'm competitive, but also that I don't lose money. I've seen people bid and I'm like I don't even know how you can do that. You have to be competitive, but you also have to make money." [#8]

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I would say opportunity. We can never compete against a larger firm that would work on 50 office buildings versus our one office building. Then, when we have to submit a proposal, we have our one office building, we can say we did a great job. Of course, we did a great job, but we only have one, versus a larger firm that would have 20, for example. So, we can never compete on that caliber because we just do not get the opportunity to work on 20 office buildings. Because we are a small minority firm we get a lot of different types of projects, but nothing that is specialized. Where we have the problem is if the client asks for five examples, we may only have two really good examples and then I think that's when we become not competitive, even though I think we could've been very competitive as far as price and production. But it's the perception that we didn't have five examples to show versus two is taken as if we are not qualified to do the work, which is not really the case. If you're an architect, we all pass the same exam. I think the architects with less experience will work harder versus a larger firm that's going to give you a cookie-cutter solution, versus a smaller firm that will work hard to find the best solution for the situation. Anything that's dealing with the city or the state you normally have those same type of political barriers. Even with the school board, even with IAA there's still a board, and there's still a politician on that board, and still that politician's going to really say who's going to get the work and who's not going to get the work. So, I think that as long as politics is a part of it would be very difficult for when you're dealing with a certain amount of money for it not to make a difference. And that's just the way it is. Now if you're dealing with supplies, no big deal, no one cares about that. You can only sell but so many different supplies. Our janitorial service, that's no big deal; they don't care about stuff like that. But when you're dealing with professional services that can be a certain volume of money then it's going to always be a political layer over there, and I don't think you're going to get around that part of it." [#14]
- A representative of a majority-owned professional services company stated, "The most significant barrier has to do with the focus on our business is investigating failures and repair design so it's a specialty type of consultation that we provide. One of the biggest barriers to our growth of our business is that there's a lot of focus on the cost of our services in lieu of the quality of the services that we provide. Unfortunately, in the type of work that we do, focusing on cost, is kind of shortsighted because of the failures that we're dealing with are very significant. If you don't fix what you found wrong and you take the cheap way and you try to do band aids, you're not solving the problem. You're fixing the symptom. The biggest barrier that we experience is only looking at the bottom line number of cost of our services without looking at the experience and quality of technical work that's provided, comparing the different people. I mentioned cost being a big factor which is I think appropriate when we're talking about projects that have many, many people that can do that well. But when cost is a factor in the work that we do which is very specialized and challenging work that there's not many people that can do as high quality of project or have the experience that we have. I sound egotistical when I'm saying this, but I think there's some truth in it. Then the client or the state or the airport is potentially taking a risk of trying to do something, trying to look at just the cost when they should really be looking at the quality because getting higher quality and services that we provide is going to

result in less risk for something else happening after we're called out to investigate a failure that we're trying to fix.” [#19]

- The owner of a WBE- and DBE-certified construction company stated, "we got to the interview and so, obviously, they thought we were qualified to do the work. The difference was that it wasn't a quality-based selection. The firm that won it actually did an entire design for free ahead of time. And, to me, that's not [right] … what they should have said, 'No. No, we can't. We're not going to accept that.' They should have specified that it's going to be a quality-based selection because when somebody comes in with a dog and pony show and just wows people, we can't compete with that as a small firm. I mean, we had no idea. If they would have told us ahead of time, 'Hey, we want you to come in with a design' maybe that would have been different. We could have made the decision to go after it or not go after it. But to let somebody come in and just present an entire design and then go, 'Oh, that's who we want to pick'. It's just not fair to all the other firms. It takes a lot of time and effort to put together those proposals, and I really commend clients who do a quality-based selection. When Eskenazi was built, they had a certain percentage of minority-owned firms and women-owned firms. Well, they met the minority percentage, but they didn't meet the women-owned percentage. But they still had a party to celebrate. I interviewed four times for architectural work as Eskenazi. Four times. And one time, I had done a project almost exactly the same and I asked, 'Why didn't I get that project?' And they said, 'Well, you weren't diverse enough.' I said, 'Excuse me?' 'Well, you weren't diverse enough.' I said, 'You hired a white male-owned firm. How did I not be diverse enough?' 'Well, he has an African American engineer.' I said, 'Well, I had an Indian engineer.' 'Well, you just weren't diverse enough … [in] the five years.' I don't know who came up with that. Five of similar kind of projects. I mean, that shouldn't matter at all. You're hiring somebody for their design … you don't have to be an expert in that we've got 30 years of space planning experience, but do we have any major space planning projects in the last 5 years? Hmm. A few. Do I have five that I can reference? Not major. I can do five smaller ones. But it shouldn't matter. We still know how to do it and we should be able to bid on it. I think, sometimes, there are unrealistic or there are things in there that are barriers to smaller companies.” [#2]

- A representative of a majority-owned professional services firm stated, "Having interviews with some finalists is a good method to really learn more about the bidders. Seeing more and more of this now that COVID is starting, it used to be pretty prevalent. I mean you'd see it all the time, interviews with certain firms, especially on larger projects. With COVID coming in, I've seen that lack of the interviewing process, because people just don't want to have contact with them. There are other methods that they could still interview virtually. I really haven't seen that being taken advantage of.” [#20]

- The Black American owner of a WBE- and DBE-certified professional services firm stated, "It's [going to] sound really bad, but it's actually the state, and it's the FMCSA auditors that come in. I mean, they come in, and we're doing our jobs, and they're already discounting us. If the auditor's not even going to take us seriously, what makes them think the owner's going to take us seriously? Now you have the owner trying to do things the non-legal way to find loopholes when they were doing things the right way. But had that auditor not said anything to them, they would've been fined. Now you're hitting the market in two spots, not just woman-owned. I mean, you got woman-owned, minority-owned. As long as the state does not take people like me seriously and what we do, a lot of people won't make it as far as I did. I know at least ten companies that've shut down the last two years because of it.” [#22]

- The owner of a WBE- and DBE-certified construction firm stated, "Yes. I will say the issue for us has been we are located in a rural county; we are in a rural area so the programs that INDOT has in place of hiring a certain percentage of persons of color and sending them through training has been very difficult because of our location." [#23]
- A representative of a majority-owned construction company stated, "Obtaining work is biggest barrier. Comes down to experience or history of previous relations." [#AV139]

5. Personnel and labor. Seventy-three business owners and managers discussed how personnel and labor can be a barrier to business development [#1, #2, #3, #4, #5, #6, #7, #8, #9, #11, #12, #13, #14, #16, #17, #18, #19, #20, #21, #22, #23, #24, #25, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "It is. You like to think you could hire people and put them in their seat and they can do a fair amount of work right away. But that's never the case." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "In the construction industry, everybody's having problems getting labor. we hire and train so we - all our labor - all our labor's low skill. It's easily taught. It's physical. It's repetitive. You don't have to have a master's degree to put signs up. So, we're able to find people to do that, but in this economy, what happens is - they don't understand - we have to pay prevailing wage rate - which, on the road now, I think it's like, $33.00 an hour. Well, that's a good rate. But they're not always on the road. Sometimes, they're in the warehouse and we don't have to pay that rate in the warehouse. But it averages out a lot higher than what the Amazon and all the warehouse people are paying. You know, 'We're paying $18.00 an hour' and they think, 'Oh, well, I'm getting $18.00 an hour.' It's like, well, you don't understand. You're getting $34.00 an hour when you're on the road. I mean, we're hiring people - like I say, they're low-skill. A lot of times, they maybe graduated high school, maybe they had a year of college and dropped out. So, we're trying to basically mentor them to give them some life skills We even have a 401K and health care and all that so, even with that, it's fairly high turnover on the lower-level positions." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "That's hard. That stuff. And that's just in our market as a whole. You know there's nobody that I work for, or you know in this industry that I that I talked to that that isn't having that issue right now is finding good people to help. That's just I think that may be everywhere. They didn't treat me the same as my male... The only other at that point in time. The only other competition that I had were for males and they basically, in a nutshell, wanted me to pay. It was just it was silly, and they weren't treating me the same as everybody else, and I even we had a meeting with them and some attorneys. And I said this is a. This is not a level playing field. You you're not leveling the playing field here and I don't understand why you're treating me different than these other people. I don't. And I, you know, and I said, I don't know if it's because of my gender or what the reason is, but you're not treating me fair and ended up. I don't think somebody didn't like on their side, didn't like that I had that to say." [#3]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "Labor was definitely an issue last year. There was a general labor shortage, and it's been an issue this year to the extent that the way we've gotten around it is we just had to raise wages. I can't ask you to come work hard labor and my machine shop, it's not easy work. I can't ask you to do that work at X dollars an hour if you can make $4.00 more than that driving around in an

air-conditioned forklift, working for Amazon. So, we just had to raise wages. That was how we got around it. But what that does is it throws off your cost structure, you know? So, if I'm looking at the projections we had in 2019 when we closed, that cost structure has been thrown out of whack because I've had to hire more guys and I'm paying each of them more than anybody was ever making here before. So, that puts pressure on us to produce more, which means we got to go get more contracts. So, it's a good pressure to have, because we actually have more capacity than we have in the past, but still, now, got to make payroll every week, so what do we do? We got to get out and sell more rebar. It's just, you know, there's more pressure." [#4]

- The Black American owner of an MBE- and DBE-certified professional services firm stated, "Right now the toughest one we're going through is finding the employees, finding people to actually work within the field that we want them to work and stuff like that. We can find them - if you find them to their rates are way high and it's a big challenge, because now the bigger corporations are offering a high amount to even workers that I have and now I have to even kind of meet that fee or they leave and go with them. Those are our big challenges that I'm facing right now, because there's a small pool of survey crew chiefs in Indiana, and I think it's pretty much across the country. I guess the ones - the big boys are the only ones who can offer them that much, then a small business, we can't. We can't compete with that." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "Finding employees as a new company and you know, convincing them that, you know you will do things properly and paychecks will cash, and insurance will be paid. You know, that can be difficult. Good people and the labor force is will probably be at capacity like we saw last year that you know, there aren't enough people. There, you know, those types of things to even do all the work." [#6]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "Finding qualified drivers would be an obstacle that I've seen." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "Finding employees is always hard. Finding people that will show up at 4:00 in the morning to go to Terra Haute and put in 15,000 feet of straw wattle - we did that over two days actually. The ones we have, we pay more than prevailing wage requires. We are a union company, and the union requires we pay a certain amount. We pay more than that because you can't find people that just show up and will do the work. Our employees have been with us a long time and I hope they'll keep staying with us. Looking for new people; I'm glad I don't have to." [#8]
- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "You just couldn't find people willing to work at that time. Yes. You know, with COVID, some people wanted to stay home, didn't want to go out to work." [#9]
- The Black American owner of a construction company stated, "No, because I'm part of the union. I don't necessarily need to - I don't have any problems finding or training because we're part of the union, and anybody who comes out to my job sites - if I were to hire somebody - would be trained. If not, they'd be an apprentice and I would have somebody training them. A journeyman. So, no - finding manpower is not the problem. It's being able to pay manpower. But that's just my business specific, you know? Any other electrical company who's not union - they probably would have some troubles." [#11]
- The owner of a majority-owned professional services firm stated, "It depends on the year. But I would say that that's not an issue." [#12]

- The Black American owner of an MBE-certified goods and services firm stated, "I would say the most significant would be probably - I don't know. I just - getting the work, and then, also getting the workers to do the work. But out of both of those two, I would say actually establishing relationships and getting the work probably was most of the struggle. After we got the work, we were able to find workers. Finding the bids and bidding the work and all that stuff - that's probably been the most challenging. Yeah, I would say [finding personnel]'s definitely always a struggle, especially in today's economy." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I have always been very successful as far as gaining interns. I normally have an intern in the spring and in the summer months, sometimes even two interns. The competition is a little bit higher, and I have not been able to secure an intern. I did have a marketing intern last fall, but not an architectural intern. Normally those interns help us understand and keep up with the industry on what they're using as far as software and things along those lines, and also to mentor them on what we're doing. They do help us. So, I have not been able to secure an intern because the competition is so high, and all the interns are being snatched up by the larger firms that can offer definitely more than I can offer. Not pay-wise, 'cause I end up paying more most of the time just to secure an intern. But as far as having that exposure with a prestigious firm is a lot more appetizing than having worked with a smaller firm, we normally will have interns or mentor at schools, so we've never had real big problems, other than the last few years we have not been able to secure an architect student. We have had success with an interior designer and marketing, but it's getting more difficult to get an architect. So that has been a barrier for us, and I think it's going to have an effect within the next couple years if we cannot get that fresh architectural student with fresh ideas to work with." [#14]
- The Black American owner of an MBE-certified professional services firm stated, "Yeah. I haven't tried to go out and hire anybody full time. I've been working in this business for 30 years - and over the years, I have worked alongside and worked with a lot of different personnel, and I was department head for many years in some other companies, so I know quite a few people. Fortunately, I had built up that repertoire of potential candidates, people I could look to for assistance, so I can't say. I haven't tried to hire and bring on staff, to this point." [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "The only challenge that I think we face, or one of the challenges we face the most is labor force and skilled labor; people being able to perform at a level that you would think that they could do, or they would indicate that they can. Just there's not enough manpower to take on the demand. That's one of the most challenging barriers to try to get over is even the old methods of hiring back in the day, you got a friend of a friend, or referral, but even that's not working. I think people aren't coming to work with the labor shortages, so therefore we had to scale back because we didn't have people. The opportunities were there. We just didn't have the manpower to bid. I mean labor has always been an issue, but it's difficult now. But skilled labor." [#17]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "We always recruited in the construction industry. Cement masons is sort of a dying art. People don't have the desire to perform quality work. So going into the ready-mix business operation, we plan to recruit and train." [#18]
- A representative of a majority-owned professional services company stated, "I think that the trend right now from our perspective is that the construction industry and architectural and

engineering industry is very heavy with workload without the sufficient staff to staff it. There are a lot of people building a lot of things right now and therefore the pool of professionals that are able to accommodate these needs is limited and may have been even more limited with the pool of people in college that may or may not have switched degrees or focused on other things or left the college pool in the COVID years. we hire specialized engineers and architects who have advanced degrees and we're particular about who we hire because of the nature of work that we do that's very challenging. By being picky and also looking for people that aren't ubiquitous, it's a barrier I would say promotion of the industry at younger ages like high school level and middle school level to get folks interested in careers in these types of fields." [#19]

- A representative of a majority-owned professional services firm stated, "That's a struggle. Yeah. Finding good quality people in this marketplace from a workforce standpoint, it's a big deal. It's hard to find good people." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Well, we are in a very specialized field. You're talking about energy and weapon systems. That requires certain skillsets that are not readily available. Sometimes it's difficult to find people that that have the skillsets required." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "The training, yeah. People, they don't have enough patience for it. If I bring somebody in here and I give 'em six weeks' worth of training, and then I'm paying for them to be certified and paying for certain amount of insurance to make them a viable asset, then they come in, and we're trying to get grants, and they see us getting blocked, and they think that we are not stable enough to work for. We have put in all this money to train our employees to make sure that they're certified, but because the state is kinda shaky about when it comes to certain things like this and you got auditors badmouthing us and you have the employees, they're like, 'What'm I here for? Am I gonna have my job next week?' so they're making it look like the job's not gonna be here. It'll be here one day and maybe gone the next." [#22]
- The owner of a WBE- and DBE-certified construction firm stated, "Yes. I will say the issue for us has been we are located in a rural country; we are in a rural area so the programs that INDOT has in place of hiring a certain percentage of persons of color and sending them through training has been very difficult because of our location. Or persons of color employees there's so much construction work that is centralized in the city that I've had trouble with going through organizations and trying to get employees and they say, 'They're not going to drive to your area, because they can catch the bus and go a block to this other construction company.'" [#23]
- The owner of a majority-owned construction firm stated, "Just not enough help out there and that goes for not only self-performed work, but when we go to sub out disciplines. They don't have enough people either. Everybody in the private sector is dealing with the same issues and it goes for supply chain. You gotta get an asphalt truck to the job. You gotta get concrete trucks to the job. You gotta get your materials and there's not enough people. Yeah, we actually hire through the local laborers and operators here in the city, and they have the same challenge. They're not bringing in enough new people for all this work that's out on the street. A lot of these questions just come back to everybody just not having enough people for all the work that's out there." [#24]
- A representative of a majority-owned construction firm stated, "From my side of things, it's gonna quickly come up to lack of transportation employees. We cannot find enough trucks,

trailers, drivers, to transport the material. Yeah, finding-good quality-minded individuals is getting very difficult to do. I don't wanna say the younger generation doesn't care about quality, 'cause a lot of them absolutely do, just a different sort of a mindset that's hard to overcome. They're already doing it, such as, it used to be just about every heavy-duty truck was a manual transmission, and as people can't drive manual transmissions anymore, they're getting away from the manual transmissions and going to automatics. They're getting a lot more computer help to aid in collision mitigation and whatnot, but all of that's making the trucks more user-friendly, they're more and more like big cars everyday than they are like heavy trucks. The system is taking care of that just with the free open market. Trying to compete with the RV manufacturers for quality labor is one of our biggest challenges." [#25]

- A representative of a majority-owned construction company stated, "Willing to work with many government agencies Still have a labor shortage, more less people not wanting to work, people want to get back to normal, provided the economy takes an up we will be in good projected." [AV2]
- A representative of a majority-owned construction company stated, "We have worked with INDOT as a subcontract. It is hard to get employees in this environment." [AV12]
- A representative of a majority-owned construction company stated, "We have not had the opportunity to work with INDOT. At this moment expansion is difficult due to lack of skilled drivers." [AV15]
- A representative of a majority-owned construction company stated, "We have had trouble getting work from IAA. We have tried to get work from them but have not been successful. We are having trouble expanding our business due to lack of finding qualified employees." [AV24]
- A representative of a woman-owned construction company stated, "Too much paperwork finding qualified employees is really hard." [AV36]
- A representative of a majority-owned construction company stated, "There haven't been any barriers. We just can't get any people to do the work. It's just really hard because people just don't want to do the work." [AV39]
- A representative of a majority-owned construction company stated, "The minority participation that we currently don't hold There is plenty of work but not plenty of people." [AV44]
- A representative of a majority-owned construction company stated, "None issues at IAA. With NDOT it is hard to break down the barriers of existing relationships they have with their consultant. Many of the contractors we use are having trouble finding qualified people for their work force." [AV53]
- A representative of a majority-owned construction company stated, "No barriers experienced right now, things are pretty good. Lot of business out there. It is hard to get employees willing to work." [AV62]
- A representative of a majority-owned construction company stated, "It's not so much the lack of opportunities but it's how you utilize those opportunities without getting swallowed up by the prime contractors that call you out for a job and then they don't pay you. It's not just lack of money to go to the next level, there is also now a lack of qualified employees, and the lack of expertise needed to do jobs. Also, to get the bigger/higher paying jobs, you have to unionize. You can go out of business trying to expand." [AV68]

- A representative of a majority-owned construction company stated, "INDOT works with a lot of out-of-state companies. I constantly hear it from other engineering firms that there is a lot of frustration with that. Most of those firms feel that INDOT should give work to the Indiana firms first before using out-of-state firms. The lack of workforce is a major concern. Also so is affordable housing to some extent in certain areas. I work all over Indiana, and I have observed this." [AV73]
- A representative of a woman-owned construction company stated, "I had an issue with the pre-qualification with INDOT over the last few years. There is a lot of work but finding qualified workers is a challenge." [AV86]
- A representative of a majority-owned construction company stated, "Workforce issues--can't find qualified workers." [AV103]
- A representative of a Black American woman-owned construction company stated, "We have had difficulty in procuring necessary materials, and labor shortages are a mainstay of the industry we work in." [AV110]
- A representative of a majority-owned construction company stated, "We can't find experienced employees. We would be a far bigger business if we could. This has been the case since the pandemic. We attribute it to people wanting free money and not wanting to work. We don't have young people wanting to go into a trade, either." [AV112]
- A representative of a Black American-owned construction company stated, "Think talent is limited, hard to find good employees." [AV119]
- A representative of a majority-owned construction company stated, "The only difficulty now is finding people to work!" [#AV128]
- A representative of a majority-owned construction company stated, "The marketplace is good, plenty of work. Drastic price increases of materials, and labor shortages, and equipment shortages." [AV129]
- A representative of a majority-owned construction company stated, "The market here is very competitive and, in our case, we have plenty of competition. The market has been very solid; however, a challenge has been finding engineering professionals in Indiana." [AV130]
- A representative of a Native American-owned construction company stated, "Shortage of qualified engineers to hire." [AV134]
- A representative of a woman-owned construction company stated, "Our biggest issues is with trying to find subcontractors to build things. Machine shops are busy and there is a worker shortage. We have a hard time trying to find subcontractors to make parts for us. We have a preference to in-state contractors, but some." [AV138]
- A representative of a majority-owned construction company stated, "Not enough workers, not qualified to do work, I compete against big firms." [AV141]
- A representative of a woman-owned construction company stated, "Not enough engineers available." [AV142]
- A representative of a Native American-owned construction company stated, "Need good employees." [AV143]

- A representative of a majority-owned construction company stated, "Lack of qualified drivers.” [AV149]
- A representative of a majority-owned construction company stated, "Lack of manpower.” [AV150]
- A representative of a majority-owned construction company stated, "Just starting this cleaning industry. Trying to find people to work is hard.” [AV152]
- A representative of a majority-owned construction company stated, "It's hard to keep people in this industry because the rules are constantly changing, and the employees get frustrated and quit.” [AV156]
- A representative of a majority-owned construction company stated, "It's hard to get good employment right now and then there's the inflation we're all going through. All of our product is continually increasing. Freight has been astronomical lately, probably because of gas prices. But I don't think we're facing anything.” [AV157]
- A representative of a majority-owned construction company stated, "It's hard to find qualified employees. You run ads and just don't get the right help.” [AV158]
- A representative of a Hispanic American-owned goods and services company stated, "It's hard to find help--qualified people that want to work.” [AV159]
- A representative of an Asian Pacific American-owned professional services company stated, "It's difficult. Not enough workers. People are lazy. It was that way before the pandemic, which just made it worse.” [AV161]
- A representative of a majority-owned construction company stated, "It is challenging to find people who want to work.” [AV168]
- A representative of a majority-owned goods and services company stated, "Hard to get supplies and significant employee shortages.” [AV181]
- A representative of a woman-owned construction company stated, "Getting workers is pretty tight-- everybody is trying to poach from everyone else.” [AV182]
- A representative of a majority-owned goods and services company stated, "Getting workers is difficult.” [AV183]
- A representative of a majority-owned goods and services company stated, "Finding staff is currently difficult.” [AV185]
- A representative of a majority-owned goods and services company stated, "Competent employees is our biggest issue, in that finding people who are capable of learning our trade.” [AV189]
- A representative of a woman-owned construction company stated, "Companies are struggling with manpower and a labor shortage right now.” [AV190]
- A representative of an Asian Pacific American-owned professional services company stated, "A failing workforce.” [AV192]
- A representative of a majority-owned professional services company stated, "The legal structure in the state is very pro-business, attracting top talent has been hard.” [AV201]

- A representative of a woman-owned professional services company stated, "Currently the market is good with lots of activity. There is issue of employees not being able to find work and wondering how long workload is going to continue." [AV2011]
- A representative of a woman-owned construction company stated, "Expanding, employee wise." [AV2025]
- A representative of a majority-owned professional services company stated, "The job market is hard to find employees." [AV2027]
- A representative of a majority-owned construction company stated, "Trying to expand business, having trouble finding employees." [AV2033]
- A representative of a woman-owned construction company stated, "We just have trouble finding workers." [AV2036]
- A representative of a majority-owned professional services company stated, "Obtaining workers and keeping them." [AV2037]
- A representative of a majority-owned construction company stated, "Fairly positive. Business good, and quite a lot of work, hard to find good employees." [AV2045]

6. Working with unions and being a union or non-union employer. Nineteen business owners and managers described their challenges with unions, or with being a union or non-union employer [#1, #2, #3, #4, #7, #8, #10, #11, #17, #20, #21, #22, #23, #24, #25, #AV]. Their comments are as follows:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Well, you've got to understand the prevailing wage law. you are all on a level playing field with whoever else you are bidding against. You are all going to pay the same wage. We are union. And you have to be union in Indiana to do work on a contract for any large paving or bridge contractor. There's probably 10 percent of the market is nonunion contractors. The other 90 percent is union. And yes, there are issues with the union. You have demands that every year, there's things we have to do. In fact, right now, our union contract runs out April 1st. So, there's a lot of angst amongst everybody about what the unions are going to ask for in labor rates due to labor shortages everywhere. So, they could totally shut down the highway program by not getting what they want. I don't think they will because they are just not that - you can deal with them. But we have to negotiate a new contract as an association here very soon. So, it's an issue. You've just got to manage it. Some of my competitors have chosen not to be union and then the ramification of that is they are not going to work for any big highway contractors They're going to be working for the smaller contractors that are nonunion. And there's a big move right now in the industry, a couple of the bigger contractors are buying up all the small bridge companies and some paving companies. So, there's not going to be many companies left in the market who are not union." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "Non-union that creates issues for us, even though INDOT has a federal regulation that does not allow discrimination based on union or non-union affiliation. The only problem is, they won't enforce that regulation. So, what happens - especially most recently - we've been starting to track it. The last three months, we could have saved the taxpayers over $120,000.00 - so, roughly $30,000.00 a month -

if they would have taken our bid versus the union traffic control company. And the only reason we weren't selected is because the union puts pressure on the primes to not - I mean, they actually had a meeting of all of the primes with the union, and they all talked everybody into voting not to use us anymore because we refuse to join the union. we were $40,000.00 under the union supplier's bid and they still wouldn't take us. And I sent the information to INDOT compliance, and I had our bids compared to the union bid and I showed them how they could save $40,000.00 in taxpayer money and no one called me back. I sent it to two different people. I explained what was going on, and all they had to do was call the prime and say, 'Hey, why didn't you select this lower bid?' And they would have said the union won't allow us to do that. And that's discrimination. And INDOT could have said, 'Well, we want that bid.' But they won't do it. INDOT has what they need to enforce the regulations against discrimination for union or non-union. They don't use it. They're - I don't know if they're afraid of the union. I don't know what the deal is. But they've never enforced it. And, in fact, when we first started, there were INDOT employees that came up to my guys and said, 'Hey, I can get you more money if you join the union.' And I went to INDOT, and I said, 'That is not appropriate. You shouldn't be recruiting for the union at all. And so, I'm putting you on notice that you need to tell your people to stop this because that's not right.' And the unions - they always want us to join. But we pay the same exact wages as a union. The prevailing wage is already set. We pay the exact same wages. We pay for health care. We pay for all those benefits. The union can do nothing for us except take my money. They can't train my people. They don't have a training program. They have no bench. So, if I need laborers on a moment's notice, I can't call the union and get in. So, they don't offer me anything other than, 'Oh, more people would hire us.' But I'm not willing - I'm so against the union. It's not a good thing. But, like I said, INDOT could easily step in. All they'd have to do is review the bids on the traffic control. Legally, they can ask for our quote. All they have to do is look at them and then say, 'Why aren't you using these people?' And they'll say, 'Well, because they're non-union.' And you know, we've been told by our primes that they like us better than the union contractor. We show up on time. We get the job done. We're easier to work with. And they told us if INDOT would tell them to use us, then they could go back to the union and say, 'INDOT said we gotta use them.' And they would be happier using us. So, somehow, I have to get that across to INDOT to say, 'Look. All you have to do is do your job. You're gonna be saving the taxpayers money. You're gonna be working within the regulations you already have.' It's, to be honest, it's the INDOT inspectors that, when we first started in and they were knew we were non-union and they didn't want us around, the inspectors were making outlandish statements about the quality of our work. And they don't even know the regulations at times, and they would say, 'Well, you have to do this.' And we'd say, 'Well, that's not what it says in the regulations. This is what it says.' And they're like, 'Well, you can't argue with me because I'm the inspector, you know?' And we found - you can't quote me on this, but most _____ inspectors are somebody's brother or uncle and it's all - they get 'em in, 'cause they know it's a good job. So, they come and they - and most of them are former union people and they're former - they're related to somebody. And they're very - they're not very knowledgeable in cases. There are some that are really good, but there are quite a few that are really bad. They would say stuff to us like, 'Well, you're not allowed to wear tennis shoes out on the job site' and the inspector's got tennis shoes on, you know? Or they'll say, 'You can't wear shorts' in the heat of the summer 'because OSHA says you can't wear shorts.' Well, we go and look at the OSHA regulation - doesn't say anything about it unless you're pouring asphalt. We're not pouring asphalt. We can wear shorts. So, they don't know the regulations, but they act like they do, and they give us an evaluation of our work and they can give you plus two, plus one

- it goes all the way down to like, negative two, and when we first started, they were giving us a lot of negatives just because they didn't want us around. And they even gave us - reported that we caused a backup on I-65 for this one project on the southbound part of the road. We were on the northbound side. We didn't do anything on the southbound side, but they blamed it on us, and everybody believed them - that we had screwed up. And then, they showed like, a wavy line - 'cause one of the first times we painted a line, it came out crooked. Well, we fixed it, you know? We had it removed and we fixed it. They were right. It was wrong. But they put that in front of the prequal committee and said, 'Look. They can't even paint a line straight.' That's like - well, you know, people make mistakes. And as long as you correct them, you shouldn't be held accountable or shouldn't be reprimanded for that. And they just - they put up this whole thing and it evolved into prequalification committee hearing and we got suspended for like, two months from bidding, when over, I'd say, 70 percent of what they put in that report were lies. And we could prove it, but they'd listen to their inspectors, and they wouldn't listen to us, even though we could prove that we had either fixed something or we'd done it right. It didn't matter. So, they can judge us, but we don't get to judge them. We don't get to do a 360 thing to say, 'This guy doesn't know what he's talking about. He told me to do this, but that's against regulation.' And he said, 'Well, do it anyway.' And we're like, 'No. We're not gonna do it. That doesn't meet the regulation.' But we're not allowed to say that so there's no evaluation of their people, I guess, is my point, and there needs to be." [#2]

- The owner of a WBE- and DBE-certified construction company stated, "We are a Union employer and they're all different. Uh were the with the operators. So, I deal with four unions and they I had an experience where I felt like because of who I was, I was treated differently than my competition and I can almost say that with 100% certainty." [#3]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "In a union city like Chicago, where you have to not only pay those high wages, but you also have to pay into those union dues, and you're spending a hundred grand a week, and it may take you six weeks to get a draw. That just - who has $600 grand just laying around?" [#4]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "We are union. And then over the years, I've been able to build a good relationship with the representatives of the Union. So, and we pay, you know, we don't try to. We pay correctly, so I really haven't had any issues with the union." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "People ask me to bid a job, a lot of different jobs, and I'll ask them if it's prevailing wage or scale, and if they say no, I tell them, 'I'm not going to be competitive. I know that because I pay union scale and fringes, and I don't pay people under the table.' No, the union hasn't been a barrier. It does help us get work. So, if they can find a union landscaper, they use us. If they can't find one, which obviously they can with us, then they can use somebody else, I understand. The union has helped us. But it's expensive." [#8]
- A representative of a woman-owned professional services company stated, "Not in our line of work. Usually, on the professional side, we don't usually work with unions; that's more of on a contractual side, around contractors. Most of our work is done by union shops; as being professional engineers we're not unionized. No. I think we've been very fortunate, most union shops we encounter are very professional and relatively skilled." [#10]

- The Black American owner of a construction company stated, "The dues. I don't have any problems with project labor agreements or anything like that. I haven't went after any jobs that had anything of that sort in place, but the only problem working with the union is, I see what contractors have to pay for each guy. It's not just what I seen on the check. It's the union dues and even, not necessarily for manpower. If I hired manpower, I would make sure that I had everything in the job to pay for everything, but it's just one thing I wasn't aware of is the amount that I have to pay for myself, personally. I wasn't expecting it. It's just been a hindrance starting out union without having any big work, you know? Having to pay for my own total package and everything, as a working owner, is kind of expensive. So, yeah, it just goes back down to money." [#11]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "For example, we're not union. I know there's opportunities to be union. You can just sign up, but you know, the financials on the front to a start-up is usually scary unless you have an influx of investors who can give you that money, give you the direction, not to lose it, but to utilize it, to find and build the company up with the resources like labor and equipment, acquire equipment and things." [#17]
- A representative of a majority-owned professional services firm stated, "Oh yeah, big time. Yeah, I honestly - I try to stay away from some of the communities that have strong unions, whether it's up in Lake County, which is really strong union area. Sometimes you get into it a little bit in South Bend area, but really, I've been around it my whole life, so I know how to handle myself around it. But it can be extremely difficult to navigate through the unions. Generally fine. Some of the union contractors are a little more expensive. I'm just going to be honest, sometimes their attitude is totally different. And I think attitude in the workplace is important, especially when you're dealing with customers that we have. You know, they're not all the same. Sometimes we get in - I've dealt with a lot of really good union contractors, but it's few and far finding them here throughout the state. Most of them here in Indianapolis tend to do a pretty good job. I work with a lot of them, but I think that it's a farce to me that sometimes you have a public entity telling you that you've got to use union people on a project. A lot of times I walk away from it. I think there is for both. I've been on both sides of it. I've worked for a union contractor; I've worked for a non-union contractor. And I think there is barriers. And I'll give you a good example. When I worked for a non-union company and we went into [workplace] down in Columbus, Indiana, and I had several union people, they sliced my tires on my vehicle because I crossed the line and went in there to work. And I think that type of behavior really sits poorly on the unions. That's not the only experience that I've had with them. You don't hear about it or see a lot of that anymore, like what it used to be, but people tend to forget that that's what it used to be like. And it's really disappointing in my opinion. You know, there's good and bad parts about each one of them, but I think a lot of times - you know, I hear all these stories about - and I teach classes to not only ABC, which is the non-union shop here. A lot of the union shops will ask me to come in and teach. I don't really see that big of a difference in the training programs. I've seen them both. I've been involved in them; I've taught both of them. And a lot of union people will say our training is more in-depth to work out in the field than it is with somebody that is non-union. I don't agree with that at all; I've seen both upfront." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "We aren't a unionized company, but some of our suppliers are. It tends to make things more expensive. It tends to make them much less responsive." [#21]

- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Unions will not work with us unless we're union. So that's a complete barrier. There's a complete wall there. If we're not union, they don't mess with us. Yes, I'm nonunion I can't employ a union employee because they take their few weeks and still get paid for it, but they can't work unless it's a union job. A barrier on both ends." [#22]
- The owner of a WBE- and DBE-certified construction firm stated, "We also are nonunion, so even though we are a minority company these larger companies that are union will not use us as a sub, so that's another barrier. I've said before we have been unable to work as a sub on INDOT projects because we are nonunion, so they will not work with us. that is a huge barrier for smaller construction companies, for minority construction companies that are trying to use their certification to get into INDOT work and they can't. Our employees don't want to join the union, number one. But the only barrier is not being able to work with the larger construction companies." [#23]
- The owner of a majority-owned construction firm stated, "Little things like you go outside of the union's district. You've gotta use so many laborers, so many different classifications of workers to get a job done. For example, we're all the way out in Putnam County and I've gotta switch some laborers that I use out of 103 for the local that's out of there. Just rules like that can get cumbersome." [#24]
- A representative of a majority-owned construction firm stated, "I think the unions have overgrown their usefulness, and the reason why they were there is no longer applicable. Free and fair compensation. From the business side of things, you can pull people out of unions if you pay them good honest wages. I don't know about being a union employer. From my standpoint, I've watched two unions stab my parents in the back, because they were holding out for miniscule things while I watched the businessowners close those businesses and move 'em elsewhere, because of the hassles they had with the unions. Where my parents felt they were secure with union employment, in actuality, they were more secure had the union not been there. I go back to being paid a fair honest wage and have a good working environment and good working equipment to work with. As long as the businessowner that is nonunion applies profits accordingly, replaces equipment, and gives good honest wages for a day's work, I think it mitigates that whole mentality of wanting to bring a union in. Not for us, but you get back to the difference between union and nonunion. When it's a nonunion workshop, you have to have easy accessibility and easy processes for that, because you want to air out and remedy those complaints before they fester and become bigger issues." [#25]
- A representative of a majority-owned construction company stated, "The only difficulty would be if they were union, because we are not union." [AV42]
- A representative of a majority-owned construction company stated, "It's not so much the lack of opportunities but it's how you utilize those opportunities without getting swallowed up by the prime contractors that call you out for a job and then they don't pay you. It's not just lack of money to go to the next level, there is also now a lack of qualified employees, and the lack of expertise needed to do jobs. Also, to get the bigger/higher paying jobs, you have to unionize. You can go out of business trying to expand." [AV68]
- A representative of a Hispanic American woman-owned construction company stated, "We are one of only two companies that are certified to use a special industrial coating that INDOT

requires--Lately we are finding it difficult to get our products since they are oil based. INDOT tends to use unionized companies over non-unionized companies." [AV114]

- A representative of a woman-owned construction company stated, "I am waiting to contract several people for work. It seems the state is trying to make my business go a certain way, such as unionizing." [AV179]

7. Obtaining inventory, equipment, or other materials and supplies. Thirty-six business owners and managers expressed challenges with obtaining inventory or other materials and supplies [#1, #2, #4, #5, #6, #8, #10, #11, #12, #13, #20, #21, #24, #25, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "It has recently, yes. We bought a big piece of equipment last year to do grooving of markings. Because of markings, all durable markings on INDOT jobs you have to cut a groove in the pavement the 10th of an inch deep approximately and an inch wider than the marking you're putting in the ground. So, we bought a machine to do that. Well, there was a lot of supply chain issues in getting the equipment. We ordered it in November 2020. We got it in June 2021. They had promised it to us for March 30, 2021. They were about 90 days late. We had contracts that were starting that kind of work. The contractor was calling us and saying we need you to get out here and do this work and our machine wasn't ready because of supply chain issues. We were able to abate some of those [but] there was a penalty on one job, and we had to send in all kinds of documentation to INDOT. Because there is a note in the INDOT spec book in the 100 section that talks about the force majeure issue. It mentions pandemic. So, if there's a pandemic that causes you to be delayed or a war or something like that, INDOT won't enforce their penalty clauses if you can document why. That your delay was due to the pandemic. And we did and they abated our penalties. It was about $40,000 in penalties. So, we were able to manage that." [#1]

- The owner of a WBE- and DBE-certified construction company stated, "We had two other projects that had deadlines and needed to move forward. The only problem is that, on the construction side, they lagged behind because of the supply chain issues. So, we got our work out in time, but then, the construction administration kind of lasted a lot longer than it should. Luckily, I had a date in my contract that I said, 'If we're not done by this date, I get to charge additional services.' So, I'm glad that we did, because otherwise, we would have lost money on that contract a public bid through CIB, and they are not paying any deposits on the furniture. And all the manufacturers, because of Covid, are requiring 100 percent deposit. So, that means I had to come up with some way to finance up front the purchase of all that furniture and not get paid for it until after it gets delivered. That's a barrier to small, minority-owned any business. It's a barrier to any business to try to come up with that kind of money. And so, luckily, I was able to partner with a couple other firms, and the bank would give me 60 percent so, I had to use credit lines. I had to partner with somebody else who could bring in cash. And so, you know, I was like, 'You're crazy. You would get a lot more bidders if you were able to pay deposits.' And they said, 'Well, we can't do that.' I'm like, 'You've done it in the past. Why aren't you doing it now?' And then, the other thing is the supply chain. They said, 'Well, you have to hold these prices and you have to hold this freight price.' We can't do that. Freight is changing all the time and it's a big problem and it's especially a big problem for small companies because they can't eat the freight cost. If it goes up 50 percent, they can't eat that. And I talked to a woman-owned business recently that has an INDOT project, and her supplier just totally backed out on her. And you know, she's left holding the bag, and I don't know how it's [going to] turn out, because it might

put her out of business because the supplier said, 'Oh, well, you know, the prices went up so, we have to charge more.' And she's like, 'I have a quote from you that says it's this amount and so, I expect to pay this amount and I've already turned in my bid. If it's going up 50 percent, I can't afford to do that.' So, I know we talked about it a couple of weeks ago. I don't know how INDOT's dealing with those kind of things, because the material prices are going up and it's not the business' fault and they shouldn't go out of business because of that. So, maybe they need to put in a contingency or something to be able to handle those kind of things - you know, supply chain issues and increasing freight and all that kind of stuff, because it's hard to get people to bid when there's that much risk. I can see where somebody just starting out it's [going to] be tough to get credit without some kind of backing. Now, I heard that there's an organization called BLI. I'm not sure what that stands for. But they could only loan us like, $100,000.00. And it's like, 'Well, it's not really worth the time and effort to go through for $100,000.00 when it was a million-dollar contract.' But I can see if someone was first starting out, that might be an avenue for them to be able to buy equipment. But I think the bank that eventually shuttled with has been very good at raising our credit limit, helping us grow, and I think not all banks are like that. And, like I said, I think it was because I owned two businesses and they knew me." [#2]

- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "One thing I will say is that INDOT … we do a lot of INDOT work, a whole lot of INDOT work. INDOT was not at all sympathetic to that fact, and we actually lost a lot of money on a lot of jobs because we did go ahead and perform under the contract that we said we would perform under. But what practically happened is you quote a job, and you don't actually perform it for a period of three, four, five months. What happens in the steel industry last year, again, don't know how familiar you are, but it had an historic rise in the price of steel. That resulted, for me, in 13 straight monthly price increases, whereas normally there's maybe one, two price increases and maybe one price decrease per year. We endured 13 increases in a row from … November 30, 2020, [through] … December 1, 2021. We had monthly increases every single month. So, what that did, imagine if I'm selling at 20 percent margin and I quote that in November/December of 2020, and then I don't perform it until March/April of 2021, or May/June of 2021, my margins are gone, and in fact I'm losing money just to perform the contract. But we did choose to perform the contract, and we have tried to go back to some of our customers and say, hey, we need more money. The response has been basically, well, INDOT's not giving us any more money, so we're not giving you any more money. So, as you can imagine, for a small … guy like us, that could have put us out of business. I don't know that they could have, because at the end of the day, I'm sure, just like we budgeted to spend a certain amount, INDOT budgeted to spend a certain amount. The only thing INDOT could have done would have been to do change orders on certain of these contracts to release more money to the material suppliers. Is there more money to be released? I have no idea. I would just say if it's a question of who has more money to spare, me or INDOT, I would assume it's INDOT. But I don't know that for a fact. My material prices have been steady since December 1 of 2021. So, if they stay steady, then that means all of my bids from November/December of last year are still good going into March and April of this year, which March and April is when things really start to get busy with the INDOT work. So, if prices stay steady, we will rebound this year and next. But if we go on another run of having six or seven straight price increases, we'll be in the exact same boat, and potentially not be around in 2023. I don't know that we can have another year like we had last year. Because prices were constantly going up, it became hard to get the stuff we needed, because everybody was ordering more than they needed to try to beat the next price increase …. I'm a small guy, so I'm nobody's number one

customer. So, if your number one customer needs more than they normally need, who gets squeezed out on the back end? Guys like me. So, to that extent, inventory was a problem." [#4]

- The Black American owner of an MBE- and DBE-certified professional services firm stated, "It's just the price and … everything is going up … pricing for everything. It's jumping and keeps jumping. That's something that in surveying we love technology because we're always ahead in technology and stuff like that. We try to be out of it as it comes. But it comes with a price, so that's pretty much [it]. Is it a burden? Yes, because the price tag is a little bit higher because the technology is being released, and if we jump on it is the best way. But then the question becomes does our client understand that price. And if you spread that cost to them it makes it a little bit difficult understanding that." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "Just getting vendors to extend credit lines can be difficult." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "Recently the price increased …. My fertilizer went from $10.50 a bag to $20.00 or more a bag. My feed has doubled. I have jobs that I bid two years ago that still are not finished that I have to go on prices that were way lower than I'm paying now. But that's just in the last four or five months, I guess. Initially, yes; as a startup company, yes. Our business has a lot of equipment, a lot of trucks, and for somebody to start out in landscaping right now I think would be difficult. First of all, you can't even buy trucks; you can't get equipment now. We waited and waited for a Harley rake that we had ordered eight to ten months ago. For somebody as a startup in landscaping would be difficult. Skid loaders, trucks and trailers, license plates, insurance, all of those things." [#8]
- A representative of a woman-owned professional services company stated, "No, we don't have a lot of inventory or equipment and materials. Most of our stuff is intellectual property and computers." [#10]
- The Black American owner of a construction company stated, "Other than the meter base shortage, Covid-19 has really played a big part on material shortages at the supply houses. I'd say my only barrier really with that is I would love to open a credit account at different places and with my business being so new and not having established credit for the business, it's hard to get a credit account, not just at the Home Depots and Lowes, but actually at the Kirby Risks and Crescent Electric Supply. I would like to get credit accounts so I could pay for material after jobs have been completed instead of paying for them up front." [#11]
- The owner of a majority-owned professional services firm stated, "I don't think it's difficult to get it if you've got money. When you first start a firm, you've got to buy computers and desks and rent space. That's when you need the financing. But it's available. It's just do you have the money to pay for it?" [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "Just working with vendors, I would say, along the cash flow lines, making sure they can help out with being able to work with cash flow and be able to get vendor credit with suppliers is a big help with cash flow. Just making sure that the vendor that you work with, obviously, if it's a government or a city contract, the supplier would - doing a joint check or something to where the supplier is on the hook in the same amount of time frame as I am for getting paid." [#13]
- A representative of a majority-owned professional services firm stated, "And the lack of being able to get materials and equipment. The long lead times that we're seeing, supply chain issues

have dramatically affected our business as well as our end-use customers that have had to wait significantly longer to get equipment and materials. Think that it all comes down to specifically what you're trying to order and type of equipment or materials that you're trying to get, who the suppliers are, if you've had a past relationship with them or not. And that's really it. I don't really see much." [#20]

- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Some of the materials that we use and the weapon systems that we work on are highly specialized exotic materials so sometimes those are difficult to find. But we are able to find the materials because we go nationwide to find them. We're not just limited to Indiana. We can go find the material elsewhere. Right at the moment, we have a problem with supply chain, for instance electronics, microchips, and things like that are very difficult to find because they're produced overseas. Those have all been farmed out to other countries that are not delivering right now for whatever, COVID, and other reasons. I think that's more of a federal issue than it is a state issue, although the state could also provide incentives for companies to launch production, design production facilities for electronic circuits, and ports, and that sort of thing." [#21]

- The owner of a majority-owned construction firm stated, "Everybody in the private sector is dealing with the same issues and it goes for supply chain. You [going to] get an asphalt truck to the job. You [going to] get concrete trucks to the job. You [going to] get your materials and there's not enough people. That's a huge issue. That goes back to the supply chain. It's all the byproducts, everything that goes into these roads and bridges that's an issue. We deal with that every day. It's worse than some of the prior good times in the economy. It's the back end, the building these jobs that's getting the cement trucks to your job site, all the aggregates and the pipe materials and all that stuff. It's a huge supply issue." [#24]

- A representative of a majority-owned construction firm stated, "Mostly, just trying to get the product from Point A to Point B in a safe manner. We run very lean when we manufacture, so we don't manufacture with the thought of there being potential error. By running that way, we're very reactive to what our customers need, instead of being proactive and having a warehouse full of stuff that they might not want. From my side of things, it's [going to] quickly come up to lack of transportation employees. We cannot find enough trucks, trailers, drivers, to transport the material. We have looked at rail, but rail is so inefficient that it doesn't service our customers very well. We have to bring more manufacturing back to the States, from wherever it is that they've gone to, and primarily, from a businessowner's standpoint, you're in business to make money. You're not [going to] lose much money or you're [going to] go out of business, i.e., the opposite of what you're trying to do. So, the only way we can actually get our raw resources that we need to manufacture what we need is we have to look for good-quality-minded companies that are stateside, that can do it for a fairly reasonable price. Obviously, we can't just buy everything American-made and still produce our product at a decent price. The reason why the businessowners have moved overseas or other countries is all tax structuring and red tape that the government has placed on businesses." [#25]

- A representative of a Black American woman-owned construction company stated, "We have not experienced any barriers. Just making sure customers know lead time on materials and price increases and price quotes are only good for a certain amount of days because there are constant changes." [#AV18]

- A representative of a majority-owned construction company stated, "No problems Concrete is hard to come by but not a public concern." [#AV56]
- A representative of a woman-owned construction company stated, "In the past we have not been able to secure the work because of the minority participation. It is also very hard to do all the paperwork required for government work. INDOT is not too bad, but government work is crazy. They need to do something about making permits easier to obtain. We are also having supply chain issues, hard to get needed supplies. There is also too much bureaucracy. You now need permits for everything and that doesn't need to be done." [#AV76]
- A representative of a majority-owned construction company stated, "Government contracts are so difficult to read, and this probably will not change. Getting work is not a problem but obtaining materials to do work is next to impossible. My Roof Unit lead times are anywhere from 20 weeks to 55 weeks …. Even if I get the job, I can't do it." [#AV93]
- A representative of a woman-owned construction company stated, "We have no problems, other than issues with the supply chain, materials are hard to get." [#AV107]
- A representative of a Black American woman-owned construction company stated, "We have had difficulty in procuring necessary materials, and labor shortages are a mainstay of the industry we work in." [#AV110]
- A representative of a majority-owned construction company stated, "We are one of the few businesses that actually have product on our lot, but for our high market items, we are low on stock." [#AV113]
- A representative of a Hispanic American woman-owned construction company stated, "We are one of only two companies that are certified to use a special industrial coating that INDOT requires. Lately we are finding it difficult to get our products since they are oil based. INDOT tends to use unionized companies over non-unionized companies." [#AV114]
- A representative of a majority-owned construction company stated, "We are kind of struggling [the] cost materials is a bit tough due to the rising cost." [#AV115]
- A representative of a Native American-owned construction company stated, "The work is not a problem. We are really busy. The issue is obtaining materials and getting the work done on time. We have to get really creative." [#AV126]
- A representative of a majority-owned construction company stated, "The only issues we [are] having right [now] is on material and equipment lead time which causes us to not bid certain larger projects." [#AV127]
- A representative of a majority-owned construction company stated, "The marketplace is good, plenty of work. Drastic price increases of materials, labor shortages, and equipment shortages." [#AV129]
- A representative of a majority-owned construction company stated, "The big problem these days is obtaining materials and being priced out for materials." [#AV131]
- A representative of a woman-owned construction company stated, "Prices are going up. Seeing inflation in materials and costs." [#AV135]
- A representative of a majority-owned construction company stated, "Plenty of work, difficult obtaining materials and very volatile pricing." [#AV136]

- A representative of a majority-owned construction company stated, "Just hard right now with the cost of everything." [#AV153]
- A representative of a majority-owned construction company stated, "It's hard to get good employment right now and then there's the inflation we're all going through. All of our product is continually increasing. Freight has been astronomical lately, probably because of gas prices. But I don't think we're facing anything." [#AV157]
- A representative of a majority-owned construction company stated, "It's a difficult time with supply chain issues and price increases." [#AV164]
- A representative of a majority-owned goods and services company stated, "Hard to get supplies and significant employee shortages." [#AV181]
- A representative of a majority-owned professional services company stated, "Supply Chain, especially furniture orders." [#AV2018]
- A representative of a majority-owned construction company stated, "Supplies are not available." [#AV2023]
- A representative of a majority-owned construction company stated, "Too many regulations and paperwork. Pretty competitive, and right now supply issue and availability is difficult." [#AV2032]

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. Eighteen business owners and managers discussed the benefits and challenges associated with pre-qualification [#1, #2, #3, #6, #8, #11, #12, #13, #17, #19, #20, #21, #22, #23, #24, #AV]. Their comments included:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Yes, they are. If you are new - you know what the requirements are, $300,000 aggregate work, you're not prequalified. And if you have a reviewed prequalified statement, you can get up to a million. I think that needs to be adjusted. That's a little light. With an audited financial statement - the thing is, most business owners have to understand that process because decisions that you make on a day-to-day basis will affect your pre-qual. For instance, cash is king. Receivables are the Queen and inventory is the princes. So, you've got to have all three of those to have your net liquid assets at an acceptable level. You can have a lot of accounts payable out there, people you owe in the next 30 or 90 days. You can't have a lot of those. And you need to keep all that in sync as a business owner so your prequalification, when you get that audit, it will allow you to have a significant amount of work. We've been in that place where we weren't prequalified, and you've got to manage how much work you get which is a good thing. I think the prequalification process is basically sound. I do not know why, when we send in our pre-qual every year, our pre-qual is pretty large. But every year they discount. I don't understand that. I don't want to criticize them, but we have an audited statement. We have financials. We have a track record. We have equipment. We have good CR-2. Okay. So, a CR-2 is a contractor's report card. So, every time you do a contract for INDOT, the engineer creates a CR-2 contractors report card, and they rate you on I don't know, 20 or 30 items. Were you prompt? Did you do your paperwork? Did you say what you were going to do? Did you take care of your equipment? Did it look like you were doing what you were doing? Did your people who came out to the job, where they trained? And they

give you ratings. If you have more than a -3, you get turned into the prequalification committee. And if you get a couple or three of those, they call you before the board and you've got to explain it. So, we get good CR-2 reports. But they still discount us every year. That's crazy. I don't understand that. Why did they discount us? We turn our prequalification. There's a formula that gives you a certain amount of work. And it's not that we need it, it's I don't understand why we get a discount. They been doing that forever. No matter how good we are or how financially sound we are, they discount our prequalification like 15 percent. let's say we commit to some work and then we find out that the work is not going to happen, it affects our prequalification because your pre-qual, the state keeps a record of how many jobs you have. The records aren't always perfectly accurate. Have a good idea of how much work you have on hand. If you could commit to a $500,000 job and it goes against your pre-qual and then they reduce it by $300,000, that never gets written off their books until a year later. And they don't do a good job of writing change orders to reduce the amount of work. They think they do, but they don't." [#1]

- The owner of a WBE- and DBE-certified construction company stated, "But it's difficult on the architectural side because everybody wants to know - 'We'd like to see five of these projects that you've done in the last five years - five identical projects.' Well, that's hard for a small firm, because we have to be flexible enough to do all types of projects. We don't just focus on medical, or we just don't focus on office. We kind of go with what's going on at the time and what's in the market at the time. And I think that's the biggest barrier for smaller design firms and architectural firms is that we can do the work, but we don't have the quantity of work. We can't possibly compete with the big firms on quantity of work. But we can compete with them on quality of work. And so, I'd like to see that change. No. It's more in getting in and developing a relationship. I think the only challenge is, like I said, if you haven't done five of exactly that type of project, they say, 'Well, we're not gonna use you.' But nobody's schooled in medical architecture or historic architecture or office architecture. You don't go to school for those specific things. You go to school for the design process. So, you learn how to design anything, and I think that's what a lot of clients don't understand - is you don't have to have somebody that's done five of that exact project. You don't even have to have anybody that's done one of those. Because if you're first starting out and trying to build a business, you probably haven't done that. Prequalification is kind of - yeah. It can be a barrier to a new company. I mean, the INDOT prequalification is pretty daunting, and we have to renew it all the time. It seems like, you know, once you're in, maybe you shouldn't have to do that again. we also have to be prequalified. But they don't enforce it. For instance, we wanted to do an architectural project at a university and the firm that they picked were not public work. They didn't have public work certification and they didn't have historic DNR certification. And so, I asked why - 'cause we had both. I said, 'Well, how can you pick these people? 'Cause they're not prequalified to do public work.' And they said, 'Well, we don't care about that.' And I said, 'Well, but the state of Indiana does. You're supposed to submit and get prequalified and all that.' They said, 'Well, we don't care.' So, I called the IDOA, and I said, 'What - should I - I've been doing this for years and now, I go to try to get a university project and they said that it doesn't matter.' And they said, 'Well, we don't have any enforcement.' And like 'Well, why do you even have it then? If you're not gonna enforce the certification, why do you have it?' Well, they don't have an enforcement arm." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "Pre-qualification comes with a hefty price tag. So that's definitely a big barrier to entry truckers. the prequal, just being able to have money to do that. I know several people who, once you tell him that, then they

think, well, I'm that's a that's a roadblock that I can't get through and it is because it's a big cost. Yeah, but that's if you're going to do big work, so you've got to start small and work your way into it.” [#3]

- The owner of a WBE- and DBE-certified construction company stated, "Pre-qualified with INDOT and they've, you know they've indicated that our capacity is $14 million so. being pre-qualified with INDOT, I mean there are certain stipulations that probably most don't realize that you have to have a positive working capital that you have to have you know experience that you have to you know you have to come show your you know the assets that you have a man to really help them be successful. It's almost like they people want to potentially work on these jobs but say they're a landscape company. They may not realize that to do government work that they have to be pre-qualified. Right now, there is a threshold of less than $300,000 worth of work, but then that stipulation also goes into that's not 300,000 of just INDOT work. That's 300,000 total. Well, you know, if they try to go after that trifle work and start bidding everything and don't you know, and I mean, yes, it's the prime contractor's responsibility to look at the pre-qualified list but you know no one mentioned being pre-qualified no one mentioned you know that threshold of 300,000 though that was all information that I discovered on my own. Well, of course it's on INDOT's website, right? And it walks you through a presentation and that's great. I would prefer that INDOT not exempt trucking from the pre-qualification. But that would be restricting things more. I say that because we are pre-qualified but CNR trucking side of the business - trucking is exempt. Not really sure why other than, there's a lot of haulers that potentially couldn't be successful in being pre-qualified.” [#6]
- The owner of a WBE- and DBE-certified construction company stated, "When we first started, we were approved for $300,000.00 with INDOT, now we're approved for $2.5 million.” [#8]
- The Black American owner of a construction company stated, "Oh, yes. That's another paperwork. Actually, just a couple of weeks ago, I got something to prequalify for the 16 Tech apartments, and some of the questions that they're asking for - they're needing references, they're needing bigger jobs - or my bigger job history. They want to know what jobs I did in the past and have completed and what was the outcome. Well, I don't have any bigger jobs so, I can't really put anything. So, is that gonna disqualify me? It's kind of intimidating to even reach out because I don't want to be laughed at.” [#11]
- The owner of a majority-owned professional services firm stated, "I think some of the agencies require that you have five years' experience before you can even submit. I think that's probably the biggest one I've seen over the years.” [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "Sometimes, [prequalification requirement barrier] happens on bigger jobs if the company needs us to do a million-dollar job or a half a million-dollar job. Yeah. There could. Yeah. There's definitely some prequalifications. But for us, for the majority of the work that we do, I'd say 1 out of every 10 jobs we may have an issue with prequalification. But 90 percent of the time, no, it's not a barrier.” [#13]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "Yes, it has. Yeah, specifically some of those requirements are usually bonding capabilities that I asked about. Or some of the OSHA-required safety stuff and manual for having the vehicles on site. You need to have a list of the chemicals and safety procedures of everything that's in there. Plus,

being a small company, you have to have resources to go after that stuff and do it. Some of those jobs are just too heavy on the requirements from the beginning for me to get to that level." [#17]

- A representative of a majority-owned professional services company stated, "The one challenge that we have from a prequalification point of view is that from an INDOT perspective we have a lot of steel bridge experts, and they reside in our headquarters in Northbrook, Illinois. So even though we have 11 people in Indianapolis, most of our bridge experts are in Northbrook, Illinois. So, when we try to pursue projects as a lead firm, we often get hampered by the fact that our bridge experts that would be working on the job are not residing in Indiana, even though we have a local presence here. Even though we have a local presence, and we are invested in the local market when we submit who the people that are the experts are going to be working on the IINDOT jobs for bridges, those people don't reside in Indiana, so therefore we look like an outside firm Recognizing that expertise is disconnected from location and that having a local presence with an office that's invested in the market should be weighted even though the experts that are right for the project are in a different office of ours. Because the way that we provide excellent service to clients is that we utilize all our experience across the company, and we collaborate a lot with other offices to provide high quality solutions. And that's a value add to projects as opposed to right now we're penalized for collaborating with our Northbrook office that has the expertise that often INDOT is seeking." [#19]

- A representative of a majority-owned professional services firm stated, "I haven't really experienced it; other than sometimes I've seen some cities/towns/state sometimes require certain qualifications that may be specific to one or two firms only. It kind of sets them up really to get it, because they maybe have a relationship with them in it, and a lot of times you have to call the state representatives and say, 'Hey, explain to me why you have this qualification barrier.' I think this is going to limit the bidding opportunities that you can have with it, and it's really not important. a lot of the times it's inflicted by the proposing entity, whether it's the state, whether it's a city or town, whether it's a county or a school corporation. They're the ones that put this stuff out. You know, I think it's really education to people at whether it's the state, county, cities, and towns that an education process to let them know that the restrictive bidding piece can be detrimental and you're not necessarily getting the best firm." [#20]

- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "I mean there are strict sets of qualifications that that the federal government requires. We have not done any kind of thing with the state, but I'm sure that they have some similar requirements. For instance, you have to have an accounting system that is compatible with the regulations and requirements, extra permits that are involved in the government program acquisition." [#21]

- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Okay, so one of the grants that're out right now, it's called a technical - for technology. They want a system that's gonna coagulate with the DOT and the transportation industry, the companies, and the drivers, so it's easier for them to transfer information from one to the next to make the audits easier on not only the state but for the company. They're not taking so much time to get through everything. I developed software. It does exactly what they're asking for 110 percent, if not more. They denied me because I have a corporation and a woman-owned business. They put me under a corporation, told me I was disqualified, even though everything that I have is qualifiable. That makes no sense to me. Everything that they asked for in that grant I literally

have in my system, in my software that I created. But they didn't even go through the whole application because they automatically said, 'Okay, well, you're a corporation. We're disqualifying you.' No, there's really not, 'cause we do background checks and stuff like that, and usually if you're good at what we do, the state auditors think they should be able to do this. Even though they're not supposed to, we get a lot of referrals from the state auditors for companies that have issues. If an auditor's working with us and they like what we're doing, and they see that we're doing good and we're not trying to cover stuff up, usually we get referrals from the auditors as well, state, and federal." [#22]

- The owner of a WBE- and DBE-certified construction firm stated, "Prequalification is very tough when you're getting started because it's based on what money you have. INDOT is very difficult to obtain your prequalification and get your aggregate and that's to bid on certain work. The prequalification through the public work, for public works projects, so the prequalification through I don't know if it through the IDOA or the Public Works Division they have a requirement that you have to do I think five jobs that are in excess of either $350,000.00 or $500,000.00. I think that really prevents a lot of smaller companies from doing work maybe in a local park or a local I guess DNR agency, because you have to - they want you to do these larger jobs and a smaller company may not do that much work, you know that many dollars of work. I definitely think that that prevents smaller companies from working on those projects. You essentially just lose, weed out and you're going to pay more to get the job done, because you're going to have large company come do it." [#23]
- The owner of a majority-owned construction firm stated, "The state's got a formula that they work through to prequalify us every year for amount of work, dollar wise, that we can do. That tends to be a slow process. A lot of it's having a good accountant that can run through all the formulas and all the inundations of these municipalities to get prequalified." [#24]
- A representative of a majority-owned construction company stated, "We've done work for the airport as subcontractors many years ago. We've done work for INDOT for a period of years. But the only limitations is this formula they do, and they give you this process to certifying you to do concrete work and paving and curbs. There's a lot of barriers in that process. The requirements they need to certify you is against the minorities. In Indiana there's a process called pre-qualification. And that to me entirely limits contractors as far as their getting qualified. Indiana has a lot of barriers as a minority person. I've had to fight with individuals to get work. It seems like they made it more difficult for us." [AV7]
- A representative of a Black American-owned construction company stated, "INDOT: we only are only allowed to submit in one category, which seems ridiculous, why only one? ask for recent past experience, we design, all kinds of project, we can do anything- that barrier needs to be removed. Also, I have called Elizabeth Kiefner several times, she does not return my calls." [AV71]
- A representative of a woman-owned construction company stated, "I had an issue with the pre-qualification with INDOT over the last few years. There is a lot of work but finding qualified workers is a challenge." [AV86]

9. Experience and expertise. Interviewees noted that gaining the required experience and expertise to be competitive in the public sector can present a barrier for small, disadvantaged

businesses. Experience is often compared to the requirements for prequalification [#11, #12, #13, #14, #17, #21, #22]. For example:

- The Black American owner of a construction company stated, "No. I don't necessarily think. Getting in the right place and having the right people reach out to me - that's the only problem, is just - 'cause I've been working with different lead-generating services, and it's just some of the stuff is a waste of my time and money, and I think I just need to learn to decipher between that. I've been on a lot of bogus adventures dealing with different customers. I think that it's just gonna be some growing pains, just learning what to go after and what not to go after." [#11]
- The owner of a majority-owned professional services firm stated, "Well, any time you start an architecture firm the first thing potential clients ask you is, 'How many times have you done this before?' And you can't say that you've done it before. You may have done it with another firm that you've worked at, but - that's by far the biggest hurdle. It just takes time. It's going to take five to ten years to get stabilized." [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "Just maybe a little education around a sales guy to do that kind of stuff and knowing exactly when to - making sure all your Is are dotted and Ts are crossed in those RFP requests. Just a little education around that would be helpful." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Because we are a small minority firm we get a lot of different types of projects, but nothing that is specialized. where we have the problem is if the client asks for five examples, we may only have two really good examples and then I think that's when we become not competitive, even though I think we could've been very competitive as far as price and production. But it's the perception that we didn't have five examples to show versus two is taken as if we are not qualified to do the work, which is not really the case. If you're an architect, we all pass the same exam. I think the architects with less experience will work harder versus a larger firm that's going to give you a cookie-cutter solution, versus a smaller firm that will work hard to find the best solution for the situation." [#14]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "But as I started to build the company, I realized that there were certain things we couldn't do because we don't have the resources. There was a learning curve in understanding the lingo and how to quote it. There's software out there, and you can quote a job. Let's just say a new building construction. You type in the square foot and go off the drawings. Just learning how to read the drawings and understanding what was in them, and then the change orders that came out, and making sure you covered yourself on what they were. Responding to RFPs, and it's not really a sore topic, but interesting process. I don't have enough experience or money - we can do the work, but we don't have the support; office personnel or staff to administer those types of requirements that they want. Some of them just don't have experience in doing them. I find out some of the smaller operations too are not accustomed to filling out those forms or those requirements, and what they mean. You don't know who to ask because they don't want to tell you." [#17]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Not for us, but I am aware that there are many start-up businesses that have difficulties because most of the personnel don't have any background in the financial side of the house,

although Elevate Ventures here in the state is conducting a number of webinars to help people understand the financial side of us starting a business, and the kinds of things that they have to go through.” [#21]

- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Actually, there's a big barrier, and that's when we ask the state for their guidelines. When they're coming and they're auditing a company, they won't give us their guidelines, but they expect us to follow our guidelines. The barrier is we don't know when an auditor's pushing too far or asking for something they shouldn't be asking for, because when we ask their supervisor, the supervisor will not give us any of we're looking for. Here's an instance. I had an auditor. He didn't like a company I was working for. He pushed for a lot more than he should have. I looked in the audit. It was uploaded into the state, and he hadn't even viewed 90 percent of the stuff that was on the state portal that we had uploaded, but yet he failed the company. When I asked for verification and I asked question on why - how he could do that without even looking at the stuff that was uploaded, I was not given any guidance. I was just basically told this is the outcome; this is what you need to do. It was hands-off. We can't work with our customers if we don't have guidance. We have our guidelines, but and they have our guidelines, but we can't have theirs. It has to be mutual.” [#22]

10. Licenses and permits. Certain licenses, permits, and certifications are required for both public and private sector projects. Twelve interviewees discussed whether licenses, permits and certifications presented barriers to doing business [#2, #4, #9, #11, #14, #20, #21, #22, #24, #25, #AV,]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "A lot of people have a lot of issues lately with the City of Indianapolis, because they're hard to get a hold of the plan reviewers to get permits, and they're farming it out. And the people who they're farming it out to obviously want to spend as much time as possible and get you to resubmit so that they can spend more time and bill more money. And it's evident that even though they're billing on an hourly basis and they're asking all these questions, those questions were on the plans. So, I'd say 80 percent of the questions were on and answered already on the plans and they just didn't see it or didn't look. And so, it's very - it falls back on whoever the owner is, because the owner has to pay for the permitting process. And a lot of times, they don't pay the architect any extra because we have to deal with people who don't know what they're doing. And so, we spend more time so, yeah, the whole shitty permit process is - it's gotten worse over probably the last - well, since Ballard. Ballard instituted more robust building permit process. And we already have to get a state release and the state - it takes some time, too, but at least they'll call you back. You try to get to the city, and you can't get to the reviewer.” [#2]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "Just getting that general contractor's license has been difficult, to say the least, especially if you don't have the funds coming in to be able to get the bond and everything else needed. Sounds like it could be a bit of a mess.” [#4]
- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "Sometimes, to the Army, when, you know, the Air Force is a problem, when you get in the base. You know, that's a bigger problem. So, lots of people don't qualify; they couldn't even get the permit to get into the base. That was less and less beyond me. I didn't know that in the

beginning, you know? But I tried to, and they say, 'Oh, you go there, you can get ID,' you know?" [#9]

- The Black American owner of a construction company stated, "No. It was just a paperwork issue. I got my license in 2016 and I held it in Bartholomew's County forever because it was only $25.00 a year and I didn't have to have all the insurance and everything else. Now, when it was time to reciprocate my license to Marion County, it was just a paperwork issue with having the right insurance, the right bonding, the references. There was an actual meeting. I had to be approved - have the license reciprocated here and I had to be approved from the committee, but it's not that hard for you to get a license in Marion County if you went through IBEW apprenticeship because they know that you've been trained very well, and if you've taken the test, then you should be good. So, yeah, I didn't have any problem with licensing; it was just paperwork. Just making sure that the paperwork was right. At first, I know that with me, a lot of my issues with a lot of areas of my business has been intimidation from the paperwork - not knowing the right paperwork to file and not good instructions on anything and trying to figure things out, trying to call people to ask questions. I think that's about it." [#11]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "As architects we actually have to maintain 20 credits a year, and some of those require us to take classes. So, I have various certifications in sustainability, leadership, as well as I'm a registered architect and a registered interior designer with the state of Indiana." [#14]
- A representative of a majority-owned professional services firm stated, "Yeah, sometimes permitting can be a real pain on any project. Especially when you're dealing sometimes with the state or city or town, everybody has some type of difficulties. But with the short staff with people that have sometimes those offices, that sometimes it can take a while. And time is money." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Some barriers depending on the county that you're in. Like for instance, Marion County as high taxes here, and they have more restrictions as far as environmental restrictions and things like that. That forces some of the companies to leave Marion County because there have industrial companies that would require more environment controls than they would find in some of the other outlying counties where the population density is lower." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Well, the permits are kind of iffy, but licensing, that's not that hard." [#22]
- The owner of a majority-owned construction firm stated, "Some permits can be slow and getting processed." [#24]
- A representative of a majority-owned construction firm stated, "Probably a tutorial as to how to go through. When I owned my own transportation company and was trying to do things, just the ignorance, because I hadn't learned, yet, what I needed to do and how I needed to do it. You're constantly tripping on yourself trying to figure out, because what you think should be a simple process has been made not simple anymore. You don't know all the steps and procedures for how to go, where to go, when to go." [#25]
- A representative of a majority-owned construction company stated, "The difficulty is to find the insurance they require and the surety bond $50000.00 I feel like our company has gotten looked over because we are minority-owned and the difficulty over the last 3 yrs. trying to obtain

proper licensing and getting set up to state requirements. A lady at INDOT helped us with getting set up." [#AV45]

- A representative of a woman-owned construction company stated, "In the past we have not been able to secure the work because of the minority participation. It is also very hard to do all the paperwork required for government work. INDOT is not too bad, but government work is crazy. They need to do something about making permits easier to obtain. We are also having--supply chain issues, hard to get needed supplies. There is also too much bureaucracy--you now need permits for everything and that doesn't need to be done." [#AV76]

11. Learning about work or marketing. Fifteen business owners and managers discussed how learning about work is a challenge, especially for smaller firms [#1, #2, #3, #11, #12, #13, #14, #16, #17, #19, #21, #22, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "I don't know. It's actually not been bad. Finding out about work can be a bit of a problem because you don't always, we should be on the bid list for all those counties and sometimes they just don't send you an invitation. I don't know why. It's a little harder to find out about work. INDOT has a website. And we also look at what's the name of that one? Reprographics has a website that gives you all of the Indianapolis and surrounding counties public work. So, we use that a lot. But in the INDOT world, we find out about it from the INDOT website or from our customers. But in those counties, we are not down in that area, it's sometimes a little harder to find out what's bidding." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "So, trying to remember and go back and look for that specifically and I don't know I think there're specialists that do that, but you have to pay them to search through SAM.gov." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "It's all about money It's hard to get us into the industry anyway. Challenges, learning opportunities or market well, I mean and that's another thing of, you know, you're trying to break into a market where people have been used to doing business with the same people year after year after year after year, so I'll send my quotes out and do all that because I was so busy, I didn't have time to travel around the whole state of Indiana to go to go, you know, introduce myself or to, you know, market myself." [#3]
- The Black American owner of a construction company stated, "I've got a website. When I first got the website, it was just the entry level website. I just increased my package so then, I can get in front of more people, but I've also been a part of Home Advisor, and Angie's List or whatever. Now I'm really getting tired of, and I plan on quitting one soon because that's where I'm saying I'm getting bad leads and I'm having to pay for those leads. A lot of times, what the people want is not even what they've indicated on the service so then, I get charged extra money for nothing. But anyway, I do the website and Angie's List, but then, also, word of mouth and people that I've known over the years. I've been an electrician and I was on a service van for Miller Reeds for four or five years so, I've had other customers and put my name out there. A lot of people know me. I haven't had any of my old customers reach out to me other than one, but that word of mouth. I've gotten referrals from multiple people that I've dealt with in the past." [#11]

- The owner of a majority-owned professional services firm stated, "That's a good question. I would say we have a website; we do social media. We go to some events but not a lot. But I would say the key to success is keeping your firm's clients happy and then you'll have slow and steady growth. You can get registered at different public agencies and get a certain percentage of work, and you can give money to politicians and get a certain percentage of work, but those aren't methods that I use. I think when you first start out you don't know about some of the projects because if a church group is considering getting proposals from five architects and you're a startup, they're not even going to give you a shot. They're going to go to the five firms in the city they know have been established for 25 or 30 years and have a good track record. So, you're just not going to know about the projects early. The more you're in business, the more projects you'll know about. The other thing is the rest of your staff or associate partners, the more they're out and about, the more projects they learn about too. So, it's not just the principal." [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "I would say the most significant, I don't know. I just get the work, and then, also getting the workers to do the work. But out of both of those two, I would say actually establishing relationships and getting the work probably was most of the struggle. After we got the work, we were able to find workers. Finding the bids and bidding the work and all that stuff, that's probably been the most challenging. Yeah. I would say there's definitely [going to] be marketing challenges around that … knowing where to best spend your money because obviously, you can blow a couple of grand a month and not get any results if you don't spend it right …. Sometimes, there's just the meeting them for the first time and sometimes, there's people out there … that can help introduce us to prime contractors." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I'm not sure how to really state this, because when I first started out in 1991, I was working with another small firm at the time. But I was a sole source because I was an independent contractor for the firm. I was mainly his marketing person, bringing in all of the work, in which he was very successful. But I find out as a female doing the same thing, I couldn't bring in the same amount of work for my own company. So that I guess was a little difficult to understand why there was a big difference in bringing in work for a male firm and bringing it in for a female firm. It was a little challenging. I guess you always have to make your own avenue and not look at the situation as being 100-percent negative; you just know that you've got to figure out a plan B when dealing with state and city work. No, not really. I've been in business 26 years, and I still have to prove myself. For example, I gave a presentation the other day, laid everything out, what was needed to be done, the process, the codes, everything, and then someone asked me after the meeting, 'Have you done this before,' as if to question my integrity or my knowledge. Was a little disappointing. It's just challenging being a female in any profession, so I'm not just saying my profession. Because I'm in several women groups and all of them say about the same thing. I have all the software I need to do competitive work. I have all the licenses I need to do competitive work. I have all the insurance needed to do competitive work. I have very talented individuals to do the competitive work. It's just getting the opportunity to do the competitive work is where we fall short. We did have a marketing person before the pandemic. That's the one person short we are now. We do not have a marketing person on staff now, but I am with a program that I signed up with through the Heron-Kelley School of Business, where they're going to provide me with marketing for a program that they are promoting to work with small

businesses on marketing. So, I'm looking forward to that. But as far as marketing, I'm basically doing all the marketing myself. A lot of people know me, so I would e-mail them every now and then and just bring them up to task on what we've been working on and how we might be able to assist them on their future projects. So, I'm the person that's doing most of the marketing for the firm, and of course I don't get to everyone. You do not hear about professional services. You will not hear about it. If you hear about it, I would say 90-percent of the time it's already too late, because someone has already been soliciting for services for that particular RFQ and you're wasting your time. I would say 90-percent of them that you do see you're wasting your time because they just have to solicit them because of requirements. But as far as you getting it, you're wasting your time. And I find that for most of them. And the other half you don't hear about anyway. I think it should be open and fair, like a lot of states have started doing different from Indiana. Indiana you don't hear about professional services because they don't want to receive 120 proposals. I can understand that too, but if it's federal or state money that's how it should be. And not given to the political party that paid for your information early on so they could have their team ready when the RFP or RFQ did come out. So, I don't have the answer to that; I just think it should be more open to all professional services versus a few professional services that have their pulse on the purchasing department to know when a certain project is being led. Well, that goes back to knowing the RFQ or RFP exists. If you don't know it exists, then you don't know who's going after it. And if you do know who's going after it you submit to those companies, you call those companies, but if you can't get on their team then you end up not going after the project because you know it's at a size that you would not be awarded." [#14]

- The Black American owner of an MBE-certified professional services firm stated, "The biggest challenge with business is having the clients to make the business go. Initially, I sent out a mailer to everybody that I knew, and I know quite a few people. I've been working in this business for some time. I haven't done much as far as marketing or going after RFPs. They call me. I know what's going to happen, and I think about it and I'm kind of half planning for it, at some point I'm going to have to turn the corner and do some marketing and put out some fliers or do a little bit more research in order to grow. I do want to grow the business. The business is doing fine, but I want to grow the business. I want to hire permanent staff, but that's going to take some time. I'm giving myself time on that so when that happens, that's when I'll get more into marketing." [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "I would say starting and knowing where to go to find work [is the biggest barrier to success]. Yeah. Finding out about it can be a challenge. I think there's a lot of opportunities where you can just go and look on those websites for the city and the state. But those jobs, take for example, concrete. We do concrete. We'll do sidewalks. We won't do foundations and stuff. We self-perform 100 percent of that work. There's a guy, another MBE that does work the city work and does concrete also. We met at a diversity meeting, and I sent him some work that was too large for me to do. I reached out to him to say, 'Hey, I can't do this project. Do you want it?' So, I said, 'Here you go. Here's the person you need to contact.' They awarded him the job, and it was great. They had a great come-up because it was a good-sized job. I looked at them and said, 'Hey, what do you guys do for the city?' 'We're pouring some sidewalks and this and that.' I said, 'Well, what's your price for square foot, or how do you guys quote those?' He told me the price. I was like, 'Oh man, that is 30-40 percent lower than what we get in the private sector for doing the same type of work.' Now all these jobs are available on the city for you to go after. I can't complain that the opportunities aren't there. It's just I don't know how they can operate on those margins. Maybe

I've been fortunate enough to be in the private sector out the gate that I just can't do it. I even went to some bid openings out of curiosity with the city just so I can learn. I looked at the bids for it. There was an electrician, and they needed on-call maintenance and some other things for the city. I can't remember what the details were on the RFP. I quoted it, and I went to the bid opening. I knew I wasn't going to get it because I knew my number was [going to] be too high. The person…the company that got it, and it's public information to see what it was the prior year. You can go onto … [a] site and it tells you what the city is paying for these particular jobs. I was like there is no way in the world you can do that. The person that got it probably knew that very rarely get called in on holidays and weekends. My weekend rate was extremely high because you don't really work on weekends or Sundays. They probably left it as low because they don't ever get called. Just an oversight and learning curve on me is realizing that you overbid the job to cover the what ifs when the what ifs probably won't ever happen. I just can't believe the price. Those opportunities, nevertheless, are out there. Just you got to determine whether or not you want to go after it. I don't think the right opportunities for our company is out there based off the amount of work and time that we put into it, and insurance that we carry to do a lot of that city work because it's always the lowest bidder. A lot of times, we bid a job that we know thoroughly what it's going to cost, and it's going to end up costing that. Someone else will bid it lower, and then going to it and do a lot of change orders to what they should have known or anticipated based off the drawings and the work, and they didn't. They didn't bid it accurately. They bid it low, which I guess is smart on them. They got the job. Then, as they get into it, there's all these change orders that are done, and they end up spending the same if not more than we would have quoted the job because we included all those change orders in our quote because we recognized early on that it wasn't going to work the way the architect had laid it out, because we worked in that particular industry. For example, if they may want to install conduit over conveyor a piece of equipment that you worked up in, you know there's no more room to put conduit out there. You did the walkthrough, you paid attention, and you knew that that's not [going to] work. You would ask the question of, 'Hey, what about this and this? This isn't [going to] work. Here's an alternate if this needs to be added. And, therefore, increases your bid.' How did they not take that into consideration? There are tricks to the trade. I guess the guy knows to bid it low and then when he gets there, he says, 'Hey, that's an unforeseen condition. We have to do a change order,' and they do a change order. But realistically is it really unforeseen? You're an expert. The owner doesn't know. That's why they hired you. But people purposely withhold information and expertise until they get the job, and then go in and tell them what they should do or not do, and sure enough, no one polices that process. How do you do it? I'd have to ethically go back and say, 'Hey, I'm just going to bid it low, and do a bunch of change orders when I get the job to beat out the next guy.' I lost many of those because I knew too much. I guess I didn't word it the right way in the quote, and my experience is to know enough of that on the quoting exercise to know better." [#17]

- A representative of a majority-owned professional services company stated, "The challenge with marketing our firm in the doer-seller model is making sure that people know our name and having the time to talk to people about what we do, which is unique compared to other consulting firms and getting that time to explain that I think is a challenge." [#19]

- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "At this point, we are just a research organization, although we have technology that is advanced now to the point that we're about to probably go into production with some of that

technology next year. At that point, we have several barriers that we have to overcome, and one of them will be financing of the production start-up. That's going to include things such as facilities, permitting, and marketing beyond military markets." [#21]

- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Marketing in this industry's kind of hard, because the state, the compliance industry as far as corporations, 80 percent of [them] fails within the 1st 2 years. If you last two years and above, then you really don't even need to market yourself." [#22]
- A representative of a majority-owned construction company stated, "Obtaining work and expanding the business in general." [#AV140]
- A representative of a Black American-owned construction company stated, "There are barriers in terms of what is available, and in transparency for where to look for opportunities. How to expand, contact to reach and order to grow." [#AV204]
- A representative of a majority-owned construction company stated, "I think more opportunities than has been, and looking forward to seeing an opportunity to bid on a project." [#AV2010]

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, #8, #11, #12, #19, #21, #22, #23, #AV]. Their comments included:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "For instance. Let's say that we are doing concrete - we also set concrete barriers. We own about 6000 feet of concrete Jersey barrier. And we will quote that installed. And we might have to move it in phase 1 or phase 2 and then remove it. If we go out to the jobsite, we will take a real big Bobcat to move barriers. It's really sometimes beneficial to us that the contractor is there, and he has a Bobcat on-site, to lease his Bobcat from him for the day and put our operator in. Or lease his Bobcat with an operator. That's a typical scenario in the construction industry. It just works well. Subcontractors sometimes rent stuff from the contractor that he has on the site. It helps everybody get the job done quicker and it helps INDOT. You don't have to wait an extra day to get equipment. And plus, with the labor shortages, that can really be beneficial. DBEs aren't allowed to do that. We have to use our own stuff. We can't rent anything. In fact, just in the last year, there's one EEO officer, and I'm not going to name names, who has really come down hard on having lease agreements. The federal highway, under the 49 CFR will allow lease agreements. So, if we want to do some kind of work and it's a small amount of work and we don't have the equipment to do it, we can usually lease it as long as the lease is structured so they are not paid by a pay item because then it becomes a subcontract. But that's been a problem over the last couple years. But it's always been a problem in that we can't - they really watch us like a hawk. And I understand it. They don't want shams going on. But when you have a company like ours that has lots of equipment, lots of assets, we've been doing this for a long time. I don't mean to brag but we've got a great reputation even with INDOT about doing things right. And when they make rules like this that overstep their authority, I think that's a problem I can't think of anything huge except for a lease agreement issue that we are always fighting You do have to watch your contracts. When you get a subcontract with somebody you've never worked with before, you need to read over it because the biggest issue is as subcontractors who want to put

unnecessarily restrictive clauses in there about indemnification. Indemnification means if we are on a job site and we do something wrong that costs money, that costs the contractor money, we've got to pay for it. We agreed to that. But there's some clauses that contractors put in there that if anybody on the job does anything wrong, you are paying for it. And you've got to read those. And what I do is I just take a pencil or pen and line through it and initial it. We're not doing that. You just have to be sure that what you are quoted is what you agreed to in the contract." [#1]

- The owner of a WBE- and DBE-certified construction company stated, "it's not really in INDOT control. It's the prime contractors. I mean, are these subcontracts from prime contractors intimidating? Yeah. When you're talking to prime contractor, sending you a 220-page document of all kinds of legalese, right? And again, like I'm trying to explain it as small business owners, I mean, are we going to pay to have an attorney look through all that? We can't afford that, but that's not an agency problem that's the choice of that prime contractor, if they want to put together a 500-page subcontracts, that's their right, right. They can exclude or include or do whatever they choose because they're the one that was awarded the job. So that I don't know if you guys have authority or if I say you, I don't know that the eight certifying agencies would have any authority over but that is that is intimidating. And I would say, you know, say a potential barrier as far as bidding." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "The state tells us this isn't the way it used to be. Used to if there was 785 feet of silt fence it was on the bid sheet, just like everything else. If it was temporary mulch, it would have the quantity. So, I would bid it. If it was 117 feet of silt fence, I need $2,000.00 to go to Terra Haute and put in that much silt fence, so I would bid it high. Now the state sets those prices. So, the state says, 'We'll give you $2.15 a foot for silt fence.' I went to Sullivan, south of Terra Haute, one time for $189.00. That's not right. For the filter sock, you can usually find what's supposed to be on the bidding sheets, on the plan sheets. Sometimes you look and look before you can find that. If they're telling me that storm water is going to be $33,000.00 for that job, they ought to be able to tell me somewhere that I can find it quickly how much silt fence there is on the whole job, how much filter sock there is on the whole job. That would help a lot. The other thing is those prices are way too low. $2.15 a foot for silt fence when the price has just gone up, it isn't even enough if put in $1,000.00 feet to do $2.15. So, the storm water prices that they set are not competitive with what I would bid. Again, going to Sullivan for 100-some-feet of silt fence is not right. I've complained, I've talked, I've tried to get at them to change. They've increased them a little bit, but not enough. How the state determines how much work we have yet - outstanding work we have is a problem. I don't know if other people have it. Maybe they don't run into the $2.5 million. I can get more if I want to pay for an audit, but again $5,000.00 to $10,000.00, I can't justify that." [#8]
- The Black American owner of a construction company stated, "I wouldn't - I don't know if I would be able to comment on that. I haven't really - I wouldn't know of any unnecessary restrictions, you know? Other than, like I said, history of what I'm saying just before - my history. I don't have history as a business because I just started my business so, I think that if they would go off of history of other jobs that I've done in the past - but even with that being said, I was just a worker on other jobs, not the one actually running the job, managing the job and stuff. I don't necessarily know if I can actually answer that question." [#11]

- The owner of a majority-owned professional services firm stated, "That's the main reason why I don't do public work. You end up with generally the agencies looking for low fee, high expectations, and you end up getting low bid contractors, and it's just not worth it." [#12]
- A representative of a majority-owned professional services company stated, "I wouldn't say that the state of Indiana is difficult, but I would say that their standard contracts have provisions that we would prefer to see updated that often seem overly stringent for the type of service we provide. However, we recognize and understand that it takes an act of the attorney general to update the contracts which kind of leaves us hogtied of either we accept the contract as is or we decline the project which is not usually a desirable alternative for us." [#19]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Well, it doesn't get any worse than what the federal government does, so. Those are highly-restrictive." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Yes. Like I said, they pick which one they don't like, and they disqualify you. Even though you've got two out of the three, if they pick the third one that's not qualified, then they drop you." [#22]
- The owner of a WBE- and DBE-certified construction firm stated, "I would say again because of the area that we're in the minority percentages and I am a person of color, but the minority percentages are tough to obtain and the INDOT project that we are currently on because we're minority we are not allowed to use any of our credits I guess towards our bid. So, you know I bid my hauling work out to other construction companies, but I wasn't allowed to use that as a credit towards my DBE percentage on my job, I bid it as a prime. We've only done three INDOT projects so far in our company's history and we are not allowed to utilize our DBE credits, which essentially handicaps us because we're in a rural area and you know if I can't use my own that I've bid out to other people, I'm not saying we would use the whole thing, but if I bid out work to other construction companies, we should be able to use that as a credit." [#23]
- A representative of a majority-owned construction company stated, "I haven't had any problems at all. I would say that the base price of steel erection should increase, because wages are being increased and steel erection prices have been basically stagnant for quite a few years." [#AV84]

13. Bid processes and criteria. Fourteen interviewees shared comments about the bidding process for public agency work; business owners or managers highlighted its challenges [#1, #2, #3, #8, #10, #11, #12, #20, #24, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "We used to do it because we had a highway letting and everybody went and listen to the bids to be opened. But now it's all online. We used to even be able to watch through video as they opened the bids. Now that doesn't happen. You kind of look at Bid Express or whatever. So those are challenges." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "Personally, I like the old-fashioned way, you know, e-mail me a copy of the RFP and then, I have it, and I can respond, and I can tell where to e-mail it back. It's quick and it's simple. But all these different entities have all these different websites, and you have to learn how to navigate each one individually. And it takes so much time to do that. I can see some firms that would just say, 'I'm not [doing this] forget it. I'm not doing it, you know?' It needs to be simple." [#2]

- The owner of a WBE- and DBE-certified construction company stated, "there's quite a bit of paperwork anyway to do any work. You know, nowadays to do any type of work just to get subcontracts through and all that kind of stuff. So. And, you know, when you're the one person doing it and you don't have somebody else to do it, you know, it's just [you]. You're working all the time to try to get it all done. And so, I'd say that, you know, having the time to go through these huge subcontracts, I'll never forget when I got one. One of my first jobs in the subcontract, they mailed [them]. Back then it was the size of a phone book. It's not like you can afford to call up an attorney to read through it. So, learning how to navigate through those, which is something that they did go over with us." [#3]
- The owner of a WBE- and DBE-certified construction company stated, "Bidding is much easier now than when I started. Used to be we had to order copies of plans and things, and when there were revisions, they would mail them to us; now everything's e-mail or we go online and download. I do all the bidding. When we first started I only did very small jobs, very small, because I didn't know what I was doing, and I didn't want to sink the company. And then as I got onto it more, I'm able to bid different jobs now; I can pretty much know without calling and getting prices on things. The state software usually works well when a lot of people are doing it just before a bid, like it was last week. Sometimes if I'm working on a Sunday night or the computer locks up. But for the most part the state system works well." [#8]
- A representative of a woman-owned professional services company stated, "Most of the time we have a different way of approaching things than contractors. We propose our services to folks and there's not really a bid sense for that." [#10]
- The Black American owner of a construction company stated, "Not necessarily. Well, some bids, they're asking for all of that prequalifying information also. Some contract opportunities that I've been noticing, they're wanting to know your history also. That's the only thing. Anything else, it's pretty straightforward. You have to make sure you have it on their bid documents, for the most part. It's intimidating to go after bigger work, especially when I don't have the funds to do it. I know that I could get manpower. As soon as I get the funds, I know I could get manpower, and get them completed, man but I'm just going out [on] good faith hoping that I could get a bigger contract and get funding from a bank and getting started that way. I don't know." [#11]
- The owner of a majority-owned professional services firm stated, "I don't know how you get around that. Those are usually federal or state guidelines that you can't just work around. I know recently in the last ten years or so they've tried to do more design-build projects, but basically design-build, they're asking for free work to get your foot in the door. And that's a waste of time." [#12]
- A representative of a majority-owned professional services firm stated, "Yeah, I see a lot more requests for qualifications that don't include pricing out there more than I do requests for proposals, where you have to give hard numbers. I think that right now in this market, with the inflationary numbers and the lead times getting on some of the materials and equipment are excessive. And fuel costs too are playing a huge barrier in this too. I mean I know some projects right now that have not gone forward because, especially diesel prices, excavating and things like that, where you're going to need double the amount of money that was typically budgeted right now because gas prices are so high that it's a tough environment to put a hard number on. A lot of times I'm seeing people that were doing requests for qualifications or they're picking a qualified firm and then they are going through the bidding process to make it transparent so that

the owner can see the actual bids and things like that. I think time that you have on bids, especially in this environment right now. I always see if somebody has a 15-day window or so on a bid requirement or on a project; that's a red flag to me. That tells me that they really don't want bids and they already have someone wired in to do the project if they don't allow time. Because in today's market you've got to have time to be able to put these bids together and to put especially competitive bids together because you're going to do your homework on here and be competitive." [#20]

- The owner of a majority-owned construction firm stated, "You got to bid these things right and not have a lot of losing opportunities out there because you will start to lose your financing. There'll be a stipulation in a lot of these contracts where the contractor has to be state qualified with INDOT to do any work over a certain amount. I would think that would be obviously harder for those guys, but we've been certified for years, so we don't have that issue." [#24]
- A representative of a woman-owned construction company stated, "Other than qualifications, have to jump through many hoops, not time to do it. The paperwork is a lot. Our Indiana is thriving." [#AV50]
- A representative of a majority-owned construction company stated, "Often there is not enough time in the bid process, for example, we get a request for work, and they want it done in a week, and we can't do it that quickly, schedule deadlines, more paperwork than private sector the changing economy and technology and regulatory climate." [#AV51]
- A representative of a majority-owned construction company stated, "It is time consuming and actually getting to talk to someone is difficult to do business and the hours and knowledge about the jobs. It is a lot of planning and hoops to go through for a small business and some of it is confusing. It is really hard because there are so many companies coming in from out of state to do business and spending $100000 to do business and it is hard for small businesses to be able to go in and procure business. There is no one there to assist you and so." [#AV70]
- A representative of a majority-owned construction company stated, "Government contracts are so difficult to read, and this probably will not change. Getting work is not a problem but obtaining materials to do work is next to impossible. My Roof Unit lead times are anywhere from 20 weeks to 55 weeks, so even if I get the job, I can't do it." [#AV93]
- A representative of a majority-owned construction company stated, "I have in the past and that [is] why don't work with them, the way the bid jobs." [#AV2026]

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. Eight business owners and managers described their experiences with bid shopping and bid manipulation in the Indiana marketplace [#2, #3, #4, #6, #12, #18, #20, #21]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "Well, you know, we haven't seen a lot of it. I think, sometimes, they'll say, 'Hey, I really want to use you. Can you tighten your numbers a little bit?' And sometimes, that happens." [#2]

- The owner of a WBE- and DBE-certified construction company stated, "That definitely happens. Uhm, there's some states that I work in, you know, and they actually, they don't have to turn in the DBE at the time of bid. So, you can 100% shop around after it's awarded you know the contracts awarded so I know that happens. I know that it happens, you know. People share your price with other people that they're friends with and you know or have been doing business with longer. It definitely happens. It's just the way it is. I've found that once I have somewhat of a relationship with somebody. You can talk to him about it, you know, and they could just tell you straight up. I will. I like this person better. And I'm going to give all my business to them that I can and if you know I need a number two person or they can't be there, then I'll call you. But that takes years of, establishing that relationship." [#3]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "You tell me if this is predatory, because I don't necessarily think it is. Say I submit a quote, and a customer will call me back and say they won't give me specifics, they'll just say can you come down on your number, is there anything you can do, and you know exactly what they're saying. I want the job, so I come down a little bit. I don't know that I would consider that predatory. But yeah, did I get squeezed down because I'm the little guy who wants to be a contract? Absolutely. Would I have done the same thing if I was the bigger guy giving out the contract? Absolutely." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "Do I think prime contractors shop pricing? So, that's basically what you're asking me. The answer is yes. Yeah, like that happens." [#6]
- The owner of a majority-owned professional services firm stated, "Sure. That happens in the private and the public sector. But I think as the architect you just stay out of it, let them fight it out amongst themselves. All you're worried about is the final contract between the owner and the contractor. You can't get involved in all that. You'll just be disappointed." [#12]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "In a similar factor. It's sort of an internal affair with whoever the GC may be. Some of the project managers have sweetheart deals with similar companies, and they try to bump us out and give the work to them. That has happened several times." [#18]
- A representative of a majority-owned professional services firm stated, "Yeah, I've seen it. I don't see it as much now as to what I used to see, especially with the state prisons, when I'd see work being advertised or bid on that. I think there's a lot of manipulation there. A lot. I've personally seen it. It makes me not want to ever go after some of those bids. All I really want is I want a fair shot. That's all I ever want. If you give me a fair shot and I lose it on there, I'm fine with that. I don't like the games that get played and manipulation by some people, and they're especially in the Department of Corrections." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "I have no evidence of any of that. I don't know that a lot of people complained that it seems that some of these procurements were prewired for other people or for somebody already. I'm not sure that is factual or not. That's strictly what some of the rumors that have been floating around for many years that there are some other shenanigans like that where some companies are favored all the time for whatever reason. I have no evidence that that's a fact." [#21]

15. Treatment by primes or customers. Nine business owners and managers described their experiences with treatment by prime contractors or customers during performance of the work was often a challenge [#1, #5, #7, #8, #10, #14, #18, #21, #24]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Oh, yeah. We work for a lot of people but even within the same company you get treated better by some people. You know what I mean. They have rules about how you're supposed to treat yourselves and there's some people who treat you really well. There's some people who don't even in the same company. So I can't point to anybody who treats us poorly all the time, although we learned to manage those people who are always asking for something for free." [#1]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "It's a typical business, you have some contractors who won't call you till a couple of days before they need you and you're like, 'Oh, I didn't know.' Of course, we already told them that he's supposed to give like a week or 14 days advance so we know how to prepare and be on site. Especially in the beginning, there's a relationship that you have to have with them, and there's also a communication thing. I keep telling my prime contractors, 'You guys got to communicate with us. Don't put us behind. Just communicate with us. You got the job, 'Hey, we got this job with you,' when you plan on starting.' You know, so we can kind of have also a schedule knowing that there is this job coming, so we know, okay, we've got maybe five big jobs that will take maybe two or three months of our crew time, so I don't want to go out and bid other jobs that will come in and all of a sudden we don't have the people to do the job." [#5]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "I had one contractor that gave me so as a subcontractor - as a DBE or MBE, WBE subcontractor, you have a dollar amount that they put in their bid that they would give you and come to complete the work. So, you know you have $20,000 they said that they would at least submit $20,000 worth of work. So, I've had one contractor that specifically, that tried to trick me into signing off on a project, Uhm, when they didn't give me the specified amount and they so then when I contacted the EEO officer and I found out that they lied to me -more or less than the meeting- and then they tried to come. So then, they felt like I went above their head, and when they found that out, they withheld a couple of paychecks from me. They withheld money. You know, you get paid on a weekly basis from them. And they withheld money. So I just quit bidding projects with them." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "Most of the people are very appreciative of the work. I've had a lot of compliments, 'You guys do a great job. We really like working with you.' But I understand that price is the determining factor. So no, not really. We do try to accommodate them as soon as they want us, but we can't always do that with the weather. You just can't. And if I get pushed back a day from a job it might have to be the next day. But most people are very understanding. And if I don't - I just don't bid with them again." [#8]\
- A representative of a woman-owned professional services company stated, "Most of our customer are longstanding customers. We've found that most people we work with we maintain a relationship for many years." [#10]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I did work on a large project with a prime, but I did not learn nothing from that prime whatsoever, even though we did a very good job based on what we were supposed to do. And we

actually told them early on when we reviewed the drawings, 'There's a mistake on these drawings, that you have a code issue that is not going to pass.' Well, they didn't listen to us and then we do the work and then they come back and tell us, 'Oh, there's a code issue on this.' Like I told you that a long time ago, but you're telling me I need to do what you tell me to do. Well, I can probably say that, as I said, this is a very, very competitive field, and for an example, I was working with IPS on a project and I was able to get in with them after, gosh, 15 years of trying to get work with them. And I finally got a project with them, and the former person that normally gets all the work for IPS got wind of me getting this project, so they tried to figure out how they can discredit whatever I was doing. And it's very easy to try to discredit someone, especially if the owner doesn't know any different. So, once they got this other consultant onboard, the consultants basically said that I wasn't doing a good job, and which I knew I was doing a good job, but I couldn't prove to them I was doing a good job, because they were listening to the ear of the consultants. And the consultant did that just to get rid of me so they could go back and put in the same company they had been using prior to the new administration. And so of course I'm kicked out after finishing the job, which we did a good job on. But now they're back to using the same majority firm they had been using. And this is IPS for all companies; seems like they would want to use a Black firm. So, things like that you can't go back and try to say I didn't do it, because I'm a Black female, what a person's going to believe is going to believe the negative. They always will believe the negative, so I don't waste my time trying to defend myself on that. I just go to the customer that believes in me and what we do, and we do have a few customers that are repeat clients that always use us, because they know we do good work." [#14]

- The Black American owner of an MBE- and DBE-certified construction firm stated, "Normally, the head of the organization is fine, because he's only concerned about quality work and being able to finance your projects. The rub comes in when you've got a project manager that's trying to make brownie points by abusing your service or your line of work to get you into a default position with the bonding company." [#18]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "We have had an issue where a prime told the customer that we have stolen our technology from them, which was a total lie. This is a big company. If we had the resources, we would had sued them. We couldn't sue them because we couldn't afford to pay the lawyers. It created quite a commotion for us so we prevailed in the end anyway. But this was a prime that told the customer a lie, a flat out lie that we had stolen the technology from them. It would be to have some sort of statutory requirement to prevent companies from making statements like that, all statements, in order to enhance their opportunity to succeed in a pyramid." [#21]
- The owner of a majority-owned construction firm stated, "Yeah, there's definitely challenges with inspectors that you get on the job that's not got some of the necessary experiences to deal with problems on a day to day basis. Some of them just don't know the specs." [#24]

16. Approval of the work by the prime contractor or customer. Five business owner described their experiences getting approvals of the work by the prime contractor or the customer [#2, #14, #22, #24, #25]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "To be honest, it's the INDOT inspectors that, when we first started in and they were knew we were non-union and they didn't want us around, the inspectors were making outlandish statements about the quality

of our work. And they don't even know the regulations at times, and they would say, 'Well, you have to do this.' And we'd say, 'Well, that's not what it says in the regulations. This is what it says.' And they're like, 'Well, you can't argue with me because I'm the inspector, you know?' And we found - you can't quote me on this, but most inspectors are somebody's brother or uncle and it's [how] they get them in, because they know it's a good job. So, they come and they [are] most of them are former union people and they're related to somebody. And they're not very knowledgeable in cases. There are some that are really good, but there are quite a few that are really bad. They would say stuff to us like, 'Well, you're not allowed to wear tennis shoes out on the job site' and the inspector's got tennis shoes on, you know? Or they'll say, 'You can't wear shorts in the heat of the summer because OSHA says you can't wear shorts.' Well, we go and look at the OSHA regulation, doesn't say anything about it unless you're pouring asphalt. We're not pouring asphalt. We can wear shorts. So, they don't know the regulations, but they act like they do, and they give us an evaluation of our work and they can give you plus two, plus one. It goes all the way down to like, negative two, and when we first started, they were giving us a lot of negatives just because they didn't want us around. And they even gave us [negative] report that we caused a backup on I-65 for this one project on the southbound part of the road. We were on the northbound side. We didn't do anything on the southbound side, but they blamed it on us, and everybody believed them, that we had screwed up. And then, they showed like, a wavy line, because one of the first times we painted a line, it came out crooked. Well, we fixed it, you know? We had it removed and we fixed it. They were right. It was wrong. But they put that in front of the prequalification committee and said, 'Look. They can't even paint a line straight.' That's like well, you know, people make mistakes. And as long as you correct them, you shouldn't be held accountable or shouldn't be reprimanded for that. And they just put up this whole thing and it evolved into prequalification committee hearing and we got suspended for like, two months from bidding, when over, I'd say, 70 percent of what they put in that report were lies. And we could prove it, but they'd listen to their inspectors, and they wouldn't listen to us, even though we could prove that we had either fixed something or we'd done it right. It didn't matter. So, they can judge us, but we don't get to judge them. We don't get to do a 360 thing to say, 'This guy doesn't know what he's talking about. He told me to do this, but that's against regulation.' And he said, 'Well, do it anyway.' And we're like, 'No. We're not going to do it. That doesn't meet the regulation.' But we're not allowed to say that so there's no evaluation of their people, I guess, [this] is my point, and there needs to be. But we had a project where it was obvious, we were doing like a walking trail, and we did these specialty applications they're appliqués on the pavement. Well, it was obvious, like the next, you know it was after winter, and it was obvious that the snowplows had ruined [appliqué]. They took a snowplow and plowed the trail and they had ruined the appliqué. And they're like, 'Well, you need to replace that.' And we're like, 'No. We're not going to replace it. That was not our fault and we're not going to replace it.' So, at times, you kind of have to stand up for yourself and say, 'You just don't get stuff for free.' If it's wrong, we fix it, but if it's not our fault and you did something wrong, then you need to take responsibility." [#2]

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I would say I normally do not go after jobs that do not at least have an understanding of architecture. Most of the universities, they have a hired architect that works with architects, because a lot of people do not understand how to work with architects, they don't understand our level of license on what we can and cannot do. I did a project - this is to give you an example - I did a project for IAA, gosh, maybe ten years ago. And they had a civil engineer to work with

us; they didn't have an architect at that time. They asked us to do this service, and it gave us a scope of work and it said something about reviewing a dock. And I asked them what I am to do with the dock, and they just said, 'You're to clean up the dock' and do this and this and this. I said, 'Okay, I understand the scope.' I presented the project and they said later, the project manager threw me under the bus because it was his job and he had to make it seem like I made the error and not him. So, he said that I got the scope wrong and it was supposed to be a new dock. I'm like if it was a new dock I would've hired a civil engineer, number one, and I would've hired a soil consultant, because I would need to know what's underneath the dirt before I can do a dock, because it goes down in the earth and the drainage, so I would need all those consultants. Why would I try to do that with just architecture if I had the scope correct? But anyway, that was a very bad experience and I got thrown under the bus, so I've never gone after another IAA project since then, because they put my name out there as if we made the mistake, and it was easy to believe because people wanted to believe that." [#14]

- The Black American owner of a WBE- and DBE-certified professional services firm stated, "I have a lot of auditors that I've worked with for years, and they come to me when they get an audit letter. Usually when my companies get audit letters, I know the auditor. Then there's the times that we don't. I think one thing to be knowledgeable and to be open about is sometimes when you get the guys that are doing the major audits, they're so dismissive of us and so disrespectful to us, it makes the owner second-guess us. It's happened so many times." [#22]
- The owner of a majority-owned construction firm stated, "It can be slow, depending on inspectors. Some are good, some are bad." [#24]
- A representative of a majority-owned construction firm stated, "Some people don't have good expectation levels, so trying to hold up to their expectation levels sometimes is a challenge." [#25]

17. Delayed payment, lack of payment, or other payment issues. Seventeen business owners and managers described their experiences with late or delayed payments, noting how timely payment was often a challenge for small firms [#1, #2, #3, #4, #6, #8, #10, #11, #12, #13, #14, #17, #20, #21, #24, #25, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Funding is a problem but the bigger problem is collecting. And one of those problems, I think this isn't just our problem, it's everybody's problem. Let's say we do [a job]. We did [the] job in 2020 on I-65 near Lafayette. It had six or eight bridges. The contractor was an Indiana contractor. We were asked to do the work that we contracted for but then as the job progresses, they might have changes in the scope of work. They say we are going to decide to tear this bridge down but we've got traffic on one side of it. So we want a new traffic control plan and they will take a change order. So they will give you an email and say we want a price for this change order. You give them the price and they will pass it on to the state and the state will say that's approved, do it. It's going to make the job go faster or whatever, it's going to be safer, whatever. So then let's say the change order was $20,000. And time is of the essence. They have a need to get it done quickly. So you invest people and you invest equipment and you invest materials, temporary markings, permanent markings. You do the work and then you send a bill. Well, this job we just did in 2020, we just got paid for it last week. It's a significant barrier. Right now about 25 percent of our accounts receivable are over 120 days. I look at the stuff every day even

though I'm on vacation. I can login virtually to my accounting system at the office. And my people are still there working and I'm talking to them every day. But when I look at the accounts receivable, it's horrid. No regular company, let's say a printing company or a restaurant or anybody could exist with the kind of pay system that we have to deal with. We have to build that into our price which increases the prices for INDOT. It increases the difficulty, and you don't want to be beating on your customers all the time because it's a very small market. We've got 150 or so customers and we've got about 25 customers that account for 80 percent of our work. You can't be beating on them all the time to get paid. And they know the issues, too. On that particular job, even though INDOT approved it, it still required a change order. Right now, INDOT is so shorthanded and there's so much work going on that a change order paperwork goes to the bottom of the pile on a project manager/engineer's desk. So they usually don't do change orders right away. It might take them 90 days just to write the change order and then it has to go up the chain. Depending on how much the change order is for, it has to go up the chain of demand in INDOT through the area engineers, sometimes to the district engineer. And then maybe even the central office to get approved. Then it comes back down and then they can create an estimate. And then the estimate gets paid in 30 to 60 days. They say 35 days but that's not always true. And then the contractor has to pay you within 10 days [unintelligible] prompt payment. So if you think about that, they can get up past six months real quick. And that's a big problem. Big problem." [#1]

- The owner of a WBE- and DBE-certified construction company stated, "Supposedly, they have to pay us within a certain time, but we've had instances where the INDOT inspectors are late getting their paperwork in so, it's from the time they get their paperwork, the prime has so long to pay us afterwards. But we've had instances where the inspectors are behind and they don't get it in and so, it goes beyond 60 days, 90 days. There were quite a few times. I don't know that that's happened lately, but in the past, what, five years, that had happened numerous times. we were shorted $25,000.00 and the prime filed bankruptcy so they wouldn't have to pay, and they didn't have to pay us. So, we lost $25,000.00 that really, it should have, I mean, the client should have known, and they should have done a dual check and they didn't. So, we were left holding the bag." [#2]

- The owner of a WBE- and DBE-certified construction company stated, "I know there's so many customers out there that are supposed to pay you in a timely manner and they don't. But there's no time to follow up on that I even was doing work for a city up north and … they had to pay you by a certain time and they don't. … What are you supposed to say? Are you supposed to say, oh, they didn't pay me on time and then risk never working for that customer again, you know? … There's only a handful of customers that you've really worked for. So, that [is] hard. It would be nice if you had somebody they could call on your receivables all the time. I've come up with a spreadsheet that … I think is easy to send … instead of just sending a statement that says you owe $5000, I sent this statement but I also send back up with it and says that combines all five or [so] invoices. … It'll have a line item for each item of the whole project that you've worked on and here's how much you've paid us for that item in here, … here's how much has remained open so that you can try to speed up that conversation. Not just. Hey, you owe me $5000. And they're like, well, you know, nobody in this industry has time anyway. So, I don't have time to look into why your $5000 or what items you might have been short, … So that's one thing that I've done to try to speed that process up. … Don't put it on the DBE to say yes, I've been paid on time. Put it on the prime to say hey, send me a copy of the check that you sent them. … Federal

Highway requires prompt payment, … instead of putting it on the DBE to say yes, we got paid when we really didn't get paid. But you don't want to get the get into it with the prime contractor, … You don't know if you're being discriminated against by being paid because you don't know [if] your competitors are getting paid. But at the same point in time, you know, there are rules as to how quick you should be paid on certain things. And there are a lot of customers that put out. … Oh well, you didn't sign this one piece of paper on page. And so that's why we didn't pay. You hear this, that and the other. And it just seems like they're trying to hold onto your money as long as they can [can]. But normally you have a list of the people that work for you and you know who pay you well and you know the ones that don't. And it just seems like that's always the case. He signs, which is what's called a DBE-3. I will not sign those. You know, we have to run an accounting report and the lady who does all my accounting. She only works three days a week. So, if she's not here, I will not send that back. That DBE-3 report until I get proof that we've been paid." [#3]

- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "It has not been a barrier in as far as customers have generally paid us on time. It has been a barrier in as far as you get back to the scarcity of materials issue, and the fact that everybody was ordering extra materials early, earlier than they needed them to try to get ahead of the next price increase and lock in your margins. It ended up being a problem last year, just because we were ordering raw materials early and my supplier wants to get paid within 30 days. We hold it for 30 days before we deliver it to the customer, and then the customer has 30 days to pay us. So, just timing of receiving payments ended up being an issue, because I was already late paying my suppliers. So, that has been an issue. But just sort of generally, our terms are 30 days' net, and most of our customers understand and adhere to that this might come under the getting paid, but for these much smaller companies, and minority companies generally fall in that category, the whole concept of retainage is kind of devastating. We barely have more than 10 percent profit in these jobs, so if they withhold the final 10 percent, it just gets painful for some of these trade guys. The other concept that's in a lot of contracts is that the subs don't get paid until the general gets paid by the owner. Maybe not as big of a deal for an INDOT job, but as you can imagine, if the owner is having some money troubles and the general doesn't get paid on time, it just [the] issue rolls downhill, it becomes a bigger and bigger problem for the next guy, because they just have that much less money." [#4]

- The owner of a WBE- and DBE-certified construction company stated, "I would say there are some contractors that pay better than others. Timely payment … [is] all in the eye of the beholder. I mean, I'd love to be paid everything in 30 days, but that's not the nature of the work. It's when they get paid on the billing side. I'm still waiting on retainage from … last year. But I mean that's how that works, so. You have to be prepared for that up front. A lot of people aren't. I mean, that's certainly not timely. It's just the way construction is." [#6]

- The owner of a WBE- and DBE-certified construction company stated, "I have a few people that are really slow [to] pay, and I found out that the state paid them, and they said they hadn't been paid. I wish the state would be able to show us on their website, on Access, on the ITAP site when the state pays the prime. Because some of these people are using our money for a month or two. They're supposed to pay us within ten days after they are paid by the state. It's hard for me to find out when the state pays them. On ITAP. It's on the state's website. … In fact, I'll send the e-mail and say, 'Such and such submitted that they paid you,' But we're not able to find out. If

I can find out that an estimate was approved and payment was pending or made or whatever, but it doesn't give a date that the prime actually got the money." [#8]

- A representative of a woman-owned professional services company stated, "Most of your longstanding customers you understand their pay schedule. There's always [something] and it doesn't matter whether you're in the professional world or the contractor world, yes, we always have some clients that drag their feet a little bit." [#10]
- The Black American owner of a construction company stated, "People, I'm having problems getting payment from different general or prime contractors, I guess, and then, the different customers that I've had to deal with just had different issues. But they don't understand. It seems like a couple of customers don't understand that I've got money invested into this business, a lot of money. My house is on the line. I can't come out and do something for $50.00. It's not beneficial to my business. I'm not coming out, going to spend 5 hours of my time for $50.00 or $100.00. No. My time is valuable. You would have to pay me just like you would have to pay any of these other bigger white-owned business, you know what I mean? Just because I'm a minority-owned business doesn't mean that you can pay me less and play me on my money, for lack of better words, you know? I've had some issues with that and just being taken serious as a business and not just a side electrician, you know? I'm not doing this on the side. This is my full-time job. This is what I'm doing to feed my family." [#11]
- The owner of a majority-owned professional services firm stated, "Yeah, timely payment [is] an issue. That was one of the problems I had when we did the public work." [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "That depends on the job itself sometimes. It's not necessarily the prime issue, but we have had issues with the primes getting liens put against them and that delays payment. I'd say half and half. Not too sure, because they're not going to pay us unless they've been paid so, it's hard one on that one. I haven't really seen too many issues. Maybe 10 percent where maybe they've been paid and then didn't pay us. But a lot of the times, it's just a payment issue from the customer, the owner itself." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Oh, definitely. Especially when you're dealing with primes, if you're under prime contractors. I don't want this to sound so negative, but you're asking me questions that I can only give you the honest truth, because I don't normally share the negative parts of architecture because I do 100-percent love what I do. And I know there's always a client and a situation that makes me enjoy what I do every day and there are clients that make me feel good, or the firm feel very good about what we do. But you're asking me these questions, so I figure I have to answer them. Yes, I've worked with a prime that now I have a bad relationship with them, because they held the payment. I was working on a job and they didn't pay me for 120 days. And now mindful that I am a sub on that project, I'm only 20-percent of that project, so I've got two people on that project for 120 days and I'm paying them biweekly, and they didn't pay me for 120 days. And I asked them to please consider paying us, because 120 days is a little bit too much. And they said, well, they could buy my firm. I'm like, 'I don't want to sell my firm. I'm just asking you to pay me.' To make a long story short, whatever project they're ever on, they always make sure that I am taken off the list of getting the RFP/RFQ. And they are a very powerful firm. So that did hurt a little bit, but it is what it is. I mean damned if I do, damned if I don't on that situation. So, I demanded that

they pay me, and I called my attorney and I had them call them, and so I got paid. But of course, they blackballed me on everything else." [#14]

- The Black American owner of an MBE- and DBE-certified construction firm stated, "Once in a while. The prime says the owner wants this and that. They're waiting for a lump sum payment for the whole project to pay me my portion. My portion is usually always small, so I always wonder why. It is what it is. Most of the jobs are net 30. Some of them are net 45 once you finish. Sometimes that's hard to carry as a smaller guy. By the time I paid my guys or the concrete company to come cut the concrete or locate a company to locate the concrete company to cut the concrete. Then the vac truck, which is 225 an hour, to vac out the dirt, and then expose the pipe, and then the mechanical company to repair the pipe. Then for us to dump the dirt back into it, that we rebar and pour the concrete back and get it done. By the time it's all said and done, there's a good amount of money for net 45 to wait for payment. And a lot of the contracts, if you set up accounts, like concrete, maybe a net 30. The concrete cutter may be a net 30, and everybody is net 30 when they finish the job. As a small guy, you're in the field working. A lot of times, I'm slow turning in my paperwork. Once I turn it in, you're like, now I should be paid in 45 days. Then you find out they say, well, we're waiting on this and that. It turns into 60 days. You're thinking, man, I'm about to run out of money. I've paid all my manpower, all like subcontractors because if you don't pay my subs, then they won't respond to me. I'm already a small guy as it is, and unless you develop the relationship with them and they trust you, then they'll be back. I pay all my subs within the net 30 because I don't run my bank account down to zero. Then you're taking on new jobs that you have to buy materials for, and some of them require you to pay, because you're new. I don't know if it's necessarily because you're an MBE. I think just because they don't have any history with you, they require you to pay up front. The material may not come in for three to four weeks. Then you're out $20,000.00-$30,000.00 on a building that was made in California that has to be paid in full or 50 percent before production is completed. The rest of it before it ships. You're thinking, I'm out 30 grand because the water main job. As a small company, you just go out and you can get small lines of credit and float it and do all that, which makes it more challenging for you to operate when primes hold back money. I don't think anyone's done it. Maybe I'm naïve, but it doesn't feel like they've done it on purpose. It just seems like the project itself, they say, 'Well, we haven't been paid from the owner yet.' Finally, they pay me. There's only been a handful, one or two times that I got into some serious concern. I was owed almost $100,000.00, and I didn't know if it was coming. You're trying to figure out how you're going to survive. Finally, they paid me. I'm like thank God. I just need to not let myself get stretched out like that. You do that, you turn down work because you can't financially finance the project. The subs are the ones paying for the job. The prime is not. The prime is not the one ordering the material and paying all that stuff. You can do it - some jobs allow you to do a partial payment. Once you get there, it's mobilization. Here's my 100,000.00. I'll bill you for 10,000 for getting everything to the job. I'm going to order the material and deliver it to the jobsite, and I'm going to bill you for it. Some of them allow you to do that, but there's been a couple of times it's happened, but I don't think it was targeted delays just to make you go under and do something. A lot of it was just self-inflicted that I wasn't aware of their timelines, and the hang-ups, and I pay people too fast. I [should] have waited for it, but I didn't want the [sub-contractors] to go through what I was going through, and I had the money at the time. I just paid them. Then you find out you probably shouldn't have done that. Now I haven't been paid. But the industry is common to operate like that. There's a lot of things that I take from other business experience that I have and other companies that I own that I bring to this

industry. I don't understand why it operates that low. Why it's always the lowest bidder getting the job. You just have to drop your price and hope you get the job and work off of the lowest price. And if you're that efficient, then you can make money off of it. Great. Usually, they're cutting corners somewhere or using material that isn't right. I found that from doing water mains when they clamped the pipe instead of replacing it. You uncover it, and you're like why did they do that? Or you're fixing a repair that was something that was done five years ago. You're like, well, lowest bidder. That's what you get. No one is watching it, so you wash out the concrete over here instead of getting a dumpster and all this kind of stuff. I called it 'Integrity Construction' because that's how I envision running it like my other companies. But man, it's just unbelievable the amount of stuff that goes on in this industry. It's a question to scratch your head about. I haven't answered your question. No, I haven't really felt I was targeted with any delayed payment. What really stuck me I think was just the situation we were in, in that job. They weren't paying the bills based off the prime doing his job." [#17]

- A representative of a majority-owned professional services firm stated, "You know, that is something that I think in a lot of cases has gotten better over the years. But you still have some that are slow paying. It's a crapshoot. Again, I think it's communication and making sure that your customer knows that specific invoice is coming in. And if you could help walk through that with your accounts payable people to make sure that it gets paid if they have any questions. I think it all comes down to communication." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "We have not run into that so much, but we know of other companies that are subcontracting through primes that are running into that, or the firm typically is a net 30 payment type of thing or net ten even. But some of these big companies are going to net 90. In [fact], they're using the small businesses who are their suppliers as their bankers. They get a lot of float for 90 days. That increases the cost of the business because we now have borrowed money to cover that cost until we get paid." [#21]
- The owner of a majority-owned construction firm stated, "This all comes down to the people that's running the jobs. You got some jobs that you got issues and you put an inspector on it. You work with INDOT on it, or the city of Indianapolis, and some jobs go a little more smoothly than others. You've got budget constraints. You start having issues on jobs, something wasn't engineered right or so forth. You start having budget issues that you [got to] work out and that tends to draw out long term." [#24]
- A representative of a majority-owned construction firm stated, "Once in a while, we hear of a hold on a customer due to finances, but I don't know how prevalent that is." [#25]
- A representative of a majority-owned construction company stated, "It's not so much the lack of opportunities but it's how you utilize those opportunities without getting swallowed up by the prime contractor that call you out for a job and then they don't pay you. It's not just lack of money to go to the next level, there is also now a lack of qualified employees, and the lack of expertise needed to do jobs. Also, to get the bigger/higher paying jobs, you have to unionize. You can go out of business trying to [expand]." [#AV68]

18. Size of contracts. Ten interviewees described the size of available contracts as challenging. [#2, #5, #9, #13, #23, #24, #25, #AV] For example:

- The owner of a WBE- and DBE-certified construction company stated, "For a smaller company, it's harder to do a large-scale project unless it's phased. But many times, it is phased so, it's not difficult. But we'll be going through the plans and making sure that we've got the capacity to do it before we bid it. And we have, over time, taken on larger and larger scale." [#2]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "I don't try to take a job that we were capable of doing, but we've got to make sure that in-house too, we can handle it with our schedule and everything. Is that a hinder? It's not. It's doing a hinder because we don't have the people or the capacity to the job; that's the problem. We have the intelligence and everything to do it, but we don't have enough people to do it." [#5]
- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "Oh, the size of the company, you know, you have to be pretty big to do something. Yeah, some the size." [#9]
- The Black American owner of an MBE-certified goods and services firm stated, "I'd say contract size and scope's always a challenge. I'd like to grow into bigger contracts and definitely, I'd like opportunities afforded me to be able to grow into the bigger contracts because staying where I'm at is not viable for the long term." [#13]
- The owner of a WBE- and DBE-certified construction firm stated, "I think that really prevents a lot of smaller companies from doing work maybe in a local park or a local, I guess, DNR agency, because - they want you to do these larger jobs and a smaller company may not do that much work, you know that many dollars of work. I definitely think that that prevents smaller companies from working on those projects. You essentially just lose, weed out and you're going to pay more to get the job done, because you're going to have large company come do it. Well, that would go back to your prequel and your aggregate numbers, so you can only bid up to what they prequalified you for. I personally haven't had any issues with that, but I know that other companies in our industry have had issues with that." [#23]
- The owner of a majority-owned construction firm stated, "That and a lot of times, you'll still have some time constraints. We're into June right now and you're seeing jobs coming out to bid that they still want done this year. That's a big challenge and yes, I only have so much capacity. I look at schedules. I look at volume of work and that's how I [got to] make my decision on whether I'm [going to] bid something or not." [#24]
- A representative of a majority-owned construction firm stated, "Well, yeah. When you're doing something private-sector, it's going to be somebody's putting a fence around their inground pool, or they're fencing in their yard or putting deck railing on. And when you start to go out to the public sector instead, then that's [going to] be larger contracts with larger demands." [#25]
- A representative of a Black American-owned construction company stated, "The only barrier is the size of the contracts offered, which are typically too small to pursue. I think it's a great place to do business. In our industry, we're related to infrastructure and there's a market now that is very good and looks like it's good for the next several years. There's funding that's been provided by the Federal Government." [#AV43]
- A representative of a woman-owned construction company stated, "Flow steady, but it would be nicer if I had a wish list to have contracts that are longer duration, larger [and] repeat work." [#AV184]

- A representative of a Black American-owned goods and services company stated, "Finding bigger contracts." [#AV2021]

19. Bookkeeping, estimating, and other technical skills. Eight interviewees discussed the challenges back-office work such as bookkeeping, estimating, and other technical skills present [#2, #3, #6, #8, #11, #12, #13, #25]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "Right now, we are limited. INDOT sets a limit to how much work you can have under contract at any one time, and right now, our limit is $2 million, unless we go to get an audit. If we have an audit, then we can go for more. So, this year is the first year that we're going to pay for an audit, because there's a big project coming up that we think we may get, and it may throw us over the limit. Now, the important thing about that is, several years ago, I went to the legislature and my senator. I went and I did a lot of research, because up until they changed it, we were only allowed to do $300,000.00 in contracts at any one time. So, if we had work, signed work, signed contracts for $300,000.00 and we got another bid that wasn't even going to start for 6 months, we could not sign that contract. So, I really felt that was really too limiting, and especially for small companies. When we were first starting out, we [needed] a higher limit. And so, I did research, and I found out what the other states limits were, and I went in and talked to the transportation committee, and I said, 'Look, you know, not only are you limiting the growth of small businesses, you know, you're not getting good pricing and you're not competitive with the other states. And I live in Indiana. I want to do business in Indiana. I don't want to go to Kentucky or Ohio or somewhere else, even though the limits are higher. I want [to work in Indiana], my home is here.' And they actually ended up changing the regulations and they raised it. But they didn't just raise it for small business; they raised it overall because of what I had submitted to them. So, I mean, they realized that 'Hey. Why shouldn't we raise it? There's more and more work going on. It's better for small businesses. There's no harm in it.' Because the only criteria was the dollar amount. It had nothing to do with the competency of the company. And they said, 'Well, it has to do with safety.' And I said, 'Well, that's funny, because when we fill out our application, you guys don't even ask about our safety record. So, how can you say it's about safety? It's all about money and it's all about keeping small businesses down.' And they said, 'Hmm.' And they voted to change it. And so, the legislature changed it." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "You know, there was just the flat-out cost of you know of paying to get an audit done. I mean it's 10s of thousands of dollars and when you're starting you need every penny you have, you know. So that was a big one for me." [#3]
- The owner of a WBE- and DBE-certified construction company stated, "I mean there's so many small business owners that are potentially DBE or WBE or DBE. I mean they're running their business out of a checkbook. Yes, they might have financials, you know, or they might take their checkbooks to the CPA at the end of the year. But to have a balance sheet and income statement and you know, some of those types of things, they don't have that put together, you know, but that's what's going to be needed." [#6]
- The owner of a WBE- and DBE-certified construction company stated, "The problem I have is with the financial report that we're required to do for the $2.5 million. It takes a lot of time. The form expires on April 30th. I'm trying to get all of that work done for the state, get my tax

returns done. It has to be submitted personal and business to the state at the same time. Then it takes a while for them to process everybody's returns or reports. So that can be a problem. I also would like to know how much I have that the state says I have of that $2.5 million. It's hard to find somebody that will give me the report and let me know. Last year we were only approved for $1 million, and then they increased it, thank goodness, to $2.5 million with a financial review, not an audit. An audit costs $5,000.00 to $10,000.00 and it's hard to find someone to even do that. Last year the state said I was over $1 million, and I said, 'No, I keep track of this. I take it off when the job is done.' Well, the state doesn't take it off until sometimes three years after the job is done. That caused a lot of problems, but finally we were approved, and got the $2.5 million. Everything was okay; it just hadn't been officially rubberstamped. The state's financial review with INDOT is a big thing, takes a lot of time. That's one of my biggest problems. Well, they told me that the legislature has the date set of April 30th for everybody. Everybody on the state that has a review, and I think it's even all the big companies. If the state spread them out over the year, like used to when our license plates were all due at a certain time. Well now, depending on your last name, that's when yours is due. So, they're busier at the state getting these processed by April 30th. If the state would let them go throughout the year, at least through October or something and have different ending dates, that would help immensely. But to have them processing them; plus, it takes me a long time. I had six certified payroll reports for last week, which means we did two things several different days. When you have this much, we might work with, maybe we would do 30 different jobs in the year. When I have to go through and key all this in it takes me a long time. I might have 150 rows on my spreadsheet and it's very labor intensive. So that's a real bottleneck and causes me a lot of problems." [#8]

- The Black American owner of a construction company stated, "Just not knowing because I got with an accountant. They got me set up on QuickBooks and there were some things that I should have known before, and I had to catch up on everything when it was time to do taxes. And it wasn't the accountant's fault. She just assumed that I knew. But I didn't know. But anyway, yes, it was just the bookkeeping portion. I mean, really, the QuickBooks takes care of most of it, but there were some different things that I needed to do a little differently. And then, estimating and bidding jobs. I've had to purchase bidding software and estimating software. With that software, it's pretty simple. It's just some of the bigger jobs, it's time consuming, and that's why I can't put too many in of the bigger jobs, because they're so time consuming because I still have to work and actually put in work to bring in money to pay for my things. So, it's just a time thing. There's no easy button." [#11]

- The owner of a majority-owned professional services firm stated, "No. I don't see that as a barrier. Putting together a proposal is the easy part. … in my 35 years as an architect the biggest mistake I see made over and over and over again is not hiring a contractor when you hire the architect. You need somebody looking over our shoulder budgeting and scheduling. And when you do traditional design-bid-build, and you have to take the low bidder you don't get that. You don't know what the cost is until bid day. And that's the worst time to find out. I don't know how you solve that." [#12]

- The Black American owner of an MBE-certified goods and services firm stated, "I mean, they're necessary. I know some businesses may need those more than others, just depending on the expertise of who you have hired. For me, I don't necessarily need that help. Bidding, obviously, is going to be one of those things where it's going to depend on your expertise in the field. If you're bidding into a new field, getting a little assistance around that would be helpful. But if it's an

experience field like, for us, painting is? We're pretty confident the painting arena to be competitive." [#13]

20. Networking. Eleven interviewees discussed barriers experienced when networking and building relationships [#1, #3, #4, #6, #13, #14, #16, #19, #20, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "We now belong to all of the pertinent trade associations; Indiana Constructors, ATSSA, which is a barricade association. We've got about 30 companies in that group in Indiana, about 3000 worldwide. So being connected to your customer groups and your other industry groups is important. Without that kind of network, it's difficult. You need to be able to meet your customers face-to-face. That's another problem that's arisen since we had the Internet. I work for people for years and never meet them. And I think in our industry, meeting people face-to-face is critical. You just have to be able to. If it means driving to Columbus for a two hour meeting from Lafayette, you've got to do it. It's just nature of the business. So, I think that can be a roadblock. The Internet, as great as it is for some things, it can also hurt you. You just don't meet people like you use to. … The biggest thing we do is build relationships. That's the key. If there's a paving contractor next door to you, you've got to go over and knock on the door and meet them at an opportune time. You can't go do it the day before a highway letting. You've got to make sure you do it when they've got time to meet you. You got to belong to some associations where you go to joint committees. You sit on committees with people who are potential contractors, and they meet you face-to-face. And that's really positive. That really helps them know who you are and what you're about. I think relationship building is the key in this business. You've got to build some relationships with key players. That will really [be] helpful because they want to use you. They really do. It's just they don't know you. And that's the downside of the Internet. You can work for people for years and do work for them for years and never meet them unless you are active. You got to go find them." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "One of the hardest things of being a startup [is] not having connections." [#3]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "2020, I couldn't get out of the office. I was stuck here, brand-new owner, didn't have a chance to go shake hands and kiss babies because we were all quarantined to stay in the office." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "Networking with contractors to get work can be difficult … developing relationships with prime contractors." [#6]
- The Black American owner of an MBE-certified goods and services firm stated, "I definitely try to attend as many networking events as possible." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "When you're dealing with professional services and the fees that we can acquire, politics will always be a part of it. Actually, I was on a conference call earlier this morning and that's what my mentor was telling me, that I have to get back into the politics, I've got to get back to the relationships with the new politicians in order to get work, because it is extremely political. I think it's for the industry as a whole and those that have a better political presence are getting the work." [#14]

- The Black American owner of an MBE-certified professional services firm stated, "I sent out a mailer when I first started years ago. Other than that, I had some business cards put together. I don't hand them out cold. When I get calls on these different jobs to look at something or the other, I hand out the card in that meeting. If I go to a seminar or if I go to a lecture, I'll hand cards out at events like that. I would say from my mailer, which I did only once, but mostly right now it's just my business cards whenever I have an open event." [#16]
- A representative of a majority-owned professional services company stated, "Promoting inclusiveness in relationships for the market is a good thing. We're the type of firm that we don't really mind working for anybody as long as it's a mutually beneficial relationship. We'll work with anybody, and work for anybody. Having that inclusive nature to focus on providing good work is what we prefer." [#19]
- A representative of a majority-owned professional services firm stated, "I think when I first started off I did [have issues]. But it was really my lack of experience in how to go about it I think that was my own fault rather than any of the other organizations." [#20]
- A representative of a Black American-owned construction company stated, "It's just very difficult to be recognized because we don't get the volume of work as the larger firms, so it's hard to get an answer for our RFP (Request for Proposals). It's difficult to team with prime firms on RFP because they'd rather use an engineer versus a like firm. They'd rather pick the engineers over the architects. And we just don't get the opportunity to submit the bids. We're not in that network which you need to be in to receive projects, because we don't have the exposure of the larger-type of firms. So, I'm talking about competing with larger architectural firms and larger engineering firms. We've just never been successful in 26 years with INDOT. In my 26 years, I've tried to mentor other female, African-American architects and they all have failed in that their companies could not sustain themselves because they couldn't get the work to keep their business afloat. And at this point, I'm the only [one]." [#AV69]
- A representative of a woman-owned construction company stated, "It is very difficult. It depends on the relationships you've had with clients you've had in the past. It will be slim pickings until you develop those relationships and trust you need to get the jobs done." [#AV165]

21. Electronic bidding and online registration with public agencies. Seven business owners and representatives discussed online registration and electronic bidding with public agencies [#2, #9, #11, #12, #20, #21, #AV]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "I would suggest … they do some kind of a workshop with all of the XBEs and train them on how to navigate their website. Because the first time I got on PlanetBids, it took me to some other PlanetBids and I registered there and … you have to go through like 200 projects to even find Indianapolis's project and then there was no information on it, but it was the wrong PlanetBids. It wasn't the IAA PlanetBids. So, I would say let's do a workshop with the XBEs [and] show them how to navigate the system, … how to find stuff, [and] how to respond." [#2]
- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "That's pretty expensive." [#9]
- The Black American owner of a construction company stated, "It's just knowing the right ones and having the money to pay for them." [#11]

- The owner of a majority-owned professional services firm stated, "We all have access to the right technology. It's just being able to pay for it." [#12]
- A representative of a majority-owned professional services firm stated, "You know, that's interesting. I don't see it a lot in the marketplace that I'm in, although I've heard that it does. But sometimes there's some questions in regard to at least some of it that I hear. I don't have any experience with it at all. Sometimes those bids can be changed or any of this kind of stuff. There's always … theories … out there about who gets the work and who doesn't." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "No, … we haven't seen anywhere. In fact, that is strictly how that the federal government is doing business nowadays. Everything we do with them is electronic. There's no other means to send in an RFP or see a solicitation. Everything's done electronically." [#21]
- A representative of a majority-owned construction company stated, "They just say we're not logged into the system. We don't know what that means, as we've sold multiple products to them." [#AV38]

22. Barriers through the life of the contract. One interviewees discussed barriers experienced throughout the life of their contracts [#AV]. For example:

- A representative of a majority-owned construction company stated, "Problems getting resolutions, sitting for 3 or 4 months as subconsultant doing work. Project needs to go forward but takes 6 months or more to get change order, and after 6 months then submit to prime consultant. Delays in contracting approvals hurts labor cost until contract is done." [#AV48]

23. Size of firm. Fifteen interviewees mentioned barriers experienced because of the size of their company [#3, #4, #6, #11, #17, #21, #23, #AV]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "I feel like, you know, most DBEs are, you know me included… We start out and were so small and we're so crunched for money, and you're so crunched for time and you're so crunched, like trying to do it all. You know I was I when I first started, I was doing, payroll, everything, you know everything. Everything. Because you couldn't afford to hire anybody to do anything. And so, you were trying to do that, do all the paperwork. I mean, I remember I'd leave here crying, you know, most nights just because it was so overwhelming. You were overwhelmed with the amount of time that it took." [#3]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "I do think that at times, we actually are not able to be as competitive as we would like to be, but sometimes, we'll get the job anyway because we are a minority, and because there are minority requirements. However, what I would love to have happen in a perfect world is that we're able to compete on our own too, MBE notwithstanding. So, I do think, again, being a small guy and the fact that we sell a commodity, we need to scale up if we're going to ultimately be competitive on our own, too, as opposed to just being competitive or a DBE, which I feel is about where we are right now." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "It's usually in my mind what it appears to be is just the larger projects, right? I mean, the massive projects that not everybody, as far as DBEs, have the wherewithal to bid on going back to your first question, right

of you know what kind of capacity or what kind of level do you size, what kind of size projects do we bid on, you know? Thankfully, we're at a size that you know, we can bid on those larger projects. But you know I utilize a lot of DBEs to assist us on those projects because they themselves can't go after the work themselves with that prime if that makes sense. They just they would they, I guess I'm speaking for the prime, but the prime wouldn't consider them because they don't have the equipment or the employees or the manpower to be a major player on it, so you know I use, I use those types of folks, but you know it does sadden me a little bit in that on the I I'm not as large on the milling side and you know there are probably projects that I get overlooked on because you know I don't have 9 mills right? I only have 3 and you know they're smaller projects that I am you know might be a great fit for but those are not the projects that have networking events." [#6]

- The Black American owner of a construction company stated, "Most of those prime contractors are not reaching out to me because they don't have my history of bigger work and different things. So, it's a no-win situation." [#11]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "Being a small company, you have to have resources to go after that stuff and do it." [#17]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Smaller businesses are typically not considered for where you have large production possibilities. The reason is that they don't think that you can do the job because you're small. You develop a technology, and you own the rights to the technology, but then they don't want to let you be the producer of that hardware using that technology. They prefer that a big prime do that. They pretty much push you to have a shotgun marriage with a prime to go into production." [#21]
- The owner of a WBE- and DBE-certified construction firm stated, "The challenge has been the big construction companies that are huge trying to put their thumb on you per se. We've got one locally that is just a giant in the industry, and they may bid jobs under cost so that we don't get them." [#23]
- A representative of a woman-owned construction company stated, "We're a relatively small company, so sometimes the contract language is not really for a small consulting firm, as opposed to a larger construction company." [AV8]
- A representative of a majority-owned construction company stated, "We have had trouble getting more opportunities for government and commercial jobs—they tend to go with the big companies with lots of resources that leave us smaller and double minority companies out." [AV25]
- A representative of a Black American-owned construction company stated, "It's just very difficult to be recognized because we don't get the volume of work as the larger firms, so it's hard to get an answer for our RFP (Request for Proposals). It's difficult to team with prime firms on RFP because they'd rather use an engineer versus a like firm. They'd rather pick the engineers over the architects. And we just don't get the opportunity to submit the bids. We're not in that network which you need to be in to receive projects, because we don't have the exposure of the larger type of firms. So, I'm talking about competing with larger architectural firms and larger engineering firms. We've just never been successful in 26 years with INDOT. In my 26 years, I've tried to mentor other female, African American architects and they all have

failed in that their companies could not sustain themselves because they couldn't get the work to keep their business afloat. And at this point, I'm the only [one]." [#AV69]

- A representative of a majority-owned construction company stated, "It is really hard because there are so many companies coming in from out of state to do business and spending $100,000 to do business, and it is hard for small businesses to be able to go in and procure business. There is no one there to assist you." [#AV70]
- A representative of a woman-owned construction company stated, "INDOT deletes the scope of work for disadvantaged businesses on a lot of the leadings. So, my work gets deleted because the lead engineer on the job deletes the pay item. It's because they have their own computers, and the engineer wants to use his own computer instead of the pay item computer or the engineer just doesn't feel like paying you. And INDOT hires consultants and uses their own engineers, so they limit what the pay item is. They put restrictions on the pay items. As far as IAA, I've worked out there for 30 years and can't seem to get a job out there as a small firm directly for the IAA. They just don't have the opportunity for small firms. I'm a civil engineer with 30 years' experience, and, with all of the construction going on, we're not busy. And I submit bids for every INDOT leading. I submit at least 30 bids and I get nothing. And I'm very competitive. I'm not bidding too high." [#AV75]
- A representative of a majority-owned construction company stated, "Basically they won't consider us because we're so small." [#AV99]
- A representative of a majority-owned construction company stated, "It's tough, [and] being a small business it's hard to break into working with the state and local municipalities." [#AV155]
- A representative of a majority-owned professional services company stated, "Being a smaller company seems that a lot of those contracts goes to larger companies, being a small company and not woman-owned, or minority-owned does not give us an opportunity for those contracts." [#AV2038]

24. Other comments about marketplace barriers and discrimination. Eleven interviewees described other challenges in the marketplace and offered additional insights [#11, #14, #16, #17, #20, #AV]. For example:

- The Black American owner of a construction company stated, "A big thing is paperwork and knowing where to go and having that mentorship would definitely help with that. And having [the] co-op that I was talking about. If that co-op - if we could have some type of state run or city run co-op that would allow different, bigger contractors to mentor smaller contractors, that would help in so many different ways for me, even now, and then, other future people who want to start their own businesses also. Now, that's in the construction realm. I don't really know too much about any other type of businesses or any other type of issues that might arise with other businesses, but in the construction realm, I think that the co-op would definitely be a good opportunity, a helpful tool for different people." [#11]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Oh, definitely. Within the Black community - the Black community and normally the people that come to me, their pockets aren't as deep, and they can't afford the percentage or the price that the state or the city sector could pay. So, we end up - in order to get the work, we end up reducing our price to, number two, help them along, and number three, just to keep working on

some of these projects. We don't make a profit on most of those projects. A lot of times we just try to break even more so, because we still have the same insurance, we have the same - software costs the same amount. And my employees sometimes even cost more. So, it's not like I would be making a profit by doing those jobs, but they have come to me over the time when I didn't have any work, so I'd still feel I'm obligated to help the community to some extent. No. I think the only barrier is actually getting an opportunity to seriously be considered for a project, to work on a project. A lot of times we just do not hear about the project, so we don't know until we hear it's under construction, 'Such and such is under construction.' We see those RFPs all the time and I'm like, 'When did the solicitation for architectural services come out?' But you see the construction. And I'm like, everyone should know about that project, rather than them calling three firms or four firms that they work with, so the same firms get the work all the time.” [#14]

- The Black American owner of an MBE-certified professional services firm stated, "I would say the most significant barrier is having the ability to get your name out there. When I first started, nobody knew me as an individual. They knew I was a part of a bigger company some years ago, but they didn't know me as an individual, so they were suspect of my abilities to perform at the level that they require. It's just about timing and having that ability to show your experience and show that you can perform to the quality that's required.” [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "They do have a lot of factors to determine that too. Credit worthiness, and I guess education experience in the industry and stuff, and then the parameters you're working in. That was that way for me; I just charge more for the job. For example, if you're going to change a lightbulb in someone's house, and your insurance is $500,000, then that's the price. If I'm going to change a lightbulb in a commercial environment, and I'm required to have ten million [dollar] insurance, instead of 50 bucks to change the lightbulb, it's probably going to be $500 to change a lightbulb in the commercial environment.” [#17]
- A representative of a majority-owned professional services firm stated, "Personally, I think sometimes politics plays a big role in it. And understanding the dynamics of the politics and being able to strategically navigate your way through the politics to be able to get your message across to them. But in the end a lot of times it's the personal relationship that you develop with a client that, in my opinion, can set you apart. It's really the biggest barrier sometimes is access to key individuals that you may want to ask some questions or get a response back. Sometimes you e-mail them and don't hear anything from them.” [#20]
- A representative of a majority-owned construction company stated, "Requirements regarding being minority-owned is a barrier.” [#AV47]
- A representative of a woman-owned construction company stated, "INDOT deletes the scope of work for disadvantaged businesses on a lot of the leads. So, my work gets deleted because the lead engineer on the job deletes the pay item. It's because they have their own computers, and the engineer wants to use his own computer instead of the pay item computer or the engineer just doesn't feel like paying you. And INDOT hires consultants and uses their own engineers, so they limit what the pay item is. They put restrictions on the pay items. As far as IAA, I've worked out there for 30 years and can't seem to get a job out there as a small firm directly for the IAA. They just don't have the opportunity for small firms. I'm a civil engineer with 30 years [of] experience, and, with all of the construction going on, we're not busy. And I submit bids for

every INDOT leading. I submit at least 30 bids and I get nothing. And I'm very competitive. I'm not bidding too high." [#AV75]

- A representative of a majority-owned construction company stated, "I keep losing out to all the minorities, women, and veteran-owned companies. I am too small to be a big company and too big to be a small company and have to compete with all the minorities. It is hard to be a white male-owned business in America today." [#AV82]
- A representative of a Hispanic American-owned construction company stated, "They use out-of-state companies a lot and that hurts in-state companies." [#AV122]
- A representative of a majority-owned construction company stated, "I'm not a minority-owned business, so it is tough." [#AV203]
- A representative of a majority-owned goods and services company stated, "Recent inflation has been a challenge -- lots of price increases happening quickly. This makes bidding jobs difficult." [#AV2022]

H. Effects of Race and Gender

Business owners and managers discussed any experiences they have with discrimination in the local marketplace, and how this behavior affects POC- or woman-owned firms:

1. Price discrimination*;*
2. 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/DBEs by government, prime or subcontractors;
11. MBE/WBE/DBE fronts or fraud;
12. False reporting of MBE/WBE/DBE participation; and
13. Other forms of discrimination against minorities or women.

1. Price discrimination. Six business owners and managers discussed how price discrimination effects small, disadvantaged businesses with obtaining financing, bonding, materials, and supplies [#2, #4, #11, #14, #17, #22]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "I don't know that I would call it discrimination, but I think sometimes it is harder to get insurance and bonding if you're a small business whether you're a minority or women or any kind of small business, it's harder to

get that kind of bonding and pay for it, but I don't know that it's - it's more about being a small business not necessarily a minority or woman." [#2]

- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "Because prices were constantly going up, it became hard to get the stuff we needed, because everybody was ordering more than they needed to try to beat the next price increase. So, me, not being, of course - again, I'm a small guy, so I'm nobody's number one customer. So, if your number one customer needs more than they normally need, who gets squeezed out on the back end? Guys like me. So, to that extent, inventory was a problem." [#4]
- The Black American owner of a construction company stated, "I've had one customer get mad when the bill came up. He thought that I was working for him for free. I don't know what he had going on. It sucks to say, but if I had a white guy doing the bidding and then, if I had a white guy doing the billing, I don't think that I would have the problems that I'm having currently. And that's unfortunate. It shouldn't be that way. But that's the way it seems. Even the black people - people who look like me - they still want to pay me less. I don't know. But that's when I tell myself, 'I'm not doing it.' I'm not gonna do something for free and deal with a bunch of stuff. I don't have to deal with it. You need me. I don't need you. Someone else is gonna spend the money." [#11]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "I know I've purposely quoted jobs below profit just to see if I'd get the job, and you don't get the job. It's like what? There is no way in the world someone bid this lower than me." [#17]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Personal and business. I have a lotta people that do the applications have me do it, because they, whether they're Mexican or Arabic, they have a harder time getting through the door. I've seen it 100 times." [#22]

2. Denial of the opportunity to bid. Eight business owners and managers expressed their experiences with any denials of the opportunity to bid on projects [#1, #3, #14, #19, #20, #21, #22, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Generally, it happened in the early days when we weren't union. They'd say we can't use you because you're not union. Yeah, that's generally been the biggest problem. But otherwise, I'd say that hasn't been an issue." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "I bid on that job over at the Home Depot and the guy ended up using me in a roundabout way, but he laughed at me when I told him that I could give him a price on the job and about just wanted to drive over there. It was night work and say, you know I can do anything that anybody else can, and I'm sorry that you're not used to speaking to a female who can estimate a job, it's just sad. It happens." [#3]
- A representative of a majority-owned professional services company stated, "Yes. When that prime is exclusive or already has a team." [#19]
- A representative of a majority-owned professional services firm stated, "Because they already had their own sort of people they wanted to work with. They didn't want to entertain anything

else. It's all about relationships. There are some firms that are out there that they team with the same people all the time and they don't defer from it. … As a matter of fact, if I do work up in Lake County or South Bend, sometimes in Evansville or Terra Haute sometimes, those are generally more union. You know, towns, cities, or counties, I see more opportunities for minority business owners and women-owned businesses and veterans in those communities than I - I see them focused more on that than I do anywhere throughout the state. Indianapolis is one too. Especially at the airport and things like that. I mean they have a lot of requirements." [#20]

- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "I'm not aware of any, although I have heard of some companies complaining that they were not allowed to bid because they were not qualified or pre-qualified. But in my opinion, they were not qualified in the first place. I don't think there there's an actual discrimination in that." [#21]

- A representative of a Black American-owned construction company stated, "It's just very difficult to be recognized because we don't get the volume of work as the larger firms, so it's hard to get an answer for our RFP (Request for Proposals). It's difficult to team with prime firms on RFP because they'd rather use an engineer versus a like firm. They'd rather pick the engineers over the architects. And we just don't get the opportunity to submit the bids. We're not in that network which you need to be in to receive projects, because we don't have the exposure of the larger-type of firms. So, I'm talking about competing with larger architectural firms and larger engineering firms. We've just never been successful in 26 years with INDOT. In my 26 years, I've tried to mentor other female, African-American architects and they all have failed in that their companies could not sustain themselves because they couldn't get the work to keep their business afloat. And at this point, I'm the only [one]." [#AV69]

3. Stereotypical attitudes. Eleven interviewees reported stereotypes that negatively affected small, disadvantaged businesses [#1, #3, #4, #5, #8, #11, #14, #18, #21, #22, #25]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "I'll never forget when I first went to buy a 'low boy' and I had you know, the salesperson apologized to me because I went there, and I took a person that was working with me while he was taught he was trying to sell the whole deal to the person that wasn't even writing the check. And that bothers me… You know, I had a fuel supplier come in here the other day and I was walking out the front door. Sometimes I take phone calls and I'll go out the front door, my office and I'll be on the phone. But they were walking in, and they said 'We need to talk to the person that would be in charge of, you know, bulk fuel?' Well, I spend a lot of money, you know, and I thought, well, I'm on the phone right now. But, you know, you can go stand in there and so they ended up talking to somebody else that works for me, but I went out there and I was asking pointed fuel-related questions, especially right now in this market. That's what you want to, you know, you need to be educated on it. Well, they never ever gave me the time of day they wouldn't, you know. And I thought I will never, ever buy anything from your company because of that exchange right there. You know, I am written off, you know, as I don't know why. But you should and I feel like you should treat, you know, that's just decency. … I worked with family before I started my own company and I had family members tell me that because of my gender, I would only move up so far and that was it. And that was that was my family, telling me that that there was a glass ceiling, and I was not going to breakthrough that. And the thing about all that, all that is though, if you believe what other people say about you then there you are. You're stuck, but you can't do

that. Or you know, if you get the ask the question well - So you own this place with your husband or you know, I mean, it's always, those kind of, that kind of thing and then you don't know but. And when I first went to buy my first 'low boy' - the sales guy there, he wouldn't even look me in the eye. I just, you know. And then he ended up apologizing to me after I'd left. Obviously, I didn't buy the 'low boy' from him, but it happens, and it's a shame when it does happen, but I try not to patronize those kind of people because they're not people that I want to do business with, and if I can keep from it, I'm going to." [#3]

- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "I have experienced stereotypical attitudes from customers and buyers, which is sort of the reason I say that I'm pretty sure I get viewed often as a minority partner rather than a rebar partner." [#4]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "I have a couple of people who are African-Americans or Africans, including myself, that when we go to a job site, and it's pretty much we're a minority in the industry of surveying also. When you go to job sites and people see you and don't acknowledge you, 'cause I mean that's normal; we kind of get used to it in a way. At first, they don't even think you are competent enough to do the job we get some jobs down south, Southern Indiana and stuff like that, you go to a job site, they're not - you know, they're not … knowing that, hey, even if Blacks are rare in Indiana or something like that. It's not normal to them, so you can't really blame them. Like I said, in time, but to me humans are human, people are people. It's kind of you've just got to know that, 'Hey, I'm here to do my job.' Just allow me to do my job and I'm out." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "Sometimes in construction, cause it's mostly men, they don't particularly care to deal with women, but we go in, do our work, and leave. So no, not really. I mean nobody's ever done anything like that, no. But I know it's a man's world in construction." [#8]
- The Black American owner of a construction company stated, "I've had one guy, as soon as he seen the color of my skin, he didn't want to even open the door for me, you know? The general - I've had two general contractors that have made me wait more than - I just got paid for the steak and shake remodels yesterday, actually, and I did those last summer. I've had some issues with that and just being taken serious as a business and not just a side electrician, you know? I'm not doing this on the side. This is my full-time job. This is what I'm doing to feed my family. I really don't know. It's just I feel like if I had a white guy doing the estimating and bidding, I would get more work." [#11]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Well, I can probably say that, as I said, this is a very, very competitive field, and for an example, I was working with IPS on a project and I was able to get in with them after, gosh, 15 years of trying to get work with them. And I finally got a project with them, and the former person that normally gets all the work for IPS got wind of me getting this project, so they tried to figure out how they can discredit whatever I was doing. And it's very easy to try to discredit someone, especially if the owner doesn't know any different. So, once they got this other consultant onboard, the consultants basically said that I wasn't doing a good job, and which I knew I was doing a good job, but I couldn't prove to them I was doing a good job, because they were listening to the ear of the consultants. And the consultant did that just to get rid of me so they could go back and put in the same company they had been using prior to the new

administration. And so of course I'm kicked out after finishing the job, which we did a good job on. But now they're back to using the same majority firm they had been using. And this is IPS for all companies; seems like they would want to use a Black firm. So, things like that you can't go back and try to say I didn't do it, because I'm a Black female, what a person's going to believe is going to believe the negative. They always will believe the negative, so I don't waste my time trying to defend myself on that. I just go to the customer that believes in me and what we do, and we do have a few customers that are repeat clients that always use us, because they know we do good work." [#14]

- The Black American owner of an MBE- and DBE-certified construction firm stated, "We were doing work in Illinois, and there was a project in Champaign, and we went up to Chicago and met with the [a large] company. And we were around the table with 12 of the company's officials, and they didn't accept our bid because the head guy didn't want a minority doing concrete work on the university. And he killed the deal. Something similar, because we had very good equipment, and there was always a knock of the whites against where did this minority guy get all this equipment from? And they didn't know how we had progressed to that state. You have to have good equipment to perform good work on various projects. We always were able to get good equipment, not used equipment. We always had proper equipment in good shape. Whether it's the project manager or superintendent, they always had a knock of just being prejudice against a minority." [#18]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Generally, when they realize that you are minority business-owned business or a veteran-owned business, they want to do business with large companies because quite a few of these larger companies also do business with the government. It's advantage for them to be able to report to the government that they have subcontractors or suppliers are that that are in that category. I have seen it. I'm aware of it." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Hundred percent. Well, a lotta the Arabic companies that I go in and I fill the paperwork and stuff out for, a lot of them feel as if there were - especially the women, if they're wearing the hajib or there's certain cultural things that they do, they get a different attitude, to when I go in. My Spanish guys, usually if they've got a really strong accent or something, they'll be like, 'I can't understand you, sir. I need you to get an interpreter. Do you need an interpreter?' They don't give 'em a chance to speak. As soon as they hear the accent or as soon as they see the hajib or they hear the accent of my Arabic community, a lotta things turn around. A lot of the companies that I do help to go for bids and stuff like that, when they ask me, that's why they ask me. Unfortunately, they call it putting the white face in front of us. I mean, it's the same concept. 80 percent of my clientele, to be honest with you, are Arabic. The other 15 percent are Mexican companies. They put me in the forefront. I speak. I don't have an accent. They feel, and I've seen it happen, when they call, they get treated differently than I get treated, and I think it's very unfortunate. They don't go in first, because they already went in first, and they've been treated wrong." [#22]
- A representative of a majority-owned construction firm stated, "Unfortunately, you will probably always have that." [#25]

4. Unfair denials of contracts and unfair termination of a contract. Five business owners and managers discussed if their firms had ever experienced unfair termination of a contract or denied the opportunity to work on a contract [#3, #14, #20, #21, #22]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "It's funny because people paint a picture, people and I guess, you know, being a woman, you can say I've always heard it. But you can say the exact same thing that a man says, but because you're a woman and you say it a certain way, it just comes off. They don't interpret it the same way or they return interpreted as being acting like a 'B word' or whatever, you know, and it's just. It's a shame that that's the way things are. When I first started, I mean, I had jobs that the males would call the other male and say: She can't do that. You know she can't perform that work for this. That and the other. And, you know, one of them decided to take it away. And then the other one. We were low and had the job and they said well, there was a closed-door meeting and there was nothing I could do about it ... [they said] you're not gonna do the work anymore." [#3]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Not recently. There was there was one instance many years ago, probably, gosh, I would say probably what is this, probably 20 years ago or so where was an instance where I felt that that this one company was discriminated upon." [#21]

5. Double standards. Seven interviewees discussed whether there were double standards for small, disadvantaged firms [#1, #4, #14, #17, #18, #22, #23]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Not at the present time but I did have a problem with an EEO officer who always held us to a higher standard than anybody else. I felt like that was discriminatory. [This was in] 2017, 18, 19." [#1]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "I mean, shit happens, shit is always going to go wrong, but for some reason, when something goes wrong on my company's watch, I do feel like a bigger deal gets made out of it." [#4]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I've been in business 26 years, and I still have to prove myself. For example, I gave a presentation the other day, laid everything out, what was needed to be done, the process, the codes, everything, and then someone asked me after the meeting, 'Have you done this before,' as if to question my integrity or my knowledge. Was a little disappointing. It's just challenging being a female in any profession, so I'm not just saying my profession. Because I'm in several women groups and all of them say about the same thing. All the others are more difficult because as a minority company you can't make one mistake. You would make one by - I don't care if it's a minor mistake, you're basically thrown out with the bathwater - you're the baby that's been thrown out with the bathwater." [#14]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "I think a lot of people assume that we were not capable of doing things on a level that we were capable of doing them once we did them." [#17]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "That goes back to where there's a sweetheart deal. Somebody in the general contractor's operation wants

to bring in a friend that does the same work that we have a contract with, or for. They want him to take over our contract. That has happened several times." [#18]

- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Yeah, that's why they put me in the front. Most of the customers that I help go for the bids or their contracts or help them fill out the paperwork, they usually do not come in until the end. They have to sign a power of attorney over to me; usually what they do at the beginning. And then at the end, if they've gotten the bid or whatever it is, that's when they come in. But it is putting a huge barrier on them." [#22]
- The owner of a WBE- and DBE-certified construction firm stated, "Maybe. I have heard it said on a particular one we worked on that job that, 'Well you're in the big leagues now so you should be able to take care of that.'" [#23]

6. Discrimination in payments. Slow payment or non-payment by the customer or prime contractor was mentioned by three interviewees as barriers to success in both public and private sector work [#7, #11, #18]. For example:

- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "I had one contractor that gave me so as a subcontractor - as a DBE or MBE, WBE subcontractor, you have a dollar amount that they put in their bid that they would give you and come to complete the work. So, you know you have $20,000 they said that they would at least submit $20,000 worth of work. So, I've had one contractor that specifically, that tried to trick me into signing off on a project, Uhm, when they didn't give me the specified amount and they so then when I contacted the EEO officer, and I found out that they lied to me -more or less than the meeting- and then they tried to come. So then, they felt like I went above their head, and when they found that out, they withheld a couple of paychecks from me. They withheld money. You know, you get paid on a weekly basis from them. And they withheld money. So, I just quit bidding projects with them." [#7]
- The Black American owner of a construction company stated, "I've had one guy, as soon as he seen the color of my skin, he didn't want to even open the door for me, you know? The general - I've had two general contractors that have made me wait more than - I just got paid for the steak and shake remodels yesterday, actually, and I did those last summer." [#11]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "At Midway Airport, we did 22 change orders in the middle of the wintertime, and they had an agreement with the city for a very profitable payout doing change order work. That's when the prime contractor/project manager wanted to bring in his friend, and they beat us out of $3.3 million. We performed all the work in mid-wintertime when normal payment season is from April through November. We performed all the work in 17-degree weather. We never got compensation for doing work where you had deficiencies of performance because of the cold weather. We had to remove snow and cover up and went through a whole lot of changes to perform the work, and we never lost any of the concrete. That was a real disaster through the court systems. The big fish eat the little fish because they can outlast you. It stayed in court six years." [#18]

7. Predatory business practices. Two business owners and managers commented about their experiences with predatory business practices [#14, #21]. For example:

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Well, [in] one incident the project management consulting firm wanted to get their architectural firm and get me out, and so they tried to find fault in everything I did, and the owner believed them because they're supposed to be professionals. But this was all a tactic to get rid of me and put in their prime firm." [#14]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "I'm aware of some companies that have gone under because the prime with whom they [were in] a joint venture took their funding away that had been promised after they were able to see the technology from the small business… that was fraudulent." [#21]

8. Unfavorable work environment for minorities or women. Four business owners and managers commented about their experiences working in unfavorable environments [#3, #6, #12, #20]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "I've been in this business long enough, you know, I've had people groped me, you know, out at it function. I mean, it's rare, make com comments and you try to just want to forget about those kinds of things. But it's a man's world still, definitely." [#3]
- The owner of a WBE- and DBE-certified construction company stated, "I think that contractors are doing a much better job of being cognizant, you know, and I can only speak of women in the workforce, but I do think they're doing a better job, whether it's having a, you know, second Port-A-Pot out of the job site or, you know, just different things like that. But yeah, I think it's fine." [#6]
- The owner of a majority-owned professional services firm stated, "I would say in the - I don't know about the public sector because, again, I don't do that much work. But in previous work we've done in the public sector and work we see in the private sector, I still see particularly women architects being treated unfairly by contractors in general. Actually, just two weeks ago I had to make an owner/contractor apologize for disparaging remarks and e-mails from a superintendent, a project manager, that they had sent out to two of our female architects in the firm. I told them either they apologize in writing, or we give them a seven-day notice. So, it still happens." [#12]
- A representative of a majority-owned professional services firm stated, "Yeah, I've seen [unfavorable work environment for minorities or women]. I would say sexual harassment." [#20]

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. Fifteen firms shared their thoughts [#2, #3, #4, #5, #6, #7, #9, #12, #14, #16, #17, #20, #21, #22, #23]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "Well to me the good old boy network is the union. I think on the private side a lot of owners don't specifically go after women and minority-owned firms, it's more the public sector does. Some of the bigger companies have the diversity goals, but not everybody does. So, there's some corporations that they don't even think about it they just do rely on kind of their old boy context, like who would you use and oh I'll use this person and things kind of happen like that." [#2]

- The owner of a WBE- and DBE-certified construction company stated, "In my in my business, so many people have had these relationships with other people for such a long time, you know, that breaking the barrier or, you know, being a woman and trying to relate to a man because there are of the estimators that I deal with, there are that I can think of three women that I quote, like major asphalt work too… So just being able to, you know, relate to other people in the industry that have different interests, you know hunting, you know sports, you know, fishing, all that kind of stuff that may be more of a male, you know, it that's hard. So, and I have certain people that call in here and you can tell that they don't want to talk to me? You know I've had customers that I've quoted work too. I had something I'll never forget. Somebody calling and asked from me for a price. It was for a Home Depot parking lot, and he laughed when he called. He said 'Could he talk to an estimator?' And I answered the phone and he said 'No, I need to talk to an estimator.' So, I said 'I can help you' and gave him a price and he ended up using another company who subcontracted the milling work to me. So, he ended up paying more to go through somebody else to have me do the work." [#3]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "Are you serious? Come on, ever since I was, like, ten with the good old boy network. Look, and here's what I always try to explain to people when you talk about systematic racism. It's not - and I think the word 'racism,' that gets everybody in a huffy. I try to explain it's not you saying you dislike me because I'm a certain race or because I'm different from you. It's more you saying I like this other guy more because he and I have more in common. If you think about it, that's how we choose our friends, that's how we choose our mates, that's how we choose everything. It's just that in a business context, it creates a ceiling for anybody who's different than you. It's not necessarily intentional, it's just what happens. You went to this other guy because that's who you're more comfortable with, because you guys went to the Bruce Springsteen concert together last year. Well, hey, I'm a Black dude who really likes Outkast. that's my favorite music band, and you have no idea who that is. So, the conversation about music ends right there, whereas if this other guy happens to tell you how much he loves Springsteen and you love Springsteen, well, now you guys are chatting it up for the next hour about all the times you've been to see him live over the course of the past 35 years. I've seen this happen. I lived that exact example at my very first law firm when I got out of law school. We went around the room, everybody say your name, say the law school you went to, and say who your favorite music band is. I said Outkast. I was 26 years old at the time. I said Outkast is my favorite music group. Maybe one guy who had kids who knew 'Hey Ya!' sort of knew who Outkast was, but nobody really knew. Then the guy next to me, who was starting the same day I was, we were both second day on the job, he said his favorite band was Bruce Springsteen, which by the way, he was lying. His favorite band was U2, but he knew what to say because he had seen that one of the big-name partners had a replica of one of Springsteen's gold records hanging up on his wall in his office. So, when this dude said Springsteen was his favorite artist, he instantly became the darling of our department. So, the way work got doled out, you just called. So, if a senior partner got a job and he needed a junior person to help him, he would just call somebody and say, 'Hey, are you busy.' So, who did everybody call first? That guy. It wasn't until his workload filled up that I started getting calls. I was the number two. Then unfortunately, there was a Latino woman who was under me. She didn't get anything until both of us had full schedules. Because at least I was a guy who could talk about sports. I played football in college, and they thought that was pretty cool. But you know, the Latino woman who I want to say she said her favorite music was the 'Mamma Mia' soundtrack, everybody kind of looked at her like, 'Did you even understand the question?' She

was bottom of the barrel. All of it goes back to who is your favorite music band, which has absolutely shit to do with how capable you are as a junior attorney. But to me, that is the good old boy network at work. It's not that you hate me, it's that you like him more, just because of extraneous issues, or extraneous reasons, I should say, that have nothing to do with why you're making the choice as to who to use. To me, that's how the good old boy network works." [#4]

- The Black American owner of an MBE- and DBE-certified professional services firm stated, "It's everywhere in the world." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "Yes. But again, I would preference that with, is it because I'm just a new company? Or is it because I'm a female? I can't speak on behalf of that. I think it could be either. So, it's hard for me to say if it's because I'm a female 'cause, I don't know. I mean, that's never been point blank set. So that's a gray area." [#6]
- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "I think that there, very much in the construction industry probably, is a good old boy mentality. And that made it tougher to get into doors to put in order to prove yourself as a woman. With a lot of them, I just said, you know, give me one contract, you know, give me, give me just one chance and then I was able to prove myself from that point. Does that make sense? And because of the requirements, the percentages with the MWDBE requirements that they're supposed to give, then it made it easier for them to give me the contract." [#7]
- The Asian Pacific American owner of a DBE- and MBE- certified construction firm stated, "Just those kind of things you know that's there, but you cannot help, you know? So, it's just there." [#9]
- The owner of a majority-owned professional services firm stated, "Oh, yeah. That's still there. No doubt about it. I've got hundreds of those. But yeah, it - I'd rather not get into detail, but yeah, there are plenty of those." [#12]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "When I first started out in 1991, I was working with another small firm at the time. But I was a sole source because I was an independent contractor for the firm. I was mainly his marketing person, bringing in all of the work, in which he was very successful. But I find out as a female doing the same thing, I couldn't bring in the same amount of work for my own company. So that I guess was a little difficult to understand why there was a big difference in bringing in work for a male firm and bringing it in for a female firm. It was a little challenging. I guess you always have to make your own avenue and not look at the situation as being 100-percent negative; you just know that you've got to figure out a plan B when dealing with state and city work. … I've been in business 26 years, and I still have to prove myself. For example, I gave a presentation the other day, laid everything out, what was needed to be done, the process, the codes, everything, and then someone asked me after the meeting, 'Have you done this before,' as if to question my integrity or my knowledge. Was a little disappointing. It's just challenging being a female in any profession, so I'm not just saying my profession. Because I'm in several women groups and all of them say about the same thing. This is a white male dominated profession, so it is hard getting in." [#14]
- The Black American owner of an MBE-certified professional services firm stated, "I have obviously heard about it, but it just really hasn't affected me because of the way I obtain projects and do my work." [#16]

- The Black American owner of an MBE- and DBE-certified construction firm stated, "It just seems, not every situation is corrupt, but it just seems like there's some good ole boys, who whether they're comfortable because they've worked with each other in the past and they don't want to take a chance on bringing someone outside the loop into the circle. But it does seem like it was very in-crowd/out-crowd kind of feel. Whether that in and out was based off experience or if it was based off of race… I don't think I've ever felt directly that someone decided not to use me because of my race. I think there is a sort of a good ole boy network, kind of a predetermined who's going to work the job, whether it be private or public. Even in public. You know, it's always the lowest bidder. You just wonder when you're turning your number in, how much of this information is being shared with other people. Because actually I've seen it happen." [#17]
- A representative of a majority-owned professional services firm stated, "Yeah, I think that's fair to say that there's preference there. You used the word 'good ole boy network' and there's still a lot of that. It's out there and so - but I don't think - when I first started in my career early on, I saw a lot more of it than what I do today. And I think that that's just because the perception is out there, and people are paying more attention to it." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Some of the large companies who have a problem with the good old boy networks. That's one of the things that leads to discrimination, not so much for reasons of race or gender, but because of the cliques that they have. If you're not a member of the clique [or] club, then you're excluded. Some of those clubs from the inset had not had any minorities involved in them, so that's why." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "The transportation industry is basically male-ran. There's not a lot of females in our industry that do what I do, so even breaking into the industry, it took a minute, because with it being a man-place business or category for jobs, it took a little while for people to take it seriously. That's when we started outreaching and talking to people, and it took us almost a year to establish and to be stable." [#22]
- The owner of a WBE- and DBE-certified construction firm stated, "I mean I'm pretty sure that that exists, but can I pinpoint one, like one for sure instance, no." [#23]

10. Resistance to use of MBE/WBEs by government, prime contractors, or subcontractors. Nine interviewees shared their experience with the government, prime or subcontractors showing resistance to using a certified firm [#1, #2, #4, #6, #14, #19, #20, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "I don't think it's so much as minority issues. I think it's just - I have a couple customers in the Indianapolis area who prefer to work with nonminority companies. I don't think it's racial. I think sometimes they feel sorry for us because all of the other companies in the Indianapolis area, there's three or four of them, that do my kind of work that are all women-owned. And I think that sometimes because now the DBE's are equal to the MBE's in the federal contracting world, I think some of these customers feel sorry for the guy who's not a minority- or women-owned and they give them work all things being equal. So that's okay. It's human nature. Well, I know that there's different ethnic groups, different minority and ethnic groups and it's like the Indians, the Cherokees didn't like the Navajos or whatever. So, there's some people, there used

to be some people at INDOT… who think it's unfair that their ethnic group didn't get their share of the pie. I'm not going to name ethnic groups but just use the Cherokees and the Navajos. Not all the people in there are happy because their ethnic group was given their share." [#1]

- The owner of a WBE- and DBE-certified construction company stated, "We identified people that were XBE firms that we wanted to work with and said, 'Look, we can - give us a project. We'll do the whole thing with an XBE team.' And they're kind of like, 'Yeah. Okay. Yeah. That looks good.' Never called us back. So, they talk diversity, and they talk inclusion and then, when you give them a way to do it, they just ignore it. And now, they're having all these monthly calls to talk about diversity and all this kind of stuff and it's like, 'You know, if you're gonna talk the talk, then walk the walk, you know? Don't tell me that you're interested in diversity if you're not even gonna listen to women talking about diversity, and I give you a pre-made team that can - has experience and has done medical projects and can being other people up with us and along with us and you don't even give us an opportunity to do something?' It's very frustrating, because I think it happens a lot. They're all about, 'Oh, well, we have to make percentage. We're all about diversity.' It's like, 'Okay. Well, show me.' I was involved in a project ... - I think I might have told you one story, but we were the architectural record and they told us they wanted 20 percent participation on the construction side, which we really don't have anything to do with because it's dependent on the contractor of who wins the low bid. So, the bids came in and they asked for their minority participation and the contractor said I don't have any. And they said well [you] you have to get him to get 20 percent, we have to have 20 percent. So, call him back and see what you can do. So, I call him back and when they bid for [this] County, they have to write down all of the people that they contacted, minorities and women that they contacted and when they contacted and who they contacted, and I went through the list and there were people on the list who didn't work there anymore that they said they contacted. There were people that I called, and I said, 'When did you get the bid documents?' And they said, 'The day of, the day after or the day before.' So, it wasn't a fair bidding thing at all and so I went through the whole list and I had comments on all of it and so I called the contractor and I said here what I found out. I said, 'Here's the bottom line, you have to get 20 percent. So, you need to call these people back and you need to figure out how to get 20 percent. And what [the] County told me is that if you have to raise your price because some of these people are higher, you can do that.' I very clearly, I said that. A week later he calls back he goes, 'I made the percentage, here's my bid it's the exact same place.' And I said, 'See how hard that was?' It wasn't hard at all; he just didn't want to do it. … Well, there again I think just the fact that the universities claim that they can't meet their goals. They can meet their goals they just talk the talk like they're gonna be diverse and then they don't walk the walk. And so, they can do it if they want to do it, 'cause like I said on that one project the contractor didn't want to do it, but when he had to do it, guess what, he could do it. So, I think it's the matter they just don't try, they either don't care [or] it's not in their corporate mission to do it. But it can be done, and you can easily find enough quality professionals to do the job if you look hard enough. I don't know that it's a resistance, I think it's just they're too lazy. It's like well I know these people and I'll use them because they'll do a good job. I don't think it's necessarily they're trying to keep people out they're just lazy. I think some of the universities are lazy too, they just don't think about it. They go oh yeah well, they've done five of these so we're gonna use them." [#2]

- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "I had two different customers, because one did it twice - two different customers on three

separate occasions, when an issue arose, the comment was made that basically, and I'll just paraphrase, if I'd had a choice, I would not have used you guys anyway. I'm only using you because of the minority requirement. Whereas I feel like hey, this could have happened to anybody. Like, that's just not a fair statement to make. We don't make mistakes or have issues come up that are above and beyond the norm, if that makes any sense. So, for somebody to say that is just being discriminatory, basically. My humble opinion, but yeah, that has happened three times just in the past four months one was public, one was not. Neither were INDOT." [#4]

- The owner of a WBE- and DBE-certified construction company stated, "Is it because I'm a DBE and a woman-owned business that folks don't want to develop the relationship? Or is it just that I'm a new business and any but I don't know that answer? I can't speak on behalf of them. Is it hard to land business and gain trust from prime contractors? Yes. Is it because we're still only five years old? Or is it because we're woman-owned business that I can't answer. I can't speak on that on their terms. But it's hard." [#6]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "When I first opened my business for business in 2001, we worked on the airport with seven minority architectural firms. Of those seven firms only two of those original firms are in existence today, because the other five are out of business because they could not get the work. And that is disappointing because now they really could use those firms, but they either left the state or they've joined another firm. We do have some newer firms that have come onboard since then, though, and some that reestablished after filing bankruptcy, so we have maybe four minority firms now. But it's difficult to try to team with those firms as well, because they're trying to be competitive. I'm like, 'Why are you trying to compete with me? I have a lot more experience I could probably offer you versus trying to make sure I didn't get any work.' So, it creates a very competitive atmosphere, because I've even had a politician to tell me that they were only going to give work to one African-American firm, and I thought that was the saddest thing I've ever heard in my life, but that's the mentality this particular person had. And I'm like, 'How's that supposed to help the Black community, if you only gave to one of every source.' Yes, definitely. You can see that by the number. You see the numbers; the numbers speak for themselves. The disparity study basically says what - I mean gives you the answer to that question. Yes, I've had someone years ago say that why should they change from what they've already been doing. It's just the mental state of that person, thinking that they could just keep things going the way they are" [#14]
- A representative of a majority-owned professional services company stated, "I do see resistance from that side primarily again because it becomes a checkbox, and we don't invest in these folks to train them to do a good job. At least there's some DBE firms that are checking the box and not aligned with the spirit of what we're trying to do which is create a diverse marketplace that has quality, diverse companies. Then there are quality, diverse companies that do get good opportunities and I'm not talking about them because I think there are good ones out there that should be the exemplar of what we're trying to do. Then there are firms that are hesitant to use because they're just a checkbox and they come on the project and don't do anything, but they get a paycheck. Right? I think that's the hesitancy. Is it really - unless we're investing the time to mentor then there's hesitancy because nobody - that's an investment of time and money to do that and people don't view that as worthwhile which at our company we do, and we do invest that time and money and we get frustrated when we see people not willing to do that or not interested in doing that." [#19]

- A representative of a majority-owned professional services firm stated, "Yeah, I've seen [resistance to the use of MBE, WBE, or DBE], definitely. But not in a lot of cases." [#20]
- A representative of a majority-owned construction company stated, "We've done work for the airport as subcontractors many years ago. We've done work for INDOT for a period of years. But the only limitations is this formula they do, and they give you this process to certifying you to do concrete work and paving and curbs. There's a lot of barriers in that process. The requirements they need to certify you is against the minorities. In Indiana there's a process called pre-qualification. And that to me entirely limits contractors as far as their getting qualified. Indiana has a lot of barriers as a minority person. I've had to fight with individuals to get work. It seems like they made it more difficult for us." [#AV7]
- A representative of a majority-owned construction company stated, "I feel like our company has gotten looked over because we are minority-owned and the difficulty over the last 3 yrs. trying to obtain proper licensing and getting set up to state requirements." [#AV45]

11. MBE/WBE/DBE fronts or fraud. Nine business owners and managers shared their experience with MBE/WBE/DBE fronts or frauds [#3, #6, #12, #17, #19, #2, #20, #21, #23]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "I've heard people that didn't get certified—like a friend of mine didn't get certified 'cause she bought the company from her father, but he funded the sale, but if she would have gone to a bank, she would have gotten certified. And I'm like well that's not right, she's still buying the company she can still prove that she's buying in, but they wouldn't certify her. And I've heard of other ones that maybe shouldn't have been certified that did get certified. They definitely… it was their husband's business, and they just took it over and they ended up being certified and it's kind of like did they pay somebody off or something to get that done, because it just seemed like the ones that were actually legitimate didn't get certified and the ones that were not legitimate got certified." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "I have a competitor right now and all along, he was going to buy the business, and now all the sudden his wife bought the business, and everything is in her name, and they've hired a DBE attorney and she has no experience in the field and blah, blah, blah, blah, blah. And it's just like - that goes on because people instead of just telling the truth and being honest and doing the right thing, they think that they can get ahead." [#3]
- The owner of a WBE- and DBE-certified construction company stated, "I think that the agencies [are] all being very thorough with, you know, their application process and you know making sure that things make sense. They were very thorough, you know, with my application right to the point that like I said it, it went to court, and I was fighting for that. But they were relying on a lot of false information from my competitors. And I know that because they were in the hearings, right? That's one way that they were very thorough in making sure that I was not a front. I would hope that they're doing that same and have that same level of intensity in regard to all applications. I don't know if that's accurate or not, but it absolutely still happens, and those front companies get through." [#6]

- The owner of a majority-owned professional services firm stated, "I've been involved in… probably 20 years ago we did some work for IU Health, and they asked us to use an MBE, and we ended up using the same engineer and just funneling it through an MBE. I'm sure that happens every day." [#12]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "I can't say that I have specifically, but I think it's happened over the time that sometimes the MBE doesn't realize that they're being used. Say for example, someone needs participation, and they want to use plumbing. And say there's MBE—or say I don't do plumbing, but I'm an MBE. They'll come to me and say, 'Hey, can you cover this for me?' I say, well, I don't do plumbing. I don't know a thing about plumbing. There are places you can go they'll loan you the labor. They'll say, 'Well, hey, we can loan you the manpower to do the job. You manage the guy, pay the guy. He's under your control.' Then you basically facilitate the project on that area of plumbing and only plumbing. Like I said, I don't know what the stipulations are on the project and what's legal and what's not, but I know when there's no work to be involved whatsoever by the MBE and it's strictly a passthrough; that becomes an ethics issue. It's like what are you saying here? You want us to do this as that allowed to give you the participation if we manage it and control it? I guess sort of calling and finding out what the requirements are specifically to meet that barrier. There's passthroughs all the time because you'll see guys out there doing jobs. And there's no minorities out there. If there's no minority plumbers doing the work, is it truly participation just because the company is getting the check. If you're turning around and writing that check back to the other guys, and they're keeping a small portion for their time, that's not effective. That's not what the program is designed for does. Does it happen? People ask, 'Hey, can you order the material for the job?' You're like, okay, if I order the material, that gives them participation for a certain percentage of it. We're not really learning anything to be able to be self-sufficient. down the road. You're not helping the cause. I don't think people care about that. The companies just want the MBE to check off the list. If they have to use you, then they want to do the work because you're too small to do the work. They say they'll help you. In reality, they're only using you for the certificate and up in making thousands of dollars or hundreds of thousands of dollars off your certificate. Then once you send them the certificate, they have it. It's not even being checked. That's what I'm finding out. You did a job with them. You specifically did the work. And they hang onto their certificate. The next job they say they're using you, and they're not. They never called you. They never anything. They submit it in the bid packet. It gets checked off, but no one follows the money. You should follow the money down to the job. Did those checks get written to that MBE that they said in the bid that they were going to use? Probably not. Because they never called them. Or they had them submit a quote to do the work, and they didn't go with them. They went with someone else. They got credit for the bid in beginning for the MBE because everyone is busy and short manpower. No one follows the money to see if the check was written to the MBE for the work that they put in the quote and said they were going to do. Or to see if they actually did it. We've had that happen before. I know it because the company was awarded to the job and they were doing the work, but I wasn't the one doing the work. I'm just assuming that they used my certificate to get the quote on the job. I don't know for sure. Just my assumption. My assumptions have gotten pretty far in life." [#17]
- A representative of a majority-owned professional services company stated, "I've witnessed that is MBE or WBE firms that are designated as those firms checking the boxes to be designated as those firms when in reality they're ran and operated by Caucasian males. I can think of a couple

examples where it's kind of like they're either just over the checkbox or being a WBE, MBE firm but in the operations, it seems clear to me that they're not aligned with the spirit of what these designations mean. Right? Where we're trying to create a more diverse work environment, but people are just checking boxes to get new opportunities. There's one firm that I think of where it's a WBE firm because it's 51 percent owned by females or a female. Where if we switched the shares by one percent, it's no longer a WBE firm and then it looks more like how non-DBE firms are ran. Right? I think that that to me looks like checking a box to open the door to other opportunities that you would otherwise not be eligible for and only doing that with a nominal investment of one percent of ownership." [#19]

- A representative of a majority-owned professional services firm stated, "Yeah, I've seen [MBE/WBE/DBE fronts or fraud]." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "I have seen in the news, and some of the briefings were front companies who claim because they're minority of the minority women-owned, minority-owned, veteran-owned, disadvantage-owned minority firms that were nothing but shell companies and fronts that received the contracts because of that, but in particular set aside. And they did not deliver what's required under the contract, so they were prosecuted, charged and prosecuted. So that is a problem for the rest of us because then that gives a bad rap. So, it's important that we police ourselves when we see that kind of behavior." [#21]
- The owner of a WBE- and DBE-certified construction firm stated, "I don't have personal experiences with them, but I know that they exist a lot." [#23]

12. False reporting of MBE/WBE/DBE participation. Eleven business owners and managers shared their experiences with the “Good Faith Efforts” programs or experiences in which primes falsely reported certified subcontractor participation. Good Faith Efforts programs give prime contractors the option to demonstrate that they have made a diligent and honest effort to meet contract goals [#1, #2, #3, #6, #7, #8, #14, #17, #19, #20, #21]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "We had a contract two years ago with a company that was doing a bunch of mowing contracts and they wrote us in in the proposal for 10 contracts. We didn't even know they wrote us in. We quoted them and they committed to us for 10 contracts. Well, later on after the season was over in November or December 2020, I got a call from INDOT that said did they use you on these jobs? They hadn’t used us at all, and the jobs were over. So, I think the IDOA was supposed to be monitoring that with INDOT's help and I think they all dropped the ball. I think the contractor that was virtually, as far as I know very little consequences. Usually, we get requests for quotes for just about everything. I think what happens is the big contractors, knowing that they are going to be [asked] about whether they met the goal if they don't meet it, what kind of an effort did you make to meet the goal? We get, probably within three weeks of the next highway [project], we will get a whole slew of emails from our customers saying are you going to bid on this job, this job, this job? And they would like to have a response. We don't think they necessarily always want a quote because they know we’re not quoting it. But they do that to cover themselves in case they don't meet the goal. So that's one way we find it. If we are on the DBE list, they don't send it to everybody, but they send it to a lot of people. So, you get a lot of requests for quotes if you are a DBE. Some of them you respond to, some of them you don't.

We're just too busy quoting the stuff that means something rather than trying to help them have something to put in the file if they don't meet their goal. That's one way to do it. I'm surprised he still got a pre-qual with INDOT, but he does.” [#1]

- The owner of a WBE- and DBE-certified construction company stated, "From INDOT, they have to request DBE companies and even though they probably won't use us because we're non-union, they still have to request it. They do follow that part of the regulation; they just don't follow the other part. We actually did get recently a project with a union prime, and I think it was because they had new estimator and that estimator didn't know that we were non-union and once they list us INDOT won't let them take us off the project. So, it's one of the big road constructions that is heavy union and I'm sure the union's not gonna be happy with them when we turn up on the job. I just think it's funny. I was involved in a project ... I think I might have told you one story, but we were the architectural record and they told us they wanted 20 percent participation on the construction side, which we really don't have anything to do with because it's dependent on the contractor of who wins the low bid. So, the bids came in and they asked for their minority participation and the contractor said I don't have any. And they said well [you], you have to get him to get 20 percent, we have to have 20 percent. So, call him back and see what you can do. So, I call him back and when they bid for [this] County, they have to write down all of the people that they contacted, minorities and women that they contacted, and when they contacted and who they contacted, and I went through the list and there were people on the list who didn't work there anymore that they said they contacted. There were people that I called, and I said, 'When did you get the bid documents?' And they said, 'The day of, the day after or the day before.' So, it wasn't a fair bidding thing at all and so I went through the whole list, and I had comments on all of it and so I called the contractor and I said here what I found out. I said, 'Here's the bottom line, you have to get 20 percent. So, you need to call these people back and you need to figure out how to get 20 percent. And what [the] County told me is that if you have to raise your price because some of these people are higher, you can do that.' I very clearly, I said that. A week later he calls back he goes, 'I made the percentage, here's my bid it's the exact same place.' And I said, 'See how hard that was?' It wasn't hard at all; he just didn't want to do it.” [#2]

- The owner of a WBE- and DBE-certified construction company stated, "I feel like anybody can push the envelope as far as did they make a good faith effort? I know sometimes people, they want to do the bare minimum to prove that they made a good faith effort, but there are companies out there who legitimately outshine the other ones, and they will call you. I need a price. Get me this price. You know … I don't know how I'm gonna meet my goal. You know, type thing. And then you'll have other people that just send a blanket email and you know that blind copies everybody and their brother on it, and a lot of times, like, I'll get that email and it won't even be my line of work. And so, you know, you know that they're not really making a good faith effort. They're doing the bare minimum to try to make it look like they made a good faith effort when in all reality they didn't do everything they could to get the price.” [#3]

- The owner of a WBE- and DBE-certified construction company stated, "INDOT makes it easy to… somewhat not quickly, because of the affirmative action reports, right? Other agencies information, you won't know you've got a job until you get subcontracting … that could be months after you even bid it. I've actually started putting a condition that it my pricing is only valid 30 days after the job is awarded. I had a job last year I bid in September, I didn't even know about it, that they even wanted to use us until April. So, you know response times, I would say it

notifying you… As I start getting jobs and bid on work and landing jobs and our schedule starts filling out well then, I taper off, right. Well then all of a sudden, a job pops through that they used us on for DBE dollars and I didn't know about it. That could be a big conflict on our schedule. I've only got 3 mills, so. Those types of things I would say yes, if INDOT there were any agency could put a requirement that they have to list all their subs, you know, by a certain time that would be awesome. So, we know quicker." [#6]

- The Hispanic American owner of a WBE-, MBE-, and DBE-certified construction company stated, "I had one contractor that gave me … as a DBE or MBE, WBE subcontractor, you have a dollar amount that they put in their bid that they would give you and come to complete the work. So, you know you have $20,000 they said that they would at least submit $20,000 worth of work. So, I've had one contractor that specifically, that tried to trick me into signing off on a project, when they didn't give me the specified amount and they so then when I contacted the EEO officer, and I found out that they lied to me -more or less than the meeting- and then they tried to come. So then, they felt like I went above their head, and when they found that out, they withheld a couple of paychecks from me. They withheld money. You know, you get paid on a weekly basis from them. And they withheld money. So, I just quit bidding projects with them." [#7]
- The owner of a WBE- and DBE-certified construction company stated, "Another thing they'll do, we have a job in Columbus, in Bartholomew County, they decided they weren't going to do some silt fence that we had on the contract that was like a $70,000.00 contract. They started whittling away at it. That contact is down to maybe $10,000.00 or $15,000.00. But on their books, it still shows the amount of the initial award. Even if they make me agree - well, I just agree, cause there's no point - if the state says they're not going to do it, there's no point in trying to fight it or complain. To me that should be off my ledger. It shouldn't be on there saying I'm going to get it, cause the state made me take it off anyway. I wouldn't know about, but I'd say falsely claiming I would know. But sometimes they do the work themselves. I've run into that twice with two different companies in the last year, where they would go in and do the filter stock themselves, even though it's on my contract. Or they'll do the feeding themselves and I say, 'You can't do that. We have to do that.' That's the only thing." [#8]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I know a few firms that did that, but it wasn't me to be the one to blow the whistle. They are who they are." [#14]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "Well, especially being an MBE because you're bombarded with people who want to cover their tracks and say that they are offering the job to all diverse groups, veteran-owned, women-owned, Black-owned, minority-owned women, whatever. They're not. I'm not crying the blues. It's just it is what it is. It's not happening. Let's take for example, I'm a general contractor. I have no minorities in my whole entire company. Maybe one or two women answering the telephone. On paper, it looks like, hey, the process is in place. Our working people are getting contacted. There are tons of emails being sent out to women-owned businesses and veteran-owned businesses, and they're just not able to do the work. Well, why is that? Because we're getting that request seven to ten days prior to the bid deadline. Two days before. I've gotten them two days before. It bids tomorrow at 4:00 or 2:00. I ask the question, 'Why didn't I get the invite prior to the pre-bid walkthrough?' Hell, the walkthrough has already taken place, and you're sending me a request in the ninth hour to cover your good [faith] estimate sheet. You don't really me want to do it. Either

the incentive for them to do it has to be greater than the inconvenience that they feel it is to work with an MBE, or the MBE has to have the resources to be able to compete on a higher level that they're not dependent upon people giving them work. That they're the ones they are bidding it as a general contractor, and then making a decision on who they go after. Because, when you look at MBE-ran businesses, whether it be women-owned, veteran-owned, or whatever, there are more people who look like the owner than not. Because they're comfortable working. Because there's going to be a learning curve even when you hire older, say veterans or whatever, they may not be hip to technology. They may not be able to do this. They're going to fill out work tickets on the paper instead of doing it on the tech iPad. You have to be patient because you respect that they are veterans. That one wants to do that because it's easier than to find some young kid who can catch on quickly and work with them. I get it. It's a cost, but if you're committed to the cause, you'll do it. You just may not make as much money. You may have to put some money back into the communities in which you work and make them a better place. You can't tell a veteran from a distance. You can tell a woman or another ethnicity of minority. You don't see it. I'm not seeing the women out there operating equipment. I'm not seeing the women foreman/project managers. It's all guys. It's a guy predominant industry. I get it. What are we doing to change it? Not only getting the company to quote and do the stuff, but really have a strong initiative to work towards changing that. I don't think the big people who put the money where the money is care. I think this is a smokescreen just to make sure they cover themselves.” [#17]

- A representative of a majority-owned professional services company stated, "So often I see that people are just checking a box with MBE percentages and then the quality suffers because some of the MBE percentages are not the right fit or they don't have the right experience or they're not capable of doing what needs to be done. I think that hurts the client more than it helps. I think when we look at the MBE percentages it would be nice to know that we're not just looking at the number but also the quality and the nurturing that happens as part of that percentage and evaluating that as well. I think that that is really the intent of the MBE program, to nurture and grow the quality MBE firms that can do this work. There's certainly ways that people might be trying to game the system by just checking the boxes with MBE percentages.” [#19]
- A representative of a majority-owned professional services firm stated, "Yep, I've seen [false reporting of participation or falsifying GFEs].” [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Yes, a lot of these instances that have been in the press, and cases that have been prosecuted because that the companies were just shells and fronts. You know, they put up a, for instance, they said it was a women-owned business. But the woman is the wife of the fellow that really owns the business, and she really has no involvement in the business at all other than her name is listed as being the owner.” [#21]

13. Other forms of discrimination against minorities or women. Three interviewees discussed various factors that affect entrance and advancement in the industry [#14, #19, #25]. For example:

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Well, I'm always asked if I have such experience or have a few such [work examples], which is very difficult if you aren't given the opportunity. So, there's always a barrier—they can always

find a barrier somewhere if they do not want to use you. I mean I basically… an RFP came out for the airport that several people asked if I would go after it and if they could be a part of my team. But after we went to the first outreach event it specifically said you had to have three examples within the last five years. Of course, that knocks 90-percent of the firms out, and minority firms off the top, because we do not get the opportunity to work on library projects, period." [#14]

- A representative of a majority-owned professional services company stated, "There is some that starts early. When you're in middle school or high school and you look at the makeup of our industry that we don't project out that it can be diverse. And there's the unintended discrimination that occurs from that by not seeing your people in that industry. I think there are some good things happening that hopefully will change that." [#19]
- A representative of a majority-owned construction firm stated, "I know [discrimination affects business opportunities], because any time you start to say somebody is more applicable to get something or a contract or whatever it is you're wanting to market, as soon as you pigeonhole certain people as being able to apply easier, or any time you do any sort of segregation, it causes issues." [#25]

I. Business Assistance Programs

Business owners and managers were asked about their views of potential race- and gender-neutral measures that might help all small businesses obtain work. Interviewees discussed various types of potential measures and, in many cases, made recommendations for specific programs and program topics.

1. Awareness of programs;
2. Technical assistance and support services;
3. On-the-job training programs;
4. Mentor/protégé relationships;
5. Joint venture relationships;
6. Financing assistance;
7. Bonding assistance;
8. Assistance in obtaining business insurance;
9. Other small business start-up assistance;
10. Information on public agency contracting procedures and bidding opportunities;
11. Directories of potential prime contractors, subcontractors, and plan-holders;
12. Pre-bid conferences;
13. Other agency outreach;
14. Unbundling contracts;
15. Price or evaluation preferences for small businesses;
16. Small business set-asides;

17. Mandatory subcontracting minimums; and
18. Small business subcontracting goals.

1. Awareness of programs. Nine business owners discussed various programs and race- and gender-neutral programs they have experienced. Multiple business owners were unaware of any available programs for small business assistance [#1, #2, #3, #4, #8, #13, #14, #16, #21]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "We now belong to all of the pertinent trade associations; Indiana Constructors, ATSSA, which is a barricade association. We've got about 30 companies in that group in Indiana, about 3000 worldwide. So being connected to your customer groups and your other industry groups is important. Without that kind of network, it's difficult. You need to be able to meet your customers face-to-face." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "I've been a NAWBO [National Association of Women Business Owners] member for years … the PTAC office at times is helpful. I don't know if you even know what that is it's part of the state and at sometimes, they will send me information on projects where they're looking for certain things and participation in order to do a government project and I think that's a nice thing because I don't think there is a website for that. They will find a project that they think I might be interested in and send me information on the solicitation, and that's very helpful because they know that okay, I do architecture and I've done federal work before. So, they send me this list—I think that's how I got the sources sot thing. So, I think they're actually combing through the SAM.gov website which is really hard to navigate and when they find something they send me this and they say hey is this something you can do? Which I think is great." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "[A national private company], they're the ones that did the WBE program. They've done it or I mean the DBE program for INDOT for a number of years, but they've done it in South Carolina and like Virginia and who knows how many other places. But for me they were they were the cream of the crop. I've been to South Carolina. I've been to Kentucky's … down in Lexington when I went to that, my women and minority contractor training program." [#3]
- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "I know INDOT and other public agencies sometimes have seminars on bidding, on estimating, resources that have bank officers come in and talk, or HR officers come in and talk, and I'm sure all of that is helpful." [#4]
- The owner of a WBE- and DBE-certified construction company stated, "I did attend a class. I was already certified then in both, but I did attend some classes. I don't know if they still have them. Once in a while I'll get an e-mail about going to the classes. They were very helpful. It was a private company, and they were very good. Even though I'd been through the process I could see where that kind of thing could really help somebody. The one that the state had. I can't think of the name of it now, but they used to have them every year and they'd start—sometimes they had them in the summer. Construction is dead December through February. That's when you need to hold them. You can't hold them in the summer because we can't attend those, so you might make a note about that." [#8]

- The Black American owner of an MBE-certified goods and services firm stated, "Not the ones that I know of yet. I mean, honestly, I'd like to participate in some of them, but I don't—I can't really think of anything off-hand." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "We did have a marketing person before the pandemic. That's the one person short we are now. We do not have a marketing person on staff now, but I am with a program that I signed up with through the Heron-Kelley School of Business, where they're going to provide me with marketing for a program that they are promoting to work with small businesses on marketing. So, I'm looking forward to that. The outreach events that is hosted by the city and the state are very helpful. For one thing, it helps us to get to know each other and work together on the networking events that we have, as well as get to know some of the decision-makers, even though a lot of times they have the MWBE person that is not the decision-maker there, and you don't get past that person if that person doesn't like you for one reason or another. But if the decision-maker is there then I will stop and speak." [#14]
- The Black American owner of an MBE-certified professional services firm stated, "I can't really speak to that because I have not taken part. I've got tons of literature that's been forwarded to me since the very beginning when I got my MBE status, but I just haven't had time and I haven't taken the time to partake in any of those opportunities, so I can't really speak to if they work or they don't work, because I don't use them." [#16]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Well, there are a number of programs that are very helpful, and those are the small business innovation research. Because they give an opportunity to minority and veteran-owned firms, women-owned firms and so forth to participate and have a chance to compete and get contract. I think that is a critical, critical program that brings a lot of technology because a great deal of that technology is developed by small businesses. It's not the big primes that develop that technology. It's the small businesses that actually do that. These programs that are very cost-effective, highly cost-effective and equipped, they provide opportunities for minorities and disadvantaged businesses." [#21]

2. Technical assistance and support services. Sven business owners and managers thought technical assistance and support services are helpful for small and disadvantaged businesses [#1, #2, #3, #6, #14, #24, #25]. Comments included:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Over the past couple years, they've been having Friday virtual training sessions. I like the idea. I don't always think the content is great, but I like the idea." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "Estimating would probably be worth it. A lot of people don't—when you start out, you probably don't have an admin person so, unless it was free, a lot of startups can't pay for that kind of stuff. But if there was some kind of program that helps people learn how to do estimating correctly and learn how to put together a bid. I think Ace Mentoring [teaches people estimating], but I don't know if they do it on the professional level. I know they do it for like, high school and college kids that are getting in, but I haven't really been involved in it so, I don't know what they offer. In terms of proposals-like, on the architectural side-it would help, again, to see what other people are submitting and what the winning proposal look like so that, 'Okay. well, I didn't include that

information' or 'Maybe I needed to focus on this.' So, you know, reviewing past proposals. I know that when the airport was built, I actually did go out and look [at past proposals]. We had called College Raba, who was a really famous architect, and we wanted to team with him, but he was too busy. Anyway, we went out and looked at the winning proposals for the design firm that actually designed the entire airport, and [the agency had the proposals available], and so, we could look through and see what format they are in, what they look like and all that, and actually, I kind of based my format on one of those, 'cause I just liked how they had organized it. So, I've kind of, you know, kind of copied a little bit of that [format]." [#2]

- The owner of a WBE- and DBE-certified construction company stated, "You know, [for technical assistance] just go into the DBE classes and talk with other people. It is all hands-on deck, but you might be the only set of hand running your own business, so that's why I think that type of training for DBEs is so imperative. You know so that even we can get together with one another and say, 'hey I use QuickBooks,' or 'I do this. I use this accounting software that helps me,' or 'have you ever tried this?' I mean I'll never forget being in those DBE classes. Getting, you know, advice from other people who had been in there—that really helped me navigate through all of this and then in being able to give advice. I would go to, you know, workshops [in] downtown Louisville and anybody that was in Lexington, they had a minority contractor training program. When I first started and I would drive there, it was Tuesday and Thursday night. So, after I left work, I would drive 2 hours to Lexington, KY just to be able to get training on bidding work and doing that kind of stuff. Anything that I thought could help me. You know what was so great about EDI [training]? They did it over the wintertime. So, we were a little bit slower. So, in the wintertime we could go to Indiana, and we had a little bit of free time only because we weren't worrying about the crews out on the road and all that other stuff that we had to worry about. So that was a nice part of what they did for us was to give us the training when we could [have time to do it]." [#3]
- The owner of a WBE- and DBE-certified construction company stated, "They started with CEI, and some of the workshops that CEI has put on for education purposes for DBEs have been phenomenal. Now whether or not the DBEs have taken advantage of some of those things, you know that's a whole other story, right. To some degree it's like maybe make some of that continuing educational requirement for the application or for the certification, you know, because that can be a little frustrating. There's DBEs that have been DBEs a lot longer than I have. And [they] still don't know some of these things and I'm educating them right. So, I'm a big advocate of these agencies educating the certified companies so that they can be better. There's a variety of software companies that do basic accounting that I think [some of these small businesses would like to understand]. I use QuickBooks, you know. Some of these small businesses, they're doing the work as well as doing the backside of the business, and I think it's certified payroll. There are companies that specialize [in] uploading your payroll into that proper form that the state requires, IDOA requires. I mentioned that to a few DBEs because they're so bombarded by paperwork and reporting, doing government work. Well, it would be nice if some of these agencies were forthright with, 'hey, did you realize that if you use ADP Payroll that can be just an automatic export into this company certified payroll report and then it's just a few clicks versus completely regurgitating it.' Some of these agencies might [say] 'well, that's not our job, it's [up to] you as a business owner to seek that out.' I mean I get it; I also know [there's] only so many hours in a day. And when you're, like, legitimately wearing every hat that there is to wear, then a resource would be nice to have that helps in those areas. I'm not

saying, 'oh, pity party us.' Every business owner has these issues, but we as DBEs, hopefully I think the point is that we have a resource, i.e. the agency that certified us, to potentially assist with these things, right? They have to. I think that's what the whole point of the survey is, right? They're trying to prioritize. Where can we help? We want these DBEs to be successful." [#6]

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I have an attorney that I call regarding contracts and other issues. I have an accountant that provides my firm with accounting services and year-end services, as well as a payroll company that I use for payroll. So, I'm set as far as the finance is concerned, but I think [technical assistance] could be helpful for some of the smaller firms that are trying to get on their feet. But I think after 26 years I've learned my lesson [about] trying to do it all myself." [#14]
- The owner of a majority-owned construction firm stated, "If we wanted to grow our business, it's harder to find the accountants and the bookkeepers that's got the construction background—accounts receivable, payables. It's harder to find those people." [#24]
- A representative of a majority-owned construction firm stated, "Any sort of real-world training that you can implement into the high schools or even the middle schools, so that the kids can actually start to learn what the jobs are about and decide if they would even like that course of work, the better." [#25]

3. On-the-job training programs. Fifteen business owners and managers thought on-the-job training programs are helpful for small and disadvantaged businesses. Support varied across industries [#1, #2, #3, #5, #13, #14, #17, #20, #21, #22, #23, #24, #25, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "The first thing we train people [as] is flagger, flaggers. And then the second step is we have, our trade association, ATSSA, American Traffic Safety, they have some training courses, and they are really good courses. We send our key people to those courses. But there's no substitution for doing it on the job. We've kind of made a general decision that we are not hiring people from our competitors. So, we are training everybody new from the ground up. And that takes time. We can put a new hire with an older guy. He can still work and be efficient. But it limits your ability to grow too quickly. But that's okay, that's just business. I don't think that's any different than any other business. Hiring and training people is always going to be an issue." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "We are ATSSA certified, which is American Traffic Safety Services Association. We have to be certified in order to do this type of work so, as part of their training, they teach us how to do those plans." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "Money is a huge deterrent for, you know, hiring people or anything. So that's why hands on training that's really good is so important." [#3]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "I mean it's pretty much some sort of training that within the surveying industry here in Indiana or even across the country, we need to get the younger generations coming in understand the field and what the field does and stuff like that, so they'll be interested in it. Right now, hardly any surveying schools are even producing any surveyors." [#5]

- The Black American owner of an MBE-certified goods and services firm stated, "I would say, for basic laborers or training people from the ground up, having an on-the-job program would be useful. That would probably be the most helpful. I mean, getting senior people in is hard, but training within is probably the best way to grow a business or at least grow laborers." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Architecture is a different beast; it's almost like an attorney or a doctor. You can't train someone if they don't have the fundamentals of it, so normally you have to work with students that at least have three years of architectural training or three years of interior design training in order to be able to work with them on the software that we have." [#14]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "I just don't have the energy to keep going after and trying to train people and work for people and get project managers out there to operate on levels that you would operate. You're almost trying to take a kindergarten experience mindset crew doing master's level work." [#17]
- A representative of a majority-owned professional services firm stated, "It [OTJ training] could be, but in our particular field it's pretty specialized, so that takes a different type of a resource than what you typically see out in the industry." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "These require that that they have the appropriate university degree, and some experience in order to do some of the things that we require. It tends to be difficult to find people that can do the job because we have to compete with the big primes. Most of that talent leaves the state and moves to the East Coast or West Coast. If there were some incentives that could be provided by the state for instance to help businesses offer training that would enhance the education of the engineers for instance. If the state would help small businesses provide tuition assistance to their engineers for postgraduate degree work for instance, that would be helpful. If you could do that, then you could have an arrangement whereby the employee would agree to a minimum number of years with the company in return for the opportunity to advance their education through the graduate programs." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Yeah. I do offer those to a few companies. I go in and I work and do contracts with them; I do offer the training for them. Sometimes they can't afford the training. We end up paying it outta pocket, but if the state could cover some of that cost and give grants for that stuff like that, I think that could be helpful. It'd open up more gates for us." [#22]
- The owner of a WBE- and DBE-certified construction firm stated, "There's none available. I mean because there's nothing available. For instance, I've been exempt from that program for the past two years because there's no training opportunities even remotely close to where we work. … I think you would spend more money than what they're intending to do with the program. I understand why they're trying to implement those things, but that they need to take into effect several factors before you just try to force companies to do it across the board, because my company located in a rural county is different than ABC Company located in downtown Indianapolis or downtown Louisville for instance. I really think that their across-the-board percentages that they try to make companies adhere too isn't feasible. It might be fine for this big giant organization that goes through a staffing agency or a union hall or something of that nature, but a smaller company like myself you know we physically just can't do it." [#23]

- The owner of a majority-owned construction firm stated, "It comes back to trying to get the younger kids that don't wanna go into college and go that route to get them enticed to get into the construction industry. I know everybody's hitting hard on trying to get the trades back in the schools again. They got away from it. Twenty years ago, they had a facility where you were either going out and building a house or you were in the school, working on cars or diesel mechanics. You were working on just the building trades in general. A lot of those people, they graduate high school they either got in the union or worked for private contractors. You've seen less of that over the last 20 years." [#24]
- A representative of a majority-owned construction firm stated, "If I get back to the transportation industry, in order to get your commercial driver's license, you can at 18, but you're extremely limited on what you can do; it has to stay within the state. For a company like ours, that the majority of our business is out of state, means I can't really acquire a truck driver until age 21. If the typical person comes out of high school, not going on to a college or some sort of a trade school, the typical person will come out at age 18 and they find tons of jobs before I can get them into my transportation job that I need 'em for." [#25]
- A representative of a majority-owned construction company stated, "We quote a lot of jobs that never materialize ... emphasis on training minorities in the profession of construction and offering real opportunities for growth in those companies, level the playing field, there's too much favoritism, monitoring true minority participation all the way through to the checks." [#AV10]
- A representative of a majority-owned professional services company stated, "It's a great place to find talent with the various engineering schools around. The students like living here and it is a cost-effective area to live in. There are a lot of tech opportunities here." [#AV2041]

4. Mentor/protégé relationships. Ten 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, #11, #12, #13, #14, #17, #21, #25, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "I was fortunate that I had a couple of mentors who were pretty savvy businesspeople and they helped introduce me to customers." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "I haven't seen a mentor protégé for architecture. but I know there are different… like, ICR has a construction round—Indiana Construction Roundtable—whose programs… there's Ace Mentoring… so, there's a lot of things out there for somebody to start out." [#2]
- The Black American owner of a construction company stated, "I definitely think so, 'cause if I had someone that I could have talked to during the start of my business, then maybe things would have… someone who I could have called on a regular basis or as needed to ask different questions, because I've got myself into a few situations that I could have avoided. Now, I've learned, and I know now, but if I would have had to have opportunity to talk to somebody, there were some mistakes that could have been avoided. … if I would have had someone to talk to from the beginning, a mentorship or something like that, that's what I was saying. I've made some mistakes with my contracts and making sure that things were clear in my payment terms

and just different things like that. If I would have had that insight at the beginning, maybe I could have avoided some of those issues. But with the people wanting to pay me less … I don't know what we could do with that. It's just people's personal… I don't know. I really don't know. It's just I feel like if I had a white guy doing the estimating and bidding, I would get more work." [#11]

- The owner of a majority-owned professional services firm stated, "I've got mentors that I've relied on over the years. I think that would be a good idea. … It's not going to get you work. It might make you more prepared to get it because, when a group sits down to review proposals, they're going to look at who has the most experience and who has the best fees, so I don't think a mentor is going to help you in that situation." [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "Definitely. Even an on-demand video would be fine. I have an IT background and having on-demand videos is great because you don't have to allocate face to face time with someone. You can just watch videos online whenever the employee has the time to do that." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Yes, it's always useful I have found. I've had several mentor-protégés over the course of my profession that has either one way or another opened the door to what I do and also exposed me to people that I can give an introduction to that can now hear me and see that we do get work, that have recommended us as well. So, it has its benefit for sure. … I was a part of a program several years ago, Indiana Construction Roundtable, Inc. (ICR), which they have changed a bit. Their program was stemmed off of the fact that you were partnered with a mentor that you met with so often to help you either finance or market, or your books or anything. That was extremely helpful, because for one thing, that general contractor saw me in a different light. Even though I'm not supposed to use that person for work, that person saw me in a different light, and they saw some of the work that we did produce, so they did recommend me to other companies that ended up using us for their architectural work. So, it's the exposure of the potential that has gained a lot of awareness, so I think the program would be very beneficial if there is some type of incentive. The only problem is the incentive for the prime is trying to get the work done; they're not trying to lose time, and if it can be structured where they could learn and benefit as well, I think it would be beneficial for both. I think if we could have a mentor-protégé type program that actually gave results and established different firms versus using them, not really helping, and just want to get rid of them, where they could actually have firms that they can compete down the line, that would be a better situation for the state as well. Because, for example, when I first opened my business for business in 2001, we worked on the airport with seven minority architectural firms. Of those seven firms only two of those original firms are in existence today, because the other five are out of business because they could not get the work. And that is disappointing because now they really could use those firms, but they either left the state or they've joined another firm." [#14]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "I have great credit. I didn't get a lot of loans. I don't like to have a lot of loans, but I was able to capitalize on some relationships with some people that sent me work my way and help coach and develop me on some opportunities that were outside of my box, and loan me manpower to help do some jobs in different genres that I wasn't an expert in or had familiarity with." [#17]

- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Mentor protégé programs are available all throughout the primes. All the primes are pretty much engaged in that sort of thing because of the program the federal government started. They put in place the means to help small businesses. I think there are some areas where startups could benefit by being connected with universities, or some of the some of the areas where universities are launching programs to incubator programs. Those source programs may have the expertise to train and assist small businesses, especially start-ups, to get some training on what is necessary, what's required, what things to watch out for, how to go about doing things." [#21]
- A representative of a majority-owned construction firm stated, "It would have to be a mentorship. They would have to be assigned to somebody that is likeminded or that they can get along with on a personal level, to where they could grow and learn from that mentor. I think that would be the best way to approach it." [#25]
- A representative of a Black American-owned construction company stated, "It's just very difficult to be recognized because we don't get the volume of work as the larger firms, so it's hard to get an answer for our RFP (Request for Proposals). It's difficult to team with prime firms on RFP because they'd rather use an engineer versus a like firm. They'd rather pick the engineers over the architects. And we just don't get the opportunity to submit the bids. We're not in that network which you need to be in to receive projects, because we don't have the exposure of the larger-type of firms. So, I'm talking about competing with larger architectural firms and larger engineering firms. We've just never been successful in 26 years with INDOT. In my 26 years, I've tried to mentor other female, African-American architects and they all have failed in that their companies could not sustain themselves because they couldn't get the work to keep their business afloat. And at this point, I'm the only [one]." [#AV69]

5. Joint venture relationships. Five business owners and managers shared their thoughts regarding joint venture relationships and their potential helpfulness for small and disadvantaged businesses [#3, #13, #14, #20, #21]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "How do you navigate that? With what I do, it be nice to have another… because I don't offer enough normally on these things with DBE goals and stuff at my dollar value is really not big enough." [#3]
- The Black American owner of an MBE-certified goods and services firm stated, "Definitely. Joint ventures and breaking up contracts definitely would help out." [#13]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "A lot of firms that you try to team with in order to get the experience, if you are a threat, they definitely will not work with you, because they don't want you to gain that experience. It's extremely competitive. The firms that we have tried to go after to work with, they will always say 'We have our team and we're not interested in adding to our team.' Especially if it's another architectural firm, they will definitely not - they will use mechanical electrical designers or IT designer versus another architect, because they look at me as competitive, therefore it's hard to say if there is a new avenue that we need experience, we can't get the experience because no one is going to give us the experience. Such as medical, that's one avenue that we have been trying for the longest, but we have not been able to get on a team. No matter what we've done over the

last five years, we have not been able to get on a team in order to get any of that experience." [#14]

- A representative of a majority-owned professional services firm stated, "You know, sometimes I think it adds more costs to projects. Although it sounds great, but in the end, I think it adds more cost in a lot of cases to projects." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Well - a joint venture is fine as the prime, the contract of the agreement with the prime is solid enforceable. What I have seen happen is that small companies enter into prime contracts or joint venture agreements with the primes, and what happens is that eventually once the prime has got all the technology in sight, they simply pull out of the agreement. The small businesses [are] unable to do much because they don't have the legal resources or the financial resources to pursue the legal case. Those are predatory practices by the big prime, and I'm talking about the Boeings of the world. Say that again. Large companies, the big primes, where they do that routinely where they will enter into an agreement with a small company that has advanced technology, and then they'll go off and break the agreement later or pull out of the agreement and go 'develop the technology themselves', quote, after they have access to it at the expense of the small company." [#21]

6. Financing assistance. Three business owners and managers thought financing assistance can be helpful for small and disadvantaged businesses [#1, #3, #6]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "We have had two SBA loans in my business. We had the first one in 1985. We always had a bank involved to help us walk through the process. Going to the SBA direct was almost impossible. You need a bank to help you and we were fortunate to find a bank that would help us in 1985. Made us a small $40,000 SBA loan, and then the bank gave us a $15,000 credit which none of that would have happened if I hadn't had some equity, a couple houses… So, it was challenging. And not really knowing much about business, I enlisted the help of a Chamber of Commerce Retired Executives Program to walk me through corporate documents, accounting, creating spreadsheets which basically we did by hand back then. So, it's a very daunting task." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "It's never been super challenging for me personally to get funding, but I believe it's all in the way that you approach your bankers and things like that. And I feel like if we could coach just other DBEs … I don't think from the bankers and I'm not doing business with big banks. You know I kind of go to local banks or around my area. I'll take a packet, my business plan or whatever I'm trying to do. I take that to them and I sell them, that's what you have to do. You have to let him know that you're there to put in the work and to do things and they you're not going to let your business fail at the same point in time. You have to be prepared to. Let them know you're taking just as bigger for risk as they are on you. You know, I will put up everything that I have. And I did when I started this business. I went all in and if you go all in with what you have and you can expect, if you can sell that to somebody, I think then there's more of a chance for them to take a chance on you. It all comes down to, I think if you want to get people in this industry, you've got to train them, you've got to give them support and they don't have the money to pay for that. So, somebody's got to put the money where their mouth is and I guess you're discriminating by, not doing anything, or doing the bare minimum." [#3]

- The owner of a WBE- and DBE-certified construction company stated, "I would challenge any agency to try to think outside the box when those of us that are faced with these barriers think of doing it a different way - documented promissory notes, documented payments. You know when all those types of things I feel like sometimes when you bring different ideas, I mean, if we all stayed the same right then, then nobody gets any better, you know? Although INDOT was forward thinking and accepting of those things, I did have challenges and other agencies, so I would say of any agency that you know, understand the dynamic behind whatever is being proposed, and you know before and that that properly versus making lots of incorrect assumptions. And that's where I do feel like INDOT did a good job in that regard, right? They looked at the factual piece of everything versus assuming lots of incorrect things." [#6]

7. Bonding assistance. Two business owners and managers thought bonding assistance can be helpful for small and disadvantaged businesses [#1, #6]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "The first time we got a bond, we had to go through the SBA because our insurance company who is also our bonding agent, he said he thought he could get us a bond if we went through SBA bonding loan company. So, we did. And that worked. It took a little longer but now we're at the point where we have to use the SBA bond." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "I would suggest reaching out to folks that do bonding. And bringing them in and explaining to folks, like myself, and this [and] this has happened. And that's how I started down that path of bonding and knowing what I needed to even get a bonding line - there's various types of bonds - and not everybody is savvy enough to understand that and [to] understand that financial statements are needed - there's so many small business owners that are potentially DBE, WBE or DBE. I mean they're running their business out of a checkbook. Yes, they might have financials, or they might take their checkbooks to the CPA at the end of the year. But to have a balance sheet and income statement and, some of those types of things, they don't have that put together, but that's what's going to be needed. Or, to develop that bonding line with an agency, so just kind of going through those types of items and walking folks through that process." [#6]

8. Assistance in obtaining business insurance. One business owner thought assistance in obtaining business insurance can be helpful for small and disadvantaged businesses [#6]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "It was difficult for car insurance carriers to look at myself as a new business owner and wanting to take on what they thought was risky as a new business owner, especially in trucking because I mean trucking holds so much liability with the big trucks, I mean you see billboards, billboards everywhere. So, I would say, potentially those agencies. I've also been a big advocate of the ideal way of Indianapolis – and why wouldn't they bring some vendors that are willing to look at companies, new companies that are certified? This could be potential business for them. Oh yeah, it might be risky, right? But just putting them in touch with people that really do want to seek out, you know? No, I'm not saying helping. I'm saying, I mean, obviously they're selling an insurance policy. There's an advantage to them, right? I mean, it's just knowing instead of making 15 phone calls to insurance companies if there was an event that had folks, banks, insurance companies,

bonding agencies all together. And they're like, hey, we want to do business with folks just like you then. I mean, how nice would that be to exchange contact information?" [#6]

9. Other small business start-up assistance. Business owners and managers shared thoughts on other small business start-up assistance programs. Four owners and managers agreed that start-up assistance is helpful [#2, #11, #AV]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "For a startup construction company that type of bidding training might be helpful." [#2]
- The Black American owner of a construction company stated, "I definitely think so, 'cause if I had someone that I could have talked to during the start of my business, then maybe things would have… someone who I could have called on a regular basis or as needed to ask different questions, because I've got myself into a few situations that I could have avoided. Now, I've learned, and I know now, but if I would have had to have opportunity to talk to somebody, there were some mistakes that could have been avoided." [#11]
- A representative of a Black American-owned construction company stated, "There are barriers in terms of what is available, and in transparency for where to look for opportunities. How to expand, contacts to reach in order to grow." [#AV204]
- A representative of a majority-owned professional services company stated, "Starting a business is extremely difficult and getting work easy. Ex: difficult to start a veteran business is extremely difficult or challenging. A lot of audits." [#AV2019]

10. Information on public agency contracting procedures and bidding opportunities. Four 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, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "There's a seminar coming up next week online from, I can't remember if it's INDOT or IDOA. They're going to teach us where to find opportunities in the market. I get these emails from IDOA or INDOT all the time telling me about jobs that are bidding. They are very incomplete. If you only relied on what they sent us, we'd never get anything. You've got to get in there on the INDOT website or other websites and you got to figure it out yourself." [#1]
- A representative of a Black American-owned construction company stated, "It's just very difficult to be recognized because we don't get the volume of work as the larger firms, so it's hard to get an answer for our RFP (Request for Proposals). It's difficult to team with prime firms on RFP because they'd rather use an engineer versus a like firm. They'd rather pick the engineers over the architects. And we just don't get the opportunity to submit the bids. We're not in that network which you need to be in to receive projects, because we don't have the exposure of the larger type of firms. So, I'm talking about competing with larger architectural firms and larger engineering firms. We've just never been successful in 26 years with INDOT. In my 26 years, I've tried to mentor other female, African American architects and they all have failed in that their companies could not sustain themselves because they couldn't get the work to keep their business afloat. And at this point, I'm the only [one]." [#AV69]

- A representative of a Black American-owned goods and services company stated, "Us not knowing the knowledge of how to get those contracts." [#AV2044]
- A representative of a woman-owned goods and services company stated, "I think it is more [like] trying to get foot in door and who to contact. Always seemed to be given to somebody else…. [they] go to people outside of Indiana. Frustrating for those of us in Indiana." [#AV2047]

11. Directories of potential prime contractors, subcontractors, and plan-holders. Six business owners and managers thought a hard copy or electronic directories of potential primes, subcontractors, and plan-holders would be helpful for small and disadvantaged businesses. Many firms knew how to access that information through INDOT's or IAA's websites, while others did not know how to access that information [#2, #5, #6, #8, #20, #22]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "I know a lot of people through NAWBO, National Association of Women Business Owners. I've met people at the diversity fairs. Sometimes I've had to Google and say okay I'm looking for a service-disabled veteran owned business and I actually got on SAM.gov because there was a project that was out there for a set aside for service-disabled veterans, but they wanted them to have a percentage of WBE. So, I contacted a local company that is service disabled, I found them through the SAM.gov website and I called them, and I said, 'Hey it's a set aside for your specific industry set of service disabled and you do engineering, would you put me on as your architectural consultant because they're also asking for other XBEs?' So, they did, we don't know if we got anything but they went ahead and did that. So, there's lots of ways to find them, there's the city list, they have a list of certified vendors. The state has a list of certified vendors, SAM.gov has a list. I mean the lists are out there if anyone wants to find them and they shouldn't use it as an excuse, oh we couldn't find anybody because you can always find somebody." [#2]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "I know most of them get posted like in Indianapolis and INDOT, they will post those opportunities for you. We have a website you can go and know what the jobs are, so they're doing a great job. But once you look for it then you have to find who are the prime bidders and try to work with them and see if you can give them numbers that works for them." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "Going back to having an event at banks, suppliers, right dealerships, I mean anything like that? Hey, who wants to do business with these people? You know, we've got landscapers, we've got, you know, I mean, the list goes on and on all the DBE companies, right? I mean there could be one for certain focus is I mean I obviously I'm in construction, so you know there's I mean fuel providers. Anything like that? I would think that folks, you know, would be interested in potentially tapping into a market. The only barrier I see is just knowing in some cases who to bid it too, right? Getting your hands on plan holders list INDOT, that's all very public, very easy to get your hands on it the same way because it flows through the INDOT portal. A City of Indianapolis for plan holders, they use Reprographics. That's fairly easy sometimes. Sometimes those things cost money like plans and things like that, whereas INDOT's is all free and public. INDOT- that information is very forthright. It's all public. Other municipalities … I don't know if you're asking about other municipalities or just that state work. I don't think they could do it any better. I mean, there's a plan holders list, you know, it's out there. The contact information is there. Thankfully, they started adding emails to that contact information so we could send bids easily or easier. But if

you're in referring to other municipalities, different cities, that type of thing, it can be more difficult. It's not as it's not just on their website with the city you're having to call a town or, you know, etc. But a lot of those same towns use INDOT specs, so would be nice if INDOT could influence that. I know they couldn't force it, but they could influence that. You know, it's posted on a website or reprographics or something." [#6]

- The owner of a WBE- and DBE-certified construction company stated, "The state has a list of who's approved for bids, and I just go down the list. Before we were faxing all of them, which took a lot of time. And nobody does faxes anymore. I asked if we couldn't do those electronically, if they would put the person's e-mail address on. They started doing that a year or two ago. So much easier." [#8]
- A representative of a majority-owned professional services firm stated, "I can find them all day. Especially if you're involved in a lot of the different organizations that are out there, from ACEC to AIC AICC, Sheriffs Association, AIM. If you're a member of one of those organizations, you're going to find whoever you want." [#20]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "The system… they're very open and transparent." [#22]

12. Pre-bid conferences. Three 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 [#3, #20, #21]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "I used to, when I first started, attend pre-bid meetings just to make myself known and it really to introduce myself to other people in the room. I haven't been to one in years. Uh, most of the things that I need, especially when you when you bid on state work, you can find in the in the bid documents. So not that big of a deal for me, but I'm almost 100% this I I'm a subcontractor, so I'm not ever working, you know, directly with whoever would be having the pre-bid meeting." [#3]
- A representative of a majority-owned professional services firm stated, "I think the pre-bidding information can be helpful. It can answer some questions to people that are interested in bidding it. I use it a lot to qualify whether I'm going to get hosed on a job or whether it's something that I really should go after. A lot of times I use that tool because sometimes the entity, whether it's a state, county, or local municipalities won't necessarily share or be forthcoming some of the specific details. At least that's been my experience." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Yeah. Sometimes in some the programs that we have participated, they have been what the military calls 'Industry Days'. When we get the chance to meet the primes and look for opportunities to subcontract or for other companies to our subcontractors so we can team up and bid together." [#21]

13. Other agency outreach. Nine business owners and managers thought other agency outreach could be helpful for small and disadvantaged businesses. Many shared their experiences with INDOT's and IAA's outreach efforts [#1, #2, #3, #6, #12, #13, #19, #21, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "You got to participate in industry events. Anytime you can go somewhere where you can have a whole [lot of] customers there, that's a positive." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "I've been to vendor fairs. I don't find that I really get anything out of them. To go around and give your card to everybody, introduce yourself… I think if you're brand new, I think those are worth it, but they're only worth it if you get a call back or you get an RFP or there's some communication back. I think there's a lot of, I go to the Commission for Women … and a lot of the diversity coordinators are there and I think that's a good place to go to talk to people and see if they've got anything coming up. So, in that case, it's good. I think we've gone a couple of times to some contractor's association. I forget what the name of it is. And so, we've gone around and handed our cards out to a lot of the prime contractors that maybe didn't know about [us]. Maybe they've seen our banners, but they didn't know who to call. So, that helps kind of get a name out as a subcontractor to that event, because a lot of primes go to that event to see who all the subs are. It's an association for non-union subcontractors. We were in that for a bit, but I really didn't see any payback that we were getting from that. I don't think we were developing any new business relationships. It was just kind of like, 'Okay. You're here. Thanks.' So, unless they really need what we have to offer, they're probably not going to call us." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "One thing that INDOT used to do that was really lovely as they had at that EDI program, which I'll go back to just 100 times over. They had meet and greets and they would bring in estimators or whoever from other companies and you get time just to stay in there and introduce yourself and to sit down and have a meal with them. And that was an awesome thing they did because I met some people there that I probably wouldn't have met, or it would have taken me a few years to get in front of. So, I think that was something cool and then they would challenge us the next year that they came back, we could send an invitation to somebody that we do a lot of work with and that's sharing a contact you have." [#3]
- The owner of a WBE- and DBE-certified construction company stated, "In regard to the networking and developing of relationships, I do think again INDOT hosts various events around certain projects to hopefully have that face-to-face interaction between subcontractors and suppliers and prime contractors that are bidding the work. I would say that it's never enough in my mind. It's usually in my mind what it appears to be is just the larger projects, right? I mean, the massive projects that not everybody as far as DBE have the wherewithal to bid on going back to your first question, right of you know what kind of capacity or what kind of level do you size, what kind of size projects do we bid on? Thankfully, we're at a size that we can bid on those larger projects. But you know I utilize a lot of DBEs to assist us on those projects because they themselves can't go after the work without that prime if that makes sense. I guess I'm speaking for the prime, but the prime wouldn't consider them because they don't have the equipment or the employees or the manpower to be a major player on it, so I use those types of folks, but you know it does sadden me a little bit in that I'm not as large on the milling side and there are probably projects that I get overlooked on because I don't have 9 mills right? I only have 3 and you know they're smaller projects that I might be a great fit for but those are not the projects that have networking events." [#6]

- The owner of a majority-owned professional services firm stated, "I don't really go to those. I'm sure you could go to the Indy Chamber events and other marketing events and things like that. I don't really think you get a lot of work from that. Maybe tangentially but not directly." [#12]
- The Black American owner of an MBE-certified goods and services firm stated, "Not really. I mean, I would say that's just… it'd be nice to know when events are being held so that way, me or a salesperson can be able to attend those." [#13]
- A representative of a majority-owned professional services company stated, "I've participated in some of those in the past but found them to be kind of exclusive in that it was hard to participate in conversations because I wasn't in the group, if that makes sense. I had an experience once with a disadvantaged business vendor fair and was going there to try to make connections. I got the feeling that many people just wanted to talk to people they already knew and not talk to people that were looking to expand their network, which was a few years ago. Things might be different now. But it did leave a kind of bitter taste in my mouth." [#19]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Well, the federal government has the Small Business Administration that conducts the Small Business Research programs. And they have an event that is held by the region. There's a Midwest, and the West, Southwest, East/Northeast, Southeast. We attend those when they're close enough to Annapolis or in Indianapolis. Sometimes those [are] productive because a number of agencies participate, and we can have discussions with them to provide information on our capabilities and the things that we have done and are doing. Sometimes that has resulted interest from other agencies." [#21]
- A representative of a woman-owned construction company stated, "Small challenges, cannot develop relationships with the prime hard to do. [If] they get rid of internal [it will be] hard to get the opportunity. What would help: Clearing house of the opportunity for sub consultant to engage w/ the prime and help to develop relationships." [#AV133]

14. Unbundling contracts. Three business owners and managers shared their thoughts on breaking up large contracts into smaller pieces. [#5, #8, #13]. For example:

- The Black American owner of an MBE- and DBE-certified professional services firm stated, "We wish our part of the work would be subbed out that you can say, 'Okay, you're doing the surveying part, which is a prime,' but it will never work that way, we're always going to be a sub. That part, we can't change that." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "I don't think they'll change this, but INDOT used to, every contract, every project, whether it was a small job or a bigger job, had its own contract number and was bid individually. Now they might put 15 different projects on one contract. And that tends to price us out of the market sometimes. I don't think they'll change it because they like having fewer contracts and getting their work done, but that has caused some problems. I just don't bid some of those jobs cause they're just too big." [#8]
- The Black American owner of an MBE-certified goods and services firm stated, "Definitely. Joint ventures and breaking up contracts definitely would help out." [#13]

15. Price or evaluation preferences for small businesses. Three business owners and managers thought price or evaluation preferences for small and local businesses are helpful [#14, #25, #AV]. For example:

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I did see one recently that did have points regarding that [price or evaluation preference]. I mean it was a small amount; it probably wouldn't have changed the effect on who would get it, of course, but it was in there. I mean it was only three-percent, and that's not really going to be enough to sway the person one way or the other; they probably would choose not to use under that. But at least it was a start, and it was in there." [#14]
- A representative of a majority-owned construction firm stated, "Yeah, 'cause typically, any bid put forward is going to take the lowest common denominator. Meaning, anybody that cuts costs and any way they cut the costs is going to win the bid. And typically, the first place you're gonna lose that cutting is in safety or quality, which we refuse to do." [#25]
- A representative of a majority-owned construction company stated, "INDOT works with a lot of out-of-state companies. I constantly hear it from other engineering firms that there is a lot of frustration with that. Most of those firms feel that INDOT should give work to the Indiana firms first before using out-of-state firms." [#AV73]

16. Small business set-asides. Four business owners and managers thought small business set-asides are helpful for small and disadvantaged businesses [#2, #14, #22, #24]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "You don't have to hire a huge 100-person firm to do a small project. Kind of tailor those smaller projects to a smaller firm, know what I'm saying? So, help give them the opportunity because, like I said, all architects have the same credentials. We're trained the same way. It's like doctors, you know? I mean, we know what we're doing. So, just because we haven't done exactly that that project before or five of those exact projects doesn't mean we can't do it. It just means we haven't had the opportunity to do it. So, I think I could do a lot for that. And, like I said, INDOT, I think, it's just a matter of is it fair that they have more… they don't have a lot of projects out there for architecture, but again, why can't I do architecture and historic architecture? There's no valid reason why I couldn't do both, other than that's the way they're set up and being told, 'This is the way we do it.' when we did that project at Purdue, they actually put out a request for proposal only to XBE companies, they didn't put out to any other firms, just the XBEs. And so that's how we were able to get in on an interview. we ended up getting the project and we wouldn't have gotten it otherwise. And we keep telling the commissioner for women and the people there, hey you can actually pick who you want, because on the professional services it's not a low bid. It's easy to get your percentage, they just don't, and I don't know if the perception is that women minorities don't do good work 'cause that's certainly not the case. I don't know I think they have their favorites and like I said they say, well how many—have you done five of this exact kind of building before? And with the minorities and women, we haven't done five of those, we've done five buildings, but we haven't done exactly that kind of building because we're a smaller firm and we don't have that depth of experience. I went back and called on the university architect and I said, 'why don't you do that again? That would help your percentage?' And he said, 'We didn't do that.' I said, 'What?' He goes, 'We didn't do a set aside.' He lied, he lied in front of his president. I know they did a set aside, because the only way I could get the engineer that I used; she had agreement with CSO to

do a right of first refusal. So, if CSO would have gone after her, she wouldn't have been able to work with me. I called her and she said no this is a set aside so none of the big firms are going after her, so yeah, I can work with you. So, I know for a fact it was a set aside and I don't why he lied about it, but I thought that's ridiculous, you shouldn't have to lie about it why can't you do a set aside? He was gone not too long after that. … Somebody had a great suggestion on one of the diversity calls that we did, and they said you know why don't you do one project, one big project that has to be a set aside for 100 percent XBE. A set aside specifically for people that could do it and were women and minorities and I thought that was a great idea. I think even if we did one a year you would give more people an opportunity to show what they can do and instead of doing little piece meal percentages that nobody ever meets." [#2]

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I think that would be a very good idea as well [having small business set asides]. Similar to what the federal government does; they have set-asides for women and other categories as well." [#14]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "There's not enough. They need more. A lot of the bids that we do are for the bigger companies. They're not for small companies like myself." [#22]
- The owner of a majority-owned construction firm stated, "There's not enough of them either." [#24]

17. Mandatory subcontracting minimums. Four 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 [#14, #19, #20, #24]. For example:

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I think it has a lot to do with comfort level, because I understand it's their job as well to have a successful project. So, they definitely do not want to try their job on someone that they aren't comfortable working with. I can understand that. I think if they had a mandatory level of commitment versus writing a waiver and saying you can't find one, well, they're now beginning to feel the effect of those waivers, because now they do not have firms to help them, because there aren't any firms because they've gone out of business. If they had a mandatory level of commitment as far as same professional services as well as some of the other services—and I'm dealing with architecture, as far as another architect or prime getting a job—and then they have to work with a small architecture firm. Yes, I think that would be a great way of having a minimum without any excuses. Because the City provides a list of all the certified vendors and there's somebody under each one of those categories. I don't think it should be an excuse for someone to have the opportunity to write a waiver to say they could not find resources. I think that's a very good idea." [#14]
- A representative of a majority-owned professional services company stated, "I think that would be hurtful. Because you're now going to require people to have a certain percentage. Sometimes it's hard to meet the percentage because it doesn't make sense from an efficiency standard, or it doesn't make sense because there's not somebody that can take on that amount of tasks because of their limited capabilities. So, then there's the risk that quality will suffer because you're bringing in somebody to do something that's beyond their capability or that hasn't been

nurtured enough to do it themselves yet. I think having percentage goals is a good thing. But then if somebody doesn't meet that goal knowing why they don't meet it is almost more important. Right? It's well, we brought this firm in because we're going to nurture them on this project so that the next one, we get like this they can take a greater percentage of it. But right now, they're just not ready because they haven't ever done it before, but we have and we're going to nurture them on this project because that's the right thing to do." [#19]

- A representative of a majority-owned professional services firm stated, "You know, I get why they do it. In my opinion, it adds more cost to a project, especially if you've got taxpayers too that you've got to answer to and you're an elected official. Sometimes that can create some issues. But I don't necessarily see that a lot anymore. I used to see it all the time, where there are a lot of requirements. The thing that really gets me about the state that really upsets me probably more than anything is that you have so many good Indiana firms here, so many of them, but yet they go outside the state and award a lot of contracts. That is a general conversation that a lot of firms have behind the scenes, and they always talk about it, that especially the governor or the State of Indiana on some of these bids, they go outside the state to hire people. That doesn't go over very well, especially with a lot of people that have invested their money and their efforts here in the state of Indiana." [#20]
- The owner of a majority-owned construction firm stated, "They do that and then the next tier is you've gotta have a certain percentage of certain minorities involved, but the problem is you don't have enough supply there for the demand." [#24]

18. Small business subcontracting goals. Two business owners and managers thought small business subcontracting goals are helpful for small and disadvantaged businesses [#3, #19]. For example:

- The owner of a WBE- and DBE-certified construction company stated, "INDOT has all these goals and everything. Well, [INDOT makes up] the majority of my work. And for some reason the places that don't have [goals] I miss out on a lot of work. So, I don't know why that is and maybe [that's] the smaller municipalities or private owners, you know, they don't have things like [goals]. Maybe that keeps me out sometimes." [#3]
- A representative of a majority-owned professional services company stated, "I think having percentage goals is a good thing. But then if somebody doesn't meet that goal knowing why they don't meet it is almost more important. Right? It's well, we brought this firm in because we're going to nurture them on this project so that the next one, we get like this they can take a greater percentage of it. But right now, they're just not ready because they haven't ever done it before, but we have, and we're going to nurture them on this project because that's the right thing to do." [#19]

J. Insights Regarding Race- and Gender-based Measures

Business owners and representatives shared their experience with INDOT's and IAA's certification, POC business programs, and small business programs and provided recommendations for making it more inclusive. For example:

1. Experience with INDOT's and IAA's programs;
2. Experience with the federal DBE program; and

3. Recommendations about race- and gender-based programs.

1. Experience with INDOT's and IAA's programs. Nine business owners and representatives shared their experiences with INDOT's and IAA's programs [#1, #2, #3, #4, #5, #6, #14, #20, #AV] For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "When they changed from a pure MBE to a DBE and included the women, that really diluted the ability of MBEs, like we are a true MBE because of my Hispanic heritage, from getting work. That was an issue for a while. But I understand why they did it. They were having trouble getting enough minority owners in the program. And I think they had some pressure from the women-owned businesses and contractors to expand who could be certified. So that impacted our business. Another thing that impacted us in the beginning in a good way was when the state of Indiana decided to establish separate goals for MBE's, WBE's, DBE's on totally state-funded work. And that was in the beginning was a good thing but over the past few years, the Department of Administration has not managed that well. For instance, let's say that we are doing concrete - we also set concrete barriers. We own about 6000 feet of concrete barrier. And we will quote that installed. And we might have to move it in phase 1 or phase 2 and then remove it. If we go out to the jobsite, we will take a real big Bobcat to move barriers. It's really sometimes beneficial to us that the contractor is there, and he has a Bobcat on-site, to lease his Bobcat from him for the day and put our operator in. Or lease his Bobcat with an operator. That's a typical scenario in the construction industry. It just works well. Subcontractors sometimes rent stuff from the contractor that he has on the site. It helps everybody get the job done quicker and it helps INDOT. You don't have to wait an extra day to get equipment. And plus, with the labor shortages, that can really be beneficial. DBEs aren't allowed to do that. We have to use our own stuff. We can't rent anything. In fact, just in the last year, there's one EEO officer, and I'm not going to name names, who has really come down hard on having lease agreements. The federal highway, under the 49 CFR will allow lease agreements. So, if we want to do some kind of work and it's a small amount of work and we don't have the equipment to do it, we can usually lease it as long as the lease is structured so they are not paid by a pay item because then it becomes a subcontract. But that's been a problem over the last couple years. But it's always been a problem in that we can't; they really watch us like a hawk. And I understand it. They don't want shams going on. But when you have a company like ours that has lots of equipment, lots of assets, we've been doing this for a long time. I don't mean to brag but we've got a great reputation even with INDOT about doing things right. And when they make rules like this that overstep their authority, I think that's a problem." [#1]
- The owner of a WBE- and DBE-certified construction company stated, "We're not allowed to subcontract [to a second-tier sub]. So, we can't subcontract any of our work to anybody else. So, for instance, we can't subcontract pavement market. We don't have a big truck for pavement markets. So, it would be really advantageous if they would let us subcontract that because we're the ones who have to coordinate it anyway. So, why not let us subcontract? You don't have to count it in our work or as a DBE, but still, let us do that, because I just don't understand what that rule has anything to do with anything. So, what if we subcontract part of it? If you're not gonna count it, don't count it, but let us coordinate that. So, like, for instance, a job trailer… there's been projects where they wanted a job trailer on site and it would have been easier for us to rent that from somebody and put it in with our bid, but we can't subcontract that because

we don't own the trailer. It's just a silly rule. I don't understand where it ever came from. I mean, that, to me, is a barrier, because you're trying to build your business and offer other things, and if you could start doing things like that, then maybe you could get to the point where you could afford to buy a pavement marking truck. … I guess I would just like to say that I was very disappointed in INDOT that the compliance people wouldn't call me back, because the way I look at it they're a state employee, a state agency and they should have called me back. And I just don't think that that's right. They work for me, right? I'm a taxpayer, they should call me back and I just think for them to just ignore me, and I talked to the DBE office and explained the whole issue with the bidding and everything and I said can you get me a meeting? Well, he turned me over to some DBE compliance people that they pay for, and I talk to this guy, he's like an outside DBE compliance. I think he helps people get certified and I told him what was going on and he said, 'Well I can't help you.' And I said, 'I know that, but that's who they gave me, the guy who's in charge of the DBE program can't get me a meeting with somebody higher up to talk about this?' They're just avoiding the issue; it just makes me crazy." [#2]

- The owner of a WBE- and DBE-certified construction company stated, "I used to spend a lot of time around other DBEs. I'm going to DBE classes, and it was fabulous being, you know, for all of us to be in the same room together and really share our experiences and be able to offer suggestions to other people. It was critical for me when I started my business to be in a place of other successful DBEs and to feed off their momentum and be inspired by them. And that is what really saved me and put me where I am today, I think. But going through those classes and staying the night and doing that kind of thing and then getting up and teaching you how to do that like I learn things on plan reading and things that I've never done. And I would have felt too stupid to ask another guy or, anybody that did anything like that so. I'll never forget sitting in that EDI (Entrepreneurial Development Institute) class. And there is a sign, right in front of me … It was sitting right in front of me, but it said you have to ask for work, you know, and providing just something so simple, training like that to educate me, I guess on how to sell to people that have been doing business with the same people over and over and over and over, you know, and then being a female on top of it, you know, and maybe a man doesn't feel comfortable talking to you or whatever it is or doesn't think you know anything about anything, because I've had plenty of those kind of conversations with. INDOT ... had an EDI program that I started in I think in 2000. … starting and being a DBE company like you feel so alone. Like I'll never forget how alone I felt starting my own business. I didn't have, you know, a plethora of support by any means and going to the to those programs that they had. And being around other DBEs and having the support of that, I cannot speak highly enough about how important that was and how it helped me succeed. There is absolutely no way I would be where I am today if it weren't for going through those programs. If I could bring those back in any in in a where a physical presence for these people and asking them for to come. You know, you had to commit to going and making every class. And I think they started maybe like a Wednesday, and they went through Saturday, but they would literally rent out a hotel, hotel rooms for you and you would go and stay. So, you were consumed with fixing or making your business better. I'm a DBE in several states, but I've been to trainings in three states. And back then, by far INDOT did it the best, and it's because they got us together and they made us come there. And if there's DBE's that are seriously interested in and being in this market for years to come, that's in my opinion, what they need, to succeed. And I would love to go if something like that existed again, I would be there in a heartbeat just because I definitely still to this day struggle without being able to get out to be around my community any longer. The people at INDOT you know, just being able to

see them and talk to them and just have him say you're doing a good job, you know, or any type of support they can give you as just a pat on the back when you're when you're in this market… one thing that INDOT used to do that was really lovely as they had at that at that EDI program, which I'll go back to just 100 times over. They had, like, meet and greets and they would bring in estimators or whoever from other companies and you get time just to stay in there and introduce yourself and to sit down and have a meal with them. And that was that was an awesome thing they did because I met some people there that I probably wouldn't have met, or it would have taken me a few years to get in front of. So, I think that was that was something cool and then they would challenge us the next year that they came back, we could send an invitation to somebody that we do a lot of work with and that's sharing a contact you have. Wonderful people who care about the success of the program and the success of DBEs. I think other states, they just do it because it's the way they're gonna get federal dollars. So, I really feel proud to be, you know, involved with the with, with INDOT because of that." [#3]

- The Black American owner of an MBE-, XBE-, and DBE-certified construction company stated, "We run into some issues about whether we are a supplier versus a distributor, which is why I was trying to clarify with you. We are a supplier of fabricated rebar, and it's the fabrication is what we supply. So, I buy rebar from the steel mills, but it's not usable on a job until I cut it and bend it to the specifications that are in the drawings. So, we have gotten in arguments with public entities over whether are we actually a supplier of a material, where you get 100 percent credit, or are we a distributor of material, in which case I think you only get 60 percent credit. That's a fight we've had to fight before, but I think generally we're accepted as a supplier. one thing I don't like is the … especially on the DBE, the annual revenue number is pretty low. You imagine for me personally, with the rise in prices that we had to endure … and obviously that means I'm gonna pass that increase on to my customer, right … there's barely any room for me to grow. Based on what we did in 2019, if I do the same thing in 2022, just based on the fact that prices have gone up so much, I would be right at the revenue limit. I'll be under it still, but it'll be close. Not because I've grown or not because we've made any operational improvements, but just strictly as a function of the fact that prices went up. I think again, a number down here is something like 25, 26 million in top-line revenue, whereas as an example, the Chicago minority business enterprise, City of Chicago, I want to say that same limit is $44 million. So, I do think that that 20-something is fairly low. if you think about it logically, the only way to successfully grow out of the MBE in my mind is you got to kind of explode out of it. It won't be a situation where if you---if I get kicked out of the MBE program or DB program because I went two dollars over the revenue number, I would guess that my revenue would be down 30 or 40 percent the year after I lose my certification. Whereas what would really need to happen is the year before I'm about to lose my certification, I should put a bunch of investment dollars into growing the business, so that the following year I've scaled up and I'm ready to operate on my own. I guess that would be a problem no matter what that limit is, but if the limit is higher, then theoretically, you have more the year before to where you can invest more into your company and really grow out of being dependent on that certification, which is absolutely my goal." [#4]
- The Black American owner of an MBE- and DBE-certified professional services firm stated, "I would say definitely being working with INDOT, through that process, through the DBE process has been great. And like I said, it gives an exposure of the company out there." [#5]
- The owner of a WBE- and DBE-certified construction company stated, "They started with a I think it's CEI, and some of the workshops that CEI has put on, as for education purposes for

DBEs, I feel like have been phenomenal. Now whether or not the DBEs have taken advantage of some of those things, you know that's a whole another story, right. To some degree it's like maybe makes some of that, like continuing it maybe continuing educational requirement for the application or for the certification, you know, because that can be a little frustrating. I mean, there's DBEs that have been DBEs a lot longer than I have. And still don't know some of these things and I'm educating them right. So, I'm a big advocate of these agencies educating the certified companies so that they can be better. We did take advantage of the website design that CEI, which was free of charge, offered to DBEs for uh from INDOT Also … so basically a one-page letter planner, forget what they refer to it. It's basically a one-page document that kind of highlights: who you are, what you're about, all of those selling points and that is a very nicely designed letter that again see I the service that INDOT offers to put together free of charge. That was called a 'capability statement.' They refer to it as a capability statement. It lists your you know, NAICs codes and things like that. So, marketing in regard to that, those are those are my end going to any event." [#6]

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I was a part of a program several years ago, Indiana Construction Roundtable, Inc. (ICR), which they have changed a bit. Their program was stemmed off of the fact that you were partnered with a mentor that you met with so often to help you either finance or market, or your books or anything. That was extremely helpful, because for one thing, that general contractor saw me in a different light. Even though I'm not supposed to use that person for work, that person saw me in a different light, and they saw some of the work that we did produce, so they did recommend me to other companies that ended up using us for their architectural work. So, it's the exposure of the potential that has gained a lot of awareness, so I think the program would be very beneficial if there is some type of incentive. The only problem is the incentive for the prime is trying to get the work done; they're not trying to lose time, and if it can be structured where they could learn and benefit as well, I think it would be beneficial for both." [#14]

- A representative of a majority-owned professional services firm stated, "I don't really have an issue with it at all. Like I said, my biggest issue with the state has always been that there's a lot of qualified people that are here in Indiana that invested their money in starting a business up here and investing in Indiana, and it frustrates me and some of my colleagues more about that they bring in out-of-state firms to do work when there's plenty of Indiana qualified firms that are here." [#20]

- A representative of a majority-owned construction company stated, "The difficulty is to find the insurance they require and the surety bond $50000.00 I feel like our company has gotten looked over because we are minority-owned and the difficulty over the last 3 yrs. trying to obtain proper licensing and getting set up to state requirements. A lady at INDOT helped us with getting set up." [AV45]

3. Experience with federal DBE program. Seven business owners and representatives shared their experiences with the federal DBE program [#1, #6, #14, #20, #21, #22, #24] For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "Just through the Federal Highway Administration. But other than that, like the SBA, no. Too cumbersome. You've got to have a specific line of work that you can do that beats their

purchasing needs. For what you get for it, it's just too cumbersome. They've got some really restrictive requirements about volume of work." [#1]

- The owner of a WBE- and DBE-certified construction company stated, "I just uncovered that there is a federal DBE certification. So, we're looking into that." [#6]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "Federal is worse. It's very difficult to get in through federal… They are now starting to do some outreach programs, and I have met with a few people from GSA. I've had a presentation that I gave to quite a few of their directors from GSA, so I thought that was the first time in 20-something years that I've tried with them. I had given up on federal to get that far. They are trying to at least make an effort to consider minority women in the industry, because it's right now probably close to less than 000.1 percent." [#14]
- A representative of a majority-owned professional services firm stated, "You know, I think it's really straightforward and, in my opinion, little has changed, at least in the last five, ten years it seems like. I mean very little has changed. Everybody knows what that is supposed to be and how to go about it and what you have to do." [#20]
- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Well, other than that all the federal programs require that consideration be given. And then the Small Business Innovation Research is for small businesses. Those programs are in place." [#21]
- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Yes, the federal, yes, but I've never had anything bad to say about that. I mean, there's never been an issue with them." [#22]
- The owner of a majority-owned construction firm stated, "It would be step down to the state level, would be my experience. There's federal money involved with all this stuff, but as far as the federal contracts, I typically don't get involved with those." [#24]

4. Recommendations about race- and gender-based programs. Interviewees provided other suggestions to INDOT and IAA about how to improve their certification process and programs for certified firms [#1, #2, #3, #6, #11, #12, #13, #14, #15, #16, #17, #18, #19, #20, #21, #22, #23, #24, #AV]. For example:

- The Hispanic American owner of an MBE- and DBE-certified construction company stated, "The IDOA MBE program, there's some issues. I think they are putting goals on some contracts that are pretty high because they don't do it - like INDOT looks at each contract and says the goal ought to be 14 percent based on the line items that the DBE were. In the IDOA world, it's a 7 percent minority goal and a 3 percent WBE goal, MBE/WBE. And that's difficult sometimes to meet. So sometimes I think they modify their stance on how they count XBE's towards the goal. So, if they can't get an MBE and they can get 5 percent WBE, they usually award the contract. That's hurting the MBE's... It's in everybody's best interest to keep your certified DBE's healthy and to keep them certified. It's easier for INDOT to meet their goals if they are. Sometimes you get the feeling they would rather kick you out of the program that help you along. That's not always the case but sometimes it bothers me. Instead of spending all their energy listing new DBE's, I think they should spend some more time helping their existing DBE's succeed. Does that make sense? … I wish they'd take a second look at that lease agreement for INDOT. For IDOA,

they need to do a better job of monitoring their DBE commitments, MBE commitments. I'm sorry. It might be a good idea to have a statewide MBE/DBE association where we could all get together to discuss issues. Just for the state of Indiana." [#1]

- The owner of a WBE- and DBE-certified construction company stated, "I would suggest that they do some kind of a workshop with all of the XBEs and train them on how to navigate their website. Because the first time I got on PlanetBids it took me to some other PlanetBids and I registered there and I couldn't - you have to go through like 200 projects to even find Indianapolis's project and then there was no information on it, but it was the wrong PlanetBids. It wasn't the IAA PlanetBids. So, I would say let's do a workshop with the XBEs show them how to navigate the system, show them how to find stuff, how to respond." [#2]
- The owner of a WBE- and DBE-certified construction company stated, "Even leveling the playing field… I feel like with INDOT it's all about trucking and they allow you know truckers to one-to-one and it's like how big is too big for a trucker to be able to one-to-one people? I feel like you know, because then in that since you know you may have $1,000,000 contract and you're really paying half of it to somebody who's not even a DBE... The availability comes when they can start growing their business and hiring more people and you're gonna create more availability if they can grow their business. You know I started here 10 years ago, and I had one milling machine and I have you know 13 now. And I think I have 50 plus pieces of equipment on my Equipment List the other day… I did not get there overnight, but there is no way I would be where I am today if it weren't for that support." [#3]
- The owner of a WBE- and DBE-certified construction company stated, "I would love to see [us] going back to the face-to-face meetings and workshops. I know we had to kind of get away from some of those things through the pandemic, but if there's any way we can, we can start those back up. Like I said, I just went to one yesterday. It was very technical with, you know, quality control and plants. It wasn't as applicable, but it was still, you know, it it's always valuable to get your card out there, get your face out there. I would say that's the biggest piece." [#6]
- The Black American owner of a construction company stated, "If there was just a small business help line, I'd have had different people - and it wouldn't necessarily have to be on demand. It could be a small business has questions - you know, they can submit a question and then, a few different qualified businesses or larger businesses or businesses who have been around a lot longer, if they would check on these messages from time to time and answer a few questions from time to time, I think if there was like, a group of larger businesses that were willing to be mentors or play some type of role that small businesses could reach out to from time to time. But with that being said, I doubt that could ever happen because we're all competition. I mean, all the electrical companies - I can't reach out to an electrical company specifically 'cause I'm competition to them. … If there were - if there was a training program, some of this money that I've had to spend on some of the other software and other items that I had to spend money on could have been avoided, also if I would have been able to know how to estimate on my own and bid on my own. But the computer - with that being said, the computer system does help out, because it's all on the computer. I can click, and it's got different packages. But yes, some trainings definitely would have helped, because even in my career, as an electrician, before I started my own business, we don't get training in estimating or project managing or any - don't get any experience on running a business, basically. We're out there doing the work - I was on a service truck forever, and I would get information for the project managers to estimate, but

never had the opportunity to actually learn estimating before trying to just learn it on my own ... Training and someone instructing you is always - I mean, learning on your own - you're bound to learn if you're doing it on your own, but I would have been better prepared if I would have had some different training. I think something like that - it would be a case-by-case basis. 'Cause, not everyone is looking to be trained like that, so, it's really nothing that you can put in place in online. I mean, maybe if somebody could get some online instructions and then, be available for questions - any that arise - as people are trying to access this different training… I don't necessarily know, because, without getting those bigger contracts, I will never have that history to put down on the qualifying prequals and everything in different bid packages and stuff. So, without having that bigger work, I don't know what else I could put. I was, at one point, talking with a cooperative. They were a construction cooperative so, if I was to get registered with them, then there's somebody that would get a job and then, they would send the electrical to me, send the plumbing to another person. If I could be part of something like that where somebody would get a job and then, definitely push the work off to me so then, I could get that experience - if there was some type of co-op that was available for small businesses run by the state or city, maybe that might help. The one co-op that I was talking to, I don't think it was run by the city or state. It didn't seem like it was gonna have much traction so, I was going in other areas at the time so, I didn't really get back with those guys." [#11]

- The owner of a majority-owned professional services firm stated, "I don't know if there's any solution to that other than banks being forced to set aside community-based funds for startup businesses and entrepreneurs… United Way has a really good program where they have retired professionals in different industries - construction, architecture, engineering, social services - that they've implemented, which I think is a great program. And you might get ahold of United Way if you're serious about that, but I think you could call semi-retired or retired people who want to make a little extra money but don't really want a full-time job or have to meet a certain schedule; they just kind of do peer reviews. I think there's plenty of people out there that would do that. … I would say providing them with financing to start up and start their business. That's probably the first hurdle. I don't really know that there's a clearinghouse or consortium out there for younger firms or DBEs to be able to plug into proposals, other than them going to the different public agencies and getting certified. I don't know how you change the format of startup companies getting work. I just don't know how you do that short of providing better financing and figuring out a way somewhere for startup businesses to plug in to be able to even submit proposals and know where the work is. So, I think those would probably be the - but I'm not sure who would do that or how you would be able to set that up, unless it were like a website that was specifically set aside for startup firms or DBEs. I don't know, does the state have a website like that? I don't think they do. You would need some central point that they could all refer to. But I don't know who would want to manage that. That would be a big responsibility." [#12]

- The Black American owner of an MBE-certified goods and services firm stated, "Just the available programs that are out there, you know? I would say just knowing what programs are out there to help us find the bids, help us be able to submit the bids and participate in that whole entire interaction, I would say, would be helpful." [#13]

- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "I think if you don't hit people where it hurts it's not going to make a difference. And where it hurts is if they did not get the award or the opportunity as small businesses. Put them in the

same situation that we're in. I think if it would matter if they got the project or not, made a significant difference, a 15-point difference or something like that, then it becomes 'I better provide this service.' But overall, I would say that a lot of that still would not help the minority firms a lot, because there are too many disadvantaged or DBEs that are non-minorities that have been getting the contracts, and we still - minority firms are still left out a lot of the times. Give them an opportunity, especially on some of these projects that are less than a certain percentage point of what they do to just give them the opportunity and exposure. And with an open mind, that rather than a closed mind, that the person's going to make a mistake. Of course, the person's going to be nervous with their first project and they might make a minor mistake, but if you're willing to open up and say, 'Hey, this is where you could've done better' or 'Let's look at doing better in this area as well,' then that would help that person for one thing to build the confidence to work with you, and also to learn how to work with you." [#14]

- The Subcontinent Asian American owner of a professional services firm stated, "To make it easier for small companies to sign up. Right now, you have to go through a company called Knowledge Services. They're no longer there, and there's another company called CAI that handles all of the state's contracts, procurement contracts. They're just a pain to deal with." [#15]
- The Black American owner of an MBE-certified professional services firm stated, "I just think it just needs to be more - I see a lot. I'm not saying I'm not blind to it, and I'm sure if I really put the effort into it, I could get more out of it. I'm so busy otherwise with what I'm doing, I just don't have the time, but I always tell myself eventually I'm going to get into it. To answer your question, 'What more could be done?' I would just say continue to do what's being done, give the MBE, give the minority, give the women business owners opportunities to partake in the bigger projects, and serve a more responsible role other than just, 'Oh, we've got to have so many percentages [of] MBE, so we just throw somebody in there just as a namesake.' No. They need to be part and parcel to the actual project or what's going on and have more of a vocal and visible role to show, 'Hey, we're just not here just because we meet a certain percentage. We're here because we're good designers, we're good contractors, we do good work. We study our craft just as well or better than anybody else.' I would say just continue. I see it, but I would say continue it and broaden it such that it's more visible, because these are things I'm talking now from my conversations with others. I'm not talking from my experience, because I haven't delved into it. … I'm probably the wrong guy to speak to. I'll tell you this one thing. When I first started, within the first week, I knew a gentleman that said, 'Hey, you need to talk to this lady. She's very aware of MBE, WBE status and how it works itself out in the Indianapolis area, just so you can get a feel for if it's going to actually help you in your business.' I sought her out, I sat and talked with her, and we had a nice conversation for about a couple hours. At the end of the conversation, she said to me, 'You know what? It's really not going to matter if you are or if you aren't, because it's going to be about your services. I mean, you're a design professional, so it's going to be about your services, of what you can bring to the table.' Sure enough, I would say I really didn't get any, I'm going to say, because initially, 'Oh yeah, you'll be MBE. You'll be able to get on these bigger projects and you'll have all these projects.' Well, it did not materialize, and it still hasn't. Honestly, it hasn't. With that said, I'm not going to say that was the reason I really didn't dive into exploring the opportunities that having my MBE status identified, or dive into how that can help me expand my business or get projects, so I really just never got into it. Not saying it won't

help or it can't help, obviously I think it can, but I just have not witnessed it myself personally." [#16]

- The Black American owner of an MBE- and DBE-certified construction firm stated, "I think having more money allocated to programs that involve and train companies to operate on a different level. Because so many times, this being a smaller company coming in, you don't know where to turn. You just kind of go off word of mouth or references. You just make it happen. I've never been too heavy on requiring a company to survive off an MBE. I've never started a company to say, I just need some people to use because I'm a minority. That was never a plan of starting the company. You start a company with an intention of working with and through other people to accomplish things. If the MBE allows you to get a leveler playing field, then great. Those people that have helped you along the way, you forge relationships with and grow. I think to make a program or situation better, it has to be funded with the intent of actually being better, not just checking off a box." [#17]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "No more than what they have on board now, like training programs, or recruiting, or dealing with the final score to see where your opportunities may be and how to get involved." [#18]
- A representative of a majority-owned professional services company stated, "The way that we look at the percentages in a contract needs to be altered because we have invested some time and money in creating an MBE partnership program where we're not just checking a box. We're not just getting the percentages. We're trying to actually invest in our MBE partners so that they can grow and be nurtured and gain some of the experience we have and become a competitor to us. We think there's value in that because there's value in having high quality partners to team with us on these projects. So often I see that people are just checking a box with MBE percentages and then the quality suffers because some of the MBE percentages are not the right fit or they don't have the right experience or they're not capable of doing what needs to be done. I think that hurts the client more than it helps. I think when we look at the MBE percentages it would be nice to know that we're not just looking at the number but also the quality and the nurturing that happens as part of that percentage and evaluating that as well. I think that that is really the intent of the MBE program, to nurture and grow the quality MBE firms that can do this work. I think another measure is looking beyond just the bid and looking at a company's partnership program because again I mentioned that we created a program and its somewhat of an informal program in that it's formal in that we have it written down and we have goals and we have action items in it but it's informal in that we're trying to adapt it to the environment that we're working in because we know that we don't know everything and we're trying to adapt it when we see new opportunities or new challenges. So, it's a growing program but our program has the mission of educating and nurturing newly formed MBE firms and bringing them on as partners in projects and also being a resource to them. So even if we're not partnered on a project, we have a verbal agreement or an understanding that they can call us and ask us questions about things and that's ok and we're here to help. And we also invite them to join webinars that we put on and we want them to kind of learn with us as well. So, a longwinded way of saying that it's got to be more than if we're going to embrace the idea of creating a high quality pool of MBE firms to reduce the disparity between MBE firms and non-MBE firms then we have to not just look at the percentage number. We have to look at how the non-MBE firms are partnering and nurturing the MBE firms and that's got to carry some weight because if somebody is just checking a box with the MBE firm not only are they not helping the disparity.

They're cultivating this environment that well; it doesn't matter what the MBE firm does on this project. We're checking the box and we got the job. That's not a long-term solution. We need to have non-MBE firms invest in these MBE firms through nurturing, through training, through being a resource. That may mean that some of these MBE firms might become competitors, but they'll become good competitors. We all know competitors will never go away but it's important to have good competitors that compete on the same level. … The lack of quality or the lack of training or the lack of capability is one of the things that I see that's the biggest hurdle for getting DBEs involved. And so I go back to my previous comments that I think if we want to make our market more diverse, we've got to encourage companies to invest and mentor these companies and not just use it as a checkbox. We were discussing the MBE requirements with one of our clients, one of state clients or government clients. During that discussion we talked about the intent of DBEs, and I've spoken at length about what we view as the noble intent of it is to diversify the marketplace with quality DBE consultants. We talked about how the contracts that we get with that government agency are an investment by the state through the contract to develop these DBEs in a more diverse marketplace with quality consultants. We focused a lot on how it's not a checkbox, that it's a flow of investment through construction or through the construction industry to develop the diversity, as opposed to the government creating a grant fund or something that the money goes directly to them. We're using this as a mechanism to develop it. When we had that discussion, and we have that intent aligned with that noble goal that's what spurred us on to rethink the way we're doing this. That's when we developed the program where we're investing and mentoring and partnering with firms that we want to develop or that we hope to develop, and we hope that they help create a more diverse marketplace with quality consultants. I would say it's having those honest conversations and then recognizing that it is an investment and that yeah, we can do it all ourselves and be a little less expensive and a little more efficient, but they want us to invest in that and they know it's going to be a little less efficient. That's a good conversation to have and if we can get people on board with that goal, I think we can make a lot of change. I want them to consider requirements for an MBE program of the companies that are bidding and seeing the results of that program. I think they do need to have some kind of conversation when reviewing the bids about how the bidder is investing in mentoring the folks that they're bringing on to their projects because we're not at a point yet where many of these small businesses, startup businesses that have great potential, they just don't yet have the experience and expertise to be a plug and play subconsultant. We have to invest to create that quality and that expectation in them of what good quality technical work looks like. Once they have learned that then they're going to become a competitor to us and that's a good thing because they're going to be a good competitor and that helps us all out. It raised all ships when you raise expectations." [#19]

- A representative of a majority-owned professional services firm stated, "Just what they probably hear all the time about transparency. Making sure that things are - there's transparency there." [#20]

- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "Well, I think the government can do more by instituting a - by taking the program, like this SBIR program for instance, the Small Business Innovation Research programs and making that program permanent instead of having to appropriate it and approve it every three or four years, or whatever the case might be. They should institutionalize that program is what I'm saying. Well, I think that there are programs … that set aside programs that do more of that in

some of the less technical fields and outside of the SBIR program. That gives opportunities to minority businesses. For instance, there are a lot of custodial firms that do businesses with federal and state government agencies under the set aside programs. There are some that you cannot do much about them because there are highly technical fields are required, engineering expertise, scientific expertise, like we do here. There are programs there that do that, and they do it well. Those are actually the ones that are more involved in broad cases than some of the ones we're talking about in scientific research." [#21]

- The Black American owner of a WBE- and DBE-certified professional services firm stated, "As far as the auditor program, it needs to be a little more diverse, the auditors that you send out, 'cause there are a certain amount of positions for the veterans or whatever. I think they need to diverse that just a little bit more, and I think that would calm things down a little bit. Most of the auditors that we've come in contact are veterans. A lot of our guys are from the Middle East, and most of the veterans are coming back from the Middle East, and there's automatically a barrier there. They act like there's not, but there is. I think a little more diversity in that area would be awesome." [#22]
- The owner of a WBE- and DBE-certified construction firm stated, "Well, allowing us to use our DBE credits if they want to bid as a prime, because again if you're nonunion you're not going to be used on an INDOT project by a union prime." [#23]
- The owner of a majority-owned construction firm stated, "The goals are fine. They just haven't captured enough disabled, or veteran-based companies to do what we do. I don't know what the solution to that is. … There's no people there. Hard to get people. I'm not involved with what the SBA promotes as far as our industry. There are certain avenues - for instance, if I was a veteran and wanted to start a business. Would I want to start in construction, or would I want to go start a hamburger business? What marketing is the SBA doing to get people into our business? I don't have any comments or thoughts on how to make that better. That's what I question. I know there are programs out there that have financing and all that for these disadvantaged companies. Anybody we know that wanna start their own business or whatever. We know that they could meet the requirements of that stuff. We try to market that to them. We would try to do anything that we could to help as far as our banking channels and bonding channels, and all that stuff." [#24]
- A representative of a majority-owned construction company stated, "We quote a lot of jobs that never materialize. Emphasis on training minorities in the profession of construction and offering real opportunities for growth in those companies, level the playing field, there's too much favoritism, monitoring true minority participation all the way through to the checks." [#AV10]
- A representative of a woman-owned construction company stated, "In the past we have not been able to secure the work because of the minority participation. It is also very hard to do all the paperwork required for government work. INDOT is not too bad, but government work is crazy. They need to do something about making permits easier to obtain. We are also having --supply chain issues, hard to get needed supplies. There is also too much bureaucracy--you now need permits for everything and that doesn't need to be done." [#AV76]
- A representative of a majority-owned construction company stated, "Bidding as a prime, I quote a job for INDOT and am NOT allowed to use my credits for being a Woman-owned business. I've been fighting this for quite a while. IN is the only state around here that doesn't allow these credits to be used to compete with larger companies bids!" [#AV97]

K. Other Insights and Recommendations.

Other recommendations for INDOT, IAA, or other public agencies in Indiana to enhance the availability and participation of small businesses. Interviewees shared other insights or recommendations [#11, #14, #15, #16, #17, #20, #21, #22, #23, #24, #25]. For example:

- The Black American owner of a construction company stated, "I don't know what we could do to enhance it. Just having more opportunities put in front of us. But, with that being said, we have to be qualified and certified to get that work put in front of us. I think the certification process could be easier, or less intimidating, or have a little more one on one help with it. [Also,] some type of co-op opportunity would be great. But other than that, a tutorial or more one on one help. It's like, no one is out there to help it seems like. Either you know it, or you figure it out on your own, or you don't get it. You don't do it." [#11]
- The Black American owner of a WBE-, MBE-, and DBE-certified professional services firm stated, "INDOT… I don't know what I don't know, because I've never been successful with them and never had a conversation past the interview to know what to do with them or how to go about doing work with them, 'cause I've never been successful. IAA, they have a board, and it can be political, so a lot of times, just depending on who's on the board, people will go after it, or they won't go after it if they don't have a good relationship with the politician that is on the board. So, I would say just more exposure and transparency to let some of the smaller companies know what is going on and that they are welcome to participate without wasting their time on particular projects. And maybe it's small enough where they could be a mentoring type of program that would offer them a step into the process." [#14]
- The Subcontinent Asian American owner of a professional services firm stated, "I'm only in the IT world and independent verification, so I think they need to probably do more for large projects, have more IV&V, more independent verifications, so the state doesn't waste money on projects that are large." [#15]
- The Black American owner of an MBE-certified professional services firm stated, "When opportunities present themselves to have MBE or WBE or disadvantaged business owners, opportunities to work on projects, give them, or not give them, but allow them to have more prominent roles. I'm not saying you make them a prime if they don't have the ability to be a prime but to be in a more prominent role to affect the outcome of the project and show their abilities of whatever services they can perform." [#16]
- The Black American owner of an MBE- and DBE-certified construction firm stated, "If we were to go back and go after specific resources as a community, or a city, or a country, I think it would have great opportunities for us to be better at what do because we can tap diverse markets. Because it would be like the Hispanic market may work well in roofing because every single roofing company that I know always used Hispanic guys or whatever to do roofing. They seem to work hard, and everything is well, but what about other industries and what about other levels within the business other than the ground level? Can we be more effective at tapping those resources in diverse markets, whether it be women-owned or whatever. Not only ethnicity, but you know, male and female. I think sometimes there's companies that have a diverse male and female relationship, and they work very well. For me that there's not a pool or a place that I can go to amongst people with similar backgrounds in this industry to lean on to say, 'Hey, how did you make it? How did you do it? What resources are you using for manpower that are diverse

enough to get the job done more efficiently?' Like I said, the reason behind this study, and I hope they listen to the information to come up with viable solutions to help, but you gotta want to go after it. I think there's gonna be barriers in every industry. You just gotta be able to get through it. I don't think there's a barrier out there that's going to prevent you from doing it if really want to do it. Yeah, it would be nice there were some other opportunities, or programs, or things to able to help lessen the burden. Educating people on opportunities in the industry outside of going to college. Construction is typically blue collar, but I think the technology that's out there now, software engineering, and a lot of the stuff that kids can go to school for, whether it be Purdue or whatever, they might want a degree in construction management or whatever is great. You're still going to have those guys on the frontlines doing the physical work. Some of the guys can't transition to technology. Some of the jobs are going to be replaced simply because technology allows it to be more efficient. The old school mentality that's handed down to generations to generations has to change… We all have to check a box to get funding or they don't have a job. … To have to at least visit beyond the turn in of the quote. There are companies that are turning in [quotes], and I told him no. He said, 'Well, before people used ones [DBEs] and they're expired, and they never checked the date.' I told them, 'I'm not even certified anymore. Can you stop calling me?' It was a period of almost nine months that I wasn't certified. So, that just goes to tell you that once they get your certificate… I've had companies ask me to do work as a sub on a small job, let's say $5,000.00 or less, and asked me for my certificate so they can get the participation. I asked them, 'Hey, why do you need my certificate on a job that is so large, but you're only giving me this small portion?' How does that help you hit the 15 percent when this job is like .0001 percent of the project? They said, 'Well, every little bit helps.' I said, 'No, we don't give out our certificate unless we're doing jobs that are substantial and for me to know that it's being used as it's intended.' I said, 'No, I'm not giving it to you. If you don't want us to do the job, then we just won't do the job. And they said, 'No, no, that's fine. We'll just do the job.' It's happening out there. Once they get the certificate, then they either won't call you anymore because they're turning in the bid with your name on it, and not awarding the job to you. Let's say you're a plumber, and you turn it in, and you're an MBE. They get the job because, 15 percent of it is $100,000.00, and it's going to whatever plumbing and they're a mechanical MBE. … I just think there needs to be more regulation of the existing program if they want to say it's working, or the program needs to be changed. The money needs to be put back into the schools to encourage people to do this stuff. Then see the benefit and help educate those larger primes what the benefit is to having a more diverse culture in an organization." [#17]

- A representative of a majority-owned professional services firm stated, "I always think that it needs to be - you know, if you don't talk about it nothing changes. I think there continues to need to be conversation about it and make sure that there are opportunities that are out there for those firms. I think a lot of it is really there has to be more conversation about it, because if you don't talk about it, focus your attention on it, it falls within deaf ears. You know, the only thing that I will say is that it all comes down to the people that are working [at INDOT or other public agencies] in my opinion. You've got good people; you've got bad people. Just like you hear all the time there's good cops/bad cops that are out there. It's troublesome to hear complaints about some of these organizations and things like that, but there are good people there. People tend to forget; they always think of all the bad. That's really it." [#20]

- The Hispanic American owner of an MBE-, DBE-, and VOSB-certified professional services firm stated, "I think the state can bring in more information to light so that would encourage people

that, for instance, those living the military, male and female that are minorities that they have skills that they can put to use that could satisfy requirements and needs that the state and local agencies have. I'm talking about for instance, transportation, delivery of services, electrical sub-contracting, HVAC subcontracting, that sort of thing. New companies that can be formed or started up by minorities, or women, disadvantaged businesses, or what have you, that could benefit provided that the state could give some incentives for these people to do so. Then the first place to advertise it or make it more known so that people will look at that as an opportunity to get a business started and to provide the services to the state or local agencies. Well, I would say that in particular, that there are many of these small business research programs that are done for the federal government, but they have some applicability through some of the things that the state is doing. I would say that INDOT and the IAA, they both could scan for the technology portfolios of the technology portfolios or the technology portfolios of the different government agencies, DOD and DOE for instance, to see what technologies are being developed with these small programs, small business programs because a lot of them would be qualified as disadvantaged or minority-owned or women-owned." [#21]

- The Black American owner of a WBE- and DBE-certified professional services firm stated, "Make it easier for us. Give us just as much as you're giving the regular contracts. Faster response times, less denials. Realize it's not just black and white. There is a gray area in some places. If it's all black and white, everything would be peachy, but it's not. The training in itself, diversify for what we do, versus what they do. Maybe more mixture would be great, too. People in my industry are discounted. More open-mindedness." [#22]
- The owner of a WBE- and DBE-certified construction firm stated, "I would say maybe simplifying the prequalification process and allowing a DBE company to use what works they've bid out to other primes as a percentage towards their DBE exp. I was going to say you know INDOT can't force a prime to use a sub if they're not union, it's just that prevents most smaller companies from working as a sub on an INDOT project." [#23]
- The owner of a majority-owned construction firm stated, "It goes along the lines of just better inspection, better communication on what you're getting paid for, and that's really my only issue." [#24]
- A representative of a majority-owned construction firm stated, "Really dig through feedback that you get. Try to apply all feedback you get." [#25]

APPENDIX E.
Availability Analysis Approach

BBC Research & Consulting (BBC) used a *custom census* approach to analyze the availability of Indiana businesses for construction; professional services; and non-professional services, goods, and supplies prime contracts and subcontracts the Indiana Department of Transportation (INDOT) awards.[1] Appendix E expands on information from Chapter 6 to further describe:

A. Availability Data;

B. Representative Businesses;

C. Availability Survey Instrument;

D. Survey Execution; and

E. Additional Considerations.

A. Availability Data

BBC partnered with Davis Research to conduct telephone surveys with thousands of businesses throughout the *relevant geographic market area* (RGMA), which we identified as the entire state of Indiana. Businesses Davis Research surveyed were ones with locations in the RGMA we identified as doing work in fields closely related to the types of contracts and procurements INDOT awarded between October 1, 2016 and September 30, 2021 (i.e., *the study period*). We began the survey process by determining the work specializations, or *subindustries*, relevant to each prime contract and subcontract and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries. We then compiled information about Indiana businesses 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 17,656 Indiana businesses that perform work relevant to INDOT's contracting and procurement. The study team was able to successfully contact 7,059 of those businesses, 2,995 of which completed availability surveys.

B. Representative Businesses

The objective of BBC's availability approach was not to collect information about each and every business operating in the RGMA but rather to collect information from a large, unbiased subset of Indiana businesses that appropriately represents the entire relevant business population. That approach allowed BBC to estimate the availability of person of color (POC)- and woman-owned businesses for INDOT work in an accurate, statistically valid manner. In addition, we did not design the survey effort so the study team would contact every Indiana business performing every type of construction; professional services; and non-professional services, goods, and supplies work. Instead, we determined the types of work most relevant to INDOT contracting and procurement by analyzing

[1] "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of business owned by men of color according to their corresponding racial/ethnic groups.

the prime contracts and subcontracts the agency awarded during the study period. Figure E-1 lists 8-digit work specialization codes within construction; professional services; and non-professional services, goods, and supplies most related to the relevant work INDOT awarded during the study period, which we studied as part of the availability analysis. We grouped those specializations into distinct subindustries, which are presented as headings in Figure E-1.

C. Availability Survey Instrument

BBC created a survey instrument to collect information from relevant businesses located in the RGMA. As an example, the survey instrument 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 professional services and non-professional services, goods, and supplies to reflect terms more commonly used in those industries.[2]

1. Survey structure. The availability survey included 12 sections, and Davis Research attempted to cover all sections with each business it successfully contacted.

a. Identification of purpose. The surveys began by identifying INDOT and the Indianapolis Airport Authority (IAA) as the survey sponsors and describing the purpose of the study. (e.g., "INDOT and IAA are conducting a survey to develop a list of companies potentially interested in providing construction-related services for state or local government agencies in Indiana.")

b. Verification of correct business name. The surveyor verified he or she had reached the correct business. If the business was not correct, surveyors asked if the respondent knew how to contact the correct business. Davis Research then followed up with the correct business based on the new contact information (see areas "X" and "Y" of the availability survey instrument).

c. Verification of for-profit business status. The surveyor asked whether the organization was a for-profit business as opposed to a government or nonprofit organization (Question A2). Surveyors continued the survey with only those businesses that responded "yes" to that question.

d. Confirmation of main lines of business. Businesses confirmed their main lines of business according to D&B (Question A3a). If D&B's work specialization codes were incorrect, businesses described their main lines of business (Questions A3b). Businesses were also asked to identify the other types of work they perform beyond their main lines of business (Question A3c). BBC subsequently 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) and if their businesses were subsidiaries or affiliates of other businesses (Questions A5 through A6).

f. Past bids or work with government agencies and private sector organizations. The surveyor asked about bids and work on past contracts and procurements in connection with both prime contracts and subcontracts (Questions B1 and B2).

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[2] BBC also developed e-mail versions of the survey instruments for businesses that preferred to complete the survey online.

Figure E-1.
Subindustries included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Construction			
Building construction		**Highway, street, and bridge construction**	
15410000	Industrial buildings and warehouses	16110000	Highway and street construction
15419909	Renovation, remodeling and repairs: industrial buildings	16110200	Surfacing and paving
15420000	Nonresidential construction, nec	16110202	Concrete construction: roads, highways, sidewalks, etc.
15420100	Commercial and office building contractors	16110204	Highway and street paving contractor
15420101	Commercial and office building, new construction	16110205	Resurfacing contractor
15420103	Commercial and office buildings, renovation and repair	16119901	General contractor, highway and street construction
15420400	Specialized public building contractors	16119902	Highway and street maintenance
15420406	School building construction	16220000	Bridge, tunnel, and elevated highway construction
15429902	Design and erection, combined: non-residential	16229901	Bridge construction
15429903	Institutional building construction	16290000	Heavy construction, nec
		17710301	Blacktop (asphalt) work
Concrete work		17910000	Structural steel erection
17719902	Concrete repair	17919905	Iron work, structural
Concrete, asphalt, and related products		**Industrial equipment and machinery**	
14420000	Construction sand and gravel	50830300	Agricultural machinery and equipment
29510201	Asphalt and asphaltic paving mixtures (not from refineries)		
32730000	Ready-mixed concrete	**Landscape services**	
50320500	Concrete and cinder building products	07110000	Soil preparation services
		07820207	Sodding contractor
Electrical work		07829902	Highway lawn and garden maintenance services
17310000	Electrical work	07829903	Landscape contractors
17310203	Environmental system control installation	07210410	Weed control services, after planting
Excavation, drilling, wrecking, and demolition		**Other construction materials**	
16110203	Grading	34290103	Door opening and closing devices, except electrical
17949901	Excavation and grading, building construction	35850000	Refrigeration and heating equipment
17950000	Wrecking and demolition work	36259907	Electric controls and control accessories, industrial
17959902	Demolition, buildings and other structures	36690200	Transportation signaling devices
17990903	Shoring and underpinning work	36690201	Highway signals, electric
		36690203	Pedestrian traffic control equipment
Fencing, guardrails, barriers, and signs		38220206	Temperature controls, automatic
16110100	Highway signs and guardrails	39930102	Scoreboards, electric
16110101	Guardrail construction, highways	50310200	Building materials, interior
16110102	Highway and street sign installation	50390200	Glass construction materials
17999912	Fence construction	50630304	Electronic wire and cable
52119907	Fencing	50630403	Lighting fixtures, commercial and industrial
		50639905	Motors, electric

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction (continued)			
Other construction materials (continued)		**Other construction services (continued)**	
50720000	Hardware	73899921	Flagging service (traffic control)
50740300	Plumbing fittings and supplies	76991804	Door and window repair
50750000	Warm air heating and air conditioning		
50750200	Warm air heating equipment and supplies	**Painting, striping, marking, and weatherproofing**	
50820300	General construction machinery and equipment	17210200	Commercial painting
50840700	Instruments and control equipment	17210201	Exterior commercial painting contractor
52310200	Paint and painting supplies	17210300	Industrial painting
57139901	Carpets	17210303	Pavement marking contractor
59999910	Electronic parts and equipment	17990203	Coating of Metal structures at construction site
73530000	Heavy construction equipment rental	17990206	Fireproofing buildings
73599912	Work zone traffic equipment (flags, cones, barrels, etc.)	17990209	Waterproofing
Other construction services		**Plumbing and HVAC**	
16239905	Pumping station construction	17110200	Plumbing contractors
16290302	Golf course construction	17110301	Fire sprinkler system installation
17419905	Marble masonry, exterior construction	17110401	Mechanical contractor
17419908	Tuckpointing or restoration		
17420101	Drywall	**Waste and recycling services**	
17439903	Terrazzo work	49530100	Hazardous waste collection and disposal
17520000	Floor laying and floor work, nec	49539904	Medical waste disposal
17610000	Roofing, siding, and sheetmetal work		
17610100	Roofing and gutter work	**Water, sewer, and utility lines**	
17610102	Roof repair	16230203	Telephone and communication line construction
17719903	Flooring contractor	16230302	Sewer line construction
17930000	Glass and glazing work	16239906	Underground utilities contractor
17990500	Exterior cleaning, including sandblasting		

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Professional services			
Architectural and design services		**IT and data services (continued)**	
87120000	Architectural services	73749902	Data processing service
		73790200	Computer related consulting services
Construction management			
87419902	Construction management	**Other professional services**	
87420402	Construction project management consultant	07810201	Landscape architects
		73110000	Advertising agencies
Engineering		73119901	Advertising consultant
87110000	Engineering services	73610000	Employment agencies
87110202	Mechanical engineering	87210000	Accounting, auditing, and bookkeeping
87110402	Civil engineering	87210200	Accounting services, except auditing
87110404	Structural engineering	87420200	Human resource consulting services
87119903	Consulting engineer	87429902	Business management consultant
87119909	Professional engineer		
87120100	Architectural engineering	**Testing and inspection**	
		87340203	Product testing laboratory, safety or performance
Environmental services			
87110101	Pollution control engineering	**Transportation planning services**	
87489905	Environmental consultant	87420410	Transportation consultant
89990702	Geophysical consultant	87480200	Urban planning and consulting services
		87480204	Traffic consultant
IT and data services			
73710300	Computer software development and applications		
Non-professional services, goods, and supplies			
Cleaning and janitorial services		**Furniture**	
73490101	Building cleaning service	25210000	Wood office furniture
73499902	Cleaning service, industrial or commercial	25220000	Office furniture, except wood
		25220102	Chairs, office: padded or plain: except wood
Communications equipment		25220200	Office bookcases, wallcases and partitions, except wood
50650100	Telephone and telegraphic equipment	25220202	Panel systems and partitions, office: except wood
50650200	Communication equipment	25220301	Cabinets, office: except wood
50650409	Video equipment, electronic	25310000	Public building and related furniture
50990500	Video and audio equipment	50210000	Furniture
57319907	Radios, two-way, citizens band, weather, short-wave, etc.	50210100	Office and public building furniture
59990600	Telephone and communication equipment	50210106	Office furniture, nec
59990601	Audio-visual equipment and supplies	50210107	Public building furniture, nec
73590501	Audio-visual equipment and supply rental	57129904	Office furniture
		59320501	Office furniture, secondhand

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description
Non-professional services, goods, and supplies (continued)	
Industrial chemicals	
28999943	Salt
51690000	Chemicals and allied products, nec
51690200	Industrial gases
51910102	Fertilizer and fertilizer materials
Industrial equipment and machinery	
50840518	Welding machinery and equipment
50850000	Industrial supplies
Other goods	
28410000	Soap and other detergents
28420100	Specialty cleaning
35890200	Commercial cleaning equipment
39559902	Print cartridges for laser and other computer printers
50440000	Office equipment
50440200	Copying equipment
50440207	Photocopy machines
50840803	Elevators
50870300	Cleaning and maintenance equipment and supplies
50870301	Carpet and rug cleaning equipment and supplies, commercial
50870304	Janitors' supplies
51110000	Printing and writing paper
51119902	Printing paper
51120000	Stationery and office supplies
51120405	Laser printer supplies
51129907	Office supplies, nec
51130100	Shipping supplies
51719901	Petroleum bulk stations
51720203	Gasoline
51999901	Advertising specialties
51999901	Advertising specialties
56990102	Uniforms
56990300	Sports apparel
59439902	Office forms and supplies
59990800	Farm equipment and supplies
Other goods (continued)	
59990803	Feed and farm supply
59999908	Cleaning equipment and supplies
Other services	
17969901	Elevator installation and conversion
27520101	Offset printing
73319904	Mailing service
75210101	Parking lots
76992501	Elevators: inspection, service, and repair
Safety equipment	
50630503	Fire alarm systems
50849912	Safety equipment
50990100	Firearms and ammunition, except sporting
50990301	Fire extinguishers
59990100	Alarm and safety equipment stores
59999917	Police supply stores
Security systems services	
73820000	Security systems services
Transit services	
41110102	Commuter bus operation
41110400	Passenger rail transportation
41310000	Intercity and rural bus transportation
41410000	Local bus charter service
41420000	Bus charter service, except local
Vehicle parts and supplies	
50130108	Automotive supplies
55310107	Truck equipment and parts
Waste and recycling services	
49530201	Garbage: collecting, destroying, and processing
49530203	Rubbish collection and disposal

g. Interest in future work. The surveyor asked businesses about their interest in future prime contract and subcontract work with government agencies in Indiana (Questions B3 and B4).

h. Geographical areas. The surveyor asked businesses whether they could serve customers in various regions of Indiana (Questions C1 through C7).

i. Capacity. The surveyor asked businesses about the values of the largest prime contracts and subcontracts they have the ability to perform (Question D1).

j. Ownership. The surveyor asked whether businesses were at least 51 percent owned and controlled by POCs or women (Questions E1 and E2). If businesses indicated they were POC-owned, they were also asked about the race/ethnicity of their businesses' owners (Question E3). The study team confirmed that information through several other data sources, including:

- INDOT vendor data;
- IAA vendor data;
- INDOT's Disadvantaged Business Enterprise (DBE) Certification Directory;
- City of Indianapolis Office of Minority and Women Business Development XBE Certification Directory;
- Indiana Department of Administration Certification Directory; and
- Information from other available certification directories and business lists.

k. Business revenue. The surveyor asked questions about businesses' sizes in terms of their revenues. For businesses with multiple locations, the business revenue section of the survey also included questions about their revenues and number of employees across all locations (Questions F1 through F3).

l. Potential barriers in the marketplace. The surveyor asked an open-ended question concerning working with INDOT or IAA as well as general insights about conditions in the local marketplace (Question G1). In addition, the survey included a question asking whether respondents would be willing to participate in follow-up interviews about conditions in the local marketplace (Question G2).

m. Contact information. The survey concluded with questions about participants' names, positions, and contact information (Questions H1 through H3).

D. Survey Execution

Davis Research conducted some availability surveys in 2020 as part of the 2020 State of Indiana Disparity Study, which BBC integrated into the availability analysis for the 2022 INDOT Disparity Study. (BBC was also the prime consultant on the 2020 State of Indiana Disparity Study.) We only integrated survey data from the 2020 State of Indiana Disparity Study on Indiana businesses that perform work in industries and subindustries directly relevant to INDOT work. Davis Research conducted additional availability surveys in 2022 with businesses that perform work in industries and subindustries BBC did not study as part of the 2020 State of Indiana Disparity Study but are relevant to INDOT contracting and procurement. For all surveys, Davis

Research made multiple attempts during different times of the day and on different days of the week to successfully reach each business. The firm attempted to survey the owner, manager, or other officer of each business who could provide accurate responses to survey questions.

1. Businesses the study team successfully contacted. Figure E-2 presents the disposition of the 17,656 businesses the study team attempted to contact for availability surveys and how that number resulted in the 7,059 businesses the study team was able to successfully contact.

Figure E-2.
Disposition of attempts to contact businesses

Source:
BBC availability analysis.

	Number of businesses
Beginning list	17,656
Less duplicate phone numbers	81
Less non-working phone numbers	1,199
Less wrong number/business	860
Unique business listings with working phone numbers	15,516
Less no answer	7,543
Less could not reach responsible staff member	900
Less language barrier	14
Businesses successfully contacted	**7,059**

a. Non-working or wrong phone numbers. Some of the business listings BBC purchased from D&B and Davis Research attempted to contact were:

- Duplicate phone numbers (81 listings);
- Non-working phone numbers (1,199 listings); or
- Wrong numbers for the desired businesses (860 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time D&B listed them and the time the study team attempted to contact them. For those businesses, BBC conducted additional research to find different working phone numbers so Davis Research could attempt to reach them again. The number of duplicate phone numbers, non-working numbers, and wrong numbers presented in Figure E-2 reflect those efforts.

b. Working phone numbers. As shown in Figure E-2, there were 15,516 businesses with working phone numbers Davis Research attempted to contact. They were unsuccessful in contacting many of those businesses for various reasons:

- The firm could not reach anyone after multiple attempts for 7,543 businesses.
- The firm could not reach a responsible staff member after multiple attempts for 900 businesses.
- The firm could not conduct the survey due to language barriers for 14 businesses.

Thus, Davis Research was able to successfully contact 7,059 businesses.

2. Businesses included in the availability database. Figure E-3 presents the disposition of the 7,059 businesses Davis Research successfully contacted and how that number resulted in the businesses BBC included in the availability database and considered potentially available for INDOT work.

Figure E-3. Disposition of successfully contacted businesses

Source:

BBC availability analysis.

	Number of Establishments
Businesses successfully contacted	7,059
Less businesses not interested in discussing availability for work	3,781
Less unreturned e-mail surveys	283
Businesses that completed surveys	2,995
Less not a for-profit business	90
Less line of work outside of study scope	239
Less no interest in future work	887
Less multiple locations of same business	120
Businesses potentially available for INDOT work	**1,659**

a. Businesses not interested in discussing availability for INDOT work. Of the 7,059 businesses Davis Research successfully contacted, 3,781 were not interested in discussing their availability for INDOT work. In addition, the firm sent e-mail availability surveys upon request but did not receive completed surveys from 283 businesses. Thus, in total, 2,995 successfully contacted businesses completed availability surveys.

b. Businesses available for INDOT work. BBC deemed only a portion of the businesses that completed availability surveys as potentially available for the prime contracts and subcontracts INDOT awarded during the study period. We excluded many of the businesses that completed surveys from the availability database for various reasons:

- We excluded 90 businesses that indicated they were not for-profit businesses.
- We excluded 239 businesses that reported their main lines of business were outside the study scope.
- We excluded 887 businesses that reported they were not interested in contracting opportunities with government agencies in Indiana.
- One hundred twenty businesses represented different locations of the same businesses. Prior to analyzing results, we combined responses from multiple locations of the same business into a single data record according to several rules:
  - If any of the locations reported bidding or working on a contract or procurement within a particular subindustry, we considered the business to have bid or worked on a contract or procurement in that subindustry.
  - We combined the different roles of work (i.e., prime contractor or subcontractor) different locations of the same business reported into a single response. For example, if one location reported that it works as a prime contractor and another location reported that it works as a subcontractor, then we considered the business as available for both prime contracts and subcontracts.

- BBC considered the largest contract or procurement any locations of the same business reported being able to perform as the business's capacity (i.e., the largest contract for which the business could be considered available).

After those exclusions, we compiled a database of 1,659 businesses we considered potentially available for INDOT work.

E. Additional Considerations

BBC made additional considerations related to its approach to measuring availability to ensure availability estimates 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 INDOT contracting dollars for which POC- and woman-owned businesses are *ready, willing, and able* to perform. The availability analysis did not provide a comprehensive listing of every business that could be available for INDOT work and should not be used in that way.

2. Using a custom census approach to measuring availability. Federal guidance around measuring availability recommends dividing the number of POC- and woman-owned businesses in an organization's certification directory by the total number of businesses in the marketplace (for example, as reported in United States Census data). As another option, organizations could use a list of prequalified businesses or a bidders list to estimate the availability of POC- and woman-owned businesses for its prime contracts and subcontracts. BBC did not use such approaches when measuring the availability of businesses for INDOT work, because dividing a simple count of certified businesses by the total number of businesses does not account for business characteristics crucial to estimating availability accurately. The methodology we used takes a custom census approach to measuring availability and adds several layers of refinement to a simple counting approach. For example, the availability surveys the study team conducted provided data on qualifications, business capacity, and interest in INDOT work for individual businesses, which allowed us to match business characteristics to the characteristics of the contracts and procurements INDOT actually awards, resulting in more accurate estimates of the availability of POC- and woman-owned businesses for that work.

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 to assigning businesses to specific D&B work specialization codes. Specifically, some industry codes are imprecise and overlap with other business specialties. Some businesses' primary lines of work 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. In addition, when the study team asked business owners and managers to identify their main lines of business as part of availability surveys, they often gave broad answers. For those and other reasons, BBC collapsed work specialization codes into broader subindustries to classify potentially available businesses more accurately.

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 businesses and asked respondents to confirm that information or provide more accurate estimates. Where possible, BBC also verified survey responses in a number of ways:

- We compared data from the availability surveys to information from other sources such as vendor information the study team collected from INDOT. For example, certification databases include data on the race/ethnicity and gender of the owners of certified businesses.
- We examined INDOT and IAA contract and procurement data to further explore the largest prime contracts and subcontracts awarded to businesses that participated in the availability surveys for the purposes of assessing capacity. We compared survey responses about the largest contracts businesses are able to perform with actual contract data.
- INDOT reviewed contract and vendor data BBC collected and compiled as part of the study and provided feedback regarding their accuracy.

Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Davis Research. We are calling on behalf of the Indiana Department of Transportation and the Indianapolis Airport Authority.

This is not a sales call. INDOT and IAA are developing a list of companies that are potentially interested in providing construction-related services for state or local government agencies in Indiana. 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 SURVEYS WILL ADD TO EXISTING DATA ON COMPANIES THAT ARE INTERESTED IN WORKING WITH INDOT OR IAA]

X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [*firm name*]?

1=RIGHT COMPANY – SKIP TO 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 Y4

2=Yes, can give information about named company

3=Company bought/sold/changed ownership – SKIP TO Y4

98=No, does not have information – TERMINATE

99=Refused to give information – TERMINATE

Y3. Can you give me the complete address or city for [*new firm name*]?

(NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT:

. STREET ADDRESS

. CITY

. STATE

. ZIP)

1=VERBATIM

Y4. Can you give me the name of the owner or manager of the new business?

(ENTER UPDATED NAME)

1=VERBATIM

Y5. Can I have a telephone number for him/her?

(ENTER UPDATED PHONE)

1=VERBATIM

Y6. Do you work for this new company?

1=YES

2=NO – TERMINATE

A2. Let me confirm that [*firm name*/*new firm name*] is a business, as opposed to a non-profit organization, a foundation, or a government office. Is that correct?

1=Yes, a business

2=No, other - TERMINATE

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?

[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*]?

[IF RESPONDENT INDICATES THAT FIRM'S MAIN LINE OF BUSINESS IS "GENERAL CONSTRUCTION" OR GENERAL CONTRACTOR," PROBE TO FIND OUT IF MAIN LINE OF BUSINESS IS CLOSER TO BUILDING CONSTRUCTION OR HIGHWAY AND ROAD CONSTRUCTION]

1=VERBATIM

A3c. What other types of work, if any, does your business perform?

(ENTER VERBATIM RESPONSE)

1=VERBATIM

A4. Is this the sole location for your business, or do you have offices in other locations?

1=Sole location

2=Have other locations

98=(DON'T KNOW)

99=(REFUSED)

A5. Is your company a subsidiary or affiliate of another firm?

1=Independent – SKIP TO B1

2=Subsidiary or affiliate of another firm

98=(DON'T KNOW) – SKIP TO B1

99=(REFUSED) – SKIP TO B1

A6. What is the name of your parent company?

1=VERBATIM

98=(DON'T KNOW)

99=(REFUSED)

B1. Next, I have a few questions about your company's role in doing work or providing materials related to construction, maintenance, or design. During the past five years, has your company submitted a bid or a price quote—in either the public or private sector—for any part of a contract as either a prime contractor or subcontractor?

1=Yes

2=No – SKIP TO B3

98=(DON'T KNOW) – SKIP TO B3

99=(REFUSED) – SKIP TO B3

B2. Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

1=Prime contractor

2=Subcontractor

3=Trucker/hauler

4=Supplier (or manufacturer)

98=(DON'T KNOW)

99=(REFUSED)

B3. Please think about future construction, maintenance, or design-related work as you answer the following few questions. Is your company *interested* in working with government agencies in Indiana as a prime contractor?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B4. Is your company *interested* in working with government agencies in Indiana as a subcontractor, trucker/hauler, or supplier?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

Now I want to ask you about the geographic areas your company serves within Indiana.

C1. Is your company able to do work or serve customers in all regions of Indiana or only certain regions of the state?

1=All of the state – SKIP TO D1

2=Only certain regions of the state

98=(DON'T KNOW)

99=(REFUSED)

C2. Is your company able to do work or serve customers in any part of the LaPorte/Gary region of Indiana, including the Gary, Michigan City-Laporte, Monticello, Rensselaer, and Plymouth areas?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C3. Is your company able to do work or serve customers in any part of the Fort Wayne region in Indiana, including the Bluffton, Elkhart, Fort Wayne, and Wabash areas?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C4. Is your company able to do work or serve customers in any part of the Crawfordsville region in Indiana, including Cloverdale, Crawfordsville, Frankfort, Terre Haute, and West Lafayette areas?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C5. Is your company able to do work or serve customers in any part of the Greenfield/Indianapolis region in Indiana, including the Albany, Cambridge, Greenfield, Indianapolis, and Tipton areas?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C6. Is your company able to do work or serve customers in any part of the Seymour/Bloomington District in Indiana, including the Aurora, Bloomington, Columbus, Falls City, and Madison areas?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C7. Is your company able to do work or serve customers in any part of the Vincennes District in Indiana, including the Evansville, Linton, Paoli, Tell City, and Vincennes areas?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

D1. What is the largest prime contract or subcontract your company is able to perform? This includes contracts in either the public sector or private sector.

[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]

1=$100,000 or less

2=More than $100,000 to $250,000

3=More than $250,000 to $500,000

4=More than $500,000 to $1 million

5=More than $1 million to $2 million

6=More than $2 million to $5 million

7=More than $5 million to $10 million

8=More than $10 million to $20 million

9=More than $20 million to $50 million

10=More than $50 million to $100 million

11= More than $100 million to $200 million

12=$200 million or greater

97=(NONE)

98=(DON'T KNOW)

99=(REFUSED)

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 Asian Pacific American, Black American, Hispanic American, Native American, or Subcontinent Asian American individuals. By this definition, is [*firm name* || *new firm name*] a minority-owned business?

1=Yes

2=No – SKIP TO F1

98=(DON'T KNOW) – SKIP TO F1

99=(REFUSED) – SKIP TO F1

E3. Would you say that the minority group ownership of your company is mostly Asian Pacific American, Black American, Hispanic American, Native American, or Subcontinent Asian 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 Common-wealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

4=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)

6=(OTHER - SPECIFY) ____________________

98=(DON'T KNOW)

99=(REFUSED)

F1. Dun & Bradstreet lists the average annual gross revenue of your company, including all your locations, to be [*dollar amount*]. Is that an accurate estimate for your company's average annual gross revenue over the last three years?

1=Yes – SKIP TO F3

2=No

98=(DON'T KNOW) – SKIP TO F3

99=(REFUSED) – SKIP TO F3

F2. Roughly, what was the average annual gross revenue of your company, including all of your locations, over the last three years? Would you say . . .

[READ LIST]

1=Less than $1 Million
2=$1 Million - $4.5 Million
3=$4.6 Million - $7 Million
4=$7.1 Million - $12 Million
5=$12.1 Million - $16.5 Million
6=$16.6 Million - $18.5 Million
7=$18.6 Million - $24 Million
8=$24.1 Million or more
98= (DON'T KNOW)
99= (REFUSED)

F3. Dun & Bradstreet lists the number of employees at your company, including both full-time and part-time employees, to be [*number of employees*]. Is that an accurate average of your company's number of employees over the last three years?

1=Yes – SKIP TO G1a
2=No
98=(DON'T KNOW) – SKIP TO G1a
99=(REFUSED) – SKIP TO G1a

F4. About how many full-time and part-time employees did you have working in your company across all locations, on average, over the last three years?

[READ LIST IF NECESSARY]

1=100 employees or less
2=101-150 employees
3=151-200 employees
4=201-250 employees
5=251-500 employees
6=501-750 employees
7=751-1,000 employees
8=1,001-1,250 employees
9=1,251-1,500 employees
10=1,501 or more employees

G1. We're interested in whether your company has experienced barriers or difficulties related to working with or attempting to work with INDOT or IAA. Do you have any thoughts to share?

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)
97=(NOTHING/NONE/NO COMMENTS)
98=(DON'T KNOW)
99=(REFUSED)

G1b. Do you have any additional 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 a follow-up interview about any of those issues?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

H1. Just a few last questions. What is your name?

1=VERBATIM

H2. What is your position at [*firm name* / *new firm name*]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

10=(OTHER - SPECIFY) _______________

99=(REFUSED)

H3. And at what email address can you be reached?

1=VERBATIM

Thank you very much for your participation. If you have any questions or concerns, please contact Elizabeth Kiefner from the Indiana Department of Transportation at 317-650-1689 or Holli Harrington from the Indianapolis Airport Authority at 317-487-5374.

If you have any questions for the Disparity Study project team or wish to submit written testimony regarding your insights or experiences related to working in the local marketplace, please email INDOTDisparity@bbcresearch.com or IAADisparity@bbcresearch.com.

APPENDIX F.
Disparity Analysis Results Tables

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of person of color- (POC-) and woman-owned businesses in construction; professional services; and non-professional services, goods, and supplies prime contracts and subcontracts the Indiana Department of Transportation (INDOT) awarded between October 1, 2016 and June 30, 2021 (the *study period*) with the percentage of contract dollars one might expect the agency to award to those businesses based on their *availability* for that work.[1] Appendix F presents detailed results from the disparity analysis for relevant business groups and various sets of contracts and procurements INDOT awarded during the study period.

A. Format and Information

Each table in Appendix F presents disparity analysis results for a different set of contracts and procurements. For example, Figure F-1 presents disparity analysis results for all INDOT contracts and procurements BBC analyzed in the study, considered together. The format and organization of Figure F-1 is identical to that of all disparity analysis tables in Appendix F. Figure F-1 presents information about each relevant business group in separate rows:

- "All businesses" in row (1) pertains to information about all businesses regardless of the race/ethnicity and gender of their owners.
- Row (2) presents results for all POC- and woman-owned businesses considered together, regardless of whether they were certified as disadvantaged business enterprises (DBEs).
- Row (3) presents results for all white woman-owned businesses, regardless of whether they were certified as DBEs.
- Row (4) presents results for all POC-owned businesses, regardless of whether they were certified as DBEs.
- Rows (5) through (9) present results for businesses of each relevant racial/ethnic group, regardless of whether they were certified as DBEs.
- Rows (10) through (17) present utilization analysis results for businesses of each relevant racial/ethnic and gender group that were certified as DBEs.[2]

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[1] "Woman-owned businesses" refers to white woman-owned businesses. Information and results for businesses owned by women of color are included along with those of businesses owned by men of color according to their corresponding race/ethnic groups.

[2] Businesses owned by white men can also be certified as DBEs, but the disparity study focuses specifically on outcomes for POC- and woman-owned businesses.

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

- Row (1) of column (a) presents the total number of prime contracts and subcontracts (contract elements) BBC analyzed as part of the contract set. As shown in row (1) of column (a) of Figure F-1, BBC analyzed 45,453 contract elements INDOT awarded during the study period. The rest of the values presented in column (a) represent the number of contract elements in which businesses of each group participated. For example, as shown in row (6) of column (a), Black American-owned businesses participated in 1,131 prime contracts and subcontracts INDOT awarded during the study period.
- Column (b) presents the dollars (in thousands) associated with the set of contract elements. As shown in row (1) of column (b) of Figure F-1, there were approximately $10.9 billion associated with the relevant contract elements INDOT awarded during the study period. The value presented in column (b) for each individual business group represents the dollars INDOT awarded to businesses of that particular group on the set of contract elements. For example, as shown in row (6) of column (b), the agency awarded approximately $135.5 million worth of prime contracts and subcontracts to Black American-owned businesses during the study period.
- Column (c) presents the participation of each business group for INDOT work as a percentage of total dollars associated with the set of contract elements. BBC calculated each percentage in column (c) by dividing the dollars going to a particular group in column (b) by the total dollars associated with the set of contract elements shown in row (1) of column (b), and then expressing the result as a percentage. For example, for Black American-owned businesses, the study team divided $135.5 million by $10.9 billion and multiplied by 100 for a result of 1.2 percent, as shown in row (6) of column (c).

2. Availability results. Column (d) of Figure F-1 presents the availability of each relevant group for all contract elements BBC analyzed as part of the contract set. Availability estimates, which are represented as percentages of the total contracting dollars associated with the set of contract elements, serve as benchmarks against which to compare the actual participation, or utilization, of specific groups for specific sets of contracts. For example, as shown in row (6) of column (d), the availability of Black American-owned businesses for INDOT work is 2.8 percent. That is, one might expect INDOT to award 2.8 percent of its contract and procurement dollars to Black American-owned businesses based on their availability for that work.

3. Disparity indices. BBC also calculated a disparity index, or ratio, for each relevant racial/ethnic and gender group. Column (e) of Figure F-1 presents the disparity index for each group. For example, as reported in row (5) of column (e), the disparity index for Black American- owned businesses was 45, indicating that INDOT actually awarded approximately $0.45 for every dollar one might expect the agency to award to Black American-owned businesses based on their availability for relevant prime contracts and subcontracts.

For disparity indices exceeding 200, we reported an index of "200+." When there was no participation or availability for a particular group for a particular set of contracts or procurements, we reported a disparity index of "100," indicating *parity*.

B. Index and Tables

The table of contents on the next page presents information on the different sets of contracts and procurements for which BBC analyzed disparity analysis results. On the subsequent pages, we present disparity analysis results tables for various sets of INDOT contracts and procurements. The heading of each table provides a description of the contract or procurement set we analyzed for that particular table.

Table of Contents

Table	Characteristics						
	Time period	Contract area	Contract role	Contract size	Region	Funding	Goals Applied
F-1	10/01/16 - 09/30/21	All industries	Prime contracts and subcontracts	N/A	All	N/A	N/A
F-2	**10/01/16 - 09/30/18**	All industries	Prime contracts and subcontracts	N/A	All	N/A	N/A
F-3	**10/01/18 - 09/30/21**	All industries	Prime contracts and subcontracts	N/A	All	N/A	N/A
F-4	10/01/16 - 09/30/21	**Construction**	Prime contracts and subcontracts	N/A	All	N/A	N/A
F-5	10/01/16 - 09/30/21	**Professional services**	Prime contracts and subcontracts	N/A	All	N/A	N/A
F-6	10/01/16 - 09/30/21	**Non-prof. svcs., goods, and supplies**	Prime contracts and subcontracts	N/A	All	N/A	N/A
F-7	10/01/16 - 09/30/21	All industries	**Prime contracts**	N/A	All	N/A	N/A
F-8	10/01/16 - 09/30/21	All industries	**Subcontracts**	N/A	All	N/A	N/A
F-9	10/01/16 - 09/30/21	All industries	**Prime contracts**	**Large**	All	N/A	N/A
F-10	10/01/16 - 09/30/21	All industries	**Prime contracts**	**Small**	All	N/A	N/A
F-11	10/01/16 - 09/30/21	All industries	Prime contracts and subcontracts	N/A	**Northern**	N/A	N/A
F-12	10/01/16 - 09/30/21	All industries	Prime contracts and subcontracts	N/A	**Central**	N/A	N/A
F-13	10/01/16 - 09/30/21	All industries	Prime contracts and subcontracts	N/A	**Southern**	N/A	N/A
F-14	10/01/16 - 09/30/21	All industries	Prime contracts and subcontracts	N/A	All	**FHWA-funded**	N/A
F-15	10/01/16 - 09/30/21	All industries	Prime contracts and subcontracts	N/A	All	**Non FHWA-funded**	N/A
F-16	10/01/16 - 09/30/21	All industries	**Subcontracts**	N/A	All	N/A	**Yes**
F-17	10/01/16 - 09/30/21	All industries	Prime contracts and subcontracts	N/A	All	N/A	**No**
F-18	10/01/16 - 09/30/21	All industries	**Subcontracts**	N/A	All	N/A	**No**

Figure F-1.
Agency: INDOT
Time period: 10/01/2016 - 09/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	45,453	$10,892,898			
(2) POC- and woman-owned businesses	11,864	$1,355,165	12.4	12.9	96.8
(3) Non-Hispanic white woman-owned	8,858	$885,501	8.1	5.5	148.9
(4) POC-owned	3,006	$469,664	4.3	7.4	58.3
(5) Asian Pacific American-owned	125	$14,259	0.1	0.0	200+
(6) Black American-owned	1,131	$135,451	1.2	2.8	44.6
(7) Hispanic American-owned	636	$71,443	0.7	0.6	104.0
(8) Native American-owned	118	$102,148	0.9	3.2	29.0
(9) Subcontinent Asian American-owned	996	$146,363	1.3	0.7	193.0
(10) POC-owned or woman-owned DBE	10,133	$1,025,499	9.4		
(11) Non-Hispanic white woman-owned DBE	7,621	$735,049	6.7		
(12) POC-owned DBE	2,512	$290,450	2.7		
(13) Asian Pacific American-owned DBE	59	$12,966	0.1		
(14) Black American-owned DBE	981	$118,698	1.1		
(15) Hispanic American-owned DBE	631	$69,338	0.6		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	841	$89,448	0.8		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-2.
Agency: INDOT
Time period: 10/01/2016 - 09/30/2018
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	8,277	$3,192,331			
(2) POC- and woman-owned businesses	3,943	$433,327	13.6	13.7	99.3
(3) Non-Hispanic white woman-owned	2,971	$312,410	9.8	5.3	186.0
(4) POC-owned	972	$120,917	3.8	8.4	45.0
(5) Asian Pacific American-owned	20	$5,209	0.2	0.0	200+
(6) Black American-owned	397	$31,723	1.0	3.2	31.0
(7) Hispanic American-owned	240	$17,653	0.6	0.6	90.2
(8) Native American-owned	44	$28,686	0.9	3.8	23.9
(9) Subcontinent Asian American-owned	271	$37,645	1.2	0.8	149.5
(10) POC-owned or woman-owned DBE	3,449	$347,725	10.9		
(11) Non-Hispanic white woman-owned DBE	2,611	$272,371	8.5		
(12) POC-owned DBE	838	$75,354	2.4		
(13) Asian Pacific American-owned DBE	19	$5,178	0.2		
(14) Black American-owned DBE	347	$27,672	0.9		
(15) Hispanic American-owned DBE	236	$17,621	0.6		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	236	$24,882	0.8		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-3.
Agency: INDOT
Time period: 10/01/2018 - 09/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	37,176	$7,700,567			
(2) POC- and woman-owned businesses	7,921	$921,837	12.0	12.5	95.7
(3) Non-Hispanic white woman-owned	5,887	$573,091	7.4	5.5	134.3
(4) POC-owned	2,034	$348,747	4.5	7.0	65.0
(5) Asian Pacific American-owned	105	$9,050	0.1	0.0	200+
(6) Black American-owned	734	$103,728	1.3	2.6	51.6
(7) Hispanic American-owned	396	$53,790	0.7	0.6	109.5
(8) Native American-owned	74	$73,461	1.0	3.0	31.6
(9) Subcontinent Asian American-owned	725	$108,717	1.4	0.7	200+
(10) POC-owned or woman-owned DBE	6,684	$677,774	8.8		
(11) Non-Hispanic white woman-owned DBE	5,010	$462,678	6.0		
(12) POC-owned DBE	1,674	$215,097	2.8		
(13) Asian Pacific American-owned DBE	40	$7,789	0.1		
(14) Black American-owned DBE	634	$91,026	1.2		
(15) Hispanic American-owned DBE	395	$51,716	0.7		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	605	$64,566	0.8		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-4.
Agency: INDOT
Time period: 10/01/2016 - 09/30/2021
Contract area: Construction
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	26,995	$8,870,035			
(2) POC- and woman-owned businesses	8,480	$1,016,568	11.5	12.8	89.7
(3) Non-Hispanic white woman-owned	6,923	$741,935	8.4	5.5	152.2
(4) POC-owned	1,557	$274,633	3.1	7.3	42.5
(5) Asian Pacific American-owned	67	$12,977	0.1	0.0	200+
(6) Black American-owned	745	$92,448	1.0	2.8	36.7
(7) Hispanic American-owned	562	$65,910	0.7	0.5	162.6
(8) Native American-owned	113	$101,931	1.1	3.9	29.2
(9) Subcontinent Asian American-owned	70	$1,367	0.0	0.0	44.9
(10) POC-owned or woman-owned DBE	7,275	$760,890	8.6		
(11) Non-Hispanic white woman-owned DBE	5,964	$603,716	6.8		
(12) POC-owned DBE	1,311	$157,174	1.8		
(13) Asian Pacific American-owned DBE	59	$12,966	0.1		
(14) Black American-owned DBE	648	$77,132	0.9		
(15) Hispanic American-owned DBE	562	$65,910	0.7		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	42	$1,166	0.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-5.
Agency: INDOT
Time period: 10/01/2016 - 09/30/2021
Contract area: Professional services
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	7,150	$1,911,110			
(2) POC- and woman-owned businesses	3,015	$333,595	17.5	12.5	139.5
(3) Non-Hispanic white woman-owned	1,652	$142,031	7.4	4.6	160.8
(4) POC-owned	1,363	$191,564	10.0	7.9	127.0
(5) Asian Pacific American-owned	2	$27	0.0	0.2	0.9
(6) Black American-owned	361	$41,008	2.1	2.5	87.4
(7) Hispanic American-owned	74	$5,533	0.3	1.3	22.5
(8) Native American-owned	0	$0	0.0	0.2	0.0
(9) Subcontinent Asian American-owned	926	$144,996	7.6	3.8	200+
(10) POC-owned or woman-owned DBE	2,765	$262,694	13.7		
(11) Non-Hispanic white woman-owned DBE	1,579	$130,464	6.8		
(12) POC-owned DBE	1,186	$132,230	6.9		
(13) Asian Pacific American-owned DBE	0	$0	0.0		
(14) Black American-owned DBE	318	$40,520	2.1		
(15) Hispanic American-owned DBE	69	$3,428	0.2		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	799	$88,282	4.6		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-6.
Agency: INDOT
Time period: 10/01/2016 - 09/30/2021
Contract area: Non-professional services, goods, and supplies
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	11,308	$111,753			
(2) POC- and woman-owned businesses	369	$5,001	4.5	25.2	17.8
(3) Non-Hispanic white woman-owned	283	$1,535	1.4	17.0	8.1
(4) POC-owned	86	$3,466	3.1	8.1	38.1
(5) Asian Pacific American-owned	56	$1,255	1.1	0.4	200+
(6) Black American-owned	25	$1,995	1.8	4.1	43.1
(7) Hispanic American-owned	0	$0	0.0	3.2	0.0
(8) Native American-owned	5	$217	0.2	0.1	200+
(9) Subcontinent Asian American-owned	0	$0	0.0	0.3	0.0
(10) POC-owned or woman-owned DBE	93	$1,915	1.7		
(11) Non-Hispanic white woman-owned DBE	78	$869	0.8		
(12) POC-owned DBE	15	$1,046	0.9		
(13) Asian Pacific American-owned DBE	0	$0	0.0		
(14) Black American-owned DBE	15	$1,046	0.9		
(15) Hispanic American-owned DBE	0	$0	0.0		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	0	$0	0.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-7.
Agency: INDOT
Time period: 10/01/2016 - 09/30/2021
Contract area: All industries
Contract role: Prime contracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	25,925	$8,075,489			
(2) POC- and woman-owned businesses	909	$255,084	3.2	10.1	31.1
(3) Non-Hispanic white woman-owned	654	$151,600	1.9	3.3	56.6
(4) POC-owned	255	$103,485	1.3	6.8	18.8
(5) Asian Pacific American-owned	66	$1,293	0.0	0.0	124.4
(6) Black American-owned	76	$22,301	0.3	2.1	12.9
(7) Hispanic American-owned	2	$2,274	0.0	0.4	7.7
(8) Native American-owned	0	$0	0.0	3.6	0.0
(9) Subcontinent Asian American-owned	111	$77,617	1.0	0.7	144.9
(10) POC-owned or woman-owned DBE	457	$167,053	2.1		
(11) Non-Hispanic white woman-owned DBE	347	$116,761	1.4		
(12) POC-owned DBE	110	$50,292	0.6		
(13) Asian Pacific American-owned DBE	0	$0	0.0		
(14) Black American-owned DBE	55	$21,256	0.3		
(15) Hispanic American-owned DBE	1	$200	0.0		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	54	$28,836	0.4		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-8.
Agency: INDOT
Time period: 10/01/2016 - 09/30/2021
Contract area: All industries
Contract role: Subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	19,528	$2,817,409			
(2) POC- and woman-owned businesses	10,955	$1,100,080	39.0	20.6	189.5
(3) Non-Hispanic white woman-owned	8,204	$733,901	26.0	11.6	200+
(4) POC-owned	2,751	$366,179	13.0	9.0	144.2
(5) Asian Pacific American-owned	59	$12,966	0.5	0.1	200+
(6) Black American-owned	1,055	$113,150	4.0	4.6	86.6
(7) Hispanic American-owned	634	$69,169	2.5	1.4	176.9
(8) Native American-owned	118	$102,148	3.6	2.1	176.0
(9) Subcontinent Asian American-owned	885	$68,746	2.4	0.8	200+
(10) POC-owned or woman-owned DBE	9,676	$858,446	30.5		
(11) Non-Hispanic white woman-owned DBE	7,274	$618,287	21.9		
(12) POC-owned DBE	2,402	$240,159	8.5		
(13) Asian Pacific American-owned DBE	59	$12,966	0.5		
(14) Black American-owned DBE	926	$97,443	3.5		
(15) Hispanic American-owned DBE	630	$69,138	2.5		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	787	$60,612	2.2		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-9.
Agency: INDOT
Time period: 10/01/2016 - 09/30/2021
Contract area: All industries
Contract role: Prime contracts
Funding source: All funding sources

Large contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	1,079	$6,186,087			
(2) POC- and woman-owned businesses	50	$129,492	2.1	7.9	26.6
(3) Non-Hispanic white woman-owned	18	$64,318	1.0	2.4	43.6
(4) POC-owned	32	$65,174	1.1	5.5	19.3
(5) Asian Pacific American-owned	5	$582	0.0	0.0	200+
(6) Black American-owned	12	$16,313	0.3	0.9	30.4
(7) Hispanic American-owned	1	$2,074	0.0	0.3	11.5
(8) Native American-owned	0	$0	0.0	3.6	0.0
(9) Subcontinent Asian American-owned	14	$46,204	0.7	0.7	111.9
(10) POC-owned or woman-owned DBE	23	$83,873	1.4		
(11) Non-Hispanic white woman-owned DBE	12	$50,811	0.8		
(12) POC-owned DBE	11	$33,061	0.5		
(13) Asian Pacific American-owned DBE	0	$0	0.0		
(14) Black American-owned DBE	6	$15,538	0.3		
(15) Hispanic American-owned DBE	0	$0	0.0		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	5	$17,523	0.3		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-10.
Agency: INDOT
Time period: 10/01/2016 - 09/30/2021
Contract area: All industries
Contract role: Prime contracts
Funding source: All funding sources

Small contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	24,846	$1,889,402			
(2) POC- and woman-owned businesses	859	$125,592	6.6	17.7	37.7
(3) Non-Hispanic white woman-owned	636	$87,281	4.6	6.4	72.5
(4) POC-owned	223	$38,311	2.0	11.3	18.0
(5) Asian Pacific American-owned	61	$711	0.0	0.1	73.6
(6) Black American-owned	64	$5,988	0.3	6.3	5.0
(7) Hispanic American-owned	1	$200	0.0	0.6	1.7
(8) Native American-owned	0	$0	0.0	3.7	0.0
(9) Subcontinent Asian American-owned	97	$31,413	1.7	0.6	200+
(10) POC-owned or woman-owned DBE	434	$83,181	4.4		
(11) Non-Hispanic white woman-owned DBE	335	$65,950	3.5		
(12) POC-owned DBE	99	$17,231	0.9		
(13) Asian Pacific American-owned DBE	0	$0	0.0		
(14) Black American-owned DBE	49	$5,718	0.3		
(15) Hispanic American-owned DBE	1	$200	0.0		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	49	$11,313	0.6		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-11.
Agency: INDOT **North**
Time period: 10/01/2016 - 09/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	13,517	$2,169,230			
(2) POC- and woman-owned businesses	3,786	$353,750	16.3	14.2	114.5
(3) Non-Hispanic white woman-owned	2,684	$227,866	10.5	5.2	200+
(4) POC-owned	1,102	$125,883	5.8	9.0	64.2
(5) Asian Pacific American-owned	7	$387	0.0	0.1	28.1
(6) Black American-owned	376	$23,525	1.1	2.9	37.9
(7) Hispanic American-owned	207	$22,233	1.0	1.1	94.6
(8) Native American-owned	51	$41,615	1.9	4.5	42.6
(9) Subcontinent Asian American-owned	461	$38,123	1.8	0.5	200+
(10) POC-owned or woman-owned DBE	3,355	$271,818	12.5		
(11) Non-Hispanic white woman-owned DBE	2,405	$203,494	9.4		
(12) POC-owned DBE	950	$68,324	3.1		
(13) Asian Pacific American-owned DBE	0	$0	0.0		
(14) Black American-owned DBE	369	$23,346	1.1		
(15) Hispanic American-owned DBE	203	$22,202	1.0		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	378	$22,776	1.0		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-12.
Agency: INDOT — **Central**
Time period: 10/01/2016 - 09/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

	Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1)	All businesses	18,389	$5,520,589			
(2)	POC- and woman-owned businesses	4,268	$619,029	11.2	10.6	105.6
(3)	Non-Hispanic white woman-owned	3,190	$347,654	6.3	4.0	157.4
(4)	POC-owned	1,078	$271,375	4.9	6.6	74.3
(5)	Asian Pacific American-owned	57	$1,736	0.0	0.0	78.3
(6)	Black American-owned	432	$87,520	1.6	2.4	65.1
(7)	Hispanic American-owned	287	$38,900	0.7	0.6	124.7
(8)	Native American-owned	51	$59,045	1.1	2.8	38.8
(9)	Subcontinent Asian American-owned	251	$84,173	1.5	0.8	185.2
(10)	POC-owned or woman-owned DBE	3,581	$460,059	8.3		
(11)	Non-Hispanic white woman-owned DBE	2,743	$298,137	5.4		
(12)	POC-owned DBE	838	$161,922	2.9		
(13)	Asian Pacific American-owned DBE	9	$1,013	0.0		
(14)	Black American-owned DBE	346	$74,716	1.4		
(15)	Hispanic American-owned DBE	286	$36,826	0.7		
(16)	Native American-owned DBE	0	$0	0.0		
(17)	Subcontinent Asian American-owned DBE	197	$49,367	0.9		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-13.
Agency: INDOT **South**
Time period: 10/01/2016 - 09/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	12,650	$2,836,703			
(2) POC- and woman-owned businesses	3,395	$347,044	12.2	15.2	80.2
(3) Non-Hispanic white woman-owned	2,706	$279,473	9.9	7.8	126.1
(4) POC-owned	689	$67,571	2.4	7.4	32.0
(5) Asian Pacific American-owned	59	$12,112	0.4	0.0	200+
(6) Black American-owned	268	$22,299	0.8	3.2	24.4
(7) Hispanic American-owned	74	$7,991	0.3	0.5	61.7
(8) Native American-owned	6	$1,108	0.0	3.1	1.3
(9) Subcontinent Asian American-owned	282	$24,061	0.8	0.7	128.8
(10) POC-owned or woman-owned DBE	2,851	$261,880	9.2		
(11) Non-Hispanic white woman-owned DBE	2,248	$205,992	7.3		
(12) POC-owned DBE	603	$55,887	2.0		
(13) Asian Pacific American-owned DBE	48	$11,930	0.4		
(14) Black American-owned DBE	216	$18,664	0.7		
(15) Hispanic American-owned DBE	74	$7,991	0.3		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	265	$17,303	0.6		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-14.
Agency: INDOT
Time period: 10/01/2016 - 09/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: FHWA-funded

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	20,861	$9,819,514			
(2) POC- and woman-owned businesses	9,817	$1,224,651	12.5	12.2	102.2
(3) Non-Hispanic white woman-owned	7,293	$798,608	8.1	5.1	159.6
(4) POC-owned	2,524	$426,043	4.3	7.1	61.0
(5) Asian Pacific American-owned	58	$12,882	0.1	0.0	200+
(6) Black American-owned	922	$122,242	1.2	2.6	47.2
(7) Hispanic American-owned	483	$55,036	0.6	0.6	94.7
(8) Native American-owned	99	$96,560	1.0	3.1	31.7
(9) Subcontinent Asian American-owned	962	$139,322	1.4	0.7	192.4
(10) POC-owned or woman-owned DBE	8,730	$932,171	9.5		
(11) Non-Hispanic white woman-owned DBE	6,559	$670,806	6.8		
(12) POC-owned DBE	2,171	$261,365	2.7		
(13) Asian Pacific American-owned DBE	58	$12,882	0.1		
(14) Black American-owned DBE	806	$107,023	1.1		
(15) Hispanic American-owned DBE	479	$55,005	0.6		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	828	$86,454	0.9		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-15.
Agency: INDOT
Time period: 10/01/2016 - 09/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: Non-FHWA-funded

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	24,592	$1,073,384			
(2) POC- and woman-owned businesses	2,047	$130,514	12.2	18.8	64.7
(3) Non-Hispanic white woman-owned	1,565	$86,893	8.1	8.8	92.2
(4) POC-owned	482	$43,621	4.1	10.0	40.6
(5) Asian Pacific American-owned	67	$1,377	0.1	0.1	119.7
(6) Black American-owned	209	$13,209	1.2	4.1	29.8
(7) Hispanic American-owned	153	$16,407	1.5	1.0	155.1
(8) Native American-owned	19	$5,588	0.5	4.5	11.7
(9) Subcontinent Asian American-owned	34	$7,041	0.7	0.3	200+
(10) POC-owned or woman-owned DBE	1,403	$93,329	8.7		
(11) Non-Hispanic white woman-owned DBE	1,062	$64,243	6.0		
(12) POC-owned DBE	341	$29,085	2.7		
(13) Asian Pacific American-owned DBE	1	$84	0.0		
(14) Black American-owned DBE	175	$11,675	1.1		
(15) Hispanic American-owned DBE	152	$14,333	1.3		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	13	$2,994	0.3		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-16.
Agency: INDOT
Time period: 10/01/2016 - 09/30/2021
Contract area: All industries
Contract role: Subcontracts
Funding source: All funding sources

Goals applied

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	19,477	$2,806,060			
(2) POC- and woman-owned businesses	10,943	$1,098,059	39.1	20.6	189.8
(3) Non-Hispanic white woman-owned	8,199	$732,572	26.1	11.6	200+
(4) POC-owned	2,744	$365,487	13.0	9.0	144.5
(5) Asian Pacific American-owned	59	$12,966	0.5	0.1	200+
(6) Black American-owned	1,055	$113,150	4.0	4.6	86.9
(7) Hispanic American-owned	632	$69,119	2.5	1.4	177.8
(8) Native American-owned	118	$102,148	3.6	2.1	176.0
(9) Subcontinent Asian American-owned	880	$68,104	2.4	0.8	200+
(10) POC-owned or woman-owned DBE	9,666	$856,477	30.5		
(11) Non-Hispanic white woman-owned DBE	7,270	$616,971	22.0		
(12) POC-owned DBE	2,396	$239,506	8.5		
(13) Asian Pacific American-owned DBE	59	$12,966	0.5		
(14) Black American-owned DBE	926	$97,443	3.5		
(15) Hispanic American-owned DBE	628	$69,088	2.5		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	783	$60,010	2.1		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-17.
Agency: INDOT
Goals not applied
Time period: 10/01/2016 - 09/30/2021
Contract area: All industries
Contract role: Prime contracts and subcontracts
Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	25,976	$8,086,839			
(2) POC- and woman-owned businesses	921	$257,106	3.2	10.2	31.3
(3) Non-Hispanic white woman-owned	659	$152,929	1.9	3.3	56.9
(4) POC-owned	262	$104,177	1.3	6.8	18.9
(5) Asian Pacific American-owned	66	$1,293	0.0	0.0	115.5
(6) Black American-owned	76	$22,301	0.3	2.1	12.9
(7) Hispanic American-owned	4	$2,324	0.0	0.4	7.8
(8) Native American-owned	0	$0	0.0	3.6	0.0
(9) Subcontinent Asian American-owned	116	$78,259	1.0	0.7	145.2
(10) POC-owned or woman-owned DBE	467	$169,022	2.1		
(11) Non-Hispanic white woman-owned DBE	351	$118,078	1.5		
(12) POC-owned DBE	116	$50,944	0.6		
(13) Asian Pacific American-owned DBE	0	$0	0.0		
(14) Black American-owned DBE	55	$21,256	0.3		
(15) Hispanic American-owned DBE	3	$250	0.0		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	58	$29,438	0.4		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-18.
Agency: INDOT
Time period: 10/01/2016 - 09/30/2021
Contract area: All industries
Contract role: Subcontracts
Funding source: All funding sources

Goals not applied

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Utilization percentage	(d) Availability percentage	(e) Disparity index
(1) All businesses	51	$11,349			
(2) POC- and woman-owned businesses	12	$2,021	17.8	17.6	101.4
(3) Non-Hispanic white woman-owned	5	$1,329	11.7	7.6	153.2
(4) POC-owned	7	$692	6.1	9.9	61.5
(5) Asian Pacific American-owned	0	$0	0.0	0.7	0.0
(6) Black American-owned	0	$0	0.0	4.3	0.0
(7) Hispanic American-owned	2	$50	0.4	1.9	23.3
(8) Native American-owned	0	$0	0.0	0.2	0.0
(9) Subcontinent Asian American-owned	5	$642	5.7	2.9	194.6
(10) POC-owned or woman-owned DBE	10	$1,969	17.4		
(11) Non-Hispanic white woman-owned DBE	4	$1,317	11.6		
(12) POC-owned DBE	6	$652	5.7		
(13) Asian Pacific American-owned DBE	0	$0	0.0		
(14) Black American-owned DBE	0	$0	0.0		
(15) Hispanic American-owned DBE	2	$50	0.4		
(16) Native American-owned DBE	0	$0	0.0		
(17) Subcontinent Asian American-owned DBE	4	$602	5.3		

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

Source: BBC Research & Consulting Disparity Analysis.