



# **2019 Disparity Study**

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**San Diego Association of Governments**

**FINAL REPORT**

**Final Report**

July 2020

# **2019 San Diego Association of Governments Disparity Study**

**Prepared for**

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# CHAPTER ES.

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## Executive Summary

# CHAPTER ES.

## Executive Summary

The San Diego Association of Governments (SANDAG) retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help inform its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. As a Federal Transportation Administration (FTA) fund recipient, SANDAG implements the Federal DBE Program to address potential discrimination against minority- and woman-owned businesses and DBEs in the award of FTA-funded contracts. To do so, SANDAG uses various measures to encourage the participation of minority- and woman-owned businesses in its FTA-funded contracts including both *race- and gender-neutral* measures and *race- and gender-conscious* measures. Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses in SANDAG contracting, regardless of the race/ethnicity and gender of the owners. In contrast, *race- and gender-conscious* measures are designed to specifically encourage the participation of minority- and woman-owned businesses in SANDAG contracting.

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

- The percentage of contracting dollars (including subcontract dollars) that SANDAG awarded to minority- and woman-owned businesses on construction, professional services (including architecture and engineering), and goods and other services contracts that SANDAG awarded between January 1, 2013 and December 31, 2017 (i.e., *utilization*); and
- The percentage of SANDAG's contracting dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of SANDAG prime contracts and subcontracts (i.e., *availability*).

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

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

SANDAG could use study information to help refine its implementation of the Federal DBE Program, including:

- Setting an overall DBE goal for the participation of minority- and woman-owned businesses in its FTA-funded contracts;
- Determining which program measures to use to encourage the participation of minority- and woman-owned businesses in its contracting; and
- Determining which groups would be eligible to participate in race- and gender-conscious measures that the agency decides to use as part of implementing the Federal DBE Program.

BBC summarizes key information from the disparity study in five parts:

- A. Analyses in the disparity study;
- B. Availability analysis results;
- C. Utilization analysis results;
- D. Disparity analysis results;
- E. Overall DBE Goal; and
- F. Program implementation.

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

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

- The study team conducted an analysis of federal regulations, case law, and other information to guide the methodology for the disparity study. The analysis included a review of federal, state, and local requirements related to the Federal DBE Program and other minority- and woman-owned business programs (see Chapter 2 and Appendix B).
- BBC conducted quantitative analyses of the success of minorities, women, and minority- and woman-owned businesses throughout the San Diego region. In addition, BBC collected qualitative information about potential barriers that minority- and woman-owned businesses face in the local marketplace through in-depth interviews, surveys, public meetings, and written testimony (see Chapter 3, Appendix C, and Appendix D).
- BBC analyzed the percentage of SANDAG's contracting dollars that minority- and woman-owned businesses are available to perform. That analysis was based on surveys that the study team completed with businesses that work in industries related to the specific types of construction, professional services, and goods and other services contracts that SANDAG awards (see Chapter 5 and Appendix E).
- BBC analyzed the dollars that minority- and woman-owned businesses received on the construction, professional services, and goods and other services contracts that SANDAG awarded during the study period (see Chapter 6).
- BBC examined whether there were any disparities between the participation and availability of minority- and woman-owned businesses for the construction, professional services, and goods and other services contracts that SANDAG awarded during the study period (see Chapter 7).
- BBC reviewed SANDAG's current overall DBE goal and provided guidance related to setting its next overall DBE goal (see Chapter 8).
- BBC reviewed SANDAG's current contracting practices and measures to encourage the participation of minority- and woman-owned businesses in its contracting and provided guidance related to additional program options and potential refinements to those practices and measures (see Chapter 9).

- BBC reviewed requirements of the Federal DBE Program as well as SANDAG’s compliance with those requirements and provided guidance related to potential refinements to the agency’s implementation of the program (see Chapter 10).

## B. Availability Analysis Results

BBC used a *custom census* approach to analyze the availability of minority- and woman-owned businesses that are ready, willing, and able to perform on SANDAG’s construction, professional services, and goods and other services prime contracts and subcontracts. BBC’s approach relied on information from surveys that the study team conducted with potentially available businesses located throughout the San Diego region that perform work within relevant work specializations, or *subindustries*. That approach allowed BBC to develop a representative, unbiased, and statistically-valid database of potentially available businesses and estimate the availability of minority- and woman-owned businesses in an accurate, statistically-valid manner.

**Overall results.** Figure ES-1 presents overall dollar-weighted availability estimates by racial/ethnic and gender group for the construction, professional services, and goods and other services prime contracts and subcontracts that SANDAG awarded during the study period. Overall, the availability of minority- and woman-owned businesses for those contracts is 12.2 percent. In other words, one would expect minority- and woman-owned businesses to receive 12.2 percent of the contracting dollars that SANDAG awards based on their availability for that work. Non-Hispanic white woman-owned businesses (3.3%) and Hispanic American-owned businesses (7.6%) exhibited the highest availability among the relevant business groups.

**Figure ES-1.**  
Availability estimates by racial/ethnic and gender group

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	3.3 %
Asian Pacific American-owned	0.6
Black American-owned	0.1
Hispanic American-owned	7.6
Native American-owned	0.4
Subcontinent Asian American-owned	0.2
<b>Total Minority-owned</b>	<b>8.9</b>
<b>Total Minority- and Woman-owned</b>	<b>12.2 %</b>

**Results by contract goal status.** SANDAG used DBE contract goals—a race- and gender-conscious measure—to award most of its FTA-funded contracts during the study period to encourage the participation of minority- and woman-owned businesses. However, the agency did not use contract goals to award all of its FTA-funded contracts nor did it use contract goals to award any of its locally-funded contracts during the study period, because it is prohibited from doing so by Proposition 209. It is useful to examine availability analysis results separately for contracts that SANDAG awards with the use of DBE contract goals (*goal contracts*) and contracts that SANDAG awards without the use of goals (*no-goal contracts*). Figure ES-2 presents availability estimates separately for goal and no-goal contracts. As shown in Figure ES-2, the availability of minority- and woman-owned businesses considered together is higher for goal contracts (16.3%) than no-goal contracts (6.8%).



**Figure ES-2.**  
**Availability estimates by contract goal status**

Note:

Numbers rounded to nearest tenth of 1 percent and 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 Research & Consulting availability analysis.

Business group	Goal Status	
	Goal contracts	No-goal contracts
Non-Hispanic white woman-owned	4.3 %	2.0 %
Asian Pacific American-owned	0.4	0.8
Black American-owned	0.1	0.1
Hispanic American-owned	10.9	3.3
Native American-owned	0.4	0.5
Subcontinent Asian American-owned	0.2	0.2
Total Minority-owned	12.1	4.8
<b>Total Minority- and Woman-owned</b>	<b>16.3 %</b>	<b>6.8 %</b>

**Results by funding source.** SANDAG’s implementation of the Federal DBE Program applies specifically to the agency’s FTA-funded contracts. As a result, it is instructive to examine availability analysis results separately for SANDAG’s FTA-funded contracts and locally-funded contracts. (BBC considered a contract to be FTA-funded if it included at least one dollar of FTA funding.) Figure ES-3 presents those results. As shown in Figure ES-3, the availability of minority- and woman-owned businesses considered together is higher for SANDAG’s FTA-funded contracts (16.4%) than locally-funded contracts (6.6%).

**Figure ES-3.**  
**Availability estimates by funding source**

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Funding source	
	FTA-funded	Locally-funded
Non-Hispanic white woman-owned	4.3 %	2.0 %
Asian Pacific American-owned	0.5	0.7
Black American-owned	0.1	0.1
Hispanic American-owned	10.9	3.2
Native American-owned	0.5	0.4
Subcontinent Asian American-owned	0.2	0.2
Total Minority-owned	12.1	4.6
<b>Total Minority- and Woman-owned</b>	<b>16.4 %</b>	<b>6.6 %</b>

**Results by contract role.** Many minority- and woman-owned businesses often work as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for prime contracts and subcontracts. Figure ES-4 presents those results. The availability of minority- and woman-owned businesses considered together is lower for SANDAG prime contracts (5.5%) than subcontracts (27.7%). Among other factors, that result could be due to subcontracts tending to be much smaller in size than prime contracts. As a result, subcontracts are often more accessible than prime contracts to minority- and woman-owned businesses.

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

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	1.2 %	8.1 %
Asian Pacific American-owned	0.6	0.7
Black American-owned	0.0	0.3
Hispanic American-owned	3.5	17.0
Native American-owned	0.2	1.1
Subcontinent Asian American-owned	0.1	0.4
<b>Total Minority-owned</b>	<b>4.3</b>	<b>19.5</b>
<b>Total Minority- and Woman-owned</b>	<b>5.5 %</b>	<b>27.7 %</b>

### C. Utilization Analysis Results

BBC measured the participation of minority- and woman-owned businesses in SANDAG contracting in terms of *utilization*—the percentage of prime contract and subcontract dollars that minority- and woman-owned businesses received on SANDAG prime contracts and subcontracts during the study period.

**Overall results.** Figure ES-5 presents the percentage of contracting dollars that minority- and woman-owned businesses considered together received on construction, professional services, and goods and other services contracts that SANDAG awarded during the study period, including both prime contracts and subcontracts. As shown in Figure ES-1, overall, minority- and woman-owned businesses received 15.8 percent of the contracting dollars that SANDAG awarded during the study period. Less than one-half of those contracting dollars—6.6 percent—went to certified DBEs. Asian Pacific American-owned businesses (7.6%) and non-Hispanic white woman-owned businesses (3.5%) exhibited higher levels of participation than all other relevant groups.

**Figure ES-5.  
Overall utilization results**

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Utilization %
<b>Minority- and Woman-owned</b>	
Non-Hispanic white woman-owned	3.5 %
Asian Pacific American-owned	7.6
Black American-owned	0.5
Hispanic American-owned	2.9
Native American-owned	0.8
Subcontinent Asian American-owned	0.5
<b>Total Minority-owned</b>	<b>12.3</b>
<b>Total Minority- and Woman-owned</b>	<b>15.8 %</b>
<b>DBE-certified</b>	
Non-Hispanic white woman-owned	2.1 %
Asian Pacific American-owned	1.3
Black American-owned	0.5
Hispanic American-owned	1.4
Native American-owned	0.8
Subcontinent Asian American-owned	0.4
<b>Total DBE-certified Minority-owned</b>	<b>4.5</b>
<b>Total DBE-certified</b>	<b>6.6 %</b>

**Results by contract goal status.** As described above, SANDAG used DBE contract goals to award most of its FTA-funded contracts during the study period. However, the agency did not use contract goals to award all of its FTA-funded contracts nor did it use contract goals to award any of its locally-funded contracts during the study period, because it is prohibited from doing so by Proposition 209. It is instructive to compare the participation of minority- and woman-owned businesses between contracts that SANDAG awarded with and without the use of contract goals (*goal* contracts and *no-goal* contracts, respectively). Doing so provides useful information about outcomes for minority- and woman-owned businesses on contracts that SANDAG awarded in a race- and gender-neutral environment and the efficacy of race- and gender-conscious measures in encouraging the participation of minority- and woman-owned businesses in agency contracts.

Figure ES-6 presents utilization results separately for SANDAG goal contracts and no-goal contracts. Minority- and woman-owned businesses considered together showed lower participation in goal contracts (14.8%) than in no-goal contracts (17.2%). Among other factors, that result could be due to the fact that no-goal contracts largely comprise locally-funded contracts, which tend to be smaller in size than SANDAG’s FTA-funded contracts and are thus often more accessible to minority- and woman-owned businesses. Examining disparity analysis results provides a better assessment of the efficacy of contract goals, because those results also take the availability of minority- and woman-owned businesses for goal and no-goal contracts into account, including contract size and myriad other factors.

**Figure ES-6.**  
**Utilization results by contract goal status**

Note:

Numbers rounded to nearest tenth of 1 percent and 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 Research & Consulting availability analysis.

Business group	Goal status	
	Goal contracts	No-goal contracts
Non-Hispanic white woman-owned	4.7 %	1.8 %
Asian Pacific American-owned	3.9	12.5
Black American-owned	0.9	0.0
Hispanic American-owned	3.3	2.4
Native American-owned	1.4	0.0
Subcontinent Asian American-owned	0.6	0.3
Total Minority-owned	10.1	15.3
<b>Total Minority- and Woman-owned</b>	<b>14.8 %</b>	<b>17.2 %</b>

**Results by funding source.** SANDAG’s implementation of the Federal DBE Program applies specifically to the agency’s federally-funded contracts. As a result, it is instructive to examine utilization analysis results separately for SANDAG’s FTA-funded contracts and locally-funded contracts. Figure ES-7 presents those results. As shown in Figure ES-7, the participation of minority- and woman-owned businesses considered together was lower for SANDAG’s FTA-funded contracts (14.8%) than for its locally-funded contracts (17.2%). Among other factors, that result could be due to the fact that SANDAG’s locally-funded contracts tend to be smaller in size than its FTA-funded contracts, and are thus often more accessible to minority- and woman-owned businesses.

**Figure ES-7.**  
**Utilization results by funding source**

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Funding source	
	FTA-funded	Locally-funded
Non-Hispanic white woman-owned	4.7 %	1.8 %
Asian Pacific American-owned	3.9	12.6
Black American-owned	0.9	0.0
Hispanic American-owned	3.3	2.5
Native American-owned	1.4	0.0
Subcontinent Asian American-owned	0.6	0.3
Total Minority-owned	10.1	15.4
<b>Total Minority- and Woman-owned</b>	<b>14.8 %</b>	<b>17.2 %</b>

**Results by contract role.** Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors, so it might be reasonable to expect higher participation of minority- and woman-owned business in subcontracts than in prime contracts. Figure ES-8 presents utilization results for minority- and woman-owned businesses separately for prime contracts and subcontracts. The participation of minority- and woman-owned businesses considered together was substantially higher in SANDAG subcontracts (29.6%) than prime contracts (9.8%).

**Figure ES-8.**  
**Utilization results by**  
**contract role**

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	0.7 %	9.8 %
Asian Pacific American-owned	8.4	5.7
Black American-owned	0.0	1.7
Hispanic American-owned	0.5	8.4
Native American-owned	0.0	2.7
Subcontinent Asian American-owned	0.2	1.3
<b>Total Minority-owned</b>	<b>9.1</b>	<b>19.8</b>
<b>Total Minority- and Woman-owned</b>	<b>9.8 %</b>	<b>29.6 %</b>

## D. Disparity Analysis Results

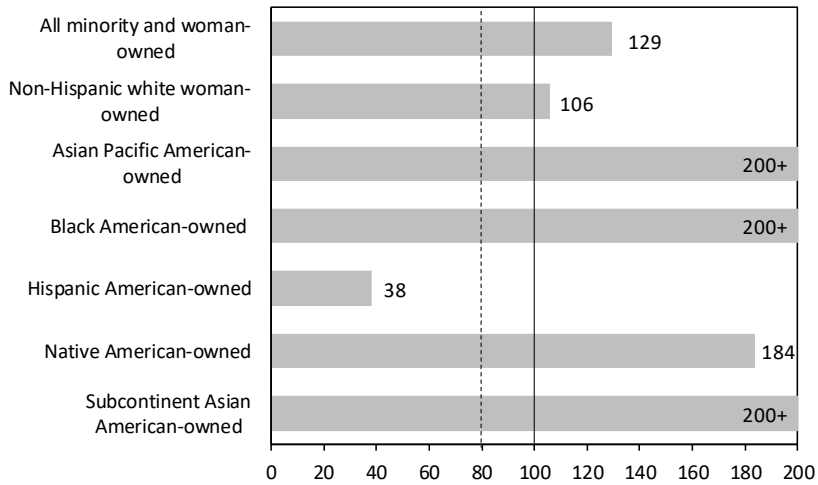
Although information about the participation of minority- and woman-owned businesses in SANDAG contracts is instructive on its own, it is even more instructive when compared with the level of participation that might be expected based on the availability of minority- and woman-owned businesses for SANDAG work. BBC compared the participation of minority- and woman-owned businesses in SANDAG prime contracts and subcontracts with the percentage of contract dollars that those businesses might be expected to receive based on their availability for that work. BBC calculated *disparity indices* for each relevant business group and for various contract sets by dividing percent participation by percent availability and multiplying the quotient by 100. A disparity index of 100 indicates an exact match between participation and availability for a particular group for a particular set of contracts (referred to as *parity*). A disparity index of less than 100 indicates a disparity between participation and availability. A disparity index of 80 or less indicates a *substantial* disparity between participation and availability and is often considered by the courts as an *inference of discrimination* against the group exhibiting the substantial disparity.

**Overall results.** Figure ES-7 presents disparity indices for all relevant prime contracts and subcontracts that SANDAG awarded during the study period. The line drawn at a disparity index level of 100 indicates parity, and the line drawn at a disparity index level of 80 indicates a substantial disparity. As shown in Figure ES-7, overall, the participation of minority- and woman-owned businesses in contracts that SANDAG awarded during the study period was higher than what one might expect based on the availability of those businesses for that work. The disparity index of 129 indicates that minority- and woman-owned businesses considered together received approximately \$1.29 for every dollar that they might be expected to receive based on their availability for transportation-related contracts that SANDAG awarded during the study period. Disparity analysis results by individual group indicated that Hispanic American-owned businesses (disparity index of 38) exhibited substantial disparities.

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

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

Source:  
BBC Research &  
Consulting disparity  
analysis.



SANDAG used DBE contract goals to award most of the transportation-related contracts that it awarded during the study period. The disparity analysis results shown in Figure ES-7 are largely reflective of the use of those measures. A crucial question is whether any disparities exist between the participation and availability of minority- and woman-owned businesses on contracts that SANDAG awarded without the use of those goals.

**Results by goals status.** SANDAG used DBE contract goals to award most contracts—both FTA- and locally-funded contracts—during the study period to encourage the participation of minority- and woman-owned businesses. SANDAG’s use of DBE contract goals is a race- and gender-conscious measure. It is useful to examine disparity analysis results separately for goal contracts and no-goal contracts. Assessing whether any disparities exist for no-goal contracts provides useful information about outcomes for minority- and woman-owned businesses on contracts that SANDAG awarded in a race- and gender-neutral environment and whether there is evidence that certain groups face any discrimination or barriers as part of SANDAG contracting.<sup>1, 2, 3</sup>

Figure ES-8 presents disparity analysis results separately for goal and no-goal contracts. As shown in Figure ES-8, minority- and woman-owned businesses considered together showed a disparity that was close to the threshold of being considered substantial on goal contracts (disparity index of 91). Moreover, they did not show a substantial disparity on no-goal contracts (disparity index of 200+). Disparity analysis results by individual group indicated that:

<sup>1</sup> *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, 1192, 1196 (9th Cir. 2013).

<sup>2</sup> *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 985, 987-88 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027, 124 S. Ct. 556 (2003).

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

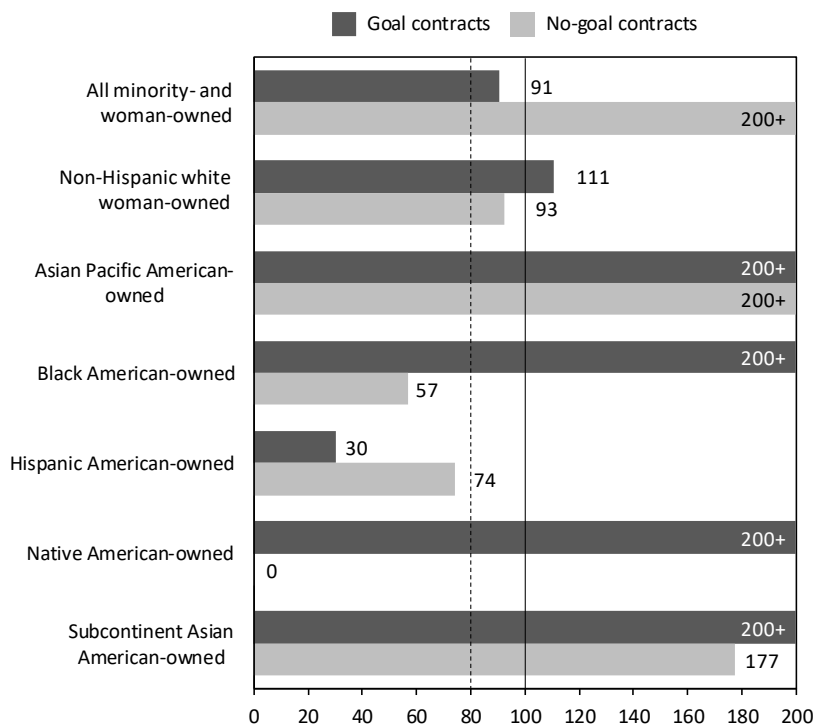
- Hispanic American-owned businesses (disparity index of 30) exhibited substantial disparities on goal contracts; and
- Black American-owned businesses (disparity index of 57), Hispanic American-owned businesses (disparity index of 74), and Native American-owned firms (disparity index of 0) exhibited substantial disparities on no-goal contracts.

Taken together, the results presented in Figure ES-8 show that SANDAG’s use of DBE contract goals is somewhat effective in encouraging the participation of certain minority- and woman-owned businesses in its contracts. Moreover, those results indicate that when SANDAG does not use race- and gender-conscious measures, more relevant business groups are substantially underutilized in SANDAG’s transportation-related contracting.

**Figure ES-8.**  
**Disparity indices for goal and no-goal contracts**

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

Source:  
 BBC Research & Consulting disparity analysis.

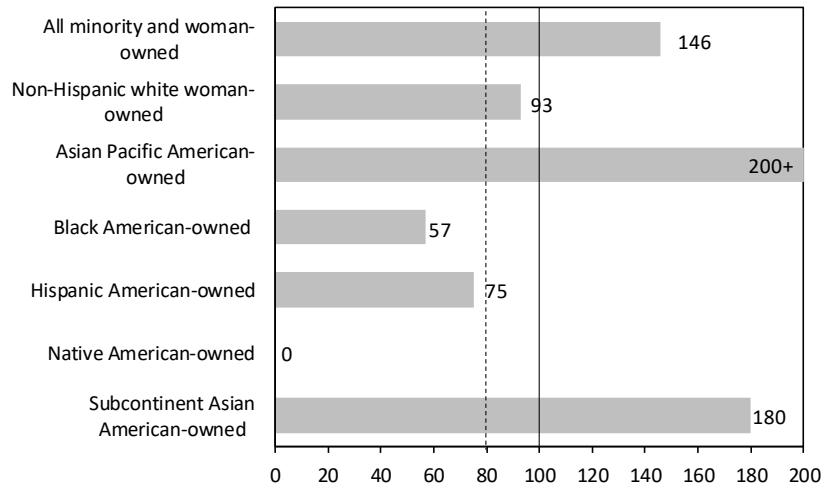


**Results for locally-funded non-Mid Coast Trolley Extension projects.** During the study period, SANDAG initiated a major construction project to expand the Mid Coast Trolley. This project included numerous FTA-funded contracts and some locally funded contracts. Due to the nature of this project, it is unlikely that SANDAG will have a similar project in the near future. As a result it is instructive to analyze locally funded contracts excluding all Mid Coast Trolley-related contracts. As shown in Figure ES-9, the participation of minority- and woman-owned businesses in those contracts was higher than what one might expect based on the availability of those businesses for that work. Disparity analysis results by individual group indicated that Black American-owned businesses (disparity index of 57), Hispanic American-owned businesses (disparity index of 75), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities on these contracts.

**Figure ES-9.  
Disparity indices  
by group**

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

Source:  
BBC Research & Consulting  
disparity analysis.



## E. Overall DBE Goal

As part of its implementation of the Federal DBE Program, SANDAG is required to set an overall goal for DBE participation in its FTA-funded contracts. Agencies that implement the Federal DBE Program must develop overall DBE goals every three years. However, the overall DBE goal is an *annual* goal in that an agency must monitor DBE participation in its FTAA-funded contracts every year. 49 Code of Federal Regulations (CFR) Part 26.45 outlines a two-step process for agencies to set their overall DBE goals: 1) establishing a base figure; and 2) considering a *step-2 adjustment*.

**Establishing a base figure.** For the purposes of helping SANDAG establish a base figure for its overall DBE goal, BBC used information from the availability analysis. The study team considered information about the availability of *potential DBEs*—minority- and woman-owned businesses that are currently DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Part 26.65—for the FTA-funded prime contracts and subcontracts that SANDAG awarded during the study period. Figure ES-13 presents the availability of potential DBEs for the FTA-funded prime contracts and subcontracts that SANDAG awarded during the study period. As show in Figure ES-10, potential DBEs might be expected to receive 10.6 percent of SANDAG’s FTA-funded prime contract and subcontract dollars based on their availability for that work. SANDAG might consider 10.6 percent as the base figure for its overall DBE goal if the agency anticipates that the types and sizes of the FTA-funded contracts that it will award in the future will be similar to those of the FTA-funded contracts that it awarded during the study period.



**Figure ES-13.**  
**Availability components of the base figure**

Business group	Base Figure Component			Weighted Average
	Construction	Professional Services	Goods and Other Services	
Asian Pacific American-owned	0.0 %	1.8 %	0.7 %	0.5 %
Black American-owned	0.2	0.0	0.8	0.1
Hispanic American-owned	3.7	15.5	20.4	7.1
Native American-owned	0.5	0.3	0.0	0.3
Subcontinent Asian American-owned	0.1	0.6	0.0	0.2
Non-Hispanic white woman-owned	1.4	5.5	6.1	2.4
<b>Total potential DBEs</b>	<b>5.8 %</b>	<b>23.8 %</b>	<b>28.0 %</b>	<b>10.6 %</b>
<b>Industry weight</b>	<b>73.5 %</b>	<b>26.2 %</b>	<b>0.4 %</b>	

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

Source: BBC Research & Consulting availability analysis.

**Considering a step-2 adjustment.** The Federal DBE Program requires SANDAG to consider a potential step-2 adjustment to its base figure as part of determining its overall DBE goal and outlines several factors that the agency must consider when assessing whether to make any adjustment:

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

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

- SANDAG’s utilization reports to FTA for federal fiscal years 2014 through 2018 indicated median annual DBE participation of 11.3 percent in FTA-funded contracts for those years, which is higher than its base figure.
- SANDAG might adjust its base figure upward to account for barriers that minorities and women face in human capital and owning businesses in the local contracting industry. Such an adjustment would correspond to a “determination of the level of DBE participation you

<sup>4</sup> 49 CFR Section 26.45.

would expect absent the effects of discrimination.”<sup>5</sup> For example, BBC’s analyses indicated that if minorities and women owned businesses at the same rate as comparable non-Hispanic white men, then the availability of minority- and woman-owned businesses for SANDAG’s FTA-funded contracts might be 12.3 percent.

- SANDAG might also adjust its base figure upward in light of evidence of barriers that affect minorities, women, and minority- and woman-owned businesses in obtaining financing, bonding, and insurance and evidence that minority- and woman-owned businesses are less successful than comparable businesses owned by non-Hispanic white men.

There are also reasons why SANDAG might consider a downward adjustment to its base figure. For example, the United States Department of Transportation’s (USDOT’s) “Tips for Goal-Setting” suggests that an agency can make a step-2 adjustment by averaging the base figure with past median DBE participation. In contrast, to SANDAG’s utilization reports to FTA, BBC’s analysis of DBE participation in SANDAG’s FTA-funded contracts indicates DBE participation of 9.8 percent in SANDAG’s FTA-funded contracts, which is lower than the base figure. If SANDAG were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of its base figure and the 9.8 percent DBE participation.

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

## **F. Program Implementation**

Chapters 9 and 10 review additional information relevant to IDOT’s implementation of the Federal DBE Program including program measures that the agency could consider using to encourage the participation of minority- and woman-owned businesses in its contracting. IDOT should review that information as well as other relevant information as it makes decisions concerning the future implementation of the Federal DBE Program. To that end, BBC presents the following areas of potential refinement for IDOT’s consideration:

- SANDAG hosts and participates in many networking and outreach events that include information about marketing, the DBE certification process, doing business with the agency, and available bid opportunities. In addition to its scheduled networking and outreach events, SANDAG also works closely with regional partners to disseminate information to their members about policies, procedures, and upcoming opportunities. SANDAG should consider continuing those efforts but might also consider broadening them to include more partnerships with local trade organizations and other public agencies.
- In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts that SANDAG awarded during the study period. In addition, as part of in-depth interviews and public meetings, several minority- and woman-owned

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

businesses reported that the size of government contracts often serves as a barrier to their success. To further encourage the participation of small businesses—including many minority- and woman-owned businesses—SANDAG should consider making efforts to unbundle relatively large contracts into several smaller contracts. Doing so would result in that work being more accessible to small businesses, which in turn might result in greater minority- and woman-owned business participation.

- Minority- and woman-owned businesses exhibited higher availability for relatively small contracts—including small prime contracts—that SANDAG awarded during the study period. However, disparity analysis results indicated substantial disparities for all racial/ethnic and gender groups on small prime contracts. SANDAG could consider implementing a small-business set-aside program to encourage the participation of small businesses—including many minority- and woman-owned businesses—as prime contractors. In doing so, SANDAG might reserve bid opportunities of a certain size (e.g., \$250,000 or less) for small business bidding. The agency should review regulations related to such measures if the agency considers implementing a small business set-aside program.
- Subcontracts represent accessible opportunities for minority- and woman-owned businesses to become involved in public contracting. However, subcontracting accounted for a relatively small percentage of the total contracting dollars that SANDAG awarded during the study period. The agency could consider implementing a program that requires prime contractors to include certain levels of subcontracting as part of their bids and proposals. For each contract to which the program applies, SANDAG would set a minimum subcontracting percentage based on the type of work involved, the size of the project, and other factors. Prime contractors bidding on the contract would be required to subcontract a percentage of the work equal to or exceeding the minimum for their bids to be responsive. If SANDAG were to implement such a program, it should include flexibility provisions such as a good faith efforts process.
- SANDAG currently uses DBE contract goals on many of the contracts it awards. Prime contractors can meet those goals by either making subcontracting commitments with certified DBE subcontractors at the time of bid or by showing that they made good faith efforts to fulfill the goals but could not do so. Disparity analysis results indicated that some racial/ethnic and gender groups showed substantial disparities on that SANDAG awarded without the use of DBE contract goals. Furthermore, SANDAG’s use of DBE contract goals appeared to address some of those disparities. Based on those results, the agency should consider continuing its use of DBE contract goals for underutilized groups in the future. SANDAG will need to ensure that the use of those goals meets the *strict scrutiny* standard of constitutional review.
- SANDAG requires prime contractors to pay their subcontractors within 30 days of receiving payment from the agency. As part of in-depth interviews and public forums, several businesses—including many minority- and woman-owned businesses—reported difficulties with receiving payment in a timely manner on government contracts, particularly when they work as subcontractors. SANDAG should consider reinforcing its prompt payment policies with its procurement staff and with prime contractors. The agency could also consider reducing the timeframe within which prime contractors are required to pay their subcontractors (e.g., within 10 days of receiving payment from

SANDAG). Doing so might help ensure that both prime contractors and subcontractors receive payment in a timely manner.

As part of the disparity study, the study team also examined information concerning conditions in the local marketplace for minorities, women, and minority- and woman-owned businesses, including results for different racial/ethnic and gender groups. SANDAG should review the full disparity study report, as well as other information it may have, in determining whether it needs to continue using race- or gender-conscious measures as part of its implementation of the Federal DBE Program, and if so, in determining what actions it might take based on study results.

# CHAPTER 1.

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Introduction

# CHAPTER 1.

## Introduction

The San Diego Association of Governments (SANDAG) is the metropolitan planning and regional transportation organization for San Diego County. SANDAG serves as a decision-making forum for the region's 18 cities and county. As a United States Department of Transportation (USDOT) fund recipient, SANDAG implements the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program is designed to address any potential discrimination against DBEs in the award and administration of USDOT-funded contracts.

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

- The percentage of contract dollars (including subcontract dollars) that SANDAG spent with minority- and woman-owned businesses during the study period (i.e., *utilization*); and
- The percentage of contract dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of SANDAG's prime contracts and subcontracts (i.e., *availability*).

BBC also assessed other quantitative and qualitative information related to:

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

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

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

BBC introduces the 2020 SANDAG Disparity Study in three parts:

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

## A. Background

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

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

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

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

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

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

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

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

## **B. Study Scope**

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

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

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

**DBEs.** DBEs are minority- and woman-owned businesses that are specifically certified as such through California Unified Certification Program (CUCP) certifying agencies, such as Caltrans. A determination of DBE eligibility includes assessing businesses' gross revenues and business owners' personal net worth (maximum of \$1.32 million excluding equity in a home and in the business). Some minority- and woman-owned businesses do not qualify as DBEs because of

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<sup>3</sup> 49 CFR Section 26.



gross revenue or net worth requirements.<sup>4</sup> Businesses seeking DBE certification in California are required to submit an application to UCP certifying agencies. The application is available online and requires businesses to submit information including business name, contact information, tax information, work specializations, and race/ethnicity and gender of owners. Certifying agencies review each application for approval. The review process may involve on-site meetings and additional documentation to confirm business information.

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

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

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

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

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

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

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

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

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

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

- Classifying minority woman-owned businesses with their corresponding minority groups.

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

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

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

**Analyses in the disparity study.** The disparity study examined whether there are any disparities between the participation and availability of minority- and woman-owned businesses on SANDAG contracts. The study focused on transportation-related construction; professional services including architecture and engineering; and goods and other services contracts that SANDAG awarded between January 1, 2013 and December 31, 2017 (i.e., the study period). During the study period, SANDAG applied DBE contract goals to many of the federally-funded contracts that it awarded.

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

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

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

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

**Marketplace conditions.** BBC conducted quantitative analyses of the success of minorities, women, and minority- and woman-owned businesses in the local contracting industries. BBC

compared business outcomes for minorities, women, and minority- and woman-owned businesses to outcomes for non-Hispanic white men and majority-owned businesses. In addition, the study team collected qualitative information about potential barriers that small businesses and minority- and woman-owned businesses face in San Diego County through in-depth interviews. Information about marketplace conditions is presented in **Chapter 3**, **Appendix C**, and **Appendix D**.

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

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

**Utilization analysis.** BBC analyzed contract dollars that SANDAG spent with minority- and woman-owned businesses on transportation-related contracts that the agency awarded between January 1, 2013 and December 31, 2017. Those data included information about associated subcontracts.<sup>5</sup> SANDAG applied DBE contract goals to many of those contracts. BBC analyzed utilization separately for businesses owned by specific minority groups and non-Hispanic women and for different types of contracts. Results from the utilization analysis are presented in **Chapter 6**.

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

**Overall DBE goal.** Based on information from the availability analysis and other research, BBC provided SANDAG with information that will help the agency set its overall DBE goal, including the base figure and consideration of a step-2 adjustment. Information about SANDAG’s overall DBE goal is presented in **Chapter 8**.

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

**Program measures.** BBC reviewed information regarding evidence of discrimination in the San Diego County contracting marketplace; analyzed SANDAG’s experience with meeting its overall DBE goal in the past; and provided information about SANDAG’s past performance in encouraging the participation of minority- and woman-owned businesses using race- and gender-neutral measures. Information from those analyses is presented in **Chapter 9**.

**Federal DBE Program.** BBC reviewed SANDAG’s implementation of the Federal DBE Program. BBC provided guidance related to additional program options. The study team’s review and guidance are presented in **Chapter 10**.

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

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

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

**Action Research.** Action Research is a woman-owned, small business professional services firm based in Oceanside, California. Action Research conducted in-depth interviews with San Diego businesses and assisted the project team with community engagement and data collection tasks.

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

**Customer Research International (CRI).** CRI is a Subcontinent Asian American-owned survey fieldwork firm based in San Marcos, Texas. CRI conducted telephone surveys with thousands of San Diego businesses to gather information for the utilization and availability analyses.

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

# **CHAPTER 2.**

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## **Legal Analysis**

# CHAPTER 2.

## Legal Analysis

As a United States Department of Transportation (USDOT) fund recipient, the San Diego Association of Governments (SANDAG) implements the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program is governed by 49 Code of Federal Regulations (CFR) Part 26 and related federal regulations. BBC Research & Consulting (BBC) presents a Legal Analysis for the 2020 SANDAG Disparity Study in two parts:

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

### A. Program Elements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

During the study period, SANDAG implemented DBE contract goals in awarding many of its USDOT-funded contracts.

## **B. Legal Standards**

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

# **CHAPTER 3.**

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## **Marketplace Conditions**

## CHAPTER 3.

# Marketplace Conditions

Historically, there have been myriad legal, economic, and social obstacles that have impeded minorities and women from acquiring the human and financial capital necessary to start and operate successful businesses. Barriers such as slavery, racial oppression, segregation, race-based displacement, and labor market discrimination resulted in substantial disparities for minorities and women, the effects of which are still apparent today. Those barriers limited opportunities for minorities in terms of both education and workplace experience.<sup>1,2,3,4</sup> Similarly, many women were restricted to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement.<sup>5</sup>

Historically, minority groups and women in San Diego have faced similar barriers, the effects of which linger to this day. For instance, socio-economic maps of San Diego show disproportionately high representation of minority racial groups in poorer areas of the city. Experts argue that this pattern is the result of a 1930s era bank loan practice whereby the Home Owners' Loan Corporation drew up maps for U.S. cities they perceived to be particularly qualified for federal mortgage insurance guarantees.<sup>6</sup> Those maps showed a clear preference for homogenous White neighborhoods, and they were adopted by federal agencies, home mortgage programs, and private lenders, thereby expanding residential segregation and setting the stage for decades of racial inequity in housing that persists to the present.<sup>7</sup> Other, more contemporary forms of discrimination also exist in San Diego. In the San Diego public education system, students of color are disproportionately more likely to undergo suspension and expulsion than their White counterparts, which is known to have long-term consequences on academic and professional success.<sup>8</sup> Contemporary gender-based disparities also exist. For example, a recent study found that, although California has some of the strongest equal pay laws in the country, women still made 89 cents of men's dollar earnings in 2018.<sup>9</sup> Over time, this wage disparity results in significantly less economic capital for women than men.

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

Federal Courts and the United States Congress have considered barriers that minorities, women, and minority- and woman-owned businesses face in a local marketplace as evidence of the existence of race-based and gender-based discrimination in that marketplace.<sup>18, 19, 20</sup> The United

States Supreme Court and other federal courts have held that analyses of conditions in a local marketplace for minorities, women, and minority- and woman-owned businesses are instructive in determining whether agencies' implementations of minority-owned and woman-owned business programs are appropriate and justified. Those analyses help agencies determine whether they are *passively participating* in any race-based or gender-based discrimination that makes it more difficult for minority-owned businesses and woman-owned businesses to compete successfully for their contracts. Passive participation in discrimination means that agencies unintentionally perpetuate race-based or gender-based discrimination simply by operating within discriminatory marketplaces. Many courts have held that passive participation in any race-based or gender-based discrimination establishes a *compelling governmental interest* for agencies to take remedial action to address such discrimination.<sup>21, 22, 23</sup>

The study team conducted quantitative and qualitative analyses to assess whether minorities, women, minority-owned businesses, and woman-owned businesses face any barriers in the San Diego construction; professional services; or goods and other services industries. The study team also examined the potential effects that any such barriers have on the formation and success of minority-owned businesses and woman-owned businesses and on their participation in, and availability for, contracts that the San Diego Association of Governments (SANDAG) awards. The study team examined local marketplace conditions primarily in four areas:

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

The information in Chapter 3 comes from existing research in the area of race-based and gender-based discrimination as well as from primary research that the study team conducted of current marketplace conditions. Additional quantitative and qualitative analyses of marketplace conditions are presented in Appendix C and Appendix D, respectively.

## A. Human Capital

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

**Education.** Barriers associated with educational attainment may preclude entry or advancement in certain industries, because many occupations require at least a high school

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

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

**Figure 3-1.**  
**Percentage of all workers 25 and older with at least a four-year degree, San Diego, 2013-2017**

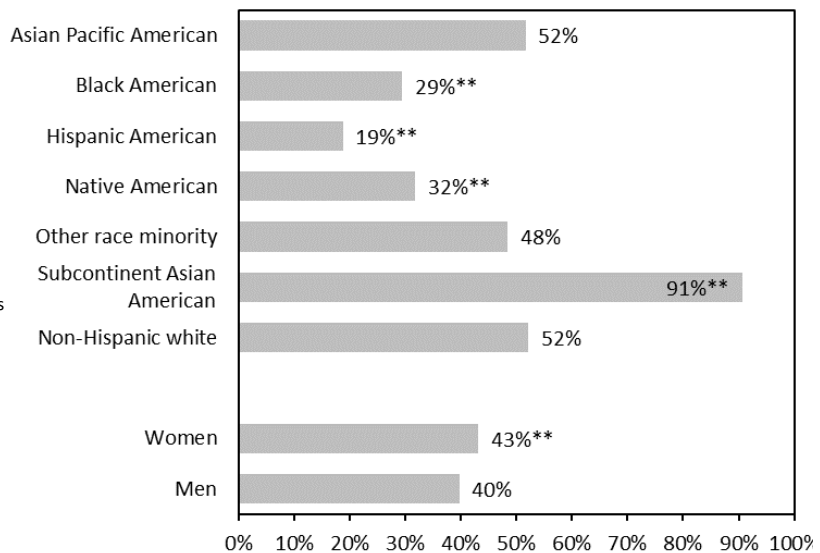
**Note:**

Other race minority represents other races not represented in any of the other race categories.

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

**Source:**

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

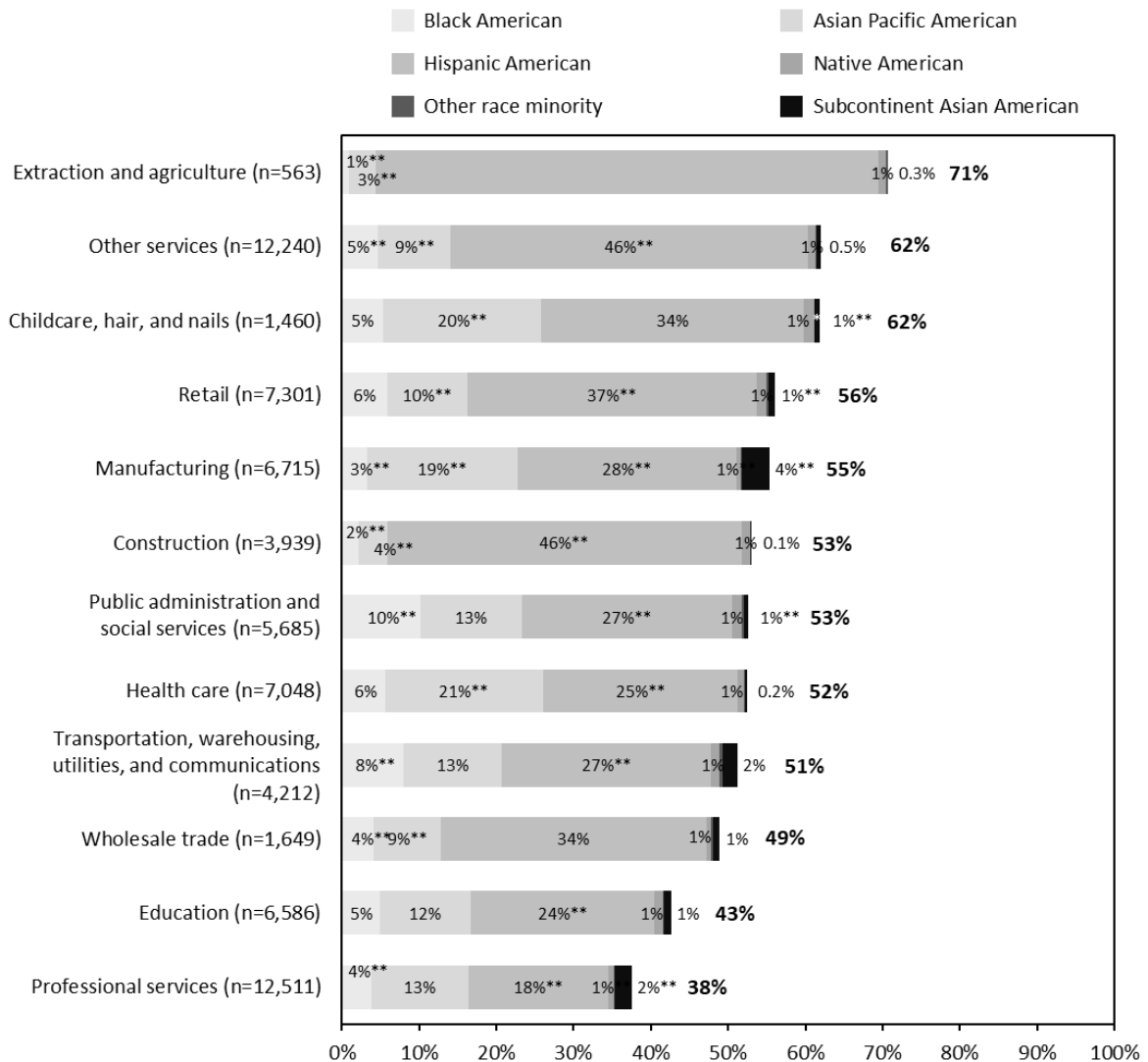


**Employment and management experience.** An important precursor to business ownership and success is acquiring direct work and management experience in relevant industries. Any barriers that limit minorities and women from acquiring that experience could prevent them from starting and operating related businesses in the future. Many of the individuals participating in in-depth interviews and public meetings stated that prior to starting their own business, they worked for other businesses in the field, and that allowed them to gain the experience to enable them to start their own businesses.

**Employment.** On a national level, prior industry experience has been shown to be an important indicator for business ownership and success. However, minorities and women are often unable to acquire relevant work experience. Minorities and women are sometimes discriminated

against in hiring decisions, which impedes their entry into the labor market.<sup>35, 36, 37</sup> When employed, minorities and women are often relegated to peripheral positions in the labor market and to industries that exhibit already high concentrations of minorities or women.<sup>38, 39, 40, 41, 42</sup> In addition, minorities are incarcerated at a higher rate than non-Hispanic whites in California and nationwide, which contributes to a number of labor difficulties including difficulties finding jobs and relatively slow wage growth.<sup>43, 44, 45, 46</sup>

**Figure 3-2.**  
**Percent representation of minorities in various industries in San Diego, 2013-2017**



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

The representation of minorities among all San Diego workers is 6% for Black Americans, 12% for Asian Pacific American, 1% for Subcontinent Asian American, 32% for Hispanic Americans, and 52% for all minorities considered together.

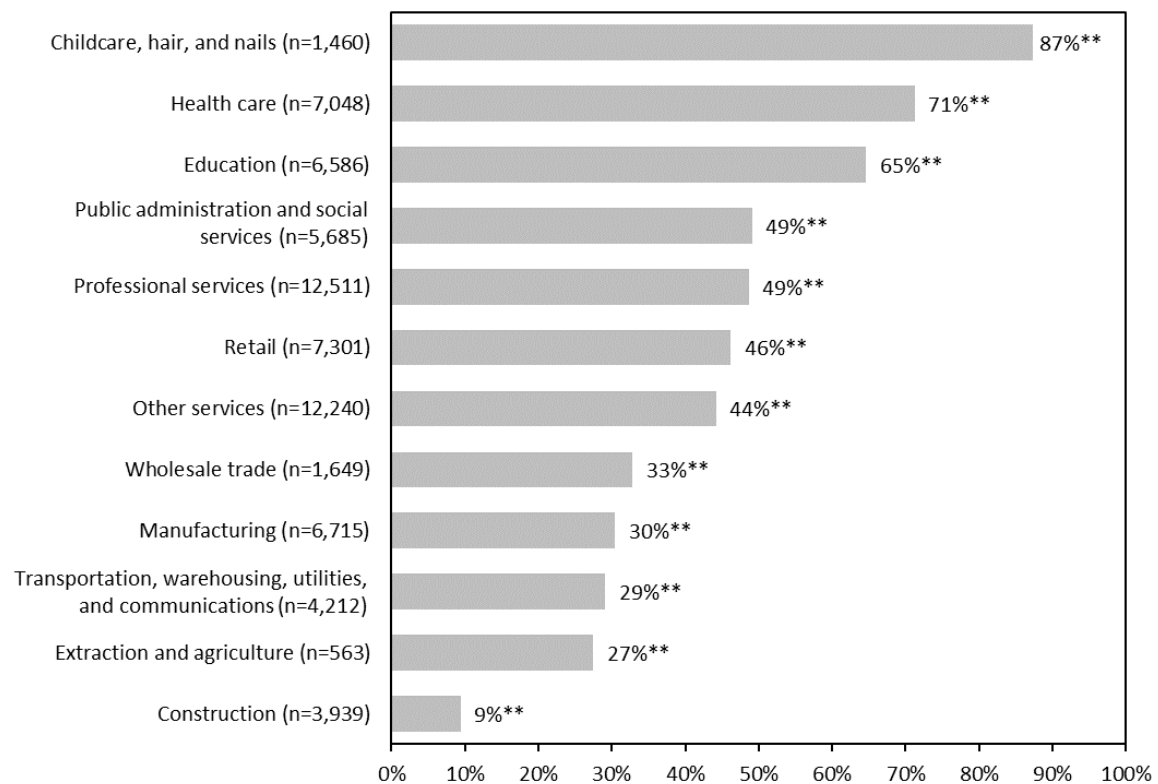
Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services; Workers in the rental and leasing, travel, investigation, waste remediation,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

Source: BBC Research & Consulting from 2013-2017 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/>

The study team’s analyses of the labor force in San Diego are largely consistent with those findings. Figures 3-2 and 3-3 present the representations of minority and women workers in various San Diego industries. As shown in Figure 3-2, the San Diego industries with the highest representations of minority workers are extraction and agriculture; childcare, hair and nails; and other services. The San Diego industries with the lowest representations of minority workers are wholesale trade; education; and professional services.

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

**Figure 3-3.**  
**Percent representation of women in various industries in San Diego, 2013-2017**



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 San Diego workers is 45%.

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

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Management experience.** Managerial experience is an essential predictor of business success. However, race-based and gender-based discrimination remains a persistent obstacle to greater diversity in management positions.<sup>47, 48, 49</sup> Nationally, minorities and women are far less likely



than non-Hispanic white men to work in management positions.<sup>50, 51</sup> Similar outcomes appear to exist for minorities and women in San Diego. The study team examined the concentration of minorities and women in management positions in the San Diego construction; professional services; and goods and other services industries. As shown in Figure 3-4:

- Compared to non-Hispanic whites, smaller percentages of Black Americans, Native Americans, and Hispanic Americans work as managers in the San Diego construction industry; and
- A smaller percentage of women than men work as managers in the San Diego professional services industry.

Many individuals that participated in in-depth interviews and public meetings expressed frustrations with difficulties related to gaining experience in the industries in which they work.

**Figure 3-4.**  
**Percentage of San Diego workers who worked as a manager in each study-related industry, 2013-2017**

Note:

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

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

Source:

BBC Research & Consulting from 2013-2017 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/>.

San Diego	Construction	Professional Services	Goods & Services
<b>Race/ethnicity</b>			
Asian Pacific American	9.6 %	3.6 %	0.0 %
Black American	4.3 % **	2.7 %	0.0 %
Hispanic American	3.9 % **	3.5 %	1.9 %
Native American	4.9 % **	7.2 % †	0.0 % †
Other race minority	0.0 % †	0.0 % †	0.0 % †
Subcontinent Asian	8.1 % †	2.1 %	0.0 % †
Non-Hispanic white	14.2 %	5.0 %	1.1 %
<b>Gender</b>			
Women	10.8 %	3.3 % **	0.0 %
Men	8.8 %	5.2 %	1.3 %
<b>All individuals</b>	<b>9.0 %</b>	<b>4.5 %</b>	<b>1.0 %</b>

**Intergenerational business experience.** Having a family member who owns a business and is working in that business is an important predictor of business ownership and business success. Such experiences help entrepreneurs gain access to important opportunity networks; obtain knowledge of best practices and business etiquette; and receive hands-on experience in helping to run businesses. However, at least nationally, minorities have substantially fewer family members who own businesses and both minorities and women have fewer opportunities to be involved with those businesses.<sup>52,53</sup> That lack of experience makes it more difficult for minorities and women to subsequently start their own businesses and operate them successfully.

## B. Financial Capital

In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.<sup>54,55,56</sup> Individuals can acquire financial capital through many sources including employment wages, personal wealth, homeownership, and financing. If race-based or gender-based discrimination exists in those capital markets, minorities and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.

**Wages and income.** Wage and income gaps between minorities and non-Hispanic whites and between women and men are well-documented throughout the country, even when researchers have statistically controlled for various factors unrelated to race and gender.<sup>57, 58, 59</sup> For example, national income data indicate that, on average, Black Americans and Hispanic Americans have household incomes that are less than two-thirds those of non-Hispanic whites.<sup>60, 61</sup> Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 84 percent the median hourly wage of men.<sup>62</sup> Such disparities make it difficult for minorities and women to use employment wages as a source of business capital.

BBC observed wage gaps in San Diego consistent with those that researchers have observed nationally. Figure 3-5 presents mean annual wages for San Diego workers by race/ethnicity and gender. As shown in Figure 3-5, Asian Pacific Americans, Black Americans, Hispanic Americans, and Native Americans in San Diego earn substantially less than non-Hispanic whites. In addition, women workers in San Diego earn substantially less than men. BBC also conducted regression analyses to assess whether wage disparities exist even after accounting for various race-neutral and gender-neutral factors such as age, education, and family status. Those analyses indicated that being Asian Pacific American, Black American, or Hispanic American was associated with substantially lower earnings than being non-Hispanic white, even after accounting for various race-neutral and gender-neutral factors. Similarly, being a woman was associated with lower earnings than being a man even after accounting for various race-neutral and gender-neutral factors (for details, see Figure C-10 in Appendix C).

**Figure 3-5.**  
**Mean annual wages**  
**among San Diego workers,**  
**2013-2017**

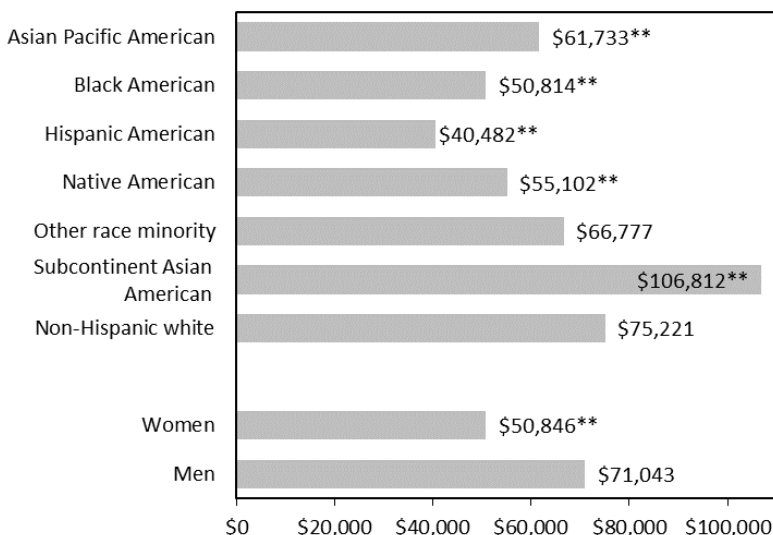
Note:

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

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

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



**Personal wealth.** Another important potential source of business capital is personal wealth. As with wages and income, there are substantial disparities between minorities and non-Hispanic whites and between women and men in terms of personal wealth.<sup>63, 64</sup> For example, in 2010, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 5 percent and 1 percent that of non-Hispanic whites, respectively. In California and nationwide, approximately one-quarter of Black Americans and Hispanic Americans are living in poverty, about double the comparable rates for non-Hispanic whites.<sup>65</sup> Wealth

inequalities also exist for women relative to men. For example, the median wealth of non-married women nationally is approximately one-third that of non-married men.<sup>66</sup>

**Homeownership.** Homeownership and home equity have been shown to be key sources of business capital.<sup>67, 68</sup> However, minorities appear to face substantial barriers nationwide in owning homes. For example, Black Americans and Hispanic Americans own homes at less than two-thirds the rate of non-Hispanic whites.<sup>69</sup> Discrimination is at least partly to blame for those disparities. Research indicates that minorities continue to be given less information on prospective homes and have their purchase offers rejected because of their race.<sup>70, 71</sup> Minorities who own homes tend to own homes that are worth substantially less than those of non-Hispanic whites and also tend to accrue substantially less equity.<sup>72, 73</sup> Differences in home values and equity between minorities and non-Hispanic whites can be attributed—at least, in part—to the depressed property values that tend to exist in racially-segregated neighborhoods.<sup>74, 75</sup>

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

**Figure 3-6.**  
**Home ownership rates in San Diego, 2013-2017**

Note:  
The sample universe is all households.  
\*\* Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level.  
Source:  
BBC Research & Consulting from 2013-2017 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/>.

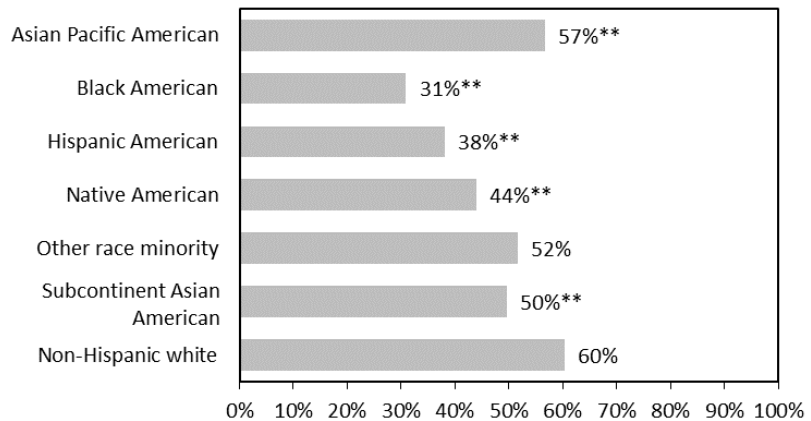


Figure 3-7 presents median home values among homeowners of different racial/ethnic groups in San Diego. Consistent with national trends, homeowners of certain minority groups—Asian Pacific Americans, Black Americans, Hispanic Americans, and Native Americans—own homes that, on average, are worth substantially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

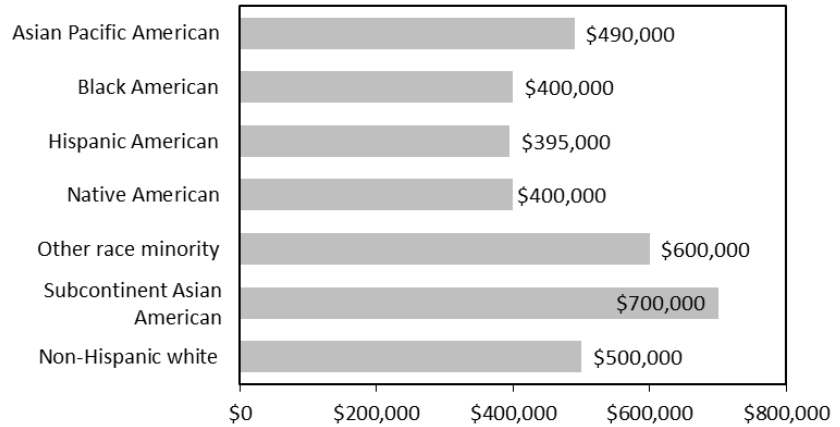
**Figure 3-7.**  
**Median home values in**  
**San Diego, 2013-2017**

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



**Access to financing.** Minorities and women face many barriers in trying to access credit and financing, both for home purchases and for business capital. Researchers have often attributed those barriers to various forms of race-based and gender-based discrimination that exist in credit markets.<sup>76, 77, 78, 79, 80, 81</sup> The study team summarizes results related to difficulties that minorities, women, minority-owned businesses, and woman-owned businesses face in the home credit and business credit markets.

Some individuals participating in in-depth interviews and public meetings spoke to the difficulties of getting financing as a small business. For example, the Hispanic American female owner of a DBE-certified trucking company stated, “...with financing, being that we’re a small business...they will really not look at you. And, that I’m aware of, there are not many financial institutions that will lend to you. Not based on race, but based on size.”

**Home credit.** Minorities and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of minorities and women during the pre-application phase and disproportionate targeting of minority and women borrowers for subprime home loans.<sup>82, 83, 84, 85, 86</sup> Race-based and gender-based barriers in home credit markets, as well as the recent foreclosure crisis, have led to decreases in homeownership among minorities and women and have eroded their levels of personal wealth.<sup>87, 88, 89, 90</sup>

To examine how minorities fare in the home credit market relative to non-Hispanic whites, the study team analyzed home loan denial rates for high-income households by race/ethnicity. The study team analyzed data for San Diego and the United States as a whole. As shown in Figure 3-8, all relevant race/ethnic minority groups exhibit higher home loan denial rates than non-Hispanic whites in the United States. In San Diego, Black Americans, Hispanic Americans, Native Americans, and Native Hawaiian or other Pacific Islanders exhibit higher home loan denial rates than non-Hispanic whites. In addition, the study team’s analyses indicate that certain minority groups in San Diego are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure C-14 in Appendix C).

**Business credit.** Minority-owned businesses and woman-owned businesses face substantial difficulties accessing business credit. For example, during loan pre-application meetings, minority-owned businesses are given less information about loan products, are subjected to more credit information requests, and are offered less support than their non-Hispanic white

counterparts.<sup>91</sup> Researchers have shown that Black American-owned businesses and Hispanic American-owned businesses are more likely to forego submitting business loan applications and are more likely to be denied business credit when they do seek loans, even after accounting for various race-neutral and gender-neutral factors.<sup>92, 93, 94</sup> In addition, women are less likely to apply for credit and receive loans of less value when they do.<sup>95, 96</sup> Without equal access to business capital, minority-owned businesses and woman-owned businesses must operate with less capital than businesses owned by non-Hispanic white men and rely more on personal finances.<sup>97, 98, 99, 100</sup>

Several individuals participating in in-depth interviews and public meetings commented on the difficulties of obtaining business credit. For example, the Black American owner of a construction company stated, “[Our] main challenge has been not [being] able to obtain financing through the traditional banking system. [That] has put us in a position to go with independent lenders with high interest rates.”

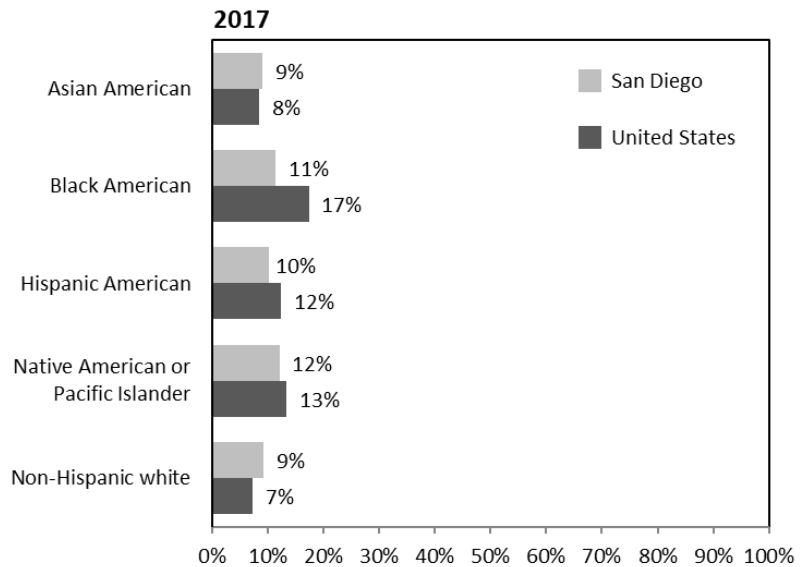
**Figure 3-8.**  
Denial rates of conventional purchase loans for high-income households, San Diego and the United States, 2017

Note:

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

Source:

FFIEC HMDA data 2016. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explore>.



**Public finance.** Minority-owned banks are a key source of banking services for minorities and for minority-owned businesses.<sup>101, 102, 103</sup> Minority-owned banks are more likely to locate branches in predominately minority and low-income communities and offer loans to individuals with weaker credit profiles.<sup>104</sup> The 2008 financial crisis caused bank consolidation that reduced the number of FDIC-insured minority-owned banks in some areas. The acquisition of closing or failing minority-owned banks by co-ethnic financial institutions helped to maintain the presence of minority-owned banks in many communities. However, despite the persistence of minority-owned banks, the financial crisis left those institutions in a diminished marketplace role in the disadvantaged communities they typically serve. After the crisis, minority-owned banks had a smaller market share of FDIC-insured deposits in predominately minority and low-income communities because of a sharp increase in deposits with majority-owned banks. Those shifts may make it difficult in some parts of the United States for public agencies to find minority-owned banks that are available for public finance projects or have diminished capacity to offer such services.

## C. Business Ownership

Nationally, there has been substantial growth in the number of minority-owned and woman-owned businesses in recent years. For example, from 2007 to 2012, the number of woman-owned businesses increased by 27 percent, the number of Black American-owned businesses increased by 35 percent, and the number of Hispanic American-owned businesses increased by 46 percent.<sup>105</sup> Despite the progress that minorities and women have made with regard to business ownership, important barriers in starting and operating businesses remain. Black Americans, Hispanic Americans, and women are still less likely to start businesses than non-Hispanic white men.<sup>106, 107, 108, 109</sup> In addition, although rates of business ownership have increased among minorities and women, they have been unable to penetrate all industries evenly. Minorities and women disproportionately own businesses in industries that require less human and financial capital to be successful and that already include large concentrations of individuals from disadvantaged groups.<sup>110, 111, 112</sup>

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

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

**Figure 3-9.**  
**Self-employment rates**  
**in study-related**  
**industries in San Diego,**  
**2013-2017**

Note:

\*\* Denotes statistical significance at the 95% confidence levels.

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

Source:

BBC Research & Consulting from 2013-2017 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/>.

San Diego	Construction	Professional Services	Goods & Services
<b>Race/ethnicity</b>			
Asian Pacific American	22.3 %	11.4 % **	29.3 %
Black American	15.4 % **	13.2 % **	41.5 %
Hispanic American	19.4 % **	22.5 % **	21.2 % **
Native American	15.0 % **	28.2 % †	63.7 % †
Other minority group	32.6 % †	0.0 % †	0.0 % †
Subcontinent Asian American	0.0 % †	11.8 % **	25.6 % †
Non-Hispanic white	27.5 %	29.8 %	37.8 %
<b>Gender</b>			
Women	12.1 % **	24.5 %	29.2 %
Men	24.3 %	25.7 %	34.2 %
<b>All individuals</b>	<b>23.2 %</b>	<b>25.3 %</b>	<b>33.0 %</b>

BBC also conducted regression analyses to determine whether differences in business ownership rates between minorities and non-Hispanic whites and between women and men

exist even after statistically controlling for various race-neutral and gender-neutral factors such as income, education, and familial status. The study team conducted those analyses separately for each relevant industry. Figure 3-10 presents the race/ethnicity and gender factors that were significantly and independently related to business ownership for each relevant industry.

**Figure 3-10.**  
**Statistically significant relationships between race/ethnicity and gender and business ownership in study-related industries in San Diego, 2013-2017**

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Industry and Group	Coefficient
<b>Construction</b>	
Subcontinent Asian American	0.0000
Women	-0.5182
<b>Professional Services</b>	
Black American	-0.6486
Asian Pacific American	-0.5864
Other minority group	0.0000
<b>Goods and Services</b>	
Asian Pacific American	-0.6106
Other minority group	0.0000
Hispanic American	-0.6952

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

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

Thus, disparities in business ownership rates between minorities and non-Hispanic whites and between women and men are not completely explained by differences in race-neutral and gender-neutral factors such as income, education, and familial status. Disparities in business ownership rates exist for several groups in all relevant industries even after accounting for such factors.

## D. Business Success

There is a great deal of research indicating that, nationally, minority-owned businesses and woman-owned businesses fare worse than businesses owned by non-Hispanic white men. For example, Black Americans, Native Americans, Hispanic Americans, and women exhibit higher rates of moving from business ownership to unemployment than non-Hispanic whites and men. In addition, minority-owned businesses and woman-owned businesses have been shown to be less successful than businesses owned by non-Hispanic whites and men using a number of different indicators such as profits, closure rates, and business size (but also see Robb and Watson 2012).<sup>113,114, 115</sup> The study team examined data on business closure, business receipts,

and business owner earnings to further explore the success of minority-owned businesses and woman-owned businesses in San Diego.

**Business closure.** The study team examined the rates of closure among California businesses by the race/ethnicity and gender of the owners. Figure 3-11 presents those results. As shown in Figure 3-11, Black American-owned businesses, Asian American-owned businesses, and Hispanic American-owned businesses in California appear to close at higher rates than white-owned businesses. In addition, woman-owned businesses in California appear to close at higher rates than businesses owned by men. Increased rates of business closure among minority-owned businesses and woman-owned businesses may have important effects on their availability for government contracts in California and San Diego.

**Figure 3-11.**  
**Rates of business closure in California, 2002-2006**

**Note:**

Data include only to non-publicly held businesses.

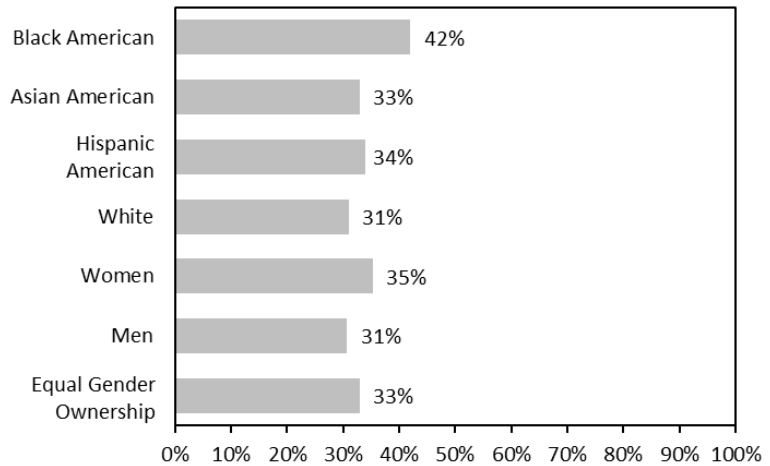
Equal Gender Ownership refers to those businesses for which ownership is split evenly between women and men.

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

**Source:**

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

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

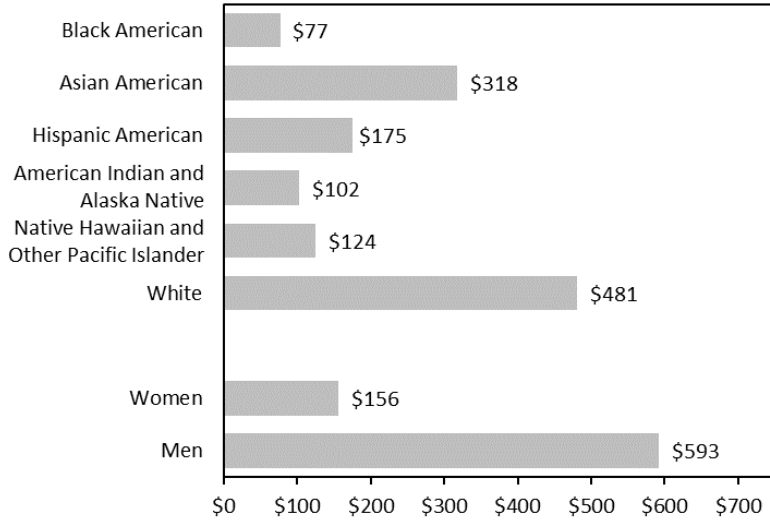


**Business receipts.** BBC also examined data on business receipts to assess whether minority-owned businesses and woman-owned businesses in San Diego earn as much as businesses owned by whites or business owned by men, respectively. Figure 3-12 shows mean annual receipts for San Diego business by the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



**Figure 3-12.**  
**Mean annual business receipts (in thousands) in San Diego, 2012**

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

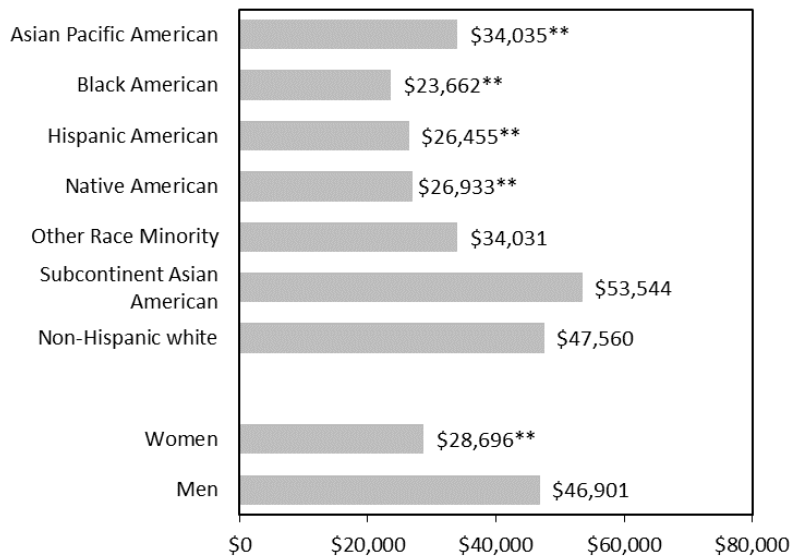


**Business owner earnings.** The study team analyzed business owner earnings to assess whether minorities and women in San Diego earn as much from the businesses that they own as non-Hispanic whites and men do. As shown in Figure 3-13, Asian Pacific Americans, Black Americans, Hispanic Americans, and Native Americans in San Diego earned significantly less on average from their businesses than non-Hispanic whites earned from their businesses. In addition, women in San Diego earned significantly less from their businesses than men earned from their businesses. BBC also conducted regression analyses to determine whether earnings disparities in San Diego exist even after statistically controlling for various race-neutral and gender-neutral factors such as age, education, and family status. The results of those analyses indicated that Black Americans and Native Americans earned significantly less from their businesses than non-Hispanic white business owners. Women business owners also earned significantly less than men (for details, see Figure C-28 in Appendix C).

**Figure 3-13.**  
**Mean annual business owner earnings in San Diego, 2013-2017**

Note:  
 The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2017 dollars.  
 \*\* Denotes statistical significance at the 95% confidence levels.

Source:  
 BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



## E. Summary

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

Barriers in the marketplace likely have important effects on the ability of minorities and women to start businesses in relevant San Diego industries—construction; professional services; goods and other services—and operating those businesses successfully. Any difficulties that minorities and women face in starting and operating businesses may reduce their availability for government agency work and may also reduce the degree to which they are able to successfully compete for government contracts. In addition, the existence of barriers in the San Diego marketplace indicates that government agencies in the state are passively participating in race-based and gender-based discrimination that makes it more difficult for minority-owned businesses and woman-owned businesses to successfully compete for their contracts. Many courts have held that passive participation in any race-based or gender-based discrimination establishes a compelling governmental interest for agencies to take remedial action to address such discrimination.<sup>1</sup>

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

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# **CHAPTER 4.**

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



# CHAPTER 4.

## Collection and Analysis of Contract Data

Chapter 4 provides an overview of the policies that the San Diego Association of Governments (SANDAG) uses to award contracts and procurements; the contracts and procurements that the study team analyzed as part of the disparity study; and the process that the study team used to collect relevant prime contract, procurement, and subcontract data for the disparity study.

Chapter 4 is organized into six parts:

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

### A. Overview of Contracting and Procurement Policies

As a recipient of public funds, SANDAG is responsible for ensuring that funds are properly spent for the public purposes for which they are intended. SANDAG has developed a detailed Procurement Manual to ensure that all funds are expended according to sound procurement principles and to aid in the uniform procurement of construction services; architecture and engineering services; other professional services; and supplies, equipment, and materials. All procurements must be authorized by the necessary level of management as set forth in SANDAG's Board Policy regarding delegation of authority from the Board to the Executive Director, and the administrative policy regarding delegation of authority from the Executive Director to designated staff.<sup>1,2</sup>

**Procurement planning.** SANDAG reviews proposed procurements to avoid purchasing unnecessary or duplicative items. SANDAG also considers whether consolidating or breaking procurements into smaller purchases would result in more economical or accessible procurement opportunities, respectively. For example, SANDAG may break relatively large procurements into smaller individual purchases to provide more accessible opportunities for Disadvantaged Business Enterprises (DBEs); small businesses; and minority- and woman-owned businesses. However, SANDAG cannot unbundle a procurement merely to avoid formal competitive bidding procedures.

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<sup>1</sup> Board Policy No. 017

<sup>2</sup> Delegation of Authority by Executive Director (Administrative Policy)

**Competitive procurement requirements.** To the extent possible, SANDAG's procurement practices encourage full and open competition, and the agency will not approve procurements that restrict competition by utilizing exclusionary or discriminatory specifications such as:

- Placing unreasonable requirements on firms by specifying technical features, conditions, or other factors for which there is insufficient operational justification of legitimate need;
- Allowing noncompetitive practices between firms (e.g., collusion, price fixing);
- Presenting conflicts of interest within SANDAG that cannot be mitigated; and
- Requiring unnecessary experience and bonding.

**Purchase size thresholds.** SANDAG implements various purchasing methods depending on the estimated cost of the purchase; the required goods or services; and the needs of the agency.

**Micropurchases for services, equipment, and supplies.** SANDAG follows micropurchase procedures for service, equipment, and supply procurements worth \$3,500 or less. Micropurchases may be made without obtaining competitive quotations. Splitting procurements to utilize micropurchase procedures and avoid a competitive procurement is not permitted.

**Small purchase invitations for bid (IFB).** SANDAG implements small purchase IFB procedures for securing equipment, supplies, and materials worth more than \$3,000 but less than \$50,000 and construction services worth more than \$500 but less than \$50,000. For small purchases of those types, SANDAG is required to solicit a minimum of three quotes. Requests for quotes must be extended to firms using any combination of SANDAG's electronic commerce systems, the California Unified Certification Program (CUCP) Directory, or known sources. Following receipt of quotes, a Contracts Analyst prepares a price analysis to compare prices and other terms. The procurement is then awarded to the lowest responsive and responsible bidder.

**Small purchase requests for proposals (RFP).** SANDAG follows small purchase RFP procedures for services other than architecture and engineering (A&E) and construction services worth more than \$3,000 but less than \$100,001. Proposals must be sought from at least three qualified firms, and the minimum release time for the solicitation must be three days. The procurement is awarded to the vendor providing the best value to SANDAG, taking into account quality, level of effort, cost, and other relevant factors as identified in the solicitation.

**Sealed bids for equipment, supplies, and construction services.** Equipment, supplies, materials, and construction services worth \$50,000 or more are procured using sealed bid procedures. Under sealed bid procedures, an IFB must be advertised in a manner that promotes competition by all qualified and capable firms. The IFB must include a clear and accurate description of the technical requirements for the material, product, or service to be procured. A pre-bid conference may be used to brief prospective bidders and explain complicated specifications and requirements as early as possible after the invitation has been issued and before the bids are due. A list of potential DBE firms should also be made available with the IFB documents on the SANDAG website. After technically-qualified SANDAG staff review the bids, the procurement is then awarded to the lowest responsive and responsible bidder.

**Competitive proposals.** SANDAG follows competitive proposal procedures to procure non-construction services worth \$100,001 or more and A&E services worth any amount. The solicitation must contain sufficient information to enable a prospective offeror to accurately prepare a proposal. The solicitation must be published on the SANDAG vendor portal; at least once in a newspaper of general circulation in San Diego County; in one or more DBE or small business directed newspapers; and in other minority or community newspapers as appropriate. The solicitation must be advertised at least 21 calendar days before the proposal due date. A pre-proposal meeting may be used to brief prospective offerors and explain complicated specifications and requirements as early as possible after the solicitation has been issued and before the proposals are due. A committee comprising technically-qualified SANDAG personnel evaluates each proposal for responsiveness and completeness.

**Limited competition procurements.** The Common Grant Rule for governmental recipients of federal funding permits SANDAG to use limited competition procurement methods when:

- Full and open competition in connection with a particular acquisition is not in the public interest;
- An unusual and urgent need for the services exists, and SANDAG would be seriously injured unless it is permitted to limit the competition; or
- A public emergency exists.

A limited competition procurement cannot be used when the need for foregoing the full and open competition requirement is due to either a failure of SANDAG to plan accordingly or to concerns about the amount of assistance available to support the procurement. SANDAG's Contracts and Procurement Staff must approve all limited competition procurements.

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

BBC Research & Consulting (BBC) collected contracting and vendor data from SANDAG's E1 financial system; E-bid system; Affidavits of Amounts Invoiced and Paid; and Diversity Reports from the Diversity Programs Office to serve as the basis of key disparity study analyses, including the utilization, availability, and disparity analyses. The study team collected the most comprehensive data that was available on prime contracts and subcontracts that SANDAG awarded between January 1, 2013 and December 31, 2017 (i.e., the study period). BBC sought data that included information about prime contracts and subcontracts regardless of the race/ethnicity and gender of the owners of the businesses that performed on those contracts or their statuses as certified woman- or minority-owned businesses. The study team collected data on construction, professional services, and goods and other services prime contracts and subcontracts that SANDAG awarded during the study period.

**Prime contract data collection.** SANDAG provided the study team with electronic data on relevant prime contracts that the agency awarded during the study period. SANDAG maintains those data in the E1 Financial System, the E-bid system, and through the Small Business Development Department. As available, BBC collected the following information about each relevant prime contract:

- Contract or purchase order number;
- Description of work;
- Award date;
- Award amount (including change orders and amendments);
- Amount paid-to-date;
- Whether DBE goals were used;
- Funding source (federal, state, or local funding);
- Prime contractor name; and
- Prime contractor identification number.

SANDAG advised the study team on how to interpret the provided data, including how to identify unique bid opportunities and how to aggregate related payment amounts. When possible, the study team aggregated individual payments or purchase order line items into contract or purchase order elements. In instances where payments or line items could not be aggregated, the study team treated payment and line item records as individual contract elements.

**Subcontract data collection.** SANDAG also provided the study team with electronic data on subcontracts related to contracts that they awarded during the study period, as it was available. SANDAG provided subcontract data for 447 prime contracts, which accounted for more than \$990 million of the contract dollars that it awarded during the study period. BBC collected the following information about each relevant subcontract:

- Associated prime contract number;
- Subcontract commitment amount;
- Amount paid on the subcontract as of December 31, 2017;
- Description of work;
- Subcontractor name; and
- Subcontractor contact information.

**Contracts included in study analyses.** The study team collected information on 649 relevant prime contract elements and 1,620 associated subcontracts that SANDAG awarded during the study period, accounting for approximately \$3 billion of agency spend. Figure 4-1 presents the number of contract elements and dollars by relevant contracting area for the prime contracts and subcontracts that the study team included in its analyses.

**Figure 4-1.**  
**Number of SANDAG contracts and value of contracts included in the study, by industry**

Source:  
 BBC Research & Consulting from SANDAG contract and payment data.

Contract Type	Contract Elements	Dollars (in Thousands)
Construction	847	\$1,544,097
Professional services	1,345	1,534,221
Good and other services	77	14,432
<b>Total</b>	<b>2,269</b>	<b>\$3,092,750</b>

**Prime contract and subcontract amounts.** For each contract element included in the study team’s analyses, BBC examined the dollars that SANDAG awarded or paid to each prime contractor and the dollars that the prime contractor paid to any subcontractors.

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

### C. Collection of Vendor Data

The study team compiled the following information on businesses that participated in relevant SANDAG contracts during the study period:

- Business name;
- Physical addresses and phone numbers;
- Ownership status (i.e., whether each business was minority-owned or woman-owned);
- Ethnicity of ownership (if minority-owned);
- DBE certification status;
- Primary lines of work;
- Business size; and
- Year of establishment.

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

- SANDAG contract and vendor data;
- SANDAG Bench Reports
- SANDAG bidders lists
- Small Business Administration certification and ownership lists, including 8(a) HUBZone and self-certification lists;
- Dun & Bradstreet (D&B) business listings and other business information sources;

- Telephone surveys that the study team conducted with business owners and managers as part of the utilization and availability analyses; and
- Business websites.

## D. Relevant Geographic Market Area

The study team used SANDAG data to help determine the *relevant geographic market area*—the geographical area in which the organization spends the substantial majority of its contracting dollars—for the study. The study team’s analysis showed that 86 percent of relevant contracting dollars during the study period went to businesses with locations in San Diego County, indicating that San Diego County should be considered the relevant geographic market area for the study. BBC’s analyses—including the availability analysis and quantitative analyses of marketplace conditions—focused on San Diego County.

## E. Relevant Types of Work

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

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

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

- SANDAG awarded to government agencies, utility providers, educational organizations, or other nonprofit organizations (\$26.5 million);
- Were classified in subindustries that reflected *national markets* (i.e., subindustries that are dominated by large national or international businesses) or were classified in subindustries for which SANDAG awarded the majority of contracting dollars to businesses located outside of the relevant geographic market area (\$4.7 million);<sup>3</sup>

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<sup>3</sup> Examples of such industries include computers and peripherals.

- Were classified in industries that were not directly related to transportation-related contracting (e.g., finance and business services) (\$53.3 million); or
- Were classified in subindustries not typically included in a disparity study (e.g., transit vehicle purchases) (\$354.2 million).

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

Note:

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

Source:

BBC Research & Consulting from SANDAG contract data.

Industry	Total (in Thousands)
<b>Construction</b>	
Heavy highway, street, and rail construction	\$1,037,167
Concrete work	76,281
Rebar and reinforcing steel	73,561
Wrecking, demolition, excavation, drilling	62,658
Traffic signals and street lighting	53,179
Building construction	50,742
Concrete, asphalt, sand, and gravel products	39,822
Electrical work	21,420
Landscape services	20,383
Water, sewer, and utility lines	20,287
Fencing, guardrails, and signs	17,117
Trucking, hauling and storage	14,424
Doors, windows, and glasswork	12,841
Heavy construction equipment rental	11,209
Other construction materials	10,742
Plumbing, heating, and air	9,275
Other construction services	7,334
Flagging services	4,223
Painting and striping	1,432
<b>Total construction</b>	<b>\$1,544,097</b>
<b>Professional services</b>	
Engineering	\$654,481
Construction management	422,412
Transportation consulting	369,709
Environmental research, consulting, and services	38,001
Testing services	24,066
Surveying and mapping	17,978
Other professional services	6,684
Landscape architecture	890
<b>Total other professional services</b>	<b>\$1,534,221</b>

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

Note:

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

Source:

BBC Research & Consulting from SANDAG contract data.

Industry	Total (in Thousands)
<b>Goods and other services</b>	
Other services	\$4,917
Elevator goods and services	2,728
Electrical equipment and supplies	2,643
Industrial equipment and machinery	1,156
Transit services	727
Vehicle	600
Cleaning and janitorial services	458
Security supplies	378
A.V. supplies	256
Other goods and supplies	250
Office goods	215
Petroleum products	104
<b>Total goods and services</b>	<b>\$14,432</b>
<b>GRAND TOTAL</b>	<b>\$3,092,750</b>

## F. Agency Review Process

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



# CHAPTER 5.

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## Availability Analysis

# CHAPTER 5.

## Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of minority- and woman-owned businesses that are ready, willing, and able to perform on the San Diego Association of Governments' (SANDAG's) transportation-related construction; professional services; and goods and other services prime contracts and subcontracts.<sup>1</sup> Chapter 5 describes the availability analysis in seven parts:

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

Appendix E provides supporting information related to the availability analysis.

### A. Purpose of the Availability Analysis

BBC examined the availability of minority- and woman-owned businesses for SANDAG prime contracts and subcontracts to inform the agency's implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. In addition, BBC used availability analysis results as inputs in the disparity analysis. In the disparity analysis, BBC compared the percentage of SANDAG contract dollars that went to minority- and woman-owned businesses during the study period (i.e., *participation* or *utilization*) to the percentage of dollars that one might expect those businesses to receive based on their availability for specific types and sizes of SANDAG prime contracts and subcontracts (i.e., *availability*).<sup>2</sup> Comparisons between participation and availability allowed the study team to determine whether any minority- or woman-owned business groups were *underutilized* during the study period relative to their availability for SANDAG work (for details, see Chapter 7).

### B. Potentially Available Businesses

BBC's availability analysis focused on specific areas of work (i.e., subindustries) related to the types of transportation-related construction; professional services; and goods and other services prime contracts and subcontracts that SANDAG awarded during the study period. BBC

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

<sup>2</sup> The study period for the disparity study was January 1, 2013 through December 31, 2017.

began the availability analysis by identifying the specific subindustries in which SANDAG spends the majority of its contracting dollars (i.e., *relevant work types*) as well as the geographic areas in which the majority of the businesses with which SANDAG spends those contracting dollars are located (i.e., *relevant geographic market area*).<sup>3</sup>

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

**Overview of availability surveys.** The study team conducted telephone surveys with business owners and managers to identify San Diego businesses that are potentially available for SANDAG's transportation-related construction; professional services; and goods and other services prime contracts and subcontracts.<sup>4</sup> BBC began the survey process by compiling a comprehensive and unbiased *phone book* of all types of San Diego businesses—that is, not only those businesses that are minority- and woman-owned but *all* businesses—that perform work in relevant subindustries. BBC developed that phone book primarily based on information from Dun & Bradstreet (D&B) Marketplace.<sup>5</sup> BBC collected information about all business establishments listed under 8-digit work specialization codes (as developed by D&B) that were most related to the contracts that SANDAG awarded during the study period. BBC obtained listings on 3,954 San Diego businesses that do work in relevant subindustries. However, BBC did not have working phone numbers for 968 of those businesses. BBC attempted availability surveys with the remaining 2,986 business establishments.

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

- Status as a private business (as opposed to a public agency or nonprofit organization);
- Status as a subsidiary or branch of another company;
- Primary lines of work;
- Role as a contractor (i.e., prime contractor, subcontractor, or both);

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<sup>3</sup> BBC identified the relevant geographic market area for the disparity study as San Diego County.

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

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

- Interest in performing work for SANDAG;
- Largest prime contract or subcontract bid on or performed in the previous five years;
- Year of establishment; and
- Race/ethnicity and gender of ownership.

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

- Being a private business (as opposed to a nonprofit organization);
- Having performed work relevant to SANDAG’s transportation-related construction; professional services; or goods and other services contracts;
- Having bid on or performed construction; professional services; or goods and other services work in either the public sector or private sector in the past five years;
- Being able to perform work or serve customers in San Diego; and
- Being interested in performing SANDAG work.<sup>6</sup>

BBC also considered the following information about businesses to determine if they were potentially available for specific prime contracts and subcontracts that SANDAG awards:

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

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

After conducting availability surveys with thousands of local businesses, BBC developed a database of information about businesses that are potentially available for SANDAG’s transportation-related construction; professional services; and goods and other services contracts. Information from the database allowed BBC to develop an accurate assessment of businesses that are ready, willing, and able to perform work for SANDAG. Figure 5-1 presents the percentage of businesses in the *availability database* that were minority- or woman-owned. The information in Figure 5-1 reflects a simple *head count* of businesses with no analysis of their availability for specific SANDAG contracts. Thus, it represents only a first step toward analyzing the availability of minority- and woman-owned businesses for SANDAG work. The study team’s analysis included 389 businesses that are potentially available for specific transportation-related construction; professional services; and goods and other services contracts that SANDAG

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

awards.<sup>7</sup> As shown in Figure 5-1, of those businesses, 40.6 percent were minority- or woman-owned.

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

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

Source:  
 BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	13.4 %
Asian Pacific American-owned	2.6
Black American-owned	2.6
Hispanic American-owned	18.0
Native American-owned	1.5
Subcontinent Asian American-owned	0.8
Unknown minority	1.5
<b>Total Minority- and Woman-owned</b>	<b>40.6 %</b>

## D. Availability Calculations

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

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

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

1. For each contract element, the study team identified businesses in the availability database that reported that they:
  - Are interested in performing construction; professional services; or goods and other services work in that particular role for that specific type of work for SANDAG;
  - Are able to serve customers in San Diego;

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<sup>7</sup> BBC included 177 businesses that were contacted as part of the 2020 SANDAG Disparity Study in the availability database. BBC also included 212 businesses from the 2018 California Department of Transportation (Caltrans) FTA Disparity Study and the 2015 Caltrans FHWA Disparity Study in the availability database. BBC only included firms from the Caltrans disparity studies if they were located in San Diego County and perform work relevant to SANDAG’s transportation-related construction; professional services; or goods and other services contracts.

- Have bid on or performed work of that size in the past five years; and
  - Were in business in the year that SANDAG awarded the contract element.
2. The study team then counted the number of minority-owned businesses, woman-owned businesses, and businesses owned by non-Hispanic white men in the availability database that met the criteria specified in Step 1.
  3. The study team translated the numeric availability of businesses for the contract element into percentage availability.

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

**Improvements on a simple head count of businesses.**

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

**BBC’s approach accounts for type of work.** Federal regulations suggest calculating availability based on businesses’ abilities to perform specific types of work. For example, the United States Department of Transportation (USDOT) gives the following example in “Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program:”

**Figure 5-2.  
Example of the availability calculation  
for a SANDAG subcontract**

On a contract that SANDAG awarded in 2015, the prime contractor awarded a subcontract worth \$300,925 for heavy highway, street, and rail construction. To determine the overall availability of minority- and woman-owned businesses for that subcontract, the study team identified businesses in the availability database that:

- a. Were in business in 2015;
- b. Indicated that they performed heavy highway, street, and rail construction;
- c. Reported bidding on work of similar or greater size in the past;
- d. Reported being able to work or serve customers in San Diego; and
- e. Reported qualifications and interest in working as a subcontractor on SANDAG projects.

The study team found 22 businesses in the availability database that met those criteria. Of those businesses, 8 were minority- or woman-owned businesses. Thus, the availability of minority- and woman-owned businesses for the subcontract was 36 percent (i.e.,  $8/22 \times 100 = 36$ ).

*If 90 percent of an agency's contracting dollars is spent on heavy construction and 10 percent on trucking, the agency would calculate the percentage of heavy construction businesses that are [minority- or woman-owned] and the percentage of trucking businesses that are [minority- or woman-owned], and weight the first figure by 90 percent and the second figure by 10 percent when calculating overall [minority- and woman-owned business] availability.<sup>8</sup>*

The BBC study team took type of work into account by examining 35 different subindustries related to construction; professional services; and goods and other services as part of estimating availability for SANDAG prime contracts and subcontracts.

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

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

**BBC's approach accounts for the relative capacity of businesses.** BBC considered the size—in terms of dollar value—of the prime contracts and subcontracts that a business bid on or received in the previous five years (i.e., *relative capacity*) when determining whether to count that business as available for a particular contract element. BBC considered whether businesses had previously bid on or received at least one contract of an equivalent or greater dollar value. BBC's approach is consistent with many recent, key court decisions that have found relative capacity measures to be important to measuring availability (e.g., *Associated General Contractors of America, San Diego Chapter vs. California Department of Transportation, et al.*,<sup>9</sup> *Western States Paving Company v. Washington State DOT*,<sup>10</sup> *Rothe Development Corp. v. U.S. Department of Defense*,<sup>11</sup> and *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*<sup>12</sup>).

**BBC's approach generates dollar-weighted results.** BBC examined availability on a contract-by-contract basis and then dollar-weighted the results for different sets of contract elements. Thus,

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<sup>8</sup> USDOT. 2014. *Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program*. Washington D.C.: U.S. Department of Transportation. (<https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>).

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

<sup>10</sup> *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

<sup>11</sup> *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

<sup>12</sup> *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996).

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

## E. Availability Results

BBC estimated the availability of minority- and woman-owned businesses for the 2,269 transportation-related construction; professional services; and goods and other services prime contracts and subcontracts that SANDAG awarded between January 1, 2013 and December 31, 2017.

**Overall results.** Figure 5-3 presents overall dollar-weighted availability estimates by racial/ethnic and gender group for SANDAG contracts. Overall, the availability of minority- and woman-owned businesses for SANDAG’s transportation-related construction; professional services; and goods and other services contracts is 12.2 percent. Hispanic American-owned businesses (7.6%) and non-Hispanic white woman-owned businesses (3.3%) exhibited the highest availability percentages among all groups.

**Figure 5-3.**  
Overall availability estimates by racial/ethnic and gender group

**Note:**

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

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

**Source:**

BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	3.3 %
Asian Pacific American-owned	0.6
Black American-owned	0.1
Hispanic American-owned	7.6
Native American-owned	0.4
Subcontinent Asian American-owned	0.2
<b>Total Minority-owned</b>	<b>8.9</b>
<b>Total Minority- and Woman-owned</b>	<b>12.2 %</b>

**Results by funding source.** SANDAG’s implementation of the Federal DBE Program applies specifically to the agency’s Federal Transit Administration (FTA)-funded contracts. As a result, it is instructive to examine availability analysis results separately for SANDAG’s FTA-funded contracts and locally-funded contracts. (The study team considered a contract to be FTA-funded if it included at least one dollar of FTA funding.) Figure 5-4 presents those results. As shown in Figure 5-4, the availability of minority- and woman-owned businesses considered together is higher for SANDAG’s FTA-funded contracts (16.4%) than for its locally-funded contracts (6.6%).



**Figure 5-4.**  
**Availability estimates by funding source**

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Funding source	
	FTA-funded	Locally-funded
Non-Hispanic white woman-owned	4.3 %	2.0 %
Asian Pacific American-owned	0.5	0.7
Black American-owned	0.1	0.1
Hispanic American-owned	10.9	3.2
Native American-owned	0.5	0.4
Subcontinent Asian American-owned	0.2	0.2
<b>Total Minority-owned</b>	<b>12.1</b>	<b>4.6</b>
<b>Total Minority- and Woman-owned</b>	<b>16.4 %</b>	<b>6.6 %</b>

**Results by contract goal status.** SANDAG used DBE contract goals to award most of its FTA-funded contracts during the study period to encourage the participation of minority- and woman-owned businesses. However, SANDAG did not apply contract goals to all of its FTA-funded contracts, nor did it apply contract goals to any of its locally-funded contracts during the study period. SANDAG’s use of DBE contract goals is a race- and gender-conscious measure. It is useful to examine availability analysis results separately for contracts that SANDAG awards with the use of DBE contract goals (*goal contracts*) and contracts that SANDAG awards without the use of goals (*no-goal contracts*). Figure 5-5 presents availability estimates separately for goal and no-goal contracts. As shown in Figure 5-5, the availability of minority- and woman-owned businesses considered together is higher for goal contracts (16.3%) than for no-goal contracts (6.8%).

**Figure 5-5.**  
**Availability estimates by contract goal status**

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Goal Status	
	Goal contracts	No-goal contracts
Non-Hispanic white woman-owned	4.3 %	2.0 %
Asian Pacific American-owned	0.4	0.8
Black American-owned	0.1	0.1
Hispanic American-owned	10.9	3.3
Native American-owned	0.4	0.5
Subcontinent Asian American-owned	0.2	0.2
<b>Total Minority-owned</b>	<b>12.1</b>	<b>4.8</b>
<b>Total Minority- and Woman-owned</b>	<b>16.3 %</b>	<b>6.8 %</b>

**Results by contract role.** Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for prime contracts and subcontracts. Figure 5-6 presents those results. As shown in Figure 5-6, the availability of minority- and woman-owned businesses considered together is lower for SANDAG prime contracts (5.5%) than for SANDAG subcontracts (27.7%). Among other factors, that result could be due to the fact that subcontracts tend to be much smaller in size than prime contracts. As a result, subcontracts are often more accessible than prime contracts to minority- and woman-owned businesses.

**Figure 5-6.**  
**Availability estimates by contract role**

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	1.2 %	8.1 %
Asian Pacific American-owned	0.5	0.7
Black American-owned	0.0	0.3
Hispanic American-owned	3.5	17.0
Native American-owned	0.2	1.1
Subcontinent Asian American-owned	0.1	0.4
<b>Total Minority-owned</b>	<b>4.3</b>	<b>19.5</b>
<b>Total Minority- and Woman-owned</b>	<b>5.5 %</b>	<b>27.7 %</b>

**Results by industry.** SANDAG’s transportation-related contracting is made up of construction; professional services; and goods and other services contracts. BBC examined availability analysis results separately for SANDAG’s transportation-related construction; professional services; and goods and other services contracts. As shown in Figure 5-7, the availability of minority- and woman-owned businesses considered together was lowest for professional services contracts (10.6%) and highest for goods and other services contracts (20.6%).

**Figure 5-7.**  
**Availability estimates by industry**

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Industry		
	Construction	Professional services	Goods and other services
Non-Hispanic white woman-owned	3.8 %	2.7 %	4.9 %
Asian Pacific American-owned	0.0	1.1	0.5
Black American-owned	0.2	0.0	1.2
Hispanic American-owned	9.0	6.2	13.9
Native American-owned	0.7	0.2	0.0
Subcontinent Asian American-owned	0.1	0.3	0.0
<b>Total Minority-owned</b>	<b>9.9</b>	<b>7.9</b>	<b>15.6</b>
<b>Total Minority- and Woman-owned</b>	<b>13.8 %</b>	<b>10.6 %</b>	<b>20.6 %</b>

**Results for locally-funded non-Mid Coast Trolley Extension projects.** During the study period, SANDAG funded a major transit project, the Mid-Coast Trolley Extension. Given the size and scope of this project, SANDAG set a separate DBE-goal for the FTA-funded contracts associated with the project. It is unlikely that SANDAG will have another project similar to the Mid-Coast Trolley Extension in the near future, so BBC examined availability analysis results separately for locally-funded projects that were not associated with the Mid-Coast project. As shown in Figure 5-8, the availability of minority- and woman-owned businesses considered together 7.8 percent.

**Figure 5-8.**  
**Availability estimates for locally-funded projects not associated with the Mid-Coast trolley extension**

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-18 n Appendix F.

Source:  
 BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	2.3 %
Asian Pacific American-owned	0.9
Black American-owned	0.1
Hispanic American-owned	3.8
Native American-owned	0.5
Subcontinent Asian American-owned	0.2
<b>Total Minority-owned</b>	<b>5.5</b>
<b>Total Minority- and Woman-owned</b>	<b>7.8 %</b>

## F. Base Figure for Overall DBE Goal

Establishing a base figure is the first step in calculating an overall goal for DBE participation in SANDAG’s FTA-funded contracts. BBC calculated the base figure using the same availability database and approach described above except that calculations only included *potential* DBEs—that is, minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 Code of Federal Regulations Part 26—and only included FTA-funded prime contracts and subcontracts. BBC’s approach to calculating SANDAG’s base figure is consistent with:

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

Figure 5-9 presents BBC’s base figure calculations by relevant racial/ethnic and gender group. Those results indicate that the availability of potential DBEs for SANDAG’s FTA-funded transportation contracts is 10.6 percent. SANDAG might consider 10.6 percent as the base figure for its overall goal for DBE participation, assuming that the types and sizes of FTA-funded contracts that the agency awards in the time period that the goal will cover are similar to the types of FTA-funded contracts that the agency awarded during the study period.

**Figure 5-9.**  
**Base figure calculations**

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-16 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	2.4 %
Asian Pacific American-owned	0.5
Black American-owned	0.1
Hispanic American-owned	7.1
Native American-owned	0.3
Subcontinent Asian American-owned	0.2
<b>Total Minority-owned</b>	<b>8.2</b>
<b>Total Minority- and Woman-owned</b>	<b>10.6 %</b>

**Differences from overall availability.** The availability of potential DBEs for FTA-funded contracts is lower than the overall availability of minority- and woman-owned businesses that is presented in Figure 5-3. BBC’s calculation of the overall availability of minority- and woman-owned businesses includes three groups of minority- and woman-owned businesses that the study team did not count as potential DBEs when calculating the base figure:

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

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

**Additional steps before SANDAG determines its overall DBE goal.** SANDAG must consider whether to make a step-2 adjustment to the base figure as part of determining its overall DBE goal. Step-2 adjustments can be upward or downward, but there is no requirement for SANDAG to make a step-2 adjustment as long as the agency can explain what factors it considered and why no adjustment was warranted. Chapter 8 discusses factors that SANDAG might consider in deciding whether to make a step-2 adjustment to the base figure.

## G. Implications for Any DBE Contract Goals

If SANDAG determines that the use of DBE contract goals is appropriate in the future, it might use information from the availability analysis when setting any DBE contract goals. It might also use information from a current DBE directory, a current bidders list, or other sources that could provide information about the availability of minority- and woman-owned businesses to participate in particular contracts. The Federal DBE Program provides agencies that use DBE contract goals with some flexibility in how they set those goals. DBE goals on some contracts might be higher than the overall DBE goal. In contrast, DBE goals on other contracts might be

lower than the overall DBE goal. In addition, there may be some FTA-funded contracts for which setting DBE contract goals would not be appropriate.

# CHAPTER 6.

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## Utilization Analysis

# CHAPTER 6.

## Utilization Analysis

Chapter 6 presents information about the participation of minority- and woman-owned businesses in transportation-related construction; professional services; and goods and other services prime contracts and subcontracts that the San Diego Association of Governments (SANDAG) awarded between January 1, 2013 and December 31, 2017.<sup>1</sup> Chapter 6 is organized in two parts:

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

### A. Overview of Utilization Analysis

BBC Research & Consulting (BBC) measured the participation of minority- and woman-owned businesses in SANDAG contracting in terms of *utilization*—the percentage of prime contract and subcontract dollars that minority- and woman-owned businesses received on SANDAG prime contracts and subcontracts during the study period. For example, if 5 percent of SANDAG prime contract and subcontract dollars went to woman-owned businesses on a particular set of contracts, utilization of woman-owned businesses for that set of contracts would be 5 percent.

The United States Department of Transportation (USDOT) requires SANDAG to submit reports about the participation of Disadvantaged Business Enterprises (DBEs) in its Federal Transit Administration (FTA)-funded transportation contracts twice each year (typically in June and December). BBC's analysis of the participation of minority- and woman-owned businesses in SANDAG contracting went beyond what the agency currently reports to USDOT in two key ways:

- BBC counted the participation of all minority- and woman-owned businesses in its analysis, not only that of certified DBEs; and
- BBC examined participation of minority- and woman-owned businesses in both FTA- and locally-funded contracts, not only in FTA-funded contracts.

### B. Utilization Analysis Results

BBC measured the participation of all minority- and woman-owned businesses in the \$3.1 billion of transportation-related contracts that SANDAG awarded during the study period. BBC included all minority- and woman-owned businesses in the analysis, regardless of whether they were certified as DBEs. The study team also measured participation separately for minority- and woman-owned businesses that were DBE certified.

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

**Overall results.** Figure 6-1 presents the percentage of contracting dollars that minority- and woman-owned businesses considered together received on transportation-related construction; professional services; and goods and other services contracts that SANDAG awarded during the study period (including both prime contracts and subcontracts). As shown in Figure 6-1, overall, minority- and woman-owned businesses considered together received 15.8 percent of the relevant contracting dollars that SANDAG awarded during the study period. Less than half of those contracting dollars—6.6 percent—went to certified DBEs. Asian Pacific American-owned businesses (7.6%) and non-Hispanic white woman-owned businesses (3.5%) exhibited higher levels of participation on SANDAG contracts than all other relevant groups.

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

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Utilization %
<b>Minority- and Woman-owned</b>	
Non-Hispanic white woman-owned	3.5 %
Asian Pacific American-owned	7.6
Black American-owned	0.5
Hispanic American-owned	2.9
Native American-owned	0.8
Subcontinent Asian American-owned	0.5
<b>Total Minority-owned</b>	<b>12.3</b>
<b>Total Minority- and Woman-owned</b>	<b>15.8 %</b>
<b>DBE-certified</b>	
Non-Hispanic white woman-owned	2.1 %
Asian Pacific American-owned	1.3
Black American-owned	0.5
Hispanic American-owned	1.4
Native American-owned	0.8
Subcontinent Asian American-owned	0.4
<b>Total DBE-certified Minority-owned</b>	<b>4.5</b>
<b>Total DBE-certified</b>	<b>6.6 %</b>

**Results by funding source.** SANDAG’s implementation of the Federal DBE Program applies specifically to the agency’s federally-funded contracts. As a result, it is instructive to examine utilization analysis results separately for SANDAG’s FTA-funded contracts and locally-funded contracts. (The study team considered a contract to be FTA-funded if it included at least one dollar of FTA funding.) Figure 6-2 presents those results. As shown in Figure 6-2, the participation of minority- and woman-owned businesses considered together was lower for SANDAG’s FTA-funded contracts (14.8%) than for its locally-funded contracts (17.2%). Among other factors, that result could be due to the fact that SANDAG’s locally-funded contracts tend to be smaller in size than its FTA-funded contracts, and are thus often more accessible to minority- and woman-owned businesses.



**Figure 6-2.**  
**Utilization results by**  
**funding source**

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Funding source	
	FTA-funded	Locally-funded
Non-Hispanic white woman-owned	4.7 %	1.8 %
Asian Pacific American-owned	3.9	12.6
Black American-owned	0.9	0.0
Hispanic American-owned	3.3	2.5
Native American-owned	1.4	0.0
Subcontinent Asian American-owned	0.6	0.3
Total Minority-owned	10.1	15.4
<b>Total Minority- and Woman-owned</b>	<b>14.8 %</b>	<b>17.2 %</b>

**Results by contract goal status.** SANDAG used DBE contract goals to award most of its FTA-funded contracts during the study period to encourage the participation of minority- and woman-owned businesses. However, SANDAG did not apply contract goals to all of its FTA-funded contracts, nor did it apply contract goals to any of its locally-funded contracts during the study period. It is instructive to compare the participation of minority- and woman-owned businesses between contracts that SANDAG awarded with the use of DBE contract goals (*goal contracts*) and contracts that SANDAG awarded without the use of DBE contract goals (*no-goal contracts*). Doing so provides useful information about outcomes for minority- and woman-owned businesses on contracts that SANDAG awarded in a *race- and gender-neutral* environment and the efficacy of DBE contract goals in encouraging the participation of minority- and woman-owned businesses in SANDAG’s transportation-related contracts.

Figure 6-3 presents utilization results separately for SANDAG *goal* contracts and *no-goal* contracts. As shown in Figure 6-3, minority- and woman-owned businesses considered together showed lower participation in goal contracts (14.8%) than in no-goal contracts (17.2%). Among other factors, that result could be due to the fact that no-goal contracts largely comprise locally-funded contract, which tend to be smaller in size than SANDAG’s FTA-funded contracts, and are thus often more accessible to minority- and woman-owned businesses. Note that examining disparity analysis results provides a better assessment of the efficacy of DBE contract goals, because those results also take the availability of minority- and woman-owned businesses for goal and no-goal contracts into account.

**Figure 6-3.**  
**Utilization results by contract goal status**

Note:  
Numbers rounded to nearest tenth of 1 percent.  
Numbers may not add to totals.  
For more detail, see Figures F-14 and F-15 in Appendix F.

Source:  
BBC Research & Consulting utilization analysis.

Business group	Goal status	
	Goal contracts	No-goal contracts
Non-Hispanic white woman-owned	4.7 %	1.8 %
Asian Pacific American-owned	3.9	12.5
Black American-owned	0.9	0.0
Hispanic American-owned	3.3	2.4
Native American-owned	1.4	0.0
Subcontinent Asian American-owned	0.6	0.3
Total Minority-owned	10.1	15.3
<b>Total Minority- and Woman-owned</b>	<b>14.8 %</b>	<b>17.2 %</b>

**Results by contract role.** Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors, so it might be reasonable to expect higher participation of minority- and woman-owned business in subcontracts than in prime contracts. Figure 6-4 presents utilization results for minority- and woman-owned businesses separately for prime contracts and subcontracts. As shown in Figure 6-4, the participation of minority- and woman-owned businesses considered together was in fact much higher in SANDAG subcontracts (29.6%) than in SANDAG’s prime contracts (9.8%).

**Figure 6-4.**  
**Utilization results by contract role**

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

Source:  
BBC Research & Consulting utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	0.7 %	9.8 %
Asian Pacific American-owned	8.4	5.7
Black American-owned	0.0	1.7
Hispanic American-owned	0.5	8.4
Native American-owned	0.0	2.7
Subcontinent Asian American-owned	0.2	1.3
Total Minority-owned	9.1	19.8
<b>Total Minority- and Woman-owned</b>	<b>9.8 %</b>	<b>29.6 %</b>

**Results by industry.** SANDAG’s transportation-related contracting is made up of construction; professional services; and goods and other services contracts. BBC examined utilization analysis results separately for SANDAG’s transportation-related construction; professional services; and goods and other services contracts. As shown in Figure 6-5, the participation of minority- and woman-owned businesses considered together was lowest for goods and other services contracts (12.9%) and highest for professional services contracts (16.7%).

**Figure 6-5.**  
**Availability estimates by industry**

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

Source:  
BBC Research & Consulting availability analysis.

Business group	Construction	Professional services	Goods and other services
Non-Hispanic white woman-owned	5.2 %	1.8 %	4.7 %
Asian Pacific American-owned	3.2	12.1	3.0
Black American-owned	0.6	0.4	3.2
Hispanic American-owned	4.2	1.6	2.0
Native American-owned	1.6	0.0	0.0
Subcontinent Asian American-owned	0.2	0.8	0.0
<b>Total Minority-owned</b>	<b>9.8</b>	<b>14.9</b>	<b>8.2</b>
<b>Total Minority- and Woman-owned</b>	<b>15.0 %</b>	<b>16.7 %</b>	<b>12.9 %</b>

**Results for locally-funded non-Mid Coast Trolley Extension projects.** During the study period, SANDAG funded a major transit project, the Mid-Coast Trolley Extension. Given the size and scope of this project, SANDAG set a separate DBE-goal for the FTA-funded contracts associated with the project. It is unlikely that SANDAG will have another project similar to the Mid-Coast Trolley Extension in the near future, so BBC examined utilization results separately for locally-funded projects that were not associated with the Mid-Coast project. As shown in Figure 6-6, the utilization of minority- and woman-owned businesses considered together 11.5 percent.

**Figure 6-6.**  
**Utilization results for locally-funded projects not associated with the Mid-Coast trolley extension**

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-18 n Appendix F.

Source:  
BBC Research & Consulting utilization analysis.

Business group	Utilization %
Non-Hispanic white woman-owned	2.1 %
Asian Pacific American-owned	6.1
Black American-owned	0.0
Hispanic American-owned	2.8
Native American-owned	0.0
Subcontinent Asian American-owned	0.4
<b>Total Minority-owned</b>	<b>9.3</b>
<b>Total Minority- and Woman-owned</b>	<b>11.5 %</b>

**Concentration of dollars.** BBC analyzed whether the dollars that each relevant racial/ethnic and gender group received on SANDAG’s transportation-related contracts were spread across a relatively large number of different businesses or were concentrated with a relatively small number of businesses. The study team assessed that question by calculating:

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

Figure 6-7 presents those results. Overall, 200 different minority- and woman-owned businesses participated in SANDAG’s transportation-related contracts during the study period. Nineteen of

those businesses, or 17 percent of all utilized minority- or woman-owned businesses, accounted for 75 percent of the total contracting dollars that minority- and woman-owned businesses received during the study period.

**Figure 6-7.**  
**Concentration of dollars that went to minority- and woman-owned businesses**

Note: The sum of utilized businesses by group is not equal to total utilized minority- and woman-owned businesses, because four minority-owned businesses that received work during the study period were of unknown race/ethnicity.

Source: BBC Research & Consulting availability analysis.

Business group	Utilized businesses	Businesses accounting for 75% of dollars	
		Number	Percent
Non-Hispanic white woman-owned	78	12	15.4%
Asian Pacific American-owned	18	1	5.6%
Black American-owned	15	6	40.0%
Hispanic American-owned	71	13	18.3%
Native American-owned	6	1	16.7%
<u>Subcontinent Asian American-owned</u>	<u>12</u>	<u>3</u>	<u>25.0%</u>
All Minority- and Woman-owned	200	19	17.2%

# **CHAPTER 7.**

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## **Disparity Analysis**

# CHAPTER 7.

## Disparity Analysis

The disparity analysis compared the participation of minority- and woman-owned businesses in contracts that the San Diego Association of Governments (SANDAG) awarded between January 1, 2013 and December 31, 2017 (i.e., the study period) to what those businesses might be expected to receive based on their availability for that work.<sup>1</sup> The analysis focused on transportation-related construction; professional services; and goods and other services prime contracts and subcontracts. Chapter 7 presents the disparity analysis in four parts:

- A. Overview of disparity analysis;
- B. Disparity analysis results;
- C. Statistical significance of disparity analysis results; and
- D. Case study analysis.

### A. Overview of Disparity Analysis

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation of minority- and woman-owned businesses in SANDAG prime contracts and subcontracts with the percentage of contract dollars that minority- and woman-owned businesses might be expected to receive based on their availability for that work. BBC expressed actual participation and availability as percentages of the total dollars associated with a particular set of contracts. (e.g., 5% participation compared with 4% availability). BBC then calculated a *disparity index* to help compare participation and availability results across relevant racial/ethnic and gender groups and different contract sets using the following formula:

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

A disparity index of 100 indicates *parity* between actual participation, or *utilization*, and availability—that is, participation was largely in line with availability. A disparity index of less than 100 indicates a *disparity* between participation and availability—that is, minority- and woman-owned businesses were *underutilized* relative to their availability. Finally, a disparity index of less than 80 indicates a *substantial disparity* between participation and availability—that is, minority- and woman-owned businesses were substantially underutilized relative to their availability.<sup>2</sup>

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

<sup>2</sup> Many courts have deemed disparity indices below 80 as being “substantial” and have accepted them as evidence of adverse conditions for minority-owned businesses and woman-owned businesses (e.g., see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng’g Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923

The disparity analysis results that BBC presents in Chapter 7 summarize detailed results tables that are presented in Appendix F. Each table in Appendix F presents disparity analysis results for a different set of contracts. For example, Figure 7-1, which is identical to Figure F-2 in Appendix F, presents disparity analysis results for all SANDAG contracts that BBC examined as part of the study—that is, transportation-related construction; professional services; and goods and other services prime contracts and subcontracts that SANDAG awarded during the study period. Appendix F includes analogous tables for different subsets of contracts, including:

- Contracts that SANDAG awarded with and without the use of contract goals;
- Federally- and locally-funded contracts;
- Construction; professional services contracts; and goods and other services; and
- Prime contracts and subcontracts.

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

A review of Figure 7-1 helps to introduce the calculations and format of all of the disparity analysis results tables in Appendix F. As presented in Figure 7-1, the disparity analysis results tables show results about each relevant racial/ethnic and gender group (as well as about all businesses) in separate rows:

- “All businesses” in row (1) pertains to information about all businesses regardless of the race/ethnicity and gender of their owners.
- Row (2) presents results for all minority- and woman-owned businesses considered together, regardless of whether they were certified as Disadvantaged Business Enterprises (DBEs).
- Row (3) presents results for all woman-owned businesses, regardless of whether they were certified as DBEs.
- Row (4) presents results for all minority-owned businesses, regardless of whether they were certified as DBEs.
- Rows (5) through (10) present results for businesses of each individual racial/ethnic group, regardless of whether they were certified as DBEs.
- The bottom half of Figure 7-1 presents utilization results for businesses that were certified as DBEs.

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(11th Circuit 1997); and *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). See Appendix B for additional discussion of those and other cases.

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

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	2,269	\$3,092,750	\$3,092,750				
(2) Minority and woman-owned businesses	804	\$489,566	\$489,566	15.8	12.2	3.6	129.4
(3) Non-Hispanic white woman-owned	307	\$107,868	\$107,868	3.5	3.3	0.2	105.8
(4) Minority-owned	497	\$381,698	\$381,698	12.3	8.9	3.4	138.1
(5) Asian Pacific American-owned	98	\$234,648	\$234,648	7.6	0.6	7.0	200+
(6) Black American-owned	53	\$15,663	\$15,663	0.5	0.1	0.4	200+
(7) Hispanic American-owned	264	\$90,147	\$90,147	2.9	7.6	-4.7	38.4
(8) Native American-owned	28	\$25,533	\$25,533	0.8	0.4	0.4	183.9
(9) Subcontinent Asian American-owned	54	\$15,707	\$15,707	0.5	0.2	0.3	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	645	\$202,970	\$202,970	6.6			
(12) Non-Hispanic white woman-owned DBE	235	\$65,281	\$65,281	2.1			
(13) Minority-owned DBE	410	\$137,689	\$137,689	4.5			
(14) Asian Pacific American-owned DBE	66	\$40,320	\$40,320	1.3			
(15) Black American-owned DBE	51	\$15,129	\$15,129	0.5			
(16) Hispanic American-owned DBE	220	\$44,542	\$44,542	1.4			
(17) Native American-owned DBE	28	\$25,533	\$25,533	0.8			
(18) Subcontinent Asian American-owned DBE	45	\$12,164	\$12,164	0.4			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of one percent.

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

Source: BBC Research & Consulting disparity analysis.



**Utilization results.** Each disparity analysis results table includes the same columns and rows. The top half of each table presents utilization results for all minority- and woman-owned businesses, regardless of whether they were certified as DBEs.

- Column (a) presents the total number of prime contracts and subcontracts (i.e., contract elements) that BBC analyzed as part of the contract set. As shown in row (1) of column (a) of Figure 7-1, BBC analyzed 2,269 contract elements. The value presented in column (a) for each individual racial/ethnic and gender group represents the number of contract elements in which businesses of that particular group participated (e.g., as shown in row (3) of column (a), non-Hispanic white woman-owned businesses participated in 307 prime contracts and subcontracts).
- Column (b) presents the dollars (in thousands) that were associated with the set of contract elements. As shown in row (1) of column (b) of Figure 7-1, BBC examined approximately \$3.1 billion for the entire set of contract elements. The dollar totals include both prime contract and subcontract dollars. The value presented in column (b) for each individual racial/ethnic and gender group represents the dollars that the businesses of that particular group received on the set of contract elements (e.g., as shown in row (3) of column (b), non-Hispanic white woman-owned businesses received approximately \$108 million).
- Column (c) presents the dollars (in thousands) that were associated with the set of contract elements after adjusting those dollars for businesses that BBC identified as minority-owned, or as DBEs, but for which specific race/ethnicity information was not available. The dollar totals include both prime contract and subcontract dollars.
- Column (d) presents the participation of each racial/ethnic and gender group as a percentage of total dollars associated with the set of contract elements. BBC calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage (e.g., for non-Hispanic white woman-owned businesses, the study team divided \$108 million by \$3.1 billion and multiplied by 100 for a result of 3.5%, as shown in row (3) of column (d)).

**Availability results.** Column (e) of Figure 7-1 presents the availability of each relevant racial/ethnic and gender group for all contract elements that the study team analyzed as part of the contract set. Availability estimates, which are represented as a percentage of the total contracting dollars associated with the set of contracts, serve as benchmarks against which to compare the participation of specific groups for specific sets of contracts (e.g., as shown in row (3) of column (e), the availability of non-Hispanic white woman-owned businesses is 3.3%).

**Differences between participation and availability.** The next step in analyzing whether there was a disparity between the participation and availability of minority- and woman-owned businesses is to subtract the participation percentage from the availability percentage. Column (f) of Figure 7-1 presents the percentage point difference between participation and availability for each relevant racial/ethnic and gender group. For example, as presented in row (3) of column (f) of Figure 7-1, the participation of non-Hispanic white woman-owned businesses in SANDAG contracts was 0.2 percentage points higher than their availability.

**Disparity indices.** It is sometimes difficult to interpret absolute percentage differences between participation and availability. Therefore, BBC also calculated a disparity index for each relevant racial/ethnic and gender group. Column (g) of Figure 7-1 presents the disparity index for each relevant racial/ethnic and gender group. For example, as reported in row (3) of column (g), the disparity index for woman-owned businesses was 106, indicating that woman-owned businesses actually received approximately \$1.06 for every dollar that they might be expected to receive based on their availability for prime contracts and subcontracts that SANDAG awarded during the study period. A disparity index of 106 is not considered a disparity.

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

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

## **B. Disparity Analysis Results**

BBC measured disparities between the participation and availability of minority- and woman-owned businesses for various sets of contracts that SANDAG awarded during the study period. The study team measured disparities for minority- and woman-owned businesses considered together and separately for each relevant racial/ethnic and gender group.

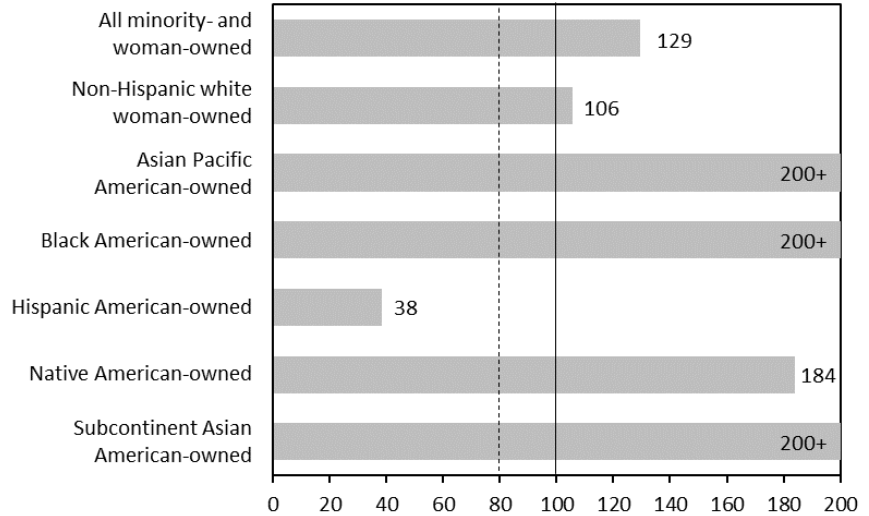
**Overall results.** Figure 7-2 presents disparity indices for all relevant prime contracts and subcontracts that SANDAG awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. Disparity indices of less than 100 indicate disparities between participation and availability. There is also a line drawn at a disparity index level of 80, because courts use 80 as the threshold for what indicates a substantial disparity.

As shown in Figure 7-2, overall, the participation of minority- and woman-owned businesses in contracts that SANDAG awarded during the study period was higher than what one might expect based on the availability of those businesses for that work. The disparity index of 129 indicates that minority- and woman-owned businesses received approximately \$1.29 for every dollar that they might be expected to receive based on their availability for transportation-related prime contracts and subcontracts that SANDAG awarded during the study period. Disparity analysis results by individual group indicated that Hispanic American-owned businesses (disparity index of 38) were the only group that exhibited a substantial disparity when considering all transportation-related contracts that SANDAG awarded during the study period.

**Figure 7-2.**  
**Disparity indices**  
**by group**

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

Source:  
BBC Research & Consulting  
disparity analysis.



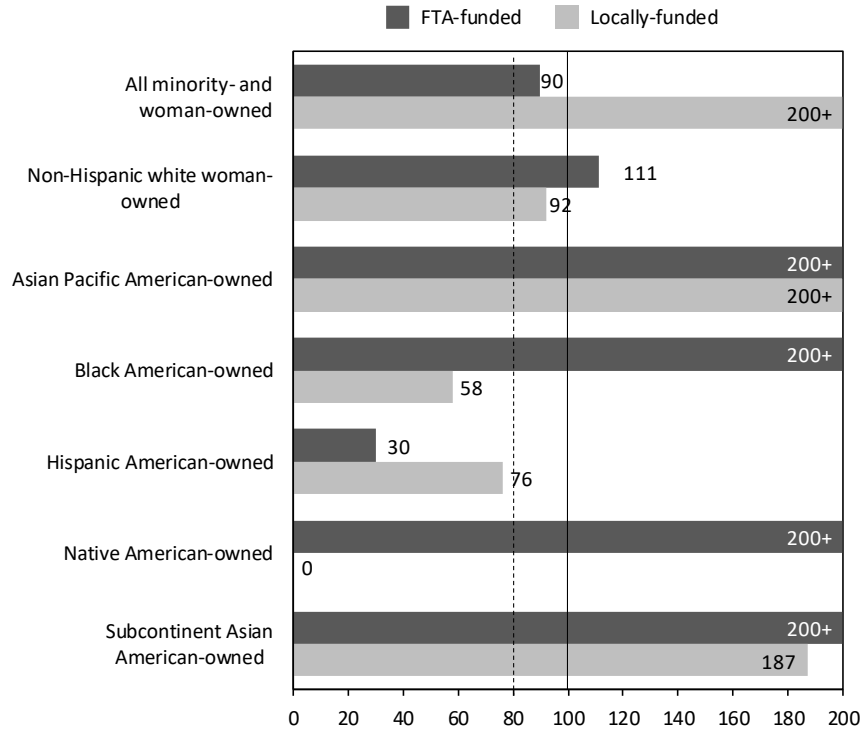
**Results by funding source.** SANDAG’s implementation of the Federal DBE Program applies specifically to the agency’s Federal Transit Administration (FTA)-funded contracts. As a result, it is useful to examine disparity analysis results separately for SANDAG’s FTA-funded contracts and locally-funded contracts. (The study team considered a contract to be FTA-funded if it included at least one dollar of FTA funding.) Figure 7-3 presents those results. Minority- and woman-owned businesses considered together showed a disparity on FTA-funded contracts (disparity index of 90), but that disparity was not substantial. Minority- and woman-owned businesses did not exhibit a disparity on locally-funded contracts (disparity index of 200+). Disparity analysis results by group indicated that:

- Hispanic American-owned businesses (disparity index of 30) exhibited a substantial disparity on FTA-funded contracts; and
- Black American-owned businesses (disparity index of 58), Hispanic American-owned businesses (disparity index of 76) and Native American-owned businesses (disparity index of 0) exhibited substantial disparities on locally-funded contracts.

**Figure 7-3.**  
**Disparity indices**  
**for FTA- and**  
**locally-funded**  
**contracts**

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

Source:  
 BBC Research &  
 Consulting disparity  
 analysis.



**Results by goals status.** SANDAG used DBE contract goals to award most of its FTA-funded contracts during the study period to encourage the participation of minority- and woman-owned businesses. However, SANDAG did not apply contract goals to all of its FTA-funded contracts, nor did it apply contract goals to any of its locally-funded contracts during the study period. SANDAG’s use of DBE contract goals is a race- and gender-conscious measure. It is useful to examine disparity analysis results separately for contracts that SANDAG awarded with the use of DBE contract goals (*goal contracts*) and contracts that SANDAG awards without the use of goals (*no-goal contracts*). Assessing whether any disparities exist for no-goal contracts provides useful information about outcomes for minority- and woman-owned businesses on contracts that SANDAG awarded in a *race and gender-neutral environment* and whether there is evidence that certain groups face any discrimination or barriers as part of the agency’s contracting.<sup>3, 4, 5</sup>

Figure 7-4 presents disparity analysis results separately for goal and no-goal contracts. As shown in Figure 7-4, minority- and woman-owned businesses considered together showed a disparity on goal contracts (disparity index of 91), but that disparity was not substantial.

<sup>3</sup> *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, 1192, 1196 (9th Cir. 2013).

<sup>4</sup> *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 985, 987-88 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027, 124 S. Ct. 556 (2003).

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

Minority- and woman-owned businesses did not exhibit a disparity on no-goal contracts (disparity index of 200+). Disparity analysis results by individual group indicated that:

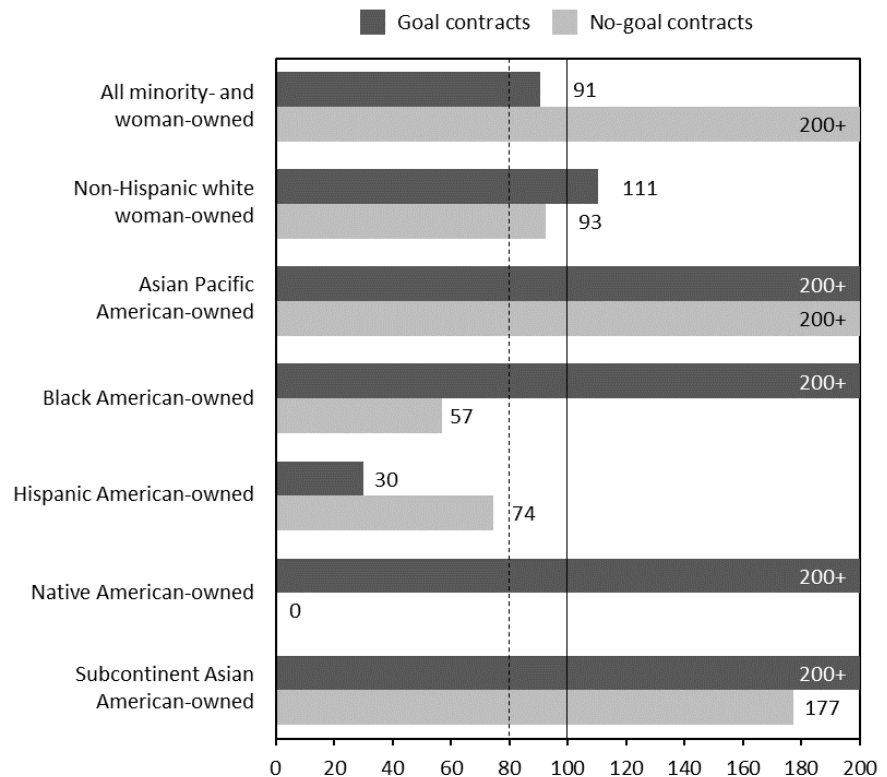
- Hispanic American-owned businesses (disparity index of 30) exhibited a substantial disparity on goal contracts; and
- Black American-owned businesses (disparity index of 57), Hispanic American-owned businesses (disparity index of 74), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities on no-goal contracts.

Taken together, the results presented in Figure 7-4 show that SANDAG’s use of DBE contract goals is somewhat effective in encouraging the participation of minority- and woman-owned businesses in its contracts. Moreover, those results indicate that when SANDAG does not use race- and gender-conscious measures, more business groups suffer from substantial underutilization in SANDAG’s transportation-related contracting.

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

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

Source:  
BBC Research & Consulting  
disparity analysis.



**Results by contract role.** Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. In addition, SANDAG’s use of DBE contract goals is a subcontracting program, so the use of those goals does not directly affect the participation of minority- and woman-owned businesses in prime contracts. Thus, it is also useful to examine disparity analysis results separately for prime contracts and subcontracts to provide additional information about outcomes for minority- and woman-owned businesses on contracts that SANDAG awarded in a race- and gender-neutral environment. Figure 7-5 presents those results. As shown in Figure 7-5, minority- and woman-owned businesses considered together did not

show a disparity for prime contracts (disparity index of 179) or subcontracts (disparity index of 107).

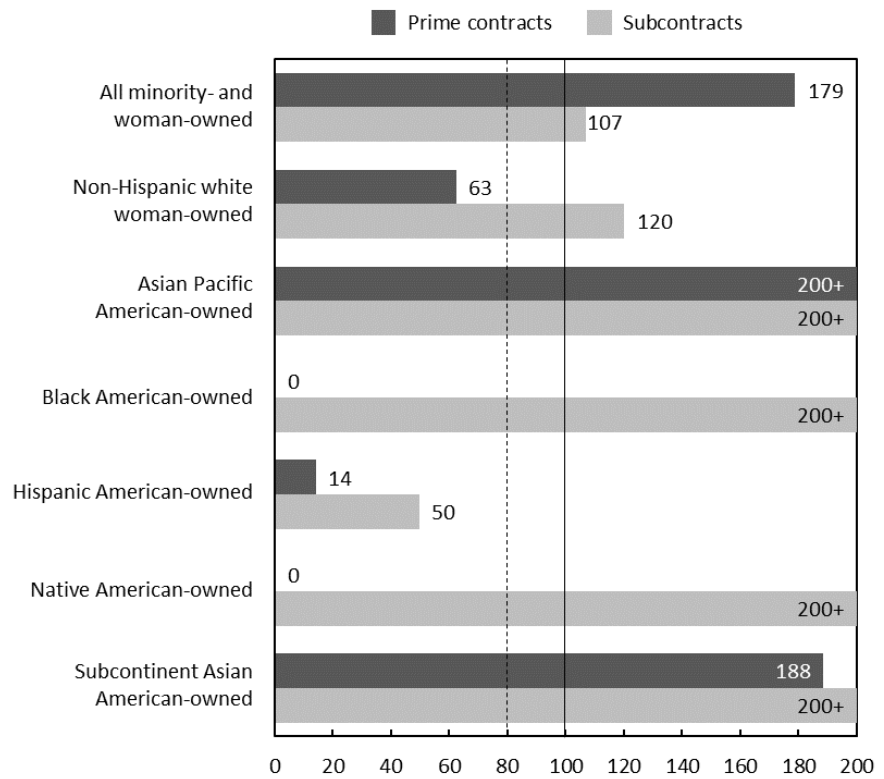
Disparity analysis results by individual group indicated that:

- Non-Hispanic white woman-owned businesses (disparity index of 63), Black American-owned businesses (disparity index of 0), Hispanic American-owned businesses (disparity index of 14), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities on prime contracts; and
- Hispanic American-owned businesses (disparity index of 50) exhibited a substantial disparity on subcontracts.

**Figure 7-5.**  
**Disparity indices**  
**for prime**  
**contracts and**  
**subcontracts**

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

Source:  
BBC Research &  
Consulting disparity  
analysis.



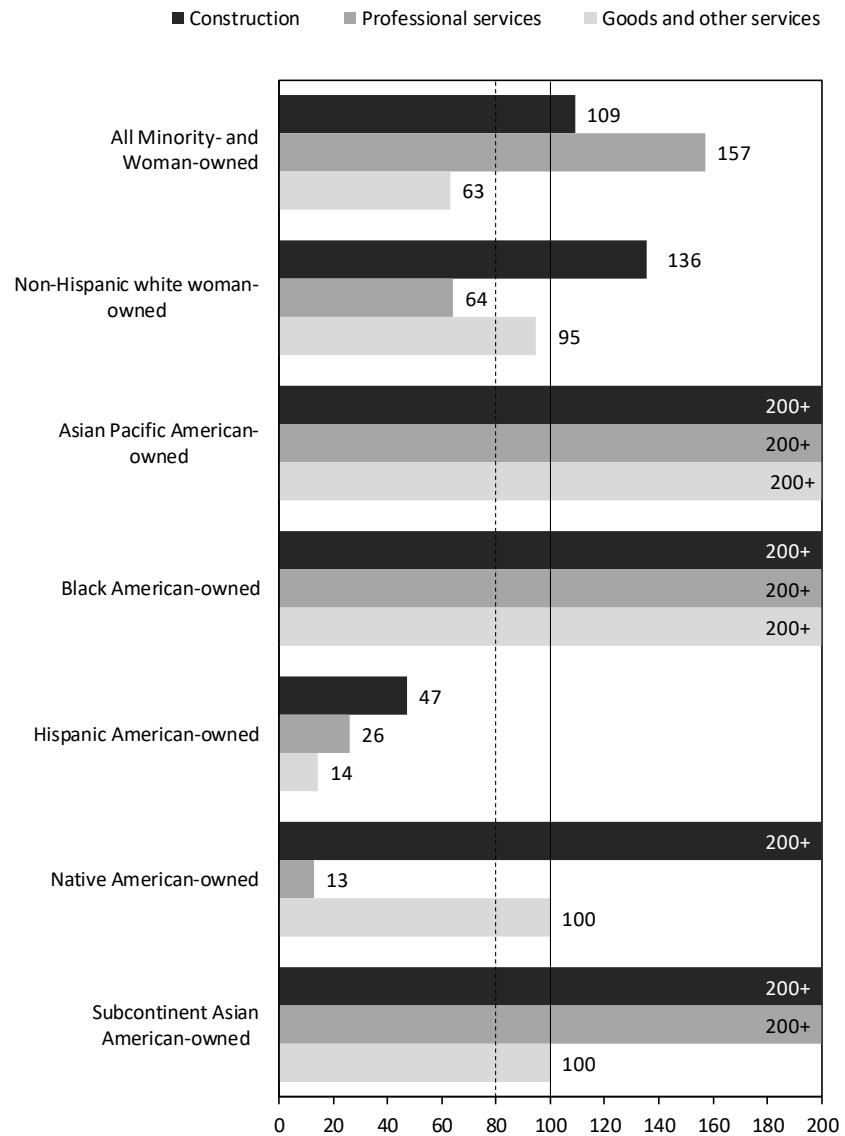
**Results by industry.** BBC examined disparity analysis results separately for SANDAG’s transportation-related construction; professional services; and goods and other services contracts. As shown in 7-6, whereas minority- and woman-owned businesses considered together did not show a disparity on construction contracts (disparity index of 109), or professional services contracts (disparity index of 157), they did show a substantial disparity on goods and other services contracts (disparity index of 57). Disparity analysis results by individual group indicated that:

- Hispanic American-owned businesses (disparity index of 47) exhibited a substantial disparity on construction contracts;
- Non-Hispanic white woman-owned businesses (disparity index of 64), Hispanic American-owned businesses (disparity index of 26), and Native American-owned businesses (disparity index of 13) exhibited substantial disparities on professional services contracts; and
- Hispanic American-owned businesses (disparity index of 14) exhibited a substantial disparity on goods and other services contracts.

**Figure 7-6.**  
**Disparity indices**  
**for construction;**  
**professional**  
**services; and**  
**goods and other**  
**services contracts**

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

Source:  
 BBC Research & Consulting  
 disparity analysis.

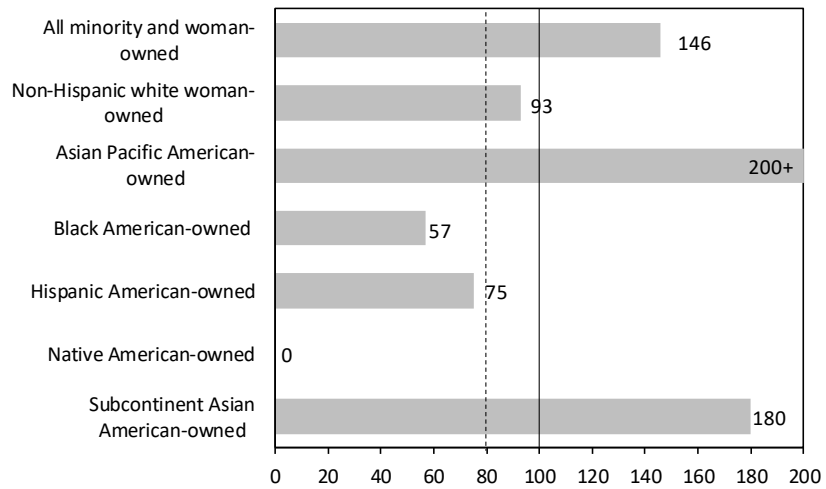


**Results for locally-funded non-Mid Coast Trolley Extension projects.** Figure 7-7 presents disparity indices for locally-funded prime contracts and subcontracts that were not related to the Mid Coast Trolley Extension project that SANDAG awarded during the study period. As shown in Figure 7-7, the participation of minority- and woman-owned businesses in those contracts was higher than what one might expect based on the availability of those businesses for that work. Disparity analysis results by individual group indicated that Black American-owned businesses (disparity index of 57), Hispanic American-owned businesses (disparity index of 75), and Native American-owned businesses (disparity index of 0) exhibited substantial disparities on these contracts.

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

Note:  
 For more detail, see Figure F-18 in Appendix F.

Source:  
 BBC Research & Consulting disparity analysis.





## C. Statistical Significance of Disparity Analysis Results

Statistical significance tests allow researchers to test the degree to which they can reject random chance as an explanation for any observed quantitative differences. In other words, a statistically significant difference is one that one can consider to be reliable or *real*.

**Monte Carlo analysis.** BBC used an algorithm that relies on repeated, random simulations to examine the statistical significance of disparity analysis results. That approach is referred to as a

### Figure 7-8. Monte Carlo Analysis

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

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

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

*Monte Carlo analysis.* Figure 7-8 provides additional information about how the study team used a Monte Carlo method to test the statistical significance of disparity analysis results.

**Results.** As shown in Figure 7-9, results from the Monte Carlo analysis indicated that the substantial disparities on all SANDAG contracts were statistically significant at the 95 percent confidence level for Hispanic American-owned firms, and for Native American-owned firms on local contracts not associated with the Mid Coast Trolley Expansion project.

**Figure 7-9.**  
**Monte Carlo simulation results for disparity analysis results**

Business Group	Disparity index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"
<b>All contracts</b>			
Minority-owned and woman-owned	129	N/A	N/A
Non-Hispanic white woman-owned	106	N/A	N/A
Minority-owned	138	N/A	N/A
Asian Pacific American-owned	200+	N/A	N/A
Black American-owned	200+	N/A	N/A
Hispanic American-owned	38	0	<0.1 %
Native American-owned	184	N/A	N/A
Subcontinent Asian American-owned	200+	N/A	N/A
<b>Local contracts not associate with Mid Coast Trolley Expansion projects</b>			
Minority-owned and woman-owned	146	N/A	N/A
Non-Hispanic white woman-owned	93	563,609	56.4 %
Minority-owned	169	N/A	N/A
Asian Pacific American-owned	200+	N/A	N/A
Black American-owned	57	411,100	41.1 %
Hispanic American-owned	75	79,143	7.9 %
Native American-owned	0	0	<0.1 %
Subcontinent Asian American-owned	180	N/A	N/A

# **CHAPTER 8.**

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**Overall DBE Goal**

# CHAPTER 8.

## Overall DBE Goal

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

SANDAG must prepare and submit a Goal and Methodology document to FTA that presents its overall DBE goal that is supported by information about the steps that the agency took to develop the goal. SANDAG last developed an overall DBE goal for FTA-funded contracts for federal fiscal years (FFYs) 2019 through 2021. The agency established an overall DBE goal of 10.3 percent. SANDAG indicated to FTA that it planned to meet the goal through the use of a combination of race- and gender-neutral and race- and gender-conscious program measures.

SANDAG will be required to develop a new goal for FFYs 2022 through 2024. Chapter 8 provides information that SANDAG might consider as part of setting its new overall DBE goal. Chapter 8 is organized in two parts that are based on the two-step process that 49 Code of Federal Regulations (CFR) Part 26.45 outlines for agencies to set their overall DBE goals:

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

### A. Establishing a Base Figure

Establishing a base figure is the first step in calculating an overall goal for DBE participation in SANDAG's FTA-funded transportation contracts. As presented in Chapter 5, potential DBEs—that is, minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on their ownership and annual revenue limits described in 13 CFR Part 121 and 49 CFR Part 26—might be expected to receive 10.6 percent of SANDAG's FTA-funded prime contract and subcontract dollars based on their availability for that work. SANDAG might consider 10.6 percent as the base figure for its overall DBE goal if it anticipates that the types and sizes of FTA-funded contracts that the agency awards in the future will be similar to the FTA-funded contracts that it awarded during the study period (January 1, 2013 through December 31, 2017).

Figure 8-1 presents the construction; professional services; and goods and other services components of the base figure for SANDAG's overall DBE goal. The availability estimates

presented in Figure 8-1 are based on the availability of potential DBEs for FTA-funded prime contracts and subcontracts. The overall base figure reflects a weight of 0.74 for construction contracts; 0.26 for professional services contracts; and 0.004 for goods and other services contracts based on the volume of dollars of FTA-funded contracts that SANDAG awarded during the study period. If SANDAG expects that the relative distributions of FTA-funded construction; professional services; and goods and other services contract dollars will change substantially in the future, the agency might consider applying different weights to the corresponding base figure components. SANDAG might also consider evaluating whether the types and sizes of the FTA-funded contracts that it awards will change substantially in the future.

**Figure 8-1.**  
**Availability components of the base figure**  
**(based on availability of potential DBEs for FTA-funded transportation contracts)**

Business group	Base Figure Component			Weighted Average
	Construction	Professional Services	Goods and Other Services	
Asian Pacific American-owned	0.0 %	1.8 %	0.7 %	0.5 %
Black American-owned	0.2	0.0	0.8	0.1
Hispanic American-owned	3.7	15.5	20.4	7.1
Native American-owned	0.5	0.3	0.0	0.3
Subcontinent Asian American-owned	0.1	0.6	0.0	0.2
Non-Hispanic white woman-owned	1.4	5.5	6.1	2.4
<b>Total potential DBEs</b>	<b>5.8 %</b>	<b>23.8 %</b>	<b>28.0 %</b>	<b>10.6 %</b>
<b>Industry weight</b>	<b>73.5 %</b>	<b>26.2 %</b>	<b>0.4 %</b>	

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

See Figures F-19, F-20, F-21, and F-22 in Appendix F for corresponding disparity results tables.

Source: BBC Research & Consulting availability analysis.

## B. Considering a Step-2 Adjustment

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

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

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

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

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

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

Figure 8-2 presents past DBE participation based on SANDAG’s Uniform Reports of DBE Awards or Commitments and Payments as reported to FTA. According to SANDAG’s Uniform Reports, median DBE participation in USDOT-funded contracts from FFYs 2014 through 2018 was 11.3 percent.

**Figure 8-2.**  
**Past certified DBE participation in USDOT-funded contracts, FFYs 2014-2018**

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

FFY	DBE Attainment	Annual DBE Goal	Difference
2014	20.44 %	6.50 %	13.94 %
2015	7.80	6.50	1.30
2016	11.30	8.00	3.30
2017	10.40	8.00	2.40
2018	17.00 %	8.00	9.00

The information about past DBE participation supports a downward adjustment to SANDAG’s base figure. If SANDAG were to use the approach that USDOT outlined in “Tips for Goals Setting” based on Uniform Reports of DBE Awards/Commitments and Payments, the overall goal would be the average of the 10.6 percent base figure and the 11.3 percent median past DBE participation, yielding a potential overall DBE goal of 11.0 percent. BBC’s analysis of DBE participation in SANDAG’s FTA-funded contracts indicates DBE participation (10.4%) that is slightly lower than the base figure. If SANDAG were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of the 10.6 percent base figure and the 9.8 percent DBE participation, yielding a potential overall DBE goal of 10.2 percent.

**2. Information related to employment, self-employment, education, training, and unions.** Chapter 3 summarizes information about conditions in the local contracting industry

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

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

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

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

BBC analyzed the impact that barriers in business ownership would have on the base figure if the groups of minorities and women that exhibited statistically significant disparities in rates of business ownership owned businesses at the same rate as comparable non-Hispanic white men. The results of that analysis—sometimes referred to as a *but for* analysis, because it estimates the availability of minority- and woman-owned businesses *but for* the effects of race- and gender-based discrimination—are presented in Figure 8-3.

The *but for* analysis included the same contracts that the study team analyzed to determine the base figure (i.e., FTA-funded prime contracts and subcontracts that SANDAG awarded during the study period). The weights for each industry were based on the proportion of FTA-funded contract dollars that SANDAG awarded in each industry during the study period (i.e., 0.74 weight for construction, 0.26 weight for professional services, and a 0.004 weight for goods and other services). In that way, BBC determined a potential adjustment to SANDAG's base figure that attempted to account for race- and gender-based barriers in business ownership in the local contracting industry.

The rows and columns of Figure 8-3 present the following information from BBC's *but for* analysis:

- a. **Current availability.** Column (a) presents the current availability of potential DBEs by racial/ethnic and gender group and by industry, as also presented in Figure 8-1. Each row presents the percentage availability for each racial/ethnic and gender group. Combined, the current availability of potential DBEs for SANDAG's FTA-funded contracts is 10.6 percent, as shown in row (28) of column (a).
- b. **Disparity indices for business ownership.** For each group that is significantly less likely than similarly-situated non-Hispanic white men to own construction and engineering businesses, BBC simulated business ownership rates if those groups owned businesses at the same rate as non-Hispanic white men who share similar race- and gender-neutral personal characteristics.

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

The study team then calculated a business ownership disparity index for each group by dividing the observed business ownership rate by the simulated business ownership rate and then multiplying the result by 100. Values of less than 100 indicate that, in reality, the group is less likely to own businesses than what would be expected for non-Hispanic white men who share similar personal characteristics. Column (b) presents disparity indices related to business ownership for the different racial/ethnic and gender groups. For example, as shown in row (6) of column (b), non-Hispanic white women own construction businesses at 42 percent of the rate that they would be expected to own construction businesses if they were non-Hispanic white men with similar personal characteristics.

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



professional services, and row (27) for goods and other services. For example, the scaled availability estimate for non-Hispanic white woman-owned construction businesses shown in row (6) of column (d) was calculated in the following way:  $(3.2\% \div 101.9\%) \times 100 = 3.2$  percent.

- e. **Components of goal.** Column (e) shows the component of the total base figure attributed to the adjusted availability of minority- and woman-owned businesses for each industry. BBC calculated each component by taking the total availability estimate shown under “Potential DBEs” in column (d)—in row (7) for construction, row (16) for professional services; and row (25) for goods and other services—and multiplying it by the proportion of total FTA-funded contract dollars for which each industry accounts (i.e., 0.74 for construction, 0.26 for professional services, and 0.004 for consulting). For example, BBC used the 7.6 percent shown in row (7) of column (d) for construction and multiplied it by 0.74 for a result of 5.6 percent (see row (7) of column (e)). The values in column (e) were then summed to equal the overall base figure adjusted for barriers in business ownership—12.3 percent, as shown in the bottom row of column (e).

Based on information related to business ownership alone, SANDAG might consider adjusting the base figure upward to 12.3 percent.

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

BBC’s analysis of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that minorities, women, and minority- and woman-owned businesses in San Diego County do not have the same access to those business inputs as non-Hispanic white men and businesses owned by non-Hispanic white men (for details, see Chapter 3 and Appendices C and D). Any barriers to obtaining financing, bonding, and insurance might limit opportunities for minorities and women to successfully form and operate businesses in the San Diego County contracting marketplace. Any barriers that minority- and woman-owned businesses face in obtaining financing, bonding, and insurance would also place those businesses at a disadvantage in competing for SANDAG’s FTA-funded prime contracts and subcontracts. Thus, information from the disparity study about financing, bonding, and insurance also supports an upward step-2 adjustment to SANDAG’s base figure.

**Figure 8-3.**  
**Potential step-2 adjustment considering disparities in the rates of business ownership**

Industry and group	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of base figure**
<b>Construction</b>					
(1) Asian Pacific American	0.0 %	n/a	0.0 %	0.0 %	
(2) Black American	0.2	n/a	0.2	0.2	
(3) Hispanic American	3.7	n/a	3.7	3.6	
(4) Native American	0.5	n/a	0.5	0.5	
(5) Subcontinent Asian American	0.1	n/a	0.1	0.1	
(6) White woman	<u>1.4</u>	<u>42</u>	<u>3.2</u>	<u>3.2</u>	
(7) Potential DBEs	5.8 %	n/a	7.7 %	7.6 %	5.6 %
(8) All other businesses ***	<u>94.2</u>	<u>n/a</u>	<u>94.2</u>	<u>92.4</u>	
(9) <b>Total</b>	<b>100.0 %</b>	n/a	<b>101.9 %</b>	<b>100.0 %</b>	
<b>Professional services</b>					
(10) Asian Pacific American	1.8 %	47	3.7 %	3.7 %	
(11) Black American	0.0	39	0.1	0.1	
(12) Hispanic American	15.5	n/a	15.5	15.2	
(13) Native American	0.3	n/a	0.3	0.3	
(14) Subcontinent Asian American	0.6	n/a	0.6	0.6	
(15) White woman	<u>5.5</u>	<u>n/a</u>	<u>5.5</u>	<u>5.4</u>	
(16) Potential DBEs	23.8 %	n/a	25.9 %	25.3 %	6.6 %
(17) All other businesses	<u>76.2</u>	<u>n/a</u>	<u>76.2</u>	<u>74.7</u>	
(18) <b>Total</b>	<b>100.0 %</b>	n/a	<b>102.0 %</b>	<b>100.0 %</b>	
<b>Goods and other services</b>					
(19) Asian Pacific American	0.7 %	61	1.1 %	0.9 %	
(20) Black American	0.8	n/a	0.8	0.7	
(21) Hispanic American	20.4	52	39.3	32.9	
(22) Native American	0.0	n/a	0.0	0.0	
(23) Subcontinent Asian American	0.0	n/a	0.0	0.0	
(24) White woman	<u>6.1</u>	<u>n/a</u>	<u>6.1</u>	<u>5.1</u>	
(25) Potential DBEs	28.0 %	n/a	47.3 %	39.7 %	0.2 %
(26) All other businesses	<u>72.0</u>	<u>n/a</u>	<u>72.0</u>	<u>60.3</u>	
(27) <b>Total</b>	<b>100.0 %</b>	n/a	<b>119.3 %</b>	<b>100.0 %</b>	
(28) <b>TOTAL</b>	<b>10.6 %</b>	n/a		n/a	<b>12.3 %</b>

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

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

\*\* Components of potential step-2 adjustment were calculated as the value after adjustment and scaling to 100 percent, multiplied by the percentage of total FTA-funded contract dollars in each industry (construction = 0.74, professional services = 0.26, and goods and other services = 0.004).

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

Source: BBC Research & Consulting.

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

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

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

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

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

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

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

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

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

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

owned by non-Hispanic white men also supports an upward adjustment to SANDAG's base figure.

- SANDAG must consider the volume of work DBEs have performed in recent years when determining whether to make a step-2 adjustment to its base figure. SANDAG's utilization reports for FFYs 2014 through 2018 indicated median annual DBE participation of 11.3 percent for those years, which is higher than its base figure.

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

- USDOT's "Tips for Goal-Setting" suggests that an agency can make a step-2 adjustment by averaging the base figure with past median DBE participation. BBC's analysis of DBE participation in SANDAG's FTA-funded contracts indicates DBE participation (9.8%) that is lower than the base figure. If SANDAG were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of its base figure and the 9.8 percent DBE participation.

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

# **CHAPTER 9.**

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## **Program Measures**

# CHAPTER 9.

## Program Measures

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

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

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

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

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

<sup>2</sup> U.S. Department of Transportation. 2018. *Official Questions and Answers (Q&A's) Disadvantaged Business Enterprise Program Regulation (49 CFR 26)*. Washington D.C.: U.S. Department of Transportation. (<https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/official-questions-and-answers-qas-disadvantaged>)

- USDOT’s “Tips for Goal-Setting,” which suggests factors for federal aid recipients to consider when making such projections.<sup>3</sup>

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

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

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

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

As presented in Chapter 3 as well as in Appendices C and D, BBC Research & Consulting (BBC) examined conditions in the San Diego County marketplace related to human capital, financial capital, business ownership, and the success of businesses. There is substantial quantitative evidence of disparities for minority- and woman-owned businesses overall and for specific groups concerning the above issues. Qualitative information also indicated some evidence of discrimination affecting the local marketplace. However, some minority and woman business owners that provided anecdotal evidence as part of the disparity study did not think that their businesses had been affected by any race- or gender-based discrimination. SANDAG should review the information about marketplace conditions presented in this report as well as other information it may have when considering the extent to which it can meet its overall DBE goal through race- and gender-neutral measures.

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

Figure 9-1 presents the participation of certified DBEs in SANDAG’s FTA-funded contracts in recent years, as presented in SANDGA reports to USDOT. Based on information about awards and commitments to DBE-certified businesses, SANDAG has met or exceeded its overall DBE goal in recent years. In federal fiscal years (FFYs) 2014 through 2018, DBE awards and commitments on USDOT-funded contracts exceeded SANDAG’s overall DBE goal by an average of 6 percentage

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<sup>3</sup> USDOT “Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program.” (<http://www.osdbu.dot.gov/DBEProgram/tips.cfm>)

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

points. SANDAG applied race- and gender-conscious DBE contract goals to USDOT-funded transportation contracts during the study period.

**Figure 9-1.**  
**Past certified DBE participation in USDOT-funded contracts, FFYs 2014-2018**

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

FFY	DBE Attainment	Annual DBE Goal	Difference
2014	20.44 %	6.50 %	13.94 %
2015	7.80	6.50	1.30
2016	11.30	8.00	3.30
2017	10.40	8.00	2.40
2018	17.00 %	8.00 %	9.00 %

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

SANDAG applied race- and gender-conscious DBE contract goals to many FTA-funded transportation contracts during the study period (January 1, 2013 through December 31, 2017). However, the agency did not use race- or gender-conscious program measures on some FTA-funded contracts or on any of its locally-funded contracts during the study period. Figure 9-2 presents the participation of certified DBEs in those contracts. DBE participation in those contracts was 2.2 percent.

**Figure 9-2.**  
**Certified DBE participation in contracts that did not include race- or gender-conscious measures**

Note:  
The study team analyzed 1,097 prime contracts and subcontracts.

Source:  
BBC Research & Consulting from SANDAG contracting data.

DBE Group	Utilization	
	Dollars in Thousands	Percent
Asian Pacific American	\$4,991	0.4 %
Black American	383	0.0
Hispanic American	7,906	0.6
Native American	24	0.0
Subcontinent Asian American	4,169	0.3
White woman	12,121	0.9
<b>Total DBE</b>	<b>\$29,596</b>	<b>2.2 %</b>

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

When determining the extent to which SANDAG could meet its overall DBE goal through the use of race- and gender- neutral measures, the agency should review the neutral measures that it and other local organizations already have in place. SANDAG should also review measures that it has planned, or could consider, for future implementation. BBC reviewed race- and gender-neutral measures that SANDAG currently uses to encourage the participation of minority- and woman-owned businesses in its contracting. In addition, BBC reviewed race- and gender-neutral measures that other entities in San Diego County use.



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

- Advocacy and outreach efforts;
- Technical assistance programs;
- Capital, bonding, and insurance assistance;
- Prompt payment policies;
- On-call procurements; and
- Bench contracts.

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

**Communications.** SANDAG maintains an online bid system and frequently uses that system to email vendors about contracting opportunities and new policies (such as changes to SANDAG’s implementation of the DBE program). SANDAG also sends notices to all DBEs in San Diego and Orange counties as well as to numerous local minority, women, and community business organizations. SANDAG’s DBE website also has numerous resources for DBEs and businesses that want to work with DBEs including the most recent program plan, information about bidding on SANDAG contracts, links to state-wide resources, and instructions about certification and other technical assistance resources.

**Networking events and workshops.** SANDAG hosts numerous events and workshops for DBEs each year. Over the next three years, SANDAG plans to attend or co-sponsor the events shown in Figure 9-3. Many of those events serve more than 100 attendees.

**Technical assistance programs.** SANDAG provides a comprehensive supportive services program in support of small businesses in the San Diego area. That program includes instruction and support for improving long-term business management practices, record keeping, accounting procedures, and financial management. SANDAG also provides additional education through the San Diego Contracting Opportunity Center and the local Small Business Development Center. In order to help businesses access SANDAG architecture and engineering (A&E) contracts, SANDAG and the California Department of Transportation (Caltrans) co-host workshops related to help A&E firms understand state and federal contracting requirements.

**Bonding, insurance, and financing.** SANDAG provides assistance to small businesses to help them overcome financial barriers to contracting by simplifying bonding processes, reducing bonding requirements where feasible, reducing general liability insurance requirements, and helping connect small businesses with the Small Business Administration and other bonding and financial resources.

**Figure 9-3.**  
**Examples of SANDAG outreach events**

SANDAG Outreach and Networking Events
Women’s Transportation Seminar (WTS) Scholarship Bowling Event
SANDAG A&E Speed Networking Event
Construction Management Association of America (CMAA) Owners' Night
Business Matchmaking Networking Event
North Small Business Development Center (SBDC) Meet the Buyers Tour
Women’s Construction Coalition (WCC) Business with Local Agencies Luncheon
San Diego Housing Commission Outreach Event
San Diego Regional Chamber of Commerce Small Business Awards, Expo & Mixer
North SBDC California Procurement Event
San Diego Unified School District Construction Expo
California Construction Expo
Doing Business with UC San Diego and Public Agency Partners
Calmentor Program Kick-Off Event
Department of the Navy Gold Coast - Small Business Procurement Event
WTS Annual Awards & Scholarship Gala
C&C Mentor/Protégé Kick-Off Event
North SBDC Meet the Buyers: Be the Best! Women in Business Expo
SD Airport Authority Meet the Primes Event
Caltrans Annual Procurement & Resource Fair
Turner School of Construction Management - PAC Night
WCC - Year End Networking and Celebration
Transportation Associations Holiday Luncheon

**Prompt payment policies.** SANDAG has robust policies in place to help ensure prompt payment to subcontractors. Prime contractors are required to pay their subcontractors within 30 days after receipt of payment from SANDAG. SANDAG also requires prime contractors and subcontractors to report and verify payments electronically.

**On-call services procurements.** Based on input from small businesses and data from past disparity studies, SANDAG has worked to unbundle large on-call services procurements. SANDAG currently designates small dollar opportunities for A&E contract, construction management (CM) contracts, and marketing services contracts. The program has provided numerous opportunities for small businesses and DBE-certified businesses.

**SANDAG bench programs.** In order to further promote the use of small businesses on on-call contracts, SANDAG established an A&E and CM bench program. The program provides a pool of firms that prime consultants can work with using a simplified contracting process.

Figure 9-4 provides details of additional race- and gender-neutral programs that SANDAG implements. There are also many other San Diego County organizations that implement race- and gender-neutral programs to help support businesses throughout the region. Figure 9-5 describes some of those programs.

**Figure 9-4.**  
**Examples of SANDAG race- and gender-neutral programs**

Type	Program
<b>Advocacy and Outreach</b>	SANDAG operates a vendor registration system that firms can use to learn about contract and bidding opportunities and receive notifications about upcoming deadlines. The system is currently hosted by PlanetBids but will be transitioned to BidNet Direct in 2020.
	SANDAG's Diversity in Small Contracting (DISCO) web page provides a wide range of resources for all types of firms including information on the DBE program, regional business assistance resources, and information about how to start the DBE-certification process.
	SANDAG hosts and participates in numerous outreach and advocacy events. SANDAG coordinates those events with the San Diego Contracting Opportunities Center (SDCOC) – also known as the Procurement Technical Assistance Center (PTAC) – and the San Diego & Imperial Small Business Development Center (SBDC) Network. Those organizations provide no-cost assistance to small businesses in the San Diego region to learn how to do business with federal, state, and local government agencies. SANDAG publishes an updated calendar of upcoming events, called the Spotlight Calendar, on the DISCO website.
	SANDAG provides a monthly look-ahead on their DBE page providing information about upcoming bid opportunities including the scope of work, licenses required, projected budget, location of work and contact information for the contract administrator.
<b>Capital, Bonding, and Insurance</b>	On a recent rail project, SANDAG worked with USDOT to streamline bonding requirements; educate potential subcontractors and suppliers about bonding and insurance; and introduce businesses to the Small Business Administration's Bond Guarantee program.
<b>Technical Assistance</b>	SANDAG provides assistance to businesses looking for contracting opportunities by hosting pre-bid conferences, networking sessions, and detailed workshops on various elements of the contracting process. For a recent mega-project, SANDAG offered sessions on safety requirements, bonding, insurance, estimating, and labor compliance. As a part of the project, SANDAG also established a monthly DBE newsletter to help DBEs and other small businesses learn about upcoming opportunities and to educate managers on the mega project about capabilities of small and disadvantaged businesses in the region.
<b>Mentor- Protégé</b>	SANDAG partners with the Caltrans District 11 office to operate the Calmentor program in San Diego County. That program is designed to encourage and support small businesses through voluntary partnerships with mid-size and larger firms. Specifically, the program aims to increase the participation of small A&E firms in public transportation projects in the San Diego region. In order to ensure success, Caltrans and SANDAG have partnered with the American Council of Engineering Companies (ACEC) – San Diego Chapter – and the Caltrans District 11 Small Business Council (D-11 SBC). A Steering Committee consisting of representatives from Caltrans, ACEC, and the D-11 SBC have worked together to develop the program materials.

**Figure 9-5.**  
**Examples of race- and gender-neutral programs implemented by other San Diego organizations**

Type	Program
<b>Technical Assistance</b>	<p>The San Diego &amp; Imperial Women’s Business Center (WBC) is a regional partner of the Small Business Administration hosted by Southwestern College at the Center for Business Advancement in National City. WBC implements a number of programs including a 12-week business accelerator program designed to help individuals launch and scale their businesses and the Mindset Reset Program for female entrepreneurs. WBC also provides counseling to small businesses related to:</p> <ul style="list-style-type: none"> <li>• Starting a business;</li> <li>• Licenses and permits;</li> <li>• Marketing strategy;</li> <li>• Social media and email marketing;</li> <li>• Business planning and strategy;</li> <li>• Pricing and financial projections; and</li> <li>• Access to capital.</li> </ul>
	<p>The Brink, a University of San Diego business accelerator offers mentoring, training, legal, and compliance resources for new and growing businesses in the San Diego region. The Brink also organizes the San Diego Angel Conference, which connects accredited investors with entrepreneurs.</p>
	<p>The San Diego &amp; Imperial Valley Small Business Development Center (SBDC) network provides a variety of programs to support to entrepreneurs and small businesses in the region. The SBDC provides one-on-one assistance related to marketing, management, financing, and business planning. The SBDC also provides a series of training workshops that cover numerous topics such as digital marketing, alternative lending, technology commercialization, financial reporting, cybersecurity, pitch preparation, social media, international trade, and franchising. The SBDC has eight locations in the region including in Carlsbad (North San Diego), National City (South San Diego), University of San Diego (SBDC The Brink), Kearny Mesa (Asian Business Associating SBDC), El Cajon (East County SBDC), City Heights/El Cajon (IRC SBDC), UTC (CONNECT SBDC), and El Centro (Imperial Valley).</p>
	<p>California’s Small Business Development Center (CA SBDC) network is one of the state’s primary resource partners for small business development. The CA SBDC network provides small businesses and entrepreneurs with one-on-one advising and expert training. Those services are offered free of charge. CA SBDC also maintains a wide business network. Small business owners can access capital; develop business and financial models; create and implement marketing strategies; connect to global markets; and grow their business online with resources from the CA SBDC.</p>
<b>Mentor-Protégé Programs</b>	<p>The San Diego chapter of the Service Corps of Retired Executives (SCORE) is a volunteer, non-profit organization that serves as a source of free business advice for entrepreneurs. SCORE mentors, many of whom are business owners or hold leadership positions in successful companies, provide free and confidential business assistance to both prospective entrepreneurs and existing small business owners. The organization also conducts a variety of workshops at locations throughout the region that address many of the essential techniques necessary for establishing and managing a successful business. SCORE also provides monthly CEO forums where trained facilitators help business leaders solve problems and set goals. The San Diego SCORE chapter also maintains a robust online library of resources for business owners on tax planning, business planning, international trade, franchising, marketing, government contracting, human resources, marketing, and legal services.</p>

**Figure 9-5. (continued)**  
**Examples of race- and gender-neutral programs implemented by other San Diego organizations**

Type	Program
<b>Capital, Bonding, and Insurance</b>	<p>The City of San Diego implements a number of programs including:</p> <ul style="list-style-type: none"> <li>• The Business Incentive Program that provides financing to base-sector businesses that are expanding or relocating to San Diego;</li> <li>• Promise zone funding for underserved neighborhoods in San Diego;</li> <li>• Storefront improvement funding for local small businesses; and</li> <li>• Business loan programs including a gap lending program for businesses located in San Diego or Chula Vista.</li> </ul>
	<p>Neighborhood National Bank is a community development finance institution (CDFI) that offer direct financial assistance to small businesses. The Bank also offers advocacy and technical support and services to small businesses.</p>
	<p>The State of California iBank implements the Just Start Loan Program, a state-funded small business microloan program. In the San Diego area, the loans are financed through the California Southern Small Business Development Corporation.</p>

# **CHAPTER 10.**

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## **Program Implementation**

# CHAPTER 10.

## Program Implementation

Chapter 10 reviews information relevant to the San Diego Association of Government's (SANDAG's) implementation of specific components of the Federal Disadvantaged Business Enterprise (DBE) Program for United States Department of Transportation (USDOT)-funded contracts.

### A. Federal DBE Program

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

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

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

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

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

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

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

**Maintaining comprehensive vendor data.** In order to effectively track the participation of minority- and woman-owned businesses on its contracts, SANDAG should consider continuing to improve the information that it collects on the ownership status of businesses that participate in its contracts, including both prime contractors and subcontractors. Not only should SANDAG consider collecting information about DBE status, but it should also consider obtaining information on the race/ethnicity and gender of business owners regardless of certification status. As appropriate, SANDAG can use business information that the study team collected as part of the 2020 disparity study to augment its vendor data.

**Prompt payment mechanisms – 49 CFR Part 26.29.** SANDAG’s prompt payment policies appear to comply with the federal regulations in 49 CFR Part 26.29. Prime contractors are required to pay their subcontractors no later than 30 days after receiving payment from SANDAG. Qualitative information that the study team collected through in-depth interviews, public meetings, and telephone surveys indicated that some businesses are dissatisfied with how promptly they receive payment on SANDAG contracts. SANDAG should consider maintaining the efforts it makes to ensure prompt payment to both prime contractors and subcontractors.

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

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

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

BBC Research & Consulting (BBC) investigated potential overconcentration in SANDAG contracts. There were ten specific subindustries in which certified DBEs accounted for 50 percent or more of total subcontract dollars for contracts that SANDAG awarded between January 1, 2013 and December 31, 2017 based on contract data that the study team received from SANDAG:

- Petroleum products (100%);
- Flagging services (97%);
- Landscape architecture (93%);
- Security supplies (91%);



- Trucking, hauling, and storage (83%);
- Transit services (74%);
- Fencing, guardrails, and signs (74%);
- Cleaning and janitorial services (63%);
- Surveying and mapping (63%); and
- Other construction materials (58%).

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

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

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

- Co-sponsoring a mentor protégé program with the California Department of Transportation (Caltrans) for architecture and engineering firms;
- Hosting small business networking and training events; and
- Providing networking opportunities at pre-proposal, pre-bid, and pre-statement of qualifications (SOQ) meetings.

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

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

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

- A review of DBE participation both prior to and after contract award;
- DBE subcontract payment tracking through its Compliance Information System;
- Additional tracking of DBE participation in contract-specific project management files; and
- Informal meetings with prime contractors and subcontractors.

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

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

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

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

- Specifying opportunities for small businesses on multi-year design-build contracts;

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

- Operating a small business bench program for architecture and engineering, construction management, and goods and services contracts; and
- Unbundling large contracts, when feasible.

In addition, Chapter 9 of the report outlines many of SANDAG's current and planned race- and gender-neutral measures and provides examples of measures that other organizations in San Diego have implemented. SANDAG should review that information and consider implementing measures that the agency deems to be effective. SANDAG should also review legal and budgetary issues in considering different measures.

Other agencies, such as the Los Angeles Metropolitan Transportation Authority (Metro) operate small business set-aside programs. Those programs designate a portion of prime contracts that are initially open only to small businesses. For Metro, the program has been successful in helping small businesses and DBE's bridge the gap between subcontracting and serving as a prime contractor on federally-funded procurements. To be of assistance to DBEs and small business enterprises (SBEs) that may be experiencing difficulties in contract work, the San Francisco Bay Area Rapid Transit District (BART) assigns an individual or firm to act as an Ombudsperson for DBE or SBE subcontractors or supplier to mediate disputes between prime contractors and subcontractors or supplies. SANDAG should consider a similar program for San Diego DBEs and SBEs to help foster relationships between prime contractors and DBE or SBE subcontractors or suppliers.

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

**Setting overall DBE goals – 49 CFR Part 26.45.** In the Final Rule effective February 28, 2011, USDOT changed how often agencies that implement the Federal DBE Program are required to submit overall DBE goals. As discussed in Chapter 1, agencies such as SANDAG now need to develop and submit overall DBE goals every three years. Chapter 8 uses data and results from the disparity study to provide SANDAG with information that could be useful in developing its next overall DBE goal submission.

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

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

Based on information about awards and commitments to DBE-certified businesses, SANDAG has met or exceeded its DBE goal in recent years. In federal fiscal years 2014 through 2018, DBE

awards and commitments on USDOT-funded contracts exceeded SANDAG’s overall DBE goal by an average of 3.4 percentage points.

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

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

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

**Maximum feasible portion of goal met through neutral program measures – 49 CFR Part 26.51(a).** As discussed in Chapter 9, SANDAG must meet the maximum feasible portion of its overall DBE goal through the use of race- and gender-neutral program measures. SANDAG must project the portion of its overall DBE goal that could be achieved through such measures. The agency should consider the information and analytical approaches presented in Chapter 9 when making such projections.

**Use of DBE contract goals – 49 CFR Part 26.51(d).** The Federal DBE Program requires agencies to use race- and gender-conscious measures—such as DBE contract goals—to meet any portion of their overall DBE goals that they do not project being able to meet using race- and gender-neutral measures. Based on information from the disparity study and other available information, SANDAG should assess whether the continued use of DBE contract goals is necessary

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

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

in the future to meet any portion of its overall DBE goal. USDOT guidelines on the use of DBE contract goals, which are presented in 49 CFR Part 26.51(e), include the following guidance:

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

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

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

- Several minority- and woman-owned businesses commented that race- and gender-conscious measures have made a positive impact on their firms by helping them get their foot in the door with prime contractors and win public sector work. A number of minority- and woman-owned businesses underscored that these measures open the door to greater opportunity for their businesses, and help their firms become known in the marketplace.
- Several interviewees observed that public agencies should reconsider how they define minority and disadvantaged business owners for race- and gender-conscious measures in present-day California where there is high diversity, and where women and minorities are excelling in certain professional sectors. A few interviewees urged a stronger focus on the disparity in opportunities for small businesses when compared with large “multi-national” corporations. Some of those interviewees suggested providing preferences for firms that were not multi-national.

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

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

**Flexible use of any race- and gender-conscious measures – 49 CFR Part 26.51(f).** State and local agencies must exercise flexibility in any use of race- and gender-conscious measures such as DBE contract goals. For example, if SANDAG determines that DBE participation exceeds its overall DBE goal for a fiscal year, it must reduce its use of DBE contract goals to the extent necessary. If it determines that it will fall short of the overall DBE goal in a fiscal year, then it must make appropriate modifications in the use of race- and gender-neutral and race- and gender-conscious measures to allow it to meet its overall DBE goal in the following year. If SANDAG observes increased DBE participation (relative to availability) on contracts to which race- and gender-conscious measures do not apply, the agency might consider changing its projection of how much of its overall DBE goal it can achieve through the use of race- and gender-neutral measures in the future.

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

SANDAG requires contractors to submit good faith efforts documentation and written confirmation in the event that bidders’ efforts to include sufficient DBE participation were unsuccessful. Guidelines on good faith efforts for prospective bidders were updated in 2016 and are available on the SANDAG website. Criteria used to evaluate good faith efforts include:

- Attending pre-bid, pre-proposal, pre-SOQ meetings;
- Advertising subcontracting, subconsulting, or supply opportunities;
- Sending written notices provided to DBE firms;
- Identifying work for DBE firms;
- Documenting rejected DBEs including the reason for rejection;
- Documenting efforts made to help interested DBEs overcome barriers related to bonding, financing, and understanding the scope of work;
- Documenting efforts made to help interested DBEs obtain the necessary equipment, supplies, materials, or related services required;
- Documenting organizations contacted to provide assistance in contacting and working with DBEs; and
- Documenting good faith negotiation with DBEs.

Perfunctory efforts are not considered good faith efforts. Determining the sufficiency of bidders’ good faith efforts is at the agency’s discretion and using quantitative formulas is not required. Several individuals participating in in-depth interviews and public meetings made comments related to good faith efforts. In general, minority- and woman-owned businesses indicated that

prime contractors often fail to make genuine efforts to use minority- and woman-owned businesses:

- Several participants indicated that the current DBE program for federally-funded projects does not require prime contractors to make anything more than perfunctory good faith efforts in order to comply with the program. A number of business owners noted that primes will reach out to prospective DBE-certified minority- and women-owned businesses, and use them in proposals, but then will not follow through to seek their meaningful participation on projects.
- Several minority business owners also observed that SANDAG “goes through the motions” but does not always adequately enforce DBE contract goal requirements for federally-funded projects to ensure that DBE subcontractors are actually awarded project work.

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

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

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

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

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

Many business owners and managers participating in in-depth interviews and public hearings commented on the DBE certification process. Many business owners felt that certification was highly valuable but commented on the length, complexity, and cost of the certification process. Some business owners were highly critical of the certification process. A number of business owners reported that the process was difficult to understand; required too much paperwork and sensitive information; and was very time consuming. Appendix D provides other perceptions of business owners that have considered DBE certification or that have gone through the certification process. SANDAG appears to follow federal regulations concerning DBE certification, which requires collecting and reviewing considerable information from program applicants. SANDAG might research other ways to make the certification process easier for potential DBEs.

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

## **B. Additional Considerations**

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

**Networking and outreach.** SANDAG hosts and participates in many networking and outreach events that include information about marketing; the DBE certification process; doing business with the agency; and available bid opportunities. In addition to the agency’s scheduled networking and outreach events, SANDAG also works closely with regional partners to get information out to their members about policies, procedures, and upcoming opportunities. SANDAG should consider continuing those efforts but might also consider broadening its efforts to include more partnerships with local trade organizations and other public agencies.

**Prime contract opportunities.** Minority- and woman-owned businesses exhibited increased availability for relatively small contracts—including small prime contracts—that SANDAG awarded



during the study period. Disparity analysis results also indicated substantial disparities for minority- and woman-owned businesses overall and for all racial/ethnic and gender groups on relatively small prime contracts that SANDAG awarded during the study period. SANDAG could consider implementing a small-business set-aside program to encourage the participation of small businesses—including many minority- and woman-owned businesses—as prime contractors. In doing so, SANDAG might reserve bid opportunities of a certain size (e.g., \$250,000 or less) for small businesses. Small business set-aside opportunities would be open to all small businesses, regardless of the race/ethnicity and gender of the businesses' owners. SANDAG should review federal and state regulations related to such measures if the agency considers implementing a small business set-aside program.

**Unbundling Large Contracts.** In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts that SANDAG awarded during the study period. In addition, as part of in-depth interviews and public meetings, several minority- and woman-owned businesses reported that the size of government contracts often serves as a barrier to their success (for details, see Appendix D). To further encourage the participation of small businesses—including many minority- and woman-owned businesses—SANDAG should consider making efforts to unbundle relatively large contracts into several smaller contracts. Doing so would result in that work being more accessible to small businesses, which in turn might increase opportunities for minority- and woman-owned businesses and result in greater minority- and woman-owned business participation.

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

**DBE contract goals.** SANDAG currently uses DBE contract goals on many of the contracts that it awards. Prime contractors can meet those goals by either making subcontracting commitments with certified DBE subcontractors at the time of bid or by showing that they made all reasonable good faith efforts to fulfill the goals but could not do so. Disparity analysis results indicated that most racial/ethnic and gender groups did not show disparities on contracts to which SANDAG applied DBE contract goals during the study period. In contrast, more racial/ethnic and gender groups showed substantial disparities on contracts to which SANDAG did not apply DBE contract goals. SANDAG should consider continuing its use of DBE contract goals in the future. The agency will need to ensure that the use of those goals is narrowly tailored and consistent with other relevant legal standards (for details, see Chapter 2 and Appendix B).

**Prompt payment policies.** SANDAG requires prime contractors to pay their subcontractors within 30 days of receiving payment from the agency. As part of in-depth interviews and public

forums, several businesses—including many minority- and woman-owned businesses—reported difficulties with receiving payment in a timely manner on government contracts, particularly when they work as subcontractors (for details, see Appendix D). In light of such comments, SANDAG should consider reinforcing its prompt payment policies with its procurement staff and with prime contractors. SANDAG could also consider reducing the timeframe within which prime contractors are required to pay their subcontractors (e.g., within 10 days of receiving payment from SANDAG). Doing so might help ensure that both prime contractors and subcontractors receive payment in a timely manner.

# **APPENDICES.**

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# **APPENDIX A.**

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## **Definition of Terms**

# APPENDIX A.

## Definitions of Terms

Appendix A defines terms that are useful to understanding the 2019 San Diego Association of Governments (SANDAG) Disparity Study report. The following definitions are only relevant in the context of this report.

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

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

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

### **Airport Concessionaire Disadvantaged Business Enterprise (ACDBE)**

The Airport Concessionaire Disadvantaged Business Enterprise Program is a U.S. Department of Transportation program designed to level the playing field for small businesses who wish to participate in contracting opportunities at the airport. To be certified as an ACDBE company, the company must be at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. The following groups are presumed to be socially and economically disadvantaged according to the ACDBE Program:

- a) Asian Pacific Americans;
- b) Black Americans;
- c) Hispanic Americans;

- d) Native Americans;
- e) Subcontinent Asian Americans; and
- f) Women of any race or ethnicity.

A determination of economic disadvantage also includes assessing business' gross revenues (maximum revenue limits ranging from \$7 million to \$24.1 million depending on subindustry) and business owners' personal net worth (maximum of \$1.32 million excluding equity in a home and in the business). Some minority- and woman-owned businesses do not qualify as DBEs because of gross revenue or net worth requirements.

### **Anecdotal Information**

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

### **Availability Analysis**

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

### **Business**

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

### **Business Listing**

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

### **Business Establishment**

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

### **California Unified Certification Program (CUCP)**

The California Unified Certification Program provides certification services to small, minority-, or women-owned businesses that seek to participate in the U.S. Department of Transportation's Disadvantaged Business Enterprise Program. CUCP also certifies businesses as Airport Concessionaire Disadvantaged Business Enterprises.

### **Compelling Governmental Interest**

As part of the strict scrutiny legal standard, an agency must demonstrate a compelling governmental interest in remedying past identified discrimination in order to implement race-

or gender-conscious measures. An agency that uses race- or gender-conscious measures as part of a minority- or woman-owned business program—such as the Federal Disadvantaged Business Enterprise Program—has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. The agency must assess discrimination within their own relevant geographic market areas.

## **Consultant**

A consultant is a business performing a professional services contract.

## **Contract**

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

## **Contract Element**

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

## **Contractor**

A contractor is a business performing a construction contract.

## **Control**

Control means exercising management and executive authority of a business.

## **Custom Census**

A custom census availability analysis is one in which researchers attempt extensive surveys with all potentially available businesses working in the local marketplace to collect information about key business characteristics. Researchers then take survey information about potentially available businesses and match them to the characteristics of prime contracts and subcontracts that an agency actually awarded during the study period. A custom census availability approach is accepted in the industry as the platinum standard for conducting availability analyses, because it takes several different factors into account including businesses’ primary lines of work and their capacity to perform on an agency’s contracts.

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

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

- g) Asian Pacific Americans;
- h) Black Americans;
- i) Hispanic Americans;
- j) Native Americans;

- k) Subcontinent Asian Americans; and
- l) Women of any race or ethnicity.

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

## **Disparity**

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

## **Disparity Analysis**

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

## **Disparity Index**

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

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

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

## **Enterprise**

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

## **Federal DBE Program**

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



## **Federally-funded Contract**

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

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

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

## **Firm**

See “business.”

## **Industry**

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

## **Local Marketplace**

See *relevant geographic market area*.

## **Majority-owned Business**

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

## **Minority**

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

## **Minority-owned Business**

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

## **Narrow Tailoring**

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

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

### **Non-DBE**

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

### **Non-response Bias**

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

### **North County Transit District (NCTD)**

North County Transit District is the agency responsible for the planning, construction, and operation of public transportation in North San Diego County.

### **Participation**

See "utilization."

### **Potential DBE**

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

### **Prime Consultant**

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

### **Prime Contract**

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

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

## **Prime Contractor**

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

## **Procurement**

*See contract.*

## **Project**

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

## **Proposition 209**

Passed in November of 1996, Proposition 209 amended California state law to prohibit discrimination and the use of race- and gender-based preferences in public contracting, employment, and education. Therefore, Proposition 209 prohibits government agencies in California from applying race- and gender- conscious measures to locally-funded contracts, but not necessarily to federally-funded contracts.

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

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

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

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

## **Rational Basis**

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

## **Relevant Geographic Market Area**

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

## **San Diego Association of Governments (SANDAG)**

Composed of representatives from 18 city and county governments, the San Diego Association of Governments is a regional decision-making body. SANDAG is a metropolitan planning organization and regional transportation organization for San Diego County. SANDAG receives funds from USDOT and therefore must implement the Federal DBE program.

## **State-funded Contract**

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

## **Statistically Significant Difference**

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

## **Strict Scrutiny**

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

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

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

## **Study Period**

The study period is the time period on which the study team focused for the utilization, availability, and disparity analyses. SANDAG had to have awarded a contract during the study

period for the contract to be included in the study team’s analyses. The study period for the disparity study was January 1, 2013 through December 31, 2017.

### **Subconsultant**

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

### **Subcontract**

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

### **Subcontractor**

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

### **Subindustry**

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

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

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

### **Utilization**

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

### **Vendor**

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

### **Woman-owned Business**

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

# **APPENDIX B.**

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## **Legal Framework and Analysis**

**HOLLAND & KNIGHT LLP**

**APPENDIX B**

**PRIVILEGED AND CONFIDENTIAL  
FINAL January 22, 2020  
ATTORNEY-CLIENT PRIVILEGE  
ATTORNEY WORK PRODUCT  
NOT FOR PUBLIC DISSEMINATION**

**CONFIDENTIAL January 31, 2020  
FINAL REPORT**

**SAN DIEGO ASSOCIATION OF  
GOVERNMENTS (SANDAG) NORTH  
COUNTY TRANSIT DISTRICT (NCTD)**

**REPORT ON LEGAL FRAMEWORK  
AND ANALYSIS**

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# APPENDIX B.

## Legal Framework and Analysis

### EXECUTIVE SUMMARY

#### A. Introduction

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

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

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study, the Federal DBE Program and Federal ACDBE Program and their implementation by state and local governments and recipients of federal funds, MBE/WBE/DBE programs, and the strict scrutiny analysis. In particular, this analysis reviews in Section D below recent Ninth Circuit Court of Appeals decisions that are instructive to the study, including the recent decisions in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (“Caltrans”), et*

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

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

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

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

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

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

*al.*<sup>7</sup> and *Western States Paving Co. v. Washington State DOT*,<sup>8</sup> *Orion Insurance Group, Ralph G. Taylor v. Washington Minority & Women’s Business Enterprise, U.S. DOT, et al.*<sup>9</sup> and the recent non-published decision in *Mountain West Holding Co. v. Montana, Montana DOT, et al.*<sup>10</sup>, and the District Court decision in *M.K. Weeden Construction v. Montana, Montana DOT, et al.*<sup>11</sup>.

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

The analyses of these and other recent cases summarized below, including the Ninth Circuit decisions in Section D below, *AGC, SDC v. Cal. DOT, Western States Paving, Mountain West Holding, Inc., M.K. Weeden and Orion Insurance Group*, are instructive to the disparity study because they are the most recent and significant decisions by courts setting forth the legal framework applied to MBE/WBE/DBE Programs, the Federal DBE and ACDBE Programs and their implementation by local and state governments receiving U.S. DOT funds, disparity studies, and construing the validity of government programs involving MBE/WBE/DBE/ACDBEs. They also are applicable in terms of the preparation of a DBE Program by SANDAG and NCTD submitted in compliance with the federal regulations.

Although these cases did not involve specific challenges to the Federal ACDBE Program, they are applicable and instructive to the study in connection with the implementation of

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

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

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

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

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

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

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

<sup>14</sup> *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).

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

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

<sup>17</sup> *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017).

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

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

the Federal ACDBE Program by recipients of U.S. DOT funds governed by 49 CFR Part 23. The Federal DBE Program and the Federal ACDBE Program are similar in many respects and the ACDBE Program in its regulations located at 49 CFR Part 23 expressly incorporates many of the federal regulations located in 49 CFR Part 26.

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

Following *Western States Paving*, the USDOT, in particular for agencies, transportation authorities, airports and other governmental entities implementing the Federal DBE Program in states in the Ninth Circuit Court of Appeals, recommended the use of disparity studies by recipients of federal financial assistance to examine whether or not there is evidence of discrimination and its effects, and how remedies might be narrowly tailored in developing their DBE Program to comply with the Federal DBE Program.<sup>20</sup> The USDOT suggests consideration of both statistical and anecdotal evidence. The USDOT instructs that recipients should ascertain evidence for discrimination and its effects separately for each group presumed to be disadvantaged in 49 CFR Part 26.<sup>21</sup> The USDOT’s Guidance provides that recipients should consider evidence of discrimination and its effects.<sup>22</sup>

The USDOT’s Guidance is recognized by the federal regulations as “valid, and express the official positions and views of the Department of Transportation”<sup>23</sup> for states in the Ninth Circuit.

In *Western States Paving*, the United States intervened to defend the Federal DBE Program’s facial constitutionality, and, according to the Court, stated “that [the Federal DBE Program’s] race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present.”<sup>24</sup> Accordingly, the USDOT advised federal aid recipients that any use of race-conscious measures must be predicated on evidence that the recipient has concerning discrimination or its effects within the local transportation contracting marketplace.<sup>25</sup>

The Ninth Circuit Court of Appeals and the United States District Court for the Eastern District of California in *AGC, San Diego Chapter, Inc. v. California DOT, et al.* held that Caltrans’ implementation of the Federal DBE Program is constitutional.<sup>26</sup> The Ninth Circuit

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<sup>20</sup> *Questions and Answers Concerning Response to Western States Paving Company v. Washington State Department of Transportation* (January 2006) [hereinafter *USDOT Guidance*], available at 71 Fed. Reg. 14,775 and [http://www.fhwa.dot.gov/civilrights/dbe\\_memo\\_a5.htm](http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm); see 49 CFR § 26.9; see, also, 49 CFR Section 26.45.

<sup>21</sup> *USDOT Guidance*, available at [http://www.fhwa.dot.gov/civilrights/dbe\\_memo\\_a5.htm](http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm) (January 2006)

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, 49 CFR § 26.9; See, 49 CFR § 23.13.

<sup>24</sup> *Western States Paving*, 407 F.3d at 996; see, also, *Br. for the United States*, at 28 (April 19, 2004).

<sup>25</sup> *DOT Guidance*, available at 71 Fed. Reg. 14,775 and [http://www.fhwa.dot.gov/civilrights/dbe\\_memo\\_a5.htm](http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm) (January 2006).

<sup>26</sup> *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, 713 F.3d 1187 (9th Cir. April 16, 2013); *Associated General Contractor of America, San Diego Chapter, Inc. v. California DOT, U.S.D.C. E.D. Cal., Civil Action No.S:09-cv-*

found that Caltrans' DBE Program implementing the Federal DBE Program was constitutional and survived strict scrutiny by: (1) having a strong basis in evidence of discrimination within the California transportation contracting industry based in substantial part on the evidence from the Disparity Study conducted for Caltrans; and (2) being "narrowly tailored" to benefit only those groups that have actually suffered discrimination.

The District Court had held that the "Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry," satisfied the strict scrutiny standard, and is "clearly constitutional" and "narrowly tailored" under *Western States Paving* and the Supreme Court cases.<sup>27</sup>

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

In *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*<sup>28</sup>, the Ninth Circuit and the district court applied the decision in *Western States*<sup>29</sup>, and the decision in *AGC, San Diego v. California DOT*<sup>30</sup>, as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state's implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program.<sup>31</sup> The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state's implementation of the DBE Program "is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry."<sup>32</sup> The Ninth Circuit in *Mountain West* also pointed out it had held that "even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination."<sup>33</sup>

Montana, the Court found, bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'"<sup>34</sup> Discrimination may be inferred from "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a

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01622, Slip Opinion (E.D. Cal. April 20, 2011) appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans' DBE Program constitutional, *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. April 16, 2013).

<sup>27</sup> *Id.*, *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, Slip Opinion Transcript of U.S. District Court at 42-56.

<sup>28</sup> 2017 WL 2179120 (9th Cir. 2017), Memorandum opinion, (Not for Publication), dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014).

<sup>29</sup> 407 F.3d 983 (9th Cir. 2005)

<sup>30</sup> 713 F.3d 1187 (9th Cir. 2013)

<sup>31</sup> 2014 WL 6686734 at \*2 (D. Mont. 2014)

<sup>32</sup> *Mountain West*, 2014 WL 6686734 at \*2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at \*2 (9th Cir. 2017) Memorandum, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

<sup>33</sup> *Mountain West*, 2017 WL 2179120 at \*2, Memorandum, at 6, and 2014 WL 6686734 at \*2, quoting *Western States*, 407 F.3d at 997-999.

<sup>34</sup> *Mountain West*, 2017 WL 2179120 at \*2 (9th Cir.), Memorandum, at 6-7, quoting, *Assoc. Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (quoting *W. States Paving*, 407 F.3d at 997-99).

particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors."<sup>35</sup>

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

The District Court decision in the Ninth Circuit in Montana, *M.K. Weeden*<sup>36</sup>, followed the *AGC, SDC v. Caltrans* Ninth Circuit decision, and held as valid and constitutional the Montana Department of Transportation's implementation of the Federal DBE Program.

A very recent case in the Ninth Circuit is *Orion Insurance Group; Ralph G. Taylor, Plaintiffs v. Washington State Office of Minority & Women's Business Enterprises, United States DOT, et al.*<sup>37</sup> Plaintiffs, Orion Insurance Group ("Orion") and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law.

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

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

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

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

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<sup>35</sup> *Mountain West*, 2017 WL 2179120 at \*2 (9th Cir.), Memorandum, at 6-7, quoting, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

<sup>36</sup> *M.K. Weeden*, 2013 WL 4774517.

<sup>37</sup> 2018 WL 6695345 (9th Cir. December 19, 2018)(Memorandum)(Not for Publication).



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

On appeal, the Ninth Circuit in affirming the District court held it correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity, Taylor’s discrimination claims under 42 U.S.C. §1983 because the federal defendants did not act “under color or state law,” Taylor’s claims for damages because the United States has not waived its sovereign immunity, and Taylor’s claims for equitable relief under 42 U.S.C. §2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

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

Also, recently the Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,<sup>38</sup> and in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*<sup>39</sup>, upheld the implementation of the Federal DBE Program by the Illinois DOT.<sup>40</sup> The court held Dunnet Bay lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting v. Illinois DOT, et al.* decision because there was no evidence IDOT exceeded its authority under federal law.<sup>41</sup> The Seventh Circuit in *Midwest Fence* also held the Federal DBE Program is facially constitutional. The court agreed with the Eighth, Ninth, and Tenth Circuits that the Federal DBE Program is narrowly tailored on its face, and thus survives strict scrutiny.<sup>42</sup>

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

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

In *Croson*, the U.S. Supreme Court struck down the City of Richmond’s “set-aside” program as unconstitutional because it did not satisfy the strict scrutiny analysis applied to “race-based” governmental programs.<sup>43</sup> J.A. Croson Co. (“Croson”) challenged the City of Richmond’s minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more Minority Business Enterprises (“MBE”). In enacting the plan, the City cited past discrimination and an

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<sup>38</sup> 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

<sup>39</sup> 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

<sup>40</sup> 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015).

<sup>41</sup> *Id.*

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

<sup>43</sup> 488 U.S. 469 (1989).

intent to increase minority business participation in construction projects as motivating factors.

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

The Court determined that the plan neither served a “compelling governmental interest” nor offered a “narrowly tailored” remedy to past discrimination. The Court found no “compelling governmental interest” because the City had not provided “a strong basis in evidence for its conclusion that [race-based] remedial action was necessary.”<sup>44</sup> The Court held the City presented no direct evidence of any race discrimination on its part in awarding construction contracts or any evidence that the City’s prime contractors had discriminated against minority-owned subcontractors.<sup>45</sup> The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was “narrowly tailored” for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the over inclusiveness of certain minorities in the “preference” program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.<sup>46</sup>

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond was misplaced. There is no doubt, the Court held, that “[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination” under Title VII.<sup>47</sup> But it is equally clear that “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.”<sup>48</sup>

The Court concluded that where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. The Court noted that “the city does not even know how many MBE’s in the relevant market are qualified to undertake prime or subcontracting work in public construction projects.”<sup>49</sup> “Nor does the city know what

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<sup>44</sup> 488 U.S. at 500, 510.

<sup>45</sup> 488 U.S. at 480, 505.

<sup>46</sup> 488 U.S. at 507-510.

<sup>47</sup> 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308, 97 S.Ct. 2736, 2741.

<sup>48</sup> 488 U.S. at 501 quoting *Hazelwood*, 433 U.S. at 308, n. 13, 97 S.Ct., at 2742, n. 13.

<sup>49</sup> 488 U.S. at 502.

percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.”<sup>50</sup>

The Supreme Court stated that it did not intend its decision to preclude a state or local government from “taking action to rectify the effects of identified discrimination within its jurisdiction.”<sup>51</sup> The Court held that “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”<sup>52</sup>

The Court said: “If the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion.”<sup>53</sup> “Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria.” “In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”<sup>54</sup>

The Court further found “if the City could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the City could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”<sup>55</sup>

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

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

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

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<sup>50</sup> Id.

<sup>51</sup> 488 U.S. at 509.

<sup>52</sup> Id.

<sup>53</sup> 488 U.S. at 509.

<sup>54</sup> Id.

<sup>55</sup> 488 U.S. at 492.

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

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

### **The Federal DBE Program (and ACDBE Program)**

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.<sup>56</sup> Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21<sup>st</sup> Century (“TEA-21”), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 (“SAFETEA”). In July 2012, Congress passed the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (“MAP-21”).<sup>57</sup> In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).<sup>58</sup> Most recently, in October 2018, Congress passed the FAA Reauthorization Act<sup>59</sup>.

The Federal DBE Program as amended changed certain requirements for federal aid recipients and accordingly changed how recipients of federal funds implemented the Federal DBE Program for federally-assisted contracts. The federal government determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not required to implement race- and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.<sup>60</sup>

The Federal DBE and ACDBE Programs established responsibility for implementing the DBE and ACDBE Programs to state and local government recipients of federal funds. A recipient

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<sup>56</sup> *Appendix-The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050, 26,051-63 & nn. 1-136 (May 23, 1996) (hereinafter “The Compelling Interest”); see *Adarand VII*, 228 F.3d at 1167-1176, citing *The Compelling Interest*.

<sup>57</sup> *Pub L. 112-141, H.R. 4348, § 1101(b)*, July 6, 2012, 126 Stat 405.

<sup>58</sup> *Pub. L. 114-94, H.R. 22, § 1101(b)*, December 4, 2015, 129 Stat. 1312.

<sup>59</sup> *Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.*

<sup>60</sup> *49 CFR § 26.51; see 49 CFR § 23.25.*

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

Provided in 49 CFR § 26.45 and 49 CFR §§ 23.41-51 are instructions as to how recipients of federal funds should set the overall goals for their DBE programs. In summary, the recipient establishes a base figure for relative availability of DBEs.<sup>61</sup> This is accomplished by determining the relative number of ready, willing, and able DBEs and ACDBEs in the recipient's market.<sup>62</sup> Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.<sup>63</sup> There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d) and 49 CFR §23.51(d). These include, among other types, the current capacity of DBEs and ACDBEs to perform work on the recipient's contracts as measured by the volume of work DBEs and ACDBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs and ACDBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs and ACDBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.<sup>64</sup> This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE and ACDBE participation one would expect absent the effects of discrimination.<sup>65</sup>

Further, the Federal DBE and ACDBE Programs require state and local government recipients of federal funds to assess how much of the DBE and ACDBE goals can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.<sup>66</sup> A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.<sup>67</sup>

Federal aid recipients are to certify DBEs and ACDBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.<sup>68</sup>

**F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21.** In October 2018, December 2015 and in July 2012, Congress passed the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made "Findings" that "discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do

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<sup>61</sup> 49 CFR § 26.45(a), (b), (c); 49 CFR § 23.51(a), (b), (c).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at § 26.45(d); *Id.* at § 23.51(d).

<sup>64</sup> *Id.*

<sup>65</sup> 49 CFR § 26.45(b)-(d); 49 CFR § 23.51.

<sup>66</sup> 49 CFR § 26.51; 49 CFR § 23.51(a).

<sup>67</sup> 49 CFR § 26.51(b); 49 CFR § 23.25.

<sup>68</sup> 49 CFR §§ 26.61-26.73; 49 CFR §§ 23.31-23.39

business in airport-related markets,” in “federally-assisted surface transportation markets,” and that the continuing barriers “merit the continuation” of the Federal ACDBE Program and the Federal DBE Program.<sup>69</sup> Congress also found in the F.A.A. Reauthorization Act of 2018, the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal ACDBE Program and the Federal DBE Program.<sup>70</sup>

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

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

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

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

(1) ‘Small business concern’

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

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

(a) Findings. Congress finds the following:

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

(2) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits. This

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<sup>69</sup> Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

<sup>70</sup> Id. at Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, § 1101(b)(1) (2015).

testimony and documentation shows that race- and gender-neutral efforts alone are insufficient to address the problem.

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

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

(b) Prompt Payments.

(1) Reporting of Complaints. Not later than 120 days after the date of enactment of this Act, the Administrator of the FAA shall ensure that each airport that participates in the Program tracks, and reports to the Administrator, the number of covered complaints made in relation to activities at the airport.

(2) Improving Compliance.

(A) In General. The Administrator shall take actions to assess and improve compliance with prompt payment requirements under 49 C.F.R. Part 26.

(B) Contents of Assessment. In carrying out subparagraph (A), the Administrator shall assess (i) whether and how airports are enforcing prompt payment language in contracts are being satisfied; (ii) whether and how airports are enforcing prompt payment requirements; (iii) the processes by which covered complaints are received and resolved by airports; (iv) whether improvements need to be made to (I) better track covered complaints received by airports; and (II) assist the resolution of covered complaints in a timely manner; (v) whether changes to prime contractor specifications need to be made to ensure prompt payments to subcontractors; and (vi) whether changes to prime contractor specifications need to be made to ensure prompt payment of retainage to subcontractors.

(C) Reporting. The Administrator shall make available to the public a report describing the results of the assessment completed under this paragraph, including a plan to respond to such results.

(3) Definitions. In this subsection, the following definitions apply:

(A) Covered Complaint. The term “covered complaint” means a complaint relating to an alleged failure to satisfy a prompt payment requirement under 49 C.F.R. Part 26.

(B) Program. The term “Program” means the airport disadvantaged business enterprise program referenced in subsection (a)(1) of the FAA Modernization and Reform Act of 2012 (49 U.S.C. 47113).

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

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

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

(b) Disadvantaged Business Enterprises-

(1) FINDINGS- Congress finds that—

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

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

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

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

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

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



disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.<sup>71</sup>

**MAP-21 (July 2012).**

In the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress provided “Findings” that “discrimination and related barriers” “merit the continuation of the” Federal DBE Program.<sup>72</sup> 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.”<sup>73</sup>

Thus, Congress in MAP-21 determined based on testimony and documentation of race and gender discrimination that there was “a compelling need for the continuation of the” Federal DBE Program.<sup>74</sup>

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<sup>71</sup> *Pub L. 114-94, H.R. 22, § 1101(b)*, December 4, 2015, 129 Stat 1312.

<sup>72</sup> *Pub L. 112-141, H.R. 4348, § 1101(b)*, July 6, 2012, 126 Stat 405.

<sup>73</sup> *Pub L. 112-141, H.R. 4348, § 1101(b)*, July 6, 2012, 126 Stat 405.

<sup>74</sup> *Id.*

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

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

The Department stated in the 2011 Final Rule with regard to disparity studies and in calculating goals, that it agrees “it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance.”<sup>75</sup>

The United States DOT in the 2011 Final Rule stated that there was a continuing compelling need for the DBE program.<sup>76</sup> The DOT concluded that, as court decisions have noted, the DOT’s DBE regulations and the statutes authorizing them, “are supported by a compelling need to address discrimination and its effects.”<sup>77</sup> The DOT said that the “basis for the program has been established by Congress and applies on a nationwide basis...”, noted that both the House and Senate Federal Aviation Administration (“FAA”) Reauthorization Bills contained findings reaffirming the compelling need for the program, and referenced additional information presented to the House of Representatives in a March 26, 2009 hearing before the Transportation and Infrastructure Committee, and a Department of Justice document entitled “The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-Owned Businesses.”<sup>78</sup> This information, the DOT stated, “confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.”<sup>79</sup>

### **1. Strict scrutiny analysis**

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.<sup>80</sup> The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and

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<sup>75</sup> 76 F.R. at 5092.

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

<sup>77</sup> 76 F.R. at 5095.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Pena* (*Adarand I*), 515 U.S. 200, 227 (1995); *see, e.g., Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7<sup>th</sup> Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9<sup>th</sup> Cir. 2013); *H.B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4<sup>th</sup> Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10<sup>th</sup> Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5<sup>th</sup> Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“*CAEP II*”), 91 F.3d 586 (3<sup>d</sup> Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“*CAEP I*”), 6 F.3d 990 (3<sup>d</sup> Cir. 1993).

- The program must be narrowly tailored to achieve that compelling government interest.<sup>81</sup>

#### a. The Compelling Governmental Interest Requirement.

The first prong of the strict scrutiny analysis requires a governmental entity to have a “compelling governmental interest” in remedying past identified discrimination in order to implement a race- and ethnicity-based program.<sup>82</sup> State and local governments cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.<sup>83</sup> Rather, state and local governments must measure discrimination in their state or local market. However, that is not necessarily confined by the jurisdiction’s boundaries.<sup>84</sup>

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.<sup>85</sup> The federal courts also have held that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).<sup>86</sup>

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<sup>81</sup> *Adarand I*, 515 U.S. 200, 227 (1995); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7<sup>th</sup> Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9<sup>th</sup> Cir. 2013); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4<sup>th</sup> Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9<sup>th</sup> Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10<sup>th</sup> Cir. 2000); *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6<sup>th</sup> Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5<sup>th</sup> Cir. 1999); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11<sup>th</sup> Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3<sup>d</sup> Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3<sup>d</sup> Cir. 1993).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; see, e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10<sup>th</sup> Cir. 1994).

<sup>84</sup> See, e.g., *Concrete Works I*, 36 F.3d at 1520.

<sup>85</sup> *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; See *Midwest Fence*, 840 F.3d 932, 2016 WL 6543514 (7<sup>th</sup> Cir. 2016), and affirming, 84 F. Supp. 3d 705, 2015 WL 1396376.

<sup>86</sup> *Id.* In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so “outdated” so as to provide an insufficient basis in evidence for the Department of Defense program (i.e., whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense (“DOD”) regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe’s* Motion for Summary Judgment and granting Defendant United States Department of Defense’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (*The Compelling Interest*, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program – was “stale” as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision below in Section G. see, also, the discussion below in Section G of the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al.*, 885 F.Supp.2d 237, (D.D.C.). Recently, in *Rothe Development, Inc. v. U.S. Dept of Defense and U.S. S.B.A.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), the United States Court of Appeals, District of Columbia Circuit, upheld the constitutionality of the Section 8(a) Program on its face, finding the Section 8(a) statute was race-neutral. The Court of Appeals affirmed on other grounds the district court decision that had upheld the constitutionality of the Section 8(a) Program. The district court had found the federal government’s evidence of discrimination provided a sufficient basis for the Section 8(a) Program. 107 F.Supp. 3d 183, 2015 WL 3536271 (D. D.C. June 5, 2015). See the discussion of the 2016 and 2015 decisions in *Rothe* in Section G below.

It is instructive to 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.”<sup>87</sup> The evidence found to satisfy the compelling interest standard included numerous congressional investigations and hearings, and outside studies of statistical and anecdotal evidence (*e.g.*, disparity studies).<sup>88</sup> The evidentiary basis on which Congress relied to support its finding of discrimination includes:

- **Barriers to minority business formation.** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of “good ol’ boy” networks, from which minority firms have traditionally been excluded, and the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.<sup>89</sup>
- **Barriers to competition for existing minority enterprises.** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor’s work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.<sup>90</sup>
- **Local disparity studies.** Congress found that local studies throughout the country tend to show a disparity between utilization and availability of minority-owned firms, raising an inference of discrimination.<sup>91</sup>
- **Results of removing affirmative action programs.** Congress found evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears, which courts have found strongly supports the government’s claim that there are significant barriers to minority competition, raising the specter of discrimination.<sup>92</sup>

**Burden of proof.** Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including

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<sup>87</sup> *Sherbrooke Turf*, 345 F.3d at 970, (citing *Adarand VII*, 228 F.3d at 1167 – 76 (10<sup>th</sup> Cir. 2000); *Western States Paving*, 407 F.3d at 992-93.

<sup>88</sup> *See, e.g., Adarand VII*, 228 F.3d at 1167– 76 (10<sup>th</sup> Cir. 2000); *see also Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>89</sup> *Adarand VII*, 228 F.3d at 1168-70 (10<sup>th</sup> Cir. 2000); *Western States Paving*, 407 F.3d at 992; *see Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237.

<sup>90</sup> *Adarand VII*, at 1170-72 (10<sup>th</sup> Cir. 2000); *see DynaLantic*, 885 F.Supp.2d 237.

<sup>91</sup> *Id.* at 1172-74 (10<sup>th</sup> Cir. 2000); *see DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>92</sup> *Adarand VII*, 228 F.3d at 1174-75 (10<sup>th</sup> Cir. 2000); *see, H. B. Rowe*, 615 F.3d 233, 247-258 (4<sup>th</sup> Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

statistical and anecdotal evidence) to support its remedial action.<sup>93</sup> If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.<sup>94</sup> The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."<sup>95</sup>

In applying the strict scrutiny analysis, the courts hold that the burden is on the government to show both a compelling interest and narrow tailoring.<sup>96</sup> It is well established that "remediating the effects of past or present racial discrimination" is a compelling interest.<sup>97</sup> In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."<sup>98</sup>

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."<sup>99</sup> "An inference of discrimination may be made with empirical evidence that demonstrates 'a significant statistical disparity between a number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality's prime contractors.'"<sup>100</sup> Anecdotal

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<sup>93</sup> See *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242, 247-258 (4th Cir. 2010); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater ("Adarand VII")*, 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

<sup>94</sup> *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>95</sup> See, e.g., *Adarand VII*, 228 F.3d at 1166; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Eng'g Contractors Ass'n*, 122 F.3d at 916; see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>96</sup> *Id.*; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990; See also *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>97</sup> *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

<sup>98</sup> *Croson*, 488 U.S. at 500; see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242; *Sherbrooke Turf*, 345 F.3d at 971-972; *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>99</sup> *Midwest Fence*, 2015 W.L. 1396376 at \*7 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994), *Geyer Signal*, 2014 WL 1309092 (D. Minn. 2014); see also *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

<sup>100</sup> See e.g., *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 2015 W.L. 1396376 at \*7, quoting *Concrete Works*; 36 F.3d 1513, 1522 (quoting *Croson*, 488 U.S. at 509), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also *Sherbrooke Turf*, 345 F.3d 233, 241-242 (8th Cir. 2003); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP II")*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia ("CAEP I")*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

evidence may be used in combination with statistical evidence to establish a compelling governmental interest.<sup>101</sup>

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.<sup>102</sup> Once the governmental entity has shown acceptable proof of a compelling interest and remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.<sup>103</sup> Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE or MBE/WBE Program to demonstrate the unconstitutionality of an affirmative-action type program.<sup>104</sup>

To successfully rebut the government’s evidence, the courts hold that a challenger must introduce “credible, particularized evidence” of its own that rebuts the government’s showing of a strong basis in evidence for the necessity of remedial action.<sup>105</sup> This rebuttal can be accomplished by providing a neutral explanation for the disparity between MBE/WBE/DBE utilization and availability, showing that the government’s data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data.<sup>106</sup> Conjecture and unsupported criticisms of the government’s methodology are insufficient.<sup>107</sup> The courts have held that mere speculation the government’s evidence is insufficient or methodologically flawed does not suffice to rebut a government’s showing.<sup>108</sup>

The courts have stated that “it is insufficient to show that ‘data was susceptible to multiple interpretations,’ instead, plaintiffs must ‘present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory

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<sup>101</sup> *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).

<sup>102</sup> *Adarand Constructors, Inc. v. Peña*, (“Adarand III”), 515 U.S. 200 at 235 (1995); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

<sup>103</sup> *Majeske*, 218 F.3d at 820; see, e.g. *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Midwest Fence*, 2015 WL 1396376 \*7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

<sup>104</sup> *Id.*; *Adarand VII*, 228 F.3d at 1166 (10<sup>th</sup> Cir. 2000).

<sup>105</sup> See, e.g., *H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242(4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at \*7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>106</sup> See, e.g., *H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242(4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at \*7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; see, generally, *Engineering Contractors*, 122 F.3d at 916; *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

<sup>107</sup> *Id.*; *H. B. Rowe*, 615 F.3d at 242; see also, *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

<sup>108</sup> *H.B. Rowe*, 615 F.3d at 242; see *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 991; see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

access to and participation in highway contracts.”<sup>109</sup> The courts hold that in assessing the evidence offered in support of a finding of discrimination, it considers “both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself.”<sup>110</sup>

The courts have noted that “there is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.”<sup>111</sup> The courts hold that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.<sup>112</sup> Instead, the Supreme Court stated that a government may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.<sup>113</sup> 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.<sup>114</sup>

The courts have stated the strict scrutiny standard is applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.”<sup>115</sup> In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.”<sup>116</sup>

Thus, courts have held that to justify a race-conscious measure, a government must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary.<sup>117</sup>

**Statistical evidence.** Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a recipient complying with the Federal DBE Program, to prove narrow tailoring of program

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<sup>109</sup> *Geyer Signal, Inc.*, 2014 WL 1309092, quoting *Sherbrooke Turf*, 345 F.3d at 970.

<sup>110</sup> *Id.*, quoting *Adarand Constructors, Inc.*, 228 F.3d at 1166; see, e.g., *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 597 (3d Cir. 1996).

<sup>111</sup> *H.B. Rowe*, 615 F.3d at 241, quoting *Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

<sup>112</sup> *H.B. Rowe Co.*, 615 F.3d at 241; see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958 (10th Cir. 2003); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

<sup>113</sup> *Croson*, 488 U.S. 509, see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

<sup>114</sup> *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); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>115</sup> 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.

<sup>116</sup> 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).

<sup>117</sup> 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).

implementation at the state recipient level.<sup>118</sup> “Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”<sup>119</sup>

One form of statistical evidence is the comparison of a government’s utilization of MBE/WBEs compared to the relative availability of qualified, willing and able MBE/WBEs.<sup>120</sup> The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and women-owned firms may raise an inference of discriminatory exclusion.<sup>121</sup> However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.<sup>122</sup>

Other considerations regarding statistical evidence include:

- **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE /ACDBE availability measures the relative number of MBE/WBEs/DBEs and ACDBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.<sup>123</sup> There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,<sup>124</sup> “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”<sup>125</sup>

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<sup>118</sup> See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 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.

<sup>119</sup> *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); see *Midwest Fence*, 840 F.3d 932, 948-954 (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).

<sup>120</sup> *Croson*, 488 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).

<sup>121</sup> See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossman Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>122</sup> *Western States Paving*, 407 F.3d at 1001.

<sup>123</sup> See, e.g., *Croson*, 488 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>124</sup> *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>125</sup> *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of*



- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.<sup>126</sup>
- **Disparity index.** An important component of statistical evidence is the “disparity index.”<sup>127</sup> A disparity index is defined as the ratio of the percent utilization to the percent availability times 100. A disparity index below 80 has been accepted as evidence of adverse impact. This has been referred to as “The Rule of Thumb” or “The 80 percent Rule.”<sup>128</sup>
- **Two standard deviation test.** The standard deviation figure describes the probability that the measured disparity is the result of mere chance. Some courts have held that a statistical disparity corresponding to a standard deviation of less than two is not considered statistically significant.<sup>129</sup>

In terms of statistical evidence, the courts, including the Ninth Circuit, have held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence”, but rather it may rely on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.<sup>130</sup>

**Marketplace discrimination and data.** The Tenth Circuit in *Concrete Works* held the district court erroneously rejected the evidence the local government presented on marketplace discrimination.<sup>131</sup> The court rejected the district court’s “erroneous” legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in its 1994 decision in *Concrete Works II* and the plurality opinion in *Croson*.<sup>132</sup> The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public and

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*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).

<sup>126</sup> See *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

<sup>127</sup> *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng’g Contractors Ass’n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

<sup>128</sup> See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence*, 840 F.3d 932, 950 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *Rothe*, 545 F.3d at 1041; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

<sup>129</sup> See, e.g., *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct; *Peightal v. Metropolitan Eng’g Contractors Ass’n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

<sup>130</sup> *H. B. Rowe*, 615 F.3d 233 at 241, citing *Croson*, 488 U.S. at 509 (plurality opinion), and citing *Concrete Works*, 321 F.3d at 958; see, e.g.; *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Concrete Works*, 36 F.3d at 1529 (10th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossman Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>131</sup> *Id.* at 973.

<sup>132</sup> *Id.*

private discrimination specifically identified in its area.”<sup>133</sup> In *Concrete Works II*, the court stated that “we do not read Croson as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.”<sup>134</sup>

The court stated that the local government could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination.<sup>135</sup> Thus, the local government was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden.<sup>136</sup>

Additionally, the court had previously concluded that the local government’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination.<sup>137</sup> Thus, the court held the local government’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination.<sup>138</sup>

The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which the local government relied were significantly flawed because they measured discrimination in the overall local government MSA construction industry, not discrimination by the municipality itself.<sup>139</sup> The court found that the district court’s conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant.<sup>140</sup>

In *Adarand VII*, the Tenth Circuit noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation.<sup>141</sup> (“[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*”<sup>142</sup> Further, the court pointed out that it earlier rejected the argument that marketplace data are irrelevant, and remanded the case to the district court to determine whether the local government could link its public spending to “the Denver MSA evidence of industry-wide discrimination.”<sup>143</sup> The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to the local government’s burden of producing strong evidence.<sup>144</sup>

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<sup>133</sup> *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added).

<sup>134</sup> *Concrete Works*, 321 F.3d 950, 973 (10<sup>th</sup> Cir. 2003), quoting *Concrete Works II*, 36 F.3d at 1529 (10<sup>th</sup> Cir. 1994).

<sup>135</sup> *Id.* at 973.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 974.

<sup>140</sup> *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

<sup>141</sup> *Concrete Works*, 321 F.3d at 976, citing *Adarand VII*, 228 F.3d at 1166-67.

<sup>142</sup> *Id.* (emphasis added).

<sup>143</sup> *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

<sup>144</sup> *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

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.”<sup>145</sup> The Tenth Circuit ruled that the local government can demonstrate that it is a “passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination.<sup>146</sup>

The court in *Concrete Works* rejected the argument that the lending discrimination studies and business formation studies presented by the local government were irrelevant. In *Adarand VII*, the Tenth Circuit concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.”<sup>147</sup>

The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the local government MSA construction industry, studies showing that discriminatory barriers to business formation exist in the local government construction industry are relevant to the municipality’s showing that it indirectly participates in industry discrimination.<sup>148</sup>

The local government also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The court held that the district court’s conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. “[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.”<sup>149</sup>

In sum, the Tenth Circuit held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the local government’s burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary.<sup>150</sup>

**Anecdotal evidence.** Anecdotal evidence includes personal accounts of incidents, including of discrimination, told from the witness’ perspective. Anecdotal evidence of discrimination,

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<sup>145</sup> *Id.*

<sup>146</sup> *Concrete Works*, 321 F.3d at 976, quoting *Croson*, 488 U.S. at 492.

<sup>147</sup> *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68.

<sup>148</sup> *Id.* at 977.

<sup>149</sup> *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

<sup>150</sup> *Id.* at 979-80.

standing alone, generally is insufficient to show a systematic pattern of discrimination.<sup>151</sup> But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.<sup>152</sup> It has been held that anecdotal evidence of a local or state government's institutional practices that exacerbate discriminatory market conditions are often particularly probative, and that the combination of anecdotal and statistical evidence is "potent."<sup>153</sup>

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.<sup>154</sup>

Courts have accepted and recognize that anecdotal evidence is the witness' narrative of incidents told from his or her perspective, including the witness' thoughts, feelings, and perceptions, and thus anecdotal evidence need not be verified.<sup>155</sup>

## **b. The Narrow Tailoring Requirement.**

The second prong of the strict scrutiny analysis requires that a race- or ethnicity-based program or legislation implemented to remedy past identified discrimination in the relevant market be "narrowly tailored" to reach that objective.

The narrow tailoring requirement has several components and the courts, including the Ninth Circuit Court of Appeals, analyze several criteria or factors in determining whether a program or legislation satisfies this requirement including:

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<sup>151</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnel Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

<sup>152</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe*, 615 F.3d 233, 248-249; *Concrete Works*, 321 F.3d 950, 989-990 (10th Cir. 2003); *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520 (10th Cir. 1994); *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>153</sup> *Concrete Works I*, 36 F.3d at 1520; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

<sup>154</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242; 249-251; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, see *Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

<sup>155</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at \*21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.<sup>156</sup>

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, which is instructive to the study, the federal courts that have evaluated state and local DBE Programs and their implementation of the Federal DBE Program, held the following factors are pertinent:

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.<sup>157</sup>

The Eleventh Circuit described the “the essence of the ‘narrowly tailored’ inquiry [as] the notion that explicitly racial preferences ... must only be a ‘last resort’ option.”<sup>158</sup> Courts have found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.”<sup>159</sup>

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik* (“*Drabik II*”), stated: “*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-

<sup>156</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181 (10<sup>th</sup> Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d Cir. 1993); see also *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>157</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 243-245, 252-255; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248; see also *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>158</sup> *Eng’g Contractors Ass’n*, 122 F.3d at 926 (internal citations omitted); see also *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion); *Webster v. Fulton County*, 51 F. Supp.2d 1354, 1380 (N.D. Ga. 1999), *aff’d per curiam* 218 F.3d 1267 (11th Cir. 2000).

<sup>159</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; see also *Adarand I*, 515 U.S. at 237-38.

neutral means to increase minority business participation' in government contracting ... or whether the program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'"<sup>160</sup>

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*<sup>161</sup> also found that race- and ethnicity-based measures should be employed as a last resort. The majority opinion stated: "Narrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives,' and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration."<sup>162</sup> The Court found that the District failed to show it seriously considered race-neutral measures.

The "narrowly tailored" analysis is instructive in terms of developing any potential legislation or programs that involve MBE/WBE/DBEs or in connection with determining appropriate remedial measures to achieve legislative objectives.

**Implementation of the Federal DBE Program: Narrow tailoring.** The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by recipients of federal funds be "narrowly tailored" to remedy identified discrimination in the particular recipient's contracting and procurement market.<sup>163</sup> The narrow tailoring requirement has several components.

In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient's own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action.<sup>164</sup> Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.<sup>165</sup>

In *Western States Paving*, and in *AGC, SDC v. Caltrans*, the Court found that even where evidence of discrimination is present in a recipient's market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race- or ethnicity-conscious program, for each of the minority groups to be included in any race- or ethnicity-conscious elements in a recipient's implementation of the Federal DBE Program, there must be evidence that the minority group suffered discrimination within the recipient's marketplace.<sup>166</sup>

In *Northern Contracting* decision (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and

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<sup>160</sup> *Associated Gen. Contractors of Ohio, Inc. v. Drabik ("Drabik II")*, 214 F.3d 730, 738 (6th Cir. 2000).

<sup>161</sup> 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007).

<sup>162</sup> 551 U.S. 701, 734-37, 127 S.Ct. at 2760-61; *see also Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 305 (2003).

<sup>163</sup> *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199 (9th Cir. 2013); *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71; *see, e.g., Midwest Fence*, 840 F.3d 932, 949-953.

<sup>164</sup> *Western States Paving*, 407 F.3d at 997-98, 1002-03; *see AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

<sup>165</sup> *Id.* at 995-1003. The Seventh Circuit Court of Appeals in *Northern Contracting* stated in a footnote that the court in *Western States Paving* "misread" the decision in *Milwaukee County Pavers*. 473 F.3d at 722, n. 5.

<sup>166</sup> 407 F.3d at 996-1000; *See AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT's program."<sup>167</sup> The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis.

The Seventh Circuit Court of Appeals held that the state DOT's [Illinois DOT] application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.<sup>168</sup> The Seventh Circuit Court of Appeals analyzed IDOT's compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth in the federal regulations.<sup>169</sup> The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).<sup>170</sup> Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.<sup>171</sup>

The 2015 and 2016 Seventh Circuit Court of Appeals decisions in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al* and *Midwest Fence Corp. v. U. S. DOT, Federal Highway Administration, Illinois DOT* followed the ruling in *Northern Contracting* that a state DOT implementing the Federal DBE Program is insulated from a constitutional challenge absent a showing that the state exceeded its federal authority.<sup>172</sup> The court held the Illinois DOT DBE Program implementing the Federal DBE Program was valid, finding there was not sufficient evidence to show the Illinois DOT exceeded its authority under the federal regulations.<sup>173</sup> The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.<sup>174</sup> In addition, the court in *Midwest Fence* upheld the constitutionality of the Federal DBE Program, and upheld the Illinois DOT DBE Program and Illinois State Tollway Highway Authority DBE Program that did not involve federal funds under the Federal DBE Program.<sup>175</sup>

**Race-, ethnicity-, and gender-neutral measures.** To the extent a "strong basis in evidence" exists concerning discrimination in a local or state government's relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a state's implementation of a race- or ethnicity-conscious program is necessary and thus narrowly tailored to achieve remedying identified discrimination. One of the key factors discussed above is consideration of race-, ethnicity- and gender-neutral measures.

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<sup>167</sup> 473 F.3d at 722.

<sup>168</sup> *Id.* at 722.

<sup>169</sup> *Id.* at 723-24.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*; *See, e.g., Midwest Fence*, 840 F.3d 932 (7<sup>th</sup> Cir. 2016); *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932 (7<sup>th</sup> Cir. 2016); *Geod Corp. v. New Jersey Transit Corp., et al.*, 746 F.Supp.2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

<sup>172</sup> *Midwest Fence*, 840 F.3d 932 (7<sup>th</sup> Cir. 2016); *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F. 3d 676, 2015 WL 4934560 at \*\*18-22 (7<sup>th</sup> Cir. 2015).

<sup>173</sup> *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at \*\*18-22.

<sup>174</sup> *Id.*

<sup>175</sup> 840 F.3d 932 (7<sup>th</sup> Cir. 2016).

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.<sup>176</sup> And the courts have held unconstitutional those race- and ethnicity-conscious programs implemented without consideration of race- and ethnicity-neutral alternatives to increase minority business participation in state and local contracting.<sup>177</sup>

The Court in *Croson* followed by decisions from federal courts of appeal found that local and state governments have at their disposal a “whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.”<sup>178</sup>

Examples of race-, ethnicity-, and gender-neutral alternatives include, but are not limited to, the following:

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and

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<sup>176</sup> 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 (10<sup>th</sup> Cir. 2000); *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia* (CAEP II), 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n* (CAEP I), 6 F.3d at 1008-1009 (3d. Cir. 1993); *Coral Constr.*, 941 F.2d at 923.

<sup>177</sup> See, *Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Virdi*, 135 Fed. Appx. At 268; *Contractors Ass’n of E. Pa. v. City of Philadelphia* (CAEP II), 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n* (CAEP I), 6 F.3d at 1008-1009 (3d. Cir. 1993).

<sup>178</sup> *Croson*, 488 U.S. at 509-510.



- Streamlining and improving the accessibility of contracts to increase small business participation.<sup>179</sup>

The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”<sup>180</sup>

### **Additional factors considered under narrow tailoring.**

In addition to the required consideration of the necessity for the relief and the efficacy of alternative remedies (race- and ethnicity-neutral efforts), the courts require evaluation of additional factors as listed above.<sup>181</sup> For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;<sup>182</sup> (2) good faith efforts provisions;<sup>183</sup> (3) waiver provisions;<sup>184</sup> (4) a rational basis for goals;<sup>185</sup> (5) graduation provisions;<sup>186</sup> (6) remedies only for groups for which there were findings of discrimination;<sup>187</sup> (7) sunset provisions;<sup>188</sup> and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.<sup>189</sup>

Several federal court decisions have upheld the Federal DBE Program and its implementation by state DOTs and recipients of federal funds, including satisfying the narrow tailoring factors.<sup>190</sup>

<sup>179</sup> See, e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179 (10<sup>th</sup> Cir. 2000); 49 CFR § 26.51(b); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

<sup>180</sup> *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

<sup>181</sup> See *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

<sup>182</sup> *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality (“AGC of Ca.”)*, 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

<sup>183</sup> *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

<sup>184</sup> *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

<sup>185</sup> *Id.*; *Sherbrooke Turf*, 345 F.3d at 971-973; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

<sup>186</sup> *Id.*

<sup>187</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 253-255; *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 593-594, 605-609 (3d Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1009, 1012 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016); *Sherbrooke Turf*, 2001 WL 150284 (unpublished opinion), *aff’d* 345 F.3d 964.

<sup>188</sup> See, e.g., *H. B. Rowe*, 615 F.3d 233, 254; *Sherbrooke Turf*, 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559; . see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016).

<sup>189</sup> *Coral Constr.*, 941 F.2d at 925.

<sup>190</sup> See, e.g., *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert. denied*, 2017 WL 497345 (2017); *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied*, 2016 WL 193809 (2016); *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006); *Mountain West Holding Co., Inc. v. The State of Montana*,

## 2. Intermediate scrutiny analysis

Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.<sup>191</sup> The Ninth Circuit has applied “intermediate scrutiny” to classifications based on gender.<sup>192</sup> Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.<sup>193</sup>

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

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.<sup>194</sup>

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard

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*Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9<sup>th</sup> Cir. May 16, 2017); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007); *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003), cert. denied, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10<sup>th</sup> 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 (7<sup>th</sup> Cir. 2015); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014); *M. K. Weeden Construction v. State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

<sup>191</sup> *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Concrete Works*, 321 F.3d 950, 960 (10<sup>th</sup> Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10<sup>th</sup> 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 (9<sup>th</sup> Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6<sup>th</sup> Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11<sup>th</sup> Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3<sup>d</sup> Cir. 1993); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Geyer Signal*, 2014 WL 1309092.

<sup>192</sup> *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4<sup>th</sup> Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10<sup>th</sup> Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10<sup>th</sup> Cir. 1994); *see, generally, Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see also, Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3<sup>d</sup> Cir. 1993); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5<sup>th</sup> Cir. 1988), cert. denied, 489 U.S. 1067 (1989) (*quoting Craig v. Boren*, 429 U.S. 190 (1976), and *Lalli v. Lalli*, 439 U.S. 259 (1978)).

<sup>193</sup> *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4<sup>th</sup> Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10<sup>th</sup> Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10<sup>th</sup> 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 (5<sup>th</sup> Cir. 2010); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3<sup>d</sup> Cir. 1993).

<sup>194</sup> *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4<sup>th</sup> Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9<sup>th</sup> Cir. 1991); *Concrete Works*, 321 F.3d 950, 960 (10<sup>th</sup> Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10<sup>th</sup> Cir. 1994); *see, e.g., Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6<sup>th</sup> Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11<sup>th</sup> Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3<sup>d</sup> 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.”).

requires the state actor to present “sufficient probative” evidence in support of its stated rationale for the program.<sup>195</sup>

Intermediate scrutiny, as interpreted by federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective.<sup>196</sup> The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.<sup>197</sup>

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.”<sup>198</sup>

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.”<sup>199</sup> The Third Circuit found this standard required the City of Philadelphia to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.<sup>200</sup> The Court in *Contractors Ass’n of E. Pa. (CAEP I)* held the City had not produced enough evidence of discrimination,

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<sup>195</sup> *Id.* The Seventh Circuit Court of Appeals, however, in *Builders Ass’n of Greater Chicago v. County of Cook, Chicago*, did not hold there is a different level of scrutiny for gender discrimination or gender based programs. 256 F.3d 642, 644-45 (7th Cir. 2001). The Court in *Builders Ass’n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

<sup>196</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Assoc. Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F.Supp 2d 613, 619-620 (2000); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996)(“exceedingly persuasive justification.”)

<sup>197</sup> *Coral Constr. Co.*, 941 F.2d at 931-932; see *Eng’g Contractors Ass’n*, 122 F.3d at 910.

<sup>198</sup> 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

<sup>199</sup> *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

<sup>200</sup> *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.<sup>201</sup>

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding women-owned construction businesses was insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses.<sup>202</sup> Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance.<sup>203</sup> But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.<sup>204</sup> 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.<sup>205</sup> This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

### 3. Rational basis analysis

Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.<sup>206</sup> When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a court is required to inquire whether the challenged classification has a legitimate purpose and whether it was reasonable for the legislature to believe that use of the challenged classification would promote that purpose.<sup>207</sup>

Courts in applying the rational basis test generally find that a challenged law is upheld “as long as there could be some rational basis for enacting [it],” that is, that “the law in question is rationally related to a legitimate government purpose.”<sup>208</sup> So long as a government

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<sup>201</sup> *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

<sup>202</sup> *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> See, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9<sup>th</sup> Cir. 2019); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10<sup>th</sup> Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10<sup>th</sup> Cir. 1998); *Cunningham v. Beavers* 858 F.2d 269, 273 (5<sup>th</sup> Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8<sup>th</sup> Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup> 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

<sup>207</sup> See, *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9<sup>th</sup> Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9<sup>th</sup> Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5<sup>th</sup> Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8<sup>th</sup> Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Ass’n of E. Pa.*, 6 F.3d at 1011 (3d Cir. 1993); *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup> 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

<sup>208</sup> See, e.g., *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9<sup>th</sup> Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9<sup>th</sup> Cir. 2018); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10<sup>th</sup> Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10<sup>th</sup> Cir. 1998) see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-

legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.<sup>209</sup>

“[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.”<sup>210</sup> Moreover, “courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality”.<sup>211</sup>

Under a rational basis review standard, a legislative classification will be upheld “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”<sup>212</sup> Because all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”<sup>213</sup>

Under the federal standard of review a court will presume the “legislation is valid and will sustain it if the classification drawn by the statute is rationally related to a legitimate [government] interest.”<sup>214</sup>

A federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the

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321 (1993) (*Under rational basis standard, a legislative classification is accorded a strong presumption of validity*); *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup> 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

<sup>209</sup> *Id.*; *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9<sup>th</sup> Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9<sup>th</sup> Cir. 2018); *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4<sup>th</sup> Cir. 2013), (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)); *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup> 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

<sup>210</sup> *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9<sup>th</sup> Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9<sup>th</sup> Cir. 2018); *United States v. Timms*, 664 F.3d 436, 448-49 (4<sup>th</sup> Cir. 2012), cert. denied, 133 S. Ct. 189 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted); *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup> 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

<sup>211</sup> *Heller v. Doe*, 509 U.S. 312, 321 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9<sup>th</sup> Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9<sup>th</sup> Cir. 2018); *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup> 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

<sup>212</sup> *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9<sup>th</sup> Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9<sup>th</sup> Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup> 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

<sup>213</sup> *Id.*

<sup>214</sup> *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Chance Mgmt., Inc. v. S. Dakota*, 97 F.3d 1107, 1114 (8<sup>th</sup> Cir. 1996); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9<sup>th</sup> Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9<sup>th</sup> Cir. 2018); see also *Lawrence v. Texas*, 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (“Under our rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest . . . . Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster.” (internal citations and quotations omitted)) (*O’Connor, J., concurring*); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8<sup>th</sup> Cir. 2012) (“Under rational basis review, the classification must only be rationally related to a legitimate government interest.”); *People v. Chatman*, 4 Cal. 5<sup>th</sup> 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4<sup>th</sup> 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4<sup>th</sup> 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals, including veteran preference goals) in a procurement under the Federal Acquisition Regulations (“FAR”)<sup>215</sup>.

*Firstline* involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration (“TSA”) issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: “Government anticipates an overall Small Business goal of 40 percent,” and that “[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5%; Woman Owned[:] 5 percent: HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent.”<sup>216</sup>

The court applied the rational basis test in construing the challenge to the establishment by the TSA of a 40 percent small business participation goal as unlawful and irrational.<sup>217</sup> The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”<sup>218</sup>

The court found that “an agency may rationally establish aspirational small business subcontracting goals for prospective offerors....” Consequently, the court held one rational method by which the Government may attempt to maximize small business participation (including veteran preference goals) is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovative ways to structure and maximize small business subcontracting within their proposals.<sup>219</sup> The court, in an exercise of judicial restraint, found the “40 percent goal is a rational expression of the Government’s policy of affording small business concerns...the maximum practicable opportunity to participate as subcontractors....”<sup>220</sup>

#### ***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

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<sup>215</sup> 2012 WL 5939228 (Fed. Cl. 2012).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

Constitution, 42 U.S.C. Sections 1981, 1983, and 2000(d), and Tenn. Code Ann. § 5-14-108 that requires competitive bidding. The Plaintiffs claim the County MWBE Program is unconstitutional and unlawful for both prime and subcontractors. Plaintiffs ask the Court to declare it as such, and to enjoin the County from further implementing or operating under it with respect to awarding government construction contracts.

The case at the time of this report is in the middle of discovery. The court has ruled on certain motions to dismiss filed by the Defendants, including granting dismissal as to individual Defendants sued in their official capacity and denied the motions to dismiss as to the individual Defendants sued in their individual capacity.

Trial has been scheduled for December 14, 2020.

- **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.

At the time of this report, MTA has filed a Motion to Dismiss, which has been deferred by the court and is pending. The parties are in discovery and the court has denied a motion by the AGC to be elevated to party status and to conduct discovery.

- **CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., Global Environmental, Inc., Premier Demolition, Inc., v. City of St. Louis, St. Louis Airport Authority, et al.**; U.S. District Court for the Eastern District of Missouri, Eastern Division; Case No: 4:19-cv-03099 (Complaint filed on November 14, 2019).

Plaintiffs allege that this cause of action arises from Defendant's Minority and Women's Business Enterprise Program Certification and Compliance Rules that require Native Americans to show at least one-quarter descent from a tribe

recognized by the Federal Bureau of Indian Affairs. Plaintiffs claim that African Americans, Hispanic Americans, and Asian Americans are only required to “have origins” in any groups or peoples from certain parts of the world. This action alleges violations of Title VI of the Civil Rights Act of 1964, and the denial of equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution based on these definitions constituting per se discrimination. Plaintiffs seek injunctive relief and damages.

Plaintiffs are businesses that are certified as MBEs through the City of St. Louis.

Plaintiffs allege they are a Minority Group Members because their owners are members of the American Indian tribe known as Northern Cherokee Nation. Plaintiffs claim the NORTHERN CHEROKEE NATION is an American Indian Tribe with contacts in what is now known as the State of Missouri since 1721.

Plaintiff alleges the City defines Minority Group Members differently depending on one's racial classification. The City's rules allow African Americans, Hispanic Americans and Asian Americans to meet the definition of a Minority Group Member by simply having “origins” within a group of peoples, whereas Native Americans are restricted to those persons who have cultural identification and can demonstrate membership in a tribe recognized by the Federal Bureau of Indian Affairs.

In 2019 Plaintiffs sought to renew their MBE certification with the City, which was denied. Plaintiff alleges the City decided to decertify the MBE status for each Plaintiff because their membership in the Northern Cherokee Nation disqualifies each company from Minority Group Membership because the Northern Cherokee Nation is not a federally recognized tribe by the Bureau of Indian Affairs.

The Plaintiffs filed an administrative appeal, and the Administrative Review Officer upheld the decision to decertify Plaintiffs firms.

Plaintiffs allege the City's policy, on its face, treats Native Americans differently than African Americans, Hispanic Americans and Asian Americans on the basis of race because it allows those groups to simply claim an origin from one of those groups of people to qualify as a Minority Group Member, but does not allow Native Americans to qualify in the same way. Plaintiffs claim this is per se intentional discrimination by the City in violation of Title VI and the Fourteenth Amendment.

Plaintiffs also allege that Defendants subjected Plaintiffs to violations of their rights as other minority contractors to the Equal Protection of Laws in the determination of their minority status by using a different standard to determine whether they should qualify as a Minority Group Member under the City's MBE Certification and Compliance Rules.



Plaintiffs claim the City's policy and practice constitute disparate treatment of Native Americans.

As a result of the City's deliberate indifference to their rights under the Fourteenth Amendment, Plaintiffs claim they have suffered loss of business, loss of standing in their community, and damage to their reputation by the City's decision to decertify the MBE status of these companies, and incurred attorney's fees and costs.

Plaintiffs request judgment against the City and other Defendants for compensatory damages for business losses, loss of standing in their community, and damage to their reputation. Plaintiffs also seek punitive damages and injunctive relief requiring the City to strike its definition a Minority Group Member under its policy and rewrite it in a non-discriminatory manner, reinstate the MBE certification of each Plaintiffs, and for attorney fees under Title VI and 42 U.S.C Section 1988.

The Complaint was filed on November 14, 2019, and an Amended Complaint was filed on November 19, 2019. At the time of this report, there has not been an Answer or other pleadings.

- **Pure Ohio Wellness, LLC v. State of Ohio Board of Pharmacy**, In the Court of Common Pleas, Madison County, Ohio, Case No. CVH 20190197, November 4, 2019. This matter is before the court pursuant to Appellant's *Pure Ohio Wellness, LLC* ("Pure Ohio"), administrative appeal from the Order by Appellee, State of Ohio Board of Pharmacy ("the Board"), in which Pure Ohio was denied a provisional medical marijuana dispensary license.

Pursuant to R.C. Chapter 3796, the Board was granted authority to implement and regulate the licensure of medical marijuana dispensaries in Ohio. The Board promulgated Ohio Administrative Code 3796:6-2-05(A) that provided the Board may issue up to 60 dispensary provisional licenses. The Board was required to issue not less than fifteen percent of retail dispensary licenses to entities that are owned and controlled by members of economically disadvantaged groups. (EDG). Because there were up to 60 dispensary licenses, the Board concluded it was required by R.C. 3796.10(C) to award 9 dispensary licenses to EDG applicants.

Pure Ohio was the lowest scoring applicant in a specific district who would otherwise be awarded a provisional dispensary license. The only reason that Pure Ohio did not receive a provisional license to operate a medical marijuana dispensary was due to R.C. 3796.10(C) and the requirement that the Board award fifteen percent of all dispensaries to EDG applicants. *Id.* at 27. Pure Ohio requested a hearing on this decision.

The Hearing Examiner did not consider Pure Ohio's constitutional challenge and that issue was left for this appeal. The Board issued an order approving the Report and Recommendation of the Hearing Examiner denying the license.

Pure Ohio filed an appeal from the Order of the Ohio Board of Pharmacy. Specifically, Pure Ohio alleges the Order is based on a statute, R.C. 3786.10(C), which established a race-based quota unconstitutional on its face and as applied to Pure Ohio. Further, Pure Ohio alleges that the Board's failure to promulgate a rule to establish how the quota would be enforced lacked fundamental fairness. Finally, Pure Ohio alleges that the Board applied an incorrect legal standard to Pure Ohio in their appeal of the denial of the license.

The Board argues that R.C. 3796.10(C) was modeled on the Ohio Minority Business Enterprise ("MBE") program which has been upheld as constitutional. The parties agree that R.C. 3796.10(C) is subject to strict scrutiny as the statute involves a race-based quota. And as such, strict scrutiny presumes the unconstitutionality of the classification absent a compelling governmental justification.

Compelling government interest. In support of the Board's assertion that the General Assembly had a compelling interest in creating R.C. 3796.10(C), the Board put forth evidence of prior discrimination in the bidding for Ohio government contracts, statistical and anecdotal studies leading to the creation of the MBE and EDGE programs, other jurisdiction's marijuana licensing programs, and news articles showing that minorities are underrepresented in the medical marijuana industry.

The last study the Board references in support of constitutionality is a 2001 anecdotal study that provides some reasons for disparities in the award of contracts and utilization of MBEs. This study was used to support the legislature's conclusion that remedial action was necessary in the industry of government procurement contracts and led to the creation of the Encouraging Diversity Growth and Equity Program (EDGE Program) in 2003. The EDGE program establishes goals for state entities in awarding contracts for procurement of supplies and services to minority-owned businesses.

However, the court found none of the evidence the Board points to in support of finding that the State had a compelling interest is specific to the medical marijuana industry. Further, it is not clear that the General Assembly considered any of this evidence prior to the enactment of R.C. 3796.10(C). The court said there is no evidence in the record that shows what of this evidence, if any, the General Assembly clearly considered prior to passage. Although the General Assembly may have considered the MBE program history and other states' medical marijuana programs, the Board provided no evidence in support of that conclusion.

Even if this evidence was considered by the General Assembly, the court found this statistical evidence and case history pertain to government procurement contracts only. The law requires that evidence considered by the legislature must be directly related to discrimination of that particular industry. The Board did not put forward any statistical evidence as to racial discrimination in the

medical marijuana industry in Ohio. And while remedying the present effects of past discrimination can be a compelling interest, the state does not have a compelling interest in remedying generalized societal discrimination.

The Board also refers to multiple news articles that conclude that minority groups are underrepresented in ownership of marijuana retail licenses. However, the court noted all of these articles were published after the law which created R.C. 3796. The court stated when evidence is provided that was not available or considered by the legislature prior to the enactment of a statute, it is considered to be “post-enactment evidence.” Courts are split as to whether or not post-enactment evidence is admissible.

While Circuit Courts have been split as to the admissibility of post-enactment evidence, the court held the Sixth Circuit precludes post-enactment evidence. Thus, the articles referenced by the Board are post-enactment evidence and should not be considered in the determination of whether a compelling interest existed at the time R.C. 3796.10(C) was enacted.

The court held there is not a strong basis in evidence supporting the General Assembly’s conclusion that remedial action is necessary to correct discrimination within the medical marijuana industry. Accordingly, a compelling government interest does not exist.

Narrowly tailored remedy. The court found the Board shows no evidence that alternative remedies were either proposed or analyzed by the General Assembly. Pure Ohio proposed some narrowly tailored remedies that could have been considered by the General Assembly rather than the strict quota. However, there is no evidence that the General Assembly considered any of the alternative remedies proposed by Pure Ohio. The court pointed out the Board’s brief shows several other medical marijuana statutes adopted in other states. None of these other statutes established a quota, instead they use more generalized requirements or goals which could have been alternative remedies if the General Assembly had considered them in their analysis.

The court found that alternative remedies could have been available to the General Assembly in order to alleviate the discrimination it sought to correct. But, no evidence was provided that showed any alternative remedies were considered by the General Assembly prior to enacting R.C. 3796.09(C).

Second, the court evaluated the flexibility and duration of the relief, which includes the availability of waivers, and found R.C. 3796.01(C) to be somewhat flexible in that it includes a waiver provision. But, the entire statute is not flexible because it outlines a strict percentage and no evidence was provided to show how the quota is in any way related to the medical marijuana industry. It simply requires that fifteen percent of licenses are issued to economically disadvantaged group members. The statute also does not include a proposed duration or how it is terminated. Thus, the court found R.C. 3796.10(C) is not flexible.

Third, the court determined the relationship of the numerical goals to the relevant labor market. Pure Ohio argued that there is no correlation between the fifteen percent quota and the medical marijuana market. The General Assembly did not make any statements about the basis of the fifteen percent quota. The Board does not provide any evidence or explanation as to why this percentage is related to the relevant labor market in the new medical marijuana industry. The court found that there is no evidence to support a reasonable relationship to the relevant population and the policy's goals, and thus the numerical goal is not reasonably related to the relevant labor market.

Fourth, the court evaluated the impact of the relief on third parties. Under the Ohio MBE program, potential contracts are constantly generated and are available for bidding by minority owned and non-minority businesses. That is not the case for R.C. 3796.10(C). The court said by allotting a fifteen percent set aside, licenses will be reserved for applicants solely on the basis of race. Although more licenses may be issued in the future, the court noted those licenses will be impacted by the same set-aside, reserving more licenses for potentially lower qualified applicants solely on the basis of race. The court found that the fifteen percent set aside is not insignificant in its impact on third parties as it can effectively bar qualified applicants from participation in the market. This burden, the court held, is excessive for a new industry with limited participants.

Upon review of all the factors together, the court found that the General Assembly failed to adequately evaluate or employ race-neutral remedies, the quota is inflexible and not limited in duration, there is a lack of relationship between the quota and the relevant labor market, and a large impact on the rights of third party. All of these taken together showed that the General Assembly failed to narrowly tailor R.C. 3796.10(C).

Conclusion. The court found that Pure Ohio met its burden to demonstrate the unconstitutionality of R.C. 3796.10(C). There is insufficient evidence to show that the General Assembly compiled and reviewed 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. In addition, the General Assembly did not narrowly tailor R.C. 3796.10(C). Therefore, the court found 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.

Pure Ohio in December 2019 voluntarily dismissed the appeal.

- **Pharmacann Ohio, LLC v. Ohio Dept. Commerce Director Jacqueline T. Williams**, In the Court of Common Pleas, Franklin County, Ohio, Case No. 17-CV-10962, November 15, 2018, appeal pending, in the Court of Appeals of Ohio, Tenth Appellate District, Case No. 18-AP-000954.

In 2016, the Ohio legislature codified R.C. Chapter 3796, legalizing medical marijuana. The legislature instructed Defendant Ohio Department of Commerce to issue certain

licenses to medical marijuana cultivators, processors, and testing laboratories. The Department was instructed to award fifteen percent of said licenses to economically disadvantaged groups, defined as African Americans, American Indians, Hispanics, and Asians.

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

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

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

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

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

The only evidence clearly considered by the legislature prior to the passage of R.C. §3796.09(C), the court stated, is marijuana related arrests. There is evidence that legislators may have considered MBE history and specifically requested the inclusion of a provision similar to the MBE program. However,

the only evidence provided are a few emails seeking a provision like the MBE program. There was no testimony showing any statistical or other evidence was considered from the previous studies conducted for the MBE program.

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

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

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

Additionally, even if the court could find this evidence was considered by the legislature in support of R.C. §3796.09(C), the materials from R.C. §125.081 pertain to government procurement contracts only. The court held the law requires that evidence considered by the legislature must be directly related to discrimination in that particular industry. Defendants argued the fact that the medical marijuana industry is new, but the court said such newness necessarily demonstrates there is no history of discrimination in this particular industry, i.e. legal cultivation of medical marijuana.

Finally, Defendants' remaining evidence, the court said, is post-enactment. The court stated it would be given a lesser weight than that of pre-enactment evidence. Considering all the evidence put forth, the court found there is not a

strong basis in evidence supporting the legislature's conclusion that remedial action is necessary to correct discrimination within the medical marijuana industry. Accordingly, it held a compelling government interest does not exist.

The court also found R.C. §3796.09(C) is not narrowly tailored to the legislature's alleged compelling interest. Under Ohio law, the legislature must engage in an analysis of alternative remedies and prior efforts before enacting race-conscious remedies. Neither party directed the court to sufficient evidence of alternative remedies proposed or analyzed by the legislature during their review of R.C. §3796.09(C). The evidence of prior alternative remedies pertains to the government contracting market. Neither of the studies Defendant cites relate to the medical marijuana industry. The Defendants did not show evidence of any alternative remedies considered by the legislature before enacting R.C. §3796.09(C).

The court believed alternative remedies could have been available to the legislature to alleviate the discrimination the legislature stated it sought to correct. If the legislature sought to rectify the elevated arrest rates for African Americans and Latinos/Hispanics possessing marijuana, the correction should have been giving preference to those companies owned by former arrestees and convicts, not a range of economically disadvantaged individuals, including preferences for unrelated races like Native Americans and Asians.

R.C. §3796.09(C) appears to be somewhat flexible, the court stated, in that it includes a waiver provision. The court found the entire statute itself is not flexible, being that it is a strict percentage, unrelated to the particular industry it is intended for, medical marijuana. R.C. §3796.09(C) requires fifteen percent of cultivator licenses are issued to economically disadvantaged group members. This is not an estimated goal, but a specific requirement. Additionally, R.C. §3796.09(C) does not include a proposed duration. Accordingly, the court found R.C. §3796.09(C) is not flexible.

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

Regarding the statistics the legislature did not review prior to enacting R.C. §3796.09(C), the cited statistics pertaining to the arrest rates of minorities, the

court found, are not directly related to the values listed within the statute. Much of the statistics referenced are based on general rates throughout the United States, or findings on discrimination pertaining to all drug related arrests. But these other statistics do not demonstrate the racial disparities pertaining to specifically marijuana throughout the state of Ohio. The statistics cited in the materials, the court said, is not reflected in the amount chosen to remediate the discrimination R.C. §3796.09(C), fifteen percent. This percentage is not based on the evidence demonstrating racial discrimination in marijuana related arrest in Ohio. Therefore, the court concluded the numerical value was selected at random by the legislature, and not based on the evidence provided.

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

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

The court found failure of the legislature to evaluate or employ race-neutral alternative remedies; plus, the inflexible and unlimited nature of the statute; combined with the lack of relationship between the numerical goals and the relevant labor market; and the large impact of the relief on the rights of third parties, shows the legislature failed to narrowly-tailor R.C. §3796.09(C).

As the ultimate burden remains with Plaintiff to demonstrate the unconstitutionality of R.C. §3796.09(C), the court found Plaintiff met its burden by showing the legislature failed to compile and review enough evidence related to the medical marijuana industry to support the finding of a strong basis in evidence for a compelling government interest to exist. Additionally, the legislature did not narrowly tailor R.C. §3796.09(C). Therefore, the Court found R.C. §3796.09(C) is unconstitutional on its face.

The case at the time of this report is on appeal.

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 and the Federal DBE/ACDBE 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, the Federal DBE and ACDBE Programs, and the implementation of the Federal DBE and ACDBE Programs by state and local government recipients of federal funds.



Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

# SUMMARIES OF RECENT DECISIONS

## D. Recent Decisions Involving the Federal DBE Program and State or Local Government MBE/WBE/DBE Programs in the Ninth Circuit Court of Appeals

***1. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9<sup>th</sup> Cir. December 19, 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court denied (June 24, 2019)***

Plaintiffs, Orion Insurance Group (“Orion”) and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law. The USDOT and Washington State Office of Minority & Women’s Business Enterprises (“OMWBE”), moved for a summary dismissal of all the claims.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE.

Plaintiffs submitted to OMWBE Orion’s application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion’s DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.

OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

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

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with

racial animus, or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

**Void for vagueness claim.** Plaintiffs asserted that the regulatory definitions of “Black American” and “Native American” are void for vagueness. The district court dismissed the claims that the definitions of “Black American” and “Native American” in the DBE regulations are impermissibly vague.

**Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State.** Plaintiffs’ claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations’ requirement that the state make decisions based on race, the district court held were constitutional.

**The Ninth Circuit on appeal affirmed the District Court.** The Ninth Circuit held the district court correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity. The Ninth Circuit also held the district court correctly dismissed Taylor’s discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act “under color or state law” as required by the statute.

In addition, the Ninth Circuit concluded the district court correctly dismissed Taylor’s claims for damages because the United States has not waived its sovereign immunity on those claims. The Ninth Circuit found the district court correctly dismissed Taylor’s claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

**Claims under the Administrative Procedure Act.** The Ninth Circuit stated the OMWBE did not act in an arbitrary and capricious manner when it determined it had a “well founded reason” to question Taylor’s membership claims, and that Taylor did not qualify as a “socially and economically disadvantaged individual.” Also, the court found OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.

The Ninth Circuit held the USDOT did not act in an arbitrary and capricious manner when it affirmed the state’s decision because the decision was supported by substantial evidence and consistent with federal regulations. The USDOT “articulated a rational connection” between the evidence and the decision to deny Taylor’s application for certification.

**Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d.** The Ninth Circuit held the district court correctly granted summary judgment to the federal and state Defendants on Taylor’s equal protection claims because Defendants did not discriminate against Taylor, and did not treat Taylor differently from others similarly situated. In addition, the court found the district court properly granted summary judgment to the state defendants on Taylor’s discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor’s claims.

Having granted summary judgment on Taylor’s claims under federal law, the Ninth Circuit concluded the district court properly declined to exercise jurisdiction over Taylor’s state law claims.

**Petition for Writ of Certiorari.** Plaintiffs/Appellants filed a Petition for Writ of Certiorari with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

***2. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2017 WL 3387344 (W.D. Wash. 2017)***

Plaintiffs, Orion Insurance Group (“Orion”), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise (“DBE”) under federal law. 2017 WL 3387344. Plaintiffs moved the Court for an order that summarily declared that the Defendants violated the Administrative Procedure Act (APA), declared that the denial of the DBE certification for Orion was unlawful, and reversed the decision that Orion is not a DBE. *Id.* at \*1. The United States Department of Transportation (“USDOT”) and the Acting Director of USDOT, (collectively the “Federal Defendants”) move for a summary dismissal of all the claims asserted against them. *Id.* The Washington State Office of Minority & Women's Business Enterprises (“OMWBE”), (collectively the “State Defendants”) moved for summary dismissal of all claims asserted against them. *Id.*

The court held Plaintiffs' motion for partial summary judgment was denied, in part, and stricken, in part, the Federal Defendants' motion for summary judgment was granted, and the State Defendants' motion for summary judgment was granted, in part, and stricken, in part. *Id.*

Factual and procedural history. In 2010, Plaintiff Ralph Taylor received results from a genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. Mr. Taylor acknowledged that he grew up thinking of himself as Caucasian, but asserted that in his late 40s, when he realized he had Black ancestry, he “embraced his Black culture.” *Id.* at \*2.

In 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as a MBE under Washington State law. *Id.* at \*2. In the application, Mr. Taylor identified himself as Black, but not Native American. *Id.* His application was initially rejected, but after Mr. Taylor appealed the decision, OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law. *Id.* at \*2.

In 2014, Plaintiffs submitted, to OMWBE, Orion's application for DBE certification under federal law. *Id.* at \*2. His application indicated that Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification submitted with the federal application. *Id.* Considered with his initial submittal were the results from the 2010 genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. *Id.* Mr. Taylor submitted the results of his father's genetic results, which estimated that he was 44% European, 44% Sub-Saharan African, and 12% East Asian. *Id.* Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray, identified as a “Negro,” who was around 86 years old, with no other supporting documentation to indicate she was an ancestor of Mr. Taylor. *Id.* at \*2.

In 2014, Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the

relevant community as either Black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. *Id.* at \*3. OMWBE also found that even if there was sufficient evidence to find that Mr. Taylor was a member of either of these racial groups, “the presumption of disadvantage has been rebutted,” and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*

Mr. Taylor appealed the denial of the DBE certification to the USDOT. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Id.* at \*\*3-4. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.*, U.S. District Court for the Western District of Washington case number 15-5267 BHS. In 2015, the USDOT affirmed the denial of Orion's DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE's decision. *Id.* at \*4.

This case was filed in 2016. *Id.* at \*4. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) “Discrimination under 42 U.S.C. § 1983” (reference is made to Equal Protection), (C) “Discrimination under 42 U.S.C. § 2000d,” (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49 C.F.R. § 26.5 are void for vagueness. *Id.* Plaintiffs seek damages, injunctive relief: (“[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE's representatives ... and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE,” and a declaration the “definitions of ‘Black American’ and ‘Native American’ in 49 C.F.R. § 26.5 to be void as impermissibly vague,”) and attorneys' fees, and costs. *Id.*

OMWBE did not act arbitrarily or capriciously in denying certification. The court examined the evidence submitted by Mr. Taylor and by the State Defendants. *Id.* at \*\*7-12. The court held that OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence that he was a member of either the Black or Native American groups. *Id.* at \*8. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.* at \*9. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a “member of a designated disadvantaged group,” the court stated Mr. Taylor “must demonstrate social and economic disadvantage on an individual basis.” *Id.* Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.*

In making these decisions, the court found OMWBE considered the relevant evidence and “articulated a rational connection between the facts found and the choices made.” *Id.* at \*10. By requiring individualized determinations of social and economic disadvantage, the Federal DBE “program requires states to extend benefits only to those who are actually disadvantaged.” *Id.*, citing, *Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was “actually disadvantaged” or when it denied Plaintiff's application. *Id.*

The U.S. DOT affirmed the decision of the state OMWBE to deny DBE status to Orion. *Id.* at \*\*10-11.

Claims for violation of equal protection. To the extent that Plaintiffs assert a claim that, on its face, the Federal DBE Program violates the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at \*\*12-13. The Ninth Circuit has held that the Federal DBE Program, including its implementing regulations, does not, on its face, violate the Equal Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). *Id.* The Western States Court held that Congress had evidence of discrimination against women and minorities in the national transportation contracting industry and the Federal DBE Program was a narrowly tailored means of remedying that sex and raced based discrimination. *Id.* Accordingly, the court found race-based determinations under the program have been determined to be constitutional. *Id.* The court noted that several other circuits, including the Seventh, Eighth, and Tenth have held the same. *Id.* at \*12, citing, *Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 936 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000).

To the extent that Plaintiffs assert that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at \*12. Plaintiffs argue that, as applied to them, the regulations “weigh adversely and disproportionately upon” mixed-race individuals, like Mr. Taylor. *Id.* This claim should be dismissed, according to the court, as the Equal Protection Clause prohibits only intentional discrimination. *Id.* Even considering materials filed outside the administrative record, the court found Plaintiffs point to no evidence that the application of the regulations here was done with an intent to discriminate against mixed-race individuals, or that it was done with racial animus. *Id.* Further, the court said Plaintiffs offer no evidence that application of the regulations creates a disparate impact on mixed-race individuals. *Id.* Plaintiffs' remaining arguments relate to the facial validity of the DBE program, and the court held they also should be dismissed. *Id.*

The court concluded that to the extent that Plaintiffs base their equal protection claim on an assertion that they were treated differently than others similarly situated, their “class of one” equal protection claim should be dismissed. *Id.* at \*13. For a class of one equal protection claim, the court stated Plaintiffs must show they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Plaintiffs, the court found, have failed to show that Mr. Taylor was intentionally treated differently than others similarly situated. *Id.* at \*13. Plaintiffs pointed to no evidence of intentional differential treatment by the Defendants. *Id.* Plaintiffs failed to show that others that were similarly situated were treated differently. *Id.*

Further, the court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment. *Id.* at \*13. Both the State and Federal Defendants according to the court, offered rational explanations for the denial of the application. *Id.* Plaintiffs' Equal Protection claims, asserted against all Defendants, the court held, should be denied. *Id.*

Void for vagueness claim. Plaintiffs assert that the regulatory definitions of “Black American” and both the definition of “Native American” that was applied to Plaintiffs and a new definition of “Native American” are void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments' due process clauses. *Id.* at \*13.

The court pointed out that although it can be applied in the civil context, the Seventh Circuit Court of Appeals has noted that in relation to the DBE regulations, the void for vagueness “doctrine is a poor fit.” *Id.* at \*14, *citing, Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 947–48 (7th Cir. 2016). Unlike criminal or civil statutes that prohibit certain conduct, the Seventh Circuit noted that the DBE regulations do not threaten parties with punishment, but, at worst, cause lost opportunities for contracts. *Id.* In any event, the court held Plaintiffs' claims that the definitions of “Black American” and of “Native American” in the DBE regulations are impermissibly vague should be dismissed. *Id.*

The court found the regulations require that to show membership, an applicant must submit a statement, and then if the reviewer has a “well founded” question regarding group membership, the reviewer must ask for additional evidence. 49 C.F.R. § 26.63 (a)(1). *Id.* at \*14. Considering the purpose of the law, the court stated the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit. *Id.*

The definition of “socially and economically disadvantaged individual” as a “citizen ... who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to their individual qualities,” the court determined, gives further meaning to the definitions of “Black American” and “Native American” here. *Id.* at \*14. “Otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity.” *Id.* at \*14, *quoting, Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005).

The court held plaintiffs also fail to show that these terms, when considered within the statutory framework, are so vague that they lend themselves to “arbitrary” decisions. *Id.* at \*14. Moreover, even if the court did have jurisdiction to consider whether the revised definition of “Native American” was void for vagueness, the court found a simple review of the statutory language leads to the conclusion that it is not. *Id.* The revised definition of “Native Americans” now “includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiian.” *Id.*, *citing*, 49 C.F.R. § 26.5. This definition, the court said, provides an objective criteria based on the decisions of the tribes, and does not leave the reviewer with any discretion. *Id.* The court thus held that Plaintiffs' void for vagueness challenges were dismissed. *Id.*

Claims for violations of 42 U.S.C. §2000d against the State Defendants. Plaintiffs' claims against the State Defendants for violation of Title VI (42 U.S.C. § 2000d), the court also held, should be dismissed. *Id.* at \*16. Plaintiffs failed to show that the State Defendants engaged in intentional impermissible racial discrimination. *Id.* The court stated that “Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” *Id.* The court pointed out the DBE regulations' requirement that the State make decisions based on race has already been held to pass constitutional muster in the Ninth Circuit. *Id.* at \*16, *citing, Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). Plaintiffs made no showing that the State Defendants violated their Equal Protection or other constitutional rights. *Id.* Moreover, Plaintiffs, the court found, failed to show that the State Defendants intentionally acted with discriminatory animus. *Id.*

The court held to the extent the Plaintiffs assert claims that are based on disparate impact, those claims are unavailable because “Title VI itself prohibits only intentional discrimination.” *Id.* at \*17, *quoting, Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). The court therefore held this claim should be dismissed. *Id.* at \*17.

Holding. Therefore, the court ordered that Plaintiffs' Motion for Partial Summary Judgment was: Denied as to the federal claims; and Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD.

In addition, the Federal Defendants' Motion for Summary Judgment on the Administrative Procedure Act, Equal Protection, and Void for Vagueness Claims was Granted; and the claims asserted against the Federal Defendants were Dismissed.

The State Defendants' Cross Motion for Summary Judgment was Granted as to Plaintiffs claims against the State Defendants for violations of the APA, Equal Protection, Void for Vagueness, 42 U.S.C. § 1983, and 42 U.S.C. § 2000d, and those claims were Dismissed. *Id.* Also, the court held the State Defendants' Cross Motion for Summary Judgment was Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD. *Id.*

***3. Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al., 2017 WL 2179120 (9<sup>th</sup> Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U. S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).***

**Note:** The Ninth Circuit Court of Appeals Memorandum provides: "This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3."

**Introduction.** Mountain West Holding Company installs signs, guardrails, and concrete barriers on highways in Montana. It competes to win subcontracts from prime contractors who have contracted with the State. It is not owned and controlled by women or minorities. Some of its competitors are disadvantaged business enterprises (DBEs) owned by women or minorities. In this case it claims that Montana's DBE goal-setting program unconstitutionally required prime contractors to give preference to these minority or female-owned competitors, which Mountain West Holdings Company argues is a violation of the Equal Protection Clause, 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

**Factual and procedural background.** *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al., 2014 WL 6686734 (D. Mont. Nov. 26, 2014); Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. ("Mountain West"), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation ("MDT") and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.*

Following the Ninth Circuit's 2005 decision in *Western States Paving v. Washington DOT, et al.*, MDT commissioned a disparity study which was completed in 2009. MDT utilized the



results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all “relevant” minority groups were underutilized in “professional services” and Asian Pacific Americans and Hispanic Americans were underutilized in “business categories combined,” but it also concluded that all “relevant” minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are “significantly overrepresented” in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserts that there was no evidence that all relevant minority groups had suffered discrimination in Montana’s transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

***AGC, San Diego v. California DOT and Western States Paving Co. v. Washington DOT.*** The Ninth Circuit and the district court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 713 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state’s implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at \*2 (D. Mont. November 26, 2014). The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state’s implementation of the DBE Program “is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.” *Mountain West*, 2014 WL 6686734 at \*2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at \*2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, quoting *AGC, San Diego v. California DOT*,

713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that “even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.” *Mountain West*, 2017 WL 2179120 at \*2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at \*2, quoting *Western States*, 407 F.3d at 997-999.

**MDT study.** MDT obtained a firm to conduct a disparity study that was completed in 2009. The district court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in “professional services” contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in “business categories combined,” slight underutilization of nonminority women in “business categories combined,” and overutilization of all groups in subcontractor “construction” contracts. *Mountain West*, 2014 WL 6686734 at \*2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The district court stated the anecdotal evidence suggested various forms of discrimination existed within Montana’s transportation contracting industry, including evidence of an exclusive “good ole boy network” that made it difficult for DBEs to break into the market. *Id.* at \*3. The district court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

**Montana’s DBE utilization after ceasing the use of contract goals.** The district court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at \*3. The utilization rate dropped, according to the district court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent *Id.* In response to this decline, for fiscal years 2011-2014, the district court said MDT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana’s overall goal of 5.83 percent DBE utilization.

MDT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

**Mountain West’s claims for relief.** Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at \*3. Mountain West’s claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting

bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana's DBE program. *Id.*

**The two-prong test to demonstrate that a DBE program is narrowly tailored.** The Court, citing AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West*, 2017 WL 2179120 at \*2, Memorandum, May 16, 2017, at 6-7.

**District Court Holding in 2014 and the Appeal.** The district court granted summary judgment to the State, and Mountain West appealed. *See Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014), *dismissed in part, reversed in part, and remanded*, U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum 2017 WL 2179120 at \*\*1-4 (9<sup>th</sup> Cir. May 16, 2017). Montana also appealed the district court's threshold determination that Mountain West had a private right of action under Title VI, and it appealed the district court's denial of the State's motion to strike an expert report submitted in support of Mountain West's motion.

**Ninth Circuit Holding.** The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West's appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court's determination that Mountain West has a private right to enforce Title VI, affirmed the district court's decision to consider the disputed expert report by Mountain West's expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at \*\*1-4 (9<sup>th</sup> Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

**Mootness.** The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West's claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at \*2 (9<sup>th</sup> Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West's Title VI claim for damages is not moot. 2017 WL 2179120 at \*\*1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

The appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West's claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at \*\*1 (9<sup>th</sup> Cir.), Memorandum, May 16, 2017, at 4.

**Private Right of Action and Discrimination under Title VI.** The Court concluded for the reasons found in the district court's order that Mountain West may state a private claim for damages against Montana under Title VI. *Id.* at \*2. The district court had granted summary judgment to Montana on Mountain West's claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible “only if they are narrowly tailored measures that further compelling governmental interests.” *Mountain West*, 2017 WL 2179120 (9<sup>th</sup> Cir.) at \*2, Memorandum, May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at \*2, n.2, Memorandum, May 16, 2017, at 6, n. 2; see, 407 F.3d at 987.

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state’s DBE contracting program, “(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be ‘limited to those minority groups that have actually suffered discrimination.’” *Mountain West*, 2017 WL 2179120 at \*2 (9<sup>th</sup> Cir.), Memorandum, May 16, 2017, at 6-7, quoting, *Assoc. Gen. Contractors of Am. v. Cal. Dep’t of Transp.*, 713 F.3d 1187, 1196 (9<sup>th</sup> Cir. 2013) (quoting *W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from “a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” *Mountain West*, 2017 WL 2179120 at \*2 (9<sup>th</sup> Cir.), Memorandum, May 16, 2017, at 6-7, quoting, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a “good ol’ boys” network within the State’s contracting industry. *Mountain West*, 2017 WL 2179120 at \*3 (9<sup>th</sup> Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light of genuine disputes of material fact as to the study’s analysis, and because the second two categories of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120 at \*3 (9<sup>th</sup> Cir.), Memorandum, May 16, 2017, at 7.

**Disputes of fact as to study.** *Mountain West*’s expert testified that the study relied on several questionable assumptions and an opaque methodology to conclude that professional services contracts were awarded on a discriminatory basis. *Id.* at \*3. The Ninth Circuit pointed out a few examples that it found illustrated the areas in which there are disputes of fact as to whether the study sufficiently supported Montana’s actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. *W. States Paving*, 407 F.3d at 1000-01. *Mountain West* argues that the study did not explain whether or how it accounted for a given firm’s size, age, geography, or other similar factors. The report’s authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study’s statistical results *Mountain West*, 2017 WL 2179120 at \*3 (9<sup>th</sup> Cir.), Memorandum, May 16, 2017, at 8.

2. The study relied on a telephone survey of a sample of Montana contractors. Mountain West argued that (a) it is unclear how the study selected that sample, (b) only a small percentage of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at \*3 (9th Cir. May 16, 2017), Memorandum at 8-9.

3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that “some of the population samples were very small and the result may not be significant statistically.” 2017 WL 2179120 at \*3 (9th Cir. May 16, 2017), Memorandum at 8-9.

4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts, but professional services contracts composed less than ten percent of total contract volume in the State’s transportation contracting industry. 2017 WL 2179120 at \*3 (9th Cir. May 16, 2017), Memorandum at 9.

5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study’s comparison was appropriate. 2017 WL 2179120 at \*3 (9th Cir. May 16, 2017), Memorandum at 9.

**The post-2005 decline in participation by DBEs.** The Ninth Circuit was unable to affirm the district court’s order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender-based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at \*3 (9th Cir.), Memorandum, May 16, 2017, at 9, quoting *Western States*, 407 F.3d at 999 (“If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination.”); *id.* at 1001 (“The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs.”). *Id.*

The Ninth Circuit also cited to the U.S. DOT statement made to the Court in *Western States*. *Mountain West*, 2017 WL 2179120 at \*3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting, U.S. Dep’t of Transp., *Western States Paving Co. Case Q&A* (Dec. 16, 2014) (“In calculating availability of DBEs, [a state’s] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.”).

**Anecdotal evidence of discrimination.** The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at \*3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting, *Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) (“While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”); and quoting, *Crosby*, 488 U.S. at 509 (“[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to Mountain West's case, it concluded that the record provides an inadequate basis for summary judgment in Montana's favor. 2017 WL 2179120 at \*3.

**Conclusion.** The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at \*4 (9<sup>th</sup> Cir.), Memorandum, May 16, 2017, at 11. The case on remand was voluntarily dismissed by stipulation of parties (March 14, 2018).

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

The Associated General Contractors of America, Inc., San Diego Chapter, Inc., ("AGC") sought declaratory and injunctive relief against the California Department of Transportation ("Caltrans") and its officers on the grounds that Caltrans' Disadvantaged Business Enterprise ("DBE") program unconstitutionally provided race- and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans' DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans' DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans' substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans' program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans' DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

**Court Applies *Western States Paving Co. v. Washington State DOT* decision.** In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9<sup>th</sup> Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT's program because it was not narrowly tailored. *Id.*, citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for “narrow tailoring”:

*“(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination.”* *Id.* 1191, citing *Western States Paving Co.*, 407 F.3d at 997-998.

Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id.* at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California’s transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a “disparity index.” *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id.* at 1191. The Court stated: “Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and women-owned businesses should be expected to receive 13.5 percent of contact dollars from Caltrans administered federally assisted contracts.” *Id.* at 1191-1192.

The Court said the research firm “examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction).” *Id.* at 1192.

The Court pointed out a key difference between federally funded and state funded contracts is that race-conscious goals were in place for the federally funded contracts during the 2002–2006 period, but not for the state funded contracts. *Id.* at 1192. Thus, the Court stated: “state funded contracts functioned as a control group to help determine whether previous affirmative action programs skewed the data.” *Id.*

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans’ administrative districts, and computed aggregate disparities based on statewide data. *Id.* at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian–Pacific, and Native American firms. *Id.* However, the research firm found that there were not substantial disparities for these minorities in *every* subcategory of contract. *Id.* The Court noted that the disparity study also found substantial disparities in utilization of women-owned firms for some categories of contracts. *Id.* After publication of the disparity study, the Court pointed out the research firm calculated disparity indices for all women-owned firms, including female minorities,

showing substantial disparities in the utilization of all women-owned firms similar to those measured for white women. *Id.*

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm's findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id.*

Caltrans' DBE Program. Caltrans concluded that the evidence from the disparity study supported an inference of discrimination in the California transportation contracting industry. *Id.* at 1192-1193. Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian-Pacific American-, Native American-, and women-owned firms. *Id.* The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. *Id.*

Caltrans submitted its proposed DBE program to the USDOT for approval, including a request for a waiver to implement the program only for the four identified groups. *Id.* at 1193. The Caltrans' DBE program included 66 race-neutral measures that Caltrans already operated or planned to implement, and subsequent proposals increased the number of race-neutral measures to 150. *Id.* The USDOT granted the waiver, but initially did not approve Caltrans' DBE program until in 2009, the DOT approved Caltrans' DBE program for fiscal year 2009.

District Court proceedings. AGC then filed a complaint alleging that Caltrans' implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans' DBE program. The district court on motions of summary judgment held that Caltrans' program was "clearly constitutional," as it "was supported by a strong basis in evidence of discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. *Id.* at 1193.

Subsequent Caltrans study and program. While the appeal by the AGC was pending, Caltrans commissioned a new disparity study from BBC to update its DBE program as required by the federal regulations. *Id.* at 1193. In August 2012, BBC published its second disparity report, and Caltrans concluded that the updated study provided evidence of continuing discrimination in the California transportation contracting industry against the same four groups and Hispanic Americans. *Id.* Caltrans submitted a modified DBE program that is nearly identical to the program approved in 2009, except that it now includes Hispanic Americans and sets an overall goal of 12.5 percent, of which 9.5 percent will be achieved through race- and gender-conscious measures. *Id.* The USDOT approved Caltrans' updated program in November 2012. *Id.*

Jurisdiction issue. Initially, the Ninth Circuit Court of Appeals considered whether it had jurisdiction over the AGC's appeal based on the doctrines of mootness and standing. The Court held that the appeal is not moot because Caltrans' new DBE program is substantially



similar to the prior program and is alleged to disadvantage AGC's members "in the same fundamental way" as the previous program. *Id.* at 1194.

The Court, however, held that the AGC did not establish associational standing. *Id.* at 1194-1195: The Court found that the AGC did not identify any affected members by name nor has it submitted declarations by any of its members attesting to harm they have suffered or will suffer under Caltrans' program. *Id.* at 1194-1195. Because AGC failed to establish standing, the Court held it must dismiss the appeal due to lack of jurisdiction. *Id.* at 1195.

Caltrans' DBE Program held constitutional on the merits. The Court then held that even if AGC could establish standing, its appeal would fail. *Id.* at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id.* at 1195-1200.

The Court stated that race-conscious remedial programs must satisfy strict scrutiny and that although strict scrutiny is stringent, it is not "fatal in fact." *Id.* at 1194-1195 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (*Adarand III*)). The Court quoted *Adarand III*: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* (quoting *Adarand III*, 515 U.S. at 237.)

The Court pointed out that gender-conscious programs must satisfy intermediate scrutiny which requires that gender-conscious programs be supported by an 'exceedingly persuasive justification' and be substantially related to the achievement of that underlying objective. *Id.* at 1195 (citing *Western States Paving*, 407 F.3d at 990 n. 6.).

The Court held that Caltrans' DBE program contains both race- and gender-conscious measures, and that the "entire program passes strict scrutiny." *Id.* at 1195.

Application of strict scrutiny standard articulated in *Western States Paving*. The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving*. The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (quoting *Western States Paving*, 407 F.3d at 997-99).

Evidence of discrimination in California contracting industry. The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id.* at 1196. The U.S. Supreme Court has suggested that a "significant statistical disparity" could be sufficient to justify race-conscious remedial programs. *Id.* at \*7 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring "the cold numbers convincingly to life." *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT's DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to

the purported disparity because Washington's data "did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state." *Id.* (quoting *Western States Paving*, 407 F.3d at 999-1001). The Court said that it struck down Washington's program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry." *Id.*

Significantly, the Court held in this case as follows: "In contrast, Caltrans' affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry." *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. *Id.* The Court found the disparity study "accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs." *Id.* (citing *Western States*, 407 F.3d at 1000).

The Court also held: "Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, *see Croson*, 488 U.S. at 509, and certainly Caltrans' statistical evidence combined with anecdotal evidence passes constitutional muster." *Id.* at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of "specific acts" of "deliberate" discrimination by Caltrans employees or prime contractors. *Id.* at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that "[t]he degree of specificity required in the findings of discrimination ... may vary." *Id.* at 1197 (quoting *Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (citing *Croson*, 488 U.S. at 509). The Court rejected AGC's argument that Caltrans' program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.* The Court found that AGC's argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out "patterns of discrimination." *Id.* quoting *Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into "a system of racial exclusion practiced by elements of the local construction industry." *Id.* at 1197 quoting *Croson* 488 U.S. at 492.

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC's argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at \*9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the "good ol boy" network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id.* at 1198, citing *Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that *every* minority-owned business is discriminated against. *Id.* The Court concluded: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC's contention that Caltrans' evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC's early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all women-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans' decision to include all women in its DBE program. *Id.* at 1195.

Program tailored to groups who actually suffered discrimination. The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state's contracting industry. *Id.* at 1198. The Court found Caltrans' DBE program is limited to those minority groups that have actually suffered discrimination. *Id.* The Court held that the 2007 disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of

contract categories. *Id.* at 1198-1199. *Id.* These disparities, according to the Court, support an inference of discrimination against those groups. *Id.*

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans' program "adheres precisely to the narrow tailoring requirements of *Western States*." *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are "sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors." *Id.*

Consideration of race-neutral alternatives. The Court rejected the AGC assertion that Caltrans' program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id.* at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id.*

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

Certification affidavits for Disadvantaged Business Enterprises. The Court rejected the AGC argument that Caltrans' program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California*. *Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id.* at 1200.

Application of program to mixed state- and federally-funded contracts. The Court also rejected AGC's challenge that Caltrans applies its program to transportation contracts funded by both federal and state money. *Id.* at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for mix-funded contracts. *Id.*

Conclusion. The Court concluded that the AGC did not have standing, and that further, Caltrans' DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California transportation contracting industry, and 2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at 1200. The Court then dismissed the appeal. *Id.*

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

This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. ("AGC") against the California Department of Transportation ("Caltrans"), to the DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

Caltrans' DBE program set a 13.5 percent DBE goal for its federally-funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. *Id.* at 42. Accordingly, the race-conscious component of the Caltrans DBE program applied only to African Americans, Native Americans, Asian Pacific Americans, and white women. *Id.*

Caltrans established this goal and its DBE program following a disparity study conducted by BBC Research & Consulting, which included gathering statistical and anecdotal evidence of race and gender disparities in the California construction industry. Slip Opinion Transcript at 42.

The parties filed motions for summary judgment. The district court issued its ruling at the hearing on the motions for summary judgment granting Caltrans' motion for summary judgment in support of its DBE program and denying the motion for summary judgment filed by the plaintiffs. Slip Opinion Transcript at 54. The court held Caltrans' DBE program applying and implementing the provisions of the Federal DBE Program is valid and constitutional. *Id.* at 56.

The district court analyzed Caltrans' implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005). The court stated that the federal government has a compelling interest "in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Slip Opinion Transcript at 43, quoting *Western States Paving*, 407 F.3d at 991, citing *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

The district court pointed out that the Ninth Circuit in *Western States Paving* and the Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have upheld the facial validity of the Federal DBE Program.

The district court stated that based on *Western States Paving*, the court is required to look at the Caltrans DBE program itself to see if there is a strong basis in evidence to show that Caltrans is acting for a proper purpose and if the program itself has been narrowly tailored. Slip Opinion Transcript at 45. The court concluded that narrow tailoring “does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good-faith consideration of workable race-neutral alternatives.” Slip Opinion Transcript at 45.

The district court identified the issues as whether Caltrans has established a compelling interest supported by a strong basis in evidence for its program, and does Caltrans’ race-conscious program meet the strict scrutiny required. Slip Opinion Transcript at 51-52. The court also phrased the issue as whether the Caltrans DBE program, “which does give preference based on race and sex, whether that program is narrowly tailored to remedy the effects of identified discrimination...”, and whether Caltrans has complied with the Ninth Circuit’s guidance in *Western States Paving*. Slip Opinion Transcript at 52.

The district court held “that Caltrans has done what the Ninth Circuit has required it to do, what the federal government has required it to do, and that it clearly has implemented a program which is supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law.” Slip Opinion Transcript at 52.

The court rejected the plaintiff’s arguments that anecdotal evidence failed to identify specific acts of discrimination, finding “there are numerous instances of specific discrimination.” Slip Opinion Transcript at 52. The district court found that after the *Western States Paving* case, Caltrans went to a racially neutral program, and the evidence showed that the program would not meet the goals of the federally-funded program, and the federal government became concerned about what was going on with Caltrans’ program applying only race-neutral alternatives. *Id.* at 52-53. The court then pointed out that Caltrans engaged in an “extensive disparity study, anecdotal evidence, both of which is what was missing” in the *Western States Paving* case. *Id.* at 53.

The court concluded that Caltrans “did exactly what the Ninth Circuit required” and that Caltrans has gone “as far as is required.” Slip Opinion Transcript at 53.

The court held that as a matter of law, the Caltrans DBE program is, under *Western States Paving* and the Supreme Court cases, “clearly constitutional,” and “narrowly tailored.” Slip Opinion Transcript at 56. The court found there are significant differences between Caltrans’ program and the program in the *Western States Paving* case. *Id.* at 54-55. In *Western States Paving*, the court said there were no statistical studies performed to try and establish the discrimination in the highway contracting industry, and that Washington simply compared the proportion of DBE firms in the state with the percentage of contracting funds awarded to DBEs on race-neutral contracts to calculate a disparity. *Id.* at 55.

The district court stated that the Ninth Circuit in *Western States Paving* found this to be oversimplified and entitled to little weight “because it did not take into account factors that may affect the relative capacity of DBEs to undertake contracting work.” Slip Opinion Transcript at 55. Whereas, the district court held the “disparity study used by Caltrans was much more comprehensive and accounted for this and other factors.” *Id.* at 55. The district noted that the State of Washington did not introduce any anecdotal information. The difference in this case, the district court found, “is that the disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well. And this evidence before the Court clearly supports a finding that this program is constitutional.” *Id.* at 56.

The court held that because “Caltrans’ DBE program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry and because the Court finds that it is narrowly tailored, the Court upholds the program as constitutional.” Slip Opinion Transcript at 56.

The decision of the district court was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal based on lack of standing by the AGC, San Diego Chapter, but ruled on the merits on alternative grounds holding constitutional Caltrans’ DBE Program. *See discussion above of AGC, SDC v. Cal. DOT.*

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

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. (“Weeden”) against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

**Factual background and claims.** Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT’s DBE Program. 2013 WL 4774517 at \*1. MDT had established an overall goal of 5.83 percent DBE participation in Montana’s highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at \*1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden’s bid actually identified only

81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at \*2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana’s DBE Program. MDT’s DBE Participation Review Committee considered Weeden’s good faith documentation and found that Weeden’s bid

was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at \*2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at \*2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at \*2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at \*2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

**No proof of irreparable harm and balance of equities favor MDT.** First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at \*3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at \*3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

**No standing.** The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at \*3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at \*3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*



**Court applies AGC v. California DOT case; evidence supports narrowly tailored DBE program.** Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at \*4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013)(holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id.* at 4, citing *Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry." 2013 WL 4774517 at \*4, quoting *AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* at \*4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at \*4. Therefore, the Court concluded that given the similarities between Weeden's claim and AGC's equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at \*4.

**Due Process claim.** The Court also rejected Weeden's bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at \*5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT's decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at \*5.

**Holding and Voluntary Dismissal.** The Court denied plaintiff Weeden's application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

## ***7. Braunstein v. Arizona DOT, 683 F.3d 1177 (9th Cir. 2012)***

Braunstein is an engineering contractor that provided subsurface utility location services for ADOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona's former affirmative action program, or race- and gender- conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause.

**Factual background.** ADOT solicited bids for a new engineering and design contract. Six firms bid on the prime contract, but Braunstein did not bid because he could not satisfy a requirement that prime contractors complete 50 percent of the contract work themselves. Instead, Braunstein contacted the bidding firms to ask about subcontracting for the utility location work. 683 F.3d at 1181. All six firms rejected Braunstein's overtures, and Braunstein did not submit a quote or subcontracting bid to any of them. *Id.*

As part of the bid, the prime contractors were required to comply with federal regulations that provide states receiving federal highway funds maintain a DBE program. 683 F.3d at 1182. Under this contract, the prime contractor would receive a maximum of 5 points for DBE participation. *Id. at 1182.* All six firms that bid on the prime contract received the maximum 5 points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least 6 percent of the work. Only one of the six bidding firms selected a DBE as its desired utility location subcontractor. Three of the bidding firms selected another company other than Braunstein to perform the utility location work. *Id.* DMJM won the bid for the 2005 contract using Aztec to perform the utility location work. Aztec was not a DBE. *Id. at 1182.*

**District Court rulings.** Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein's claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (9<sup>th</sup> Cir. 2005). This left only Braunstein's damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id. at 1183.*

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract." *Id. at 1183.* The district court found that Braunstein's inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

**Lack of standing.** The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT's DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id. at 1185.* The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id.*

The Court also pointed out that Braunstein did not seek prospective relief against the government “affirmative action” program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id. at 1186*. Thus, Braunstein’s surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is “able and ready” to seek subcontracting work. *Id.*

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id. at 1186*. The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein’s ability to compete for work as a subcontractor. *Id. at 1187*. The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff’s showing that he has been subjected to such a barrier. *Id. at 1186*.

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id. at 1186*. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id. at 1187*.

**Summary judgment granted to ADOT.** The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id.* The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

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

This case out of the Ninth Circuit struck down a state’s implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington’s implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. (“plaintiff”) was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9<sup>th</sup> Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT (“WSDOT”) under the Transportation Equity Act for the 21<sup>st</sup> Century (“TEA-21”). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id. at 988*. TEA-21 established minimum minority-owned business participation

requirements (10%) for certain federally-funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is “aspirational,” and the statutory goal “does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.” *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to “adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies.” *Id.* at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (citing regulation). TEA-21 requires a generalized, “undifferentiated” minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id.* at 990 (citing regulation).

“A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses.” *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to “obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means.” *Id.* (citing regulation).

A prime contractor must use “good faith efforts” to satisfy a contract’s DBE utilization goal. *Id.* (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff’s challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington’s implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority

preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it “would not yield a different result.” *Id.* at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in “ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.” *Id.* at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* (“Adarand VII”), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that “[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination.” *Id.* at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff’s facial challenge. *Id.*

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington’s transportation contracting industry. *Id.* at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id.* The United States intervened to defend TEA-21’s facial constitutionality, and “unambiguously conceded that TEA-21’s race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present.” *Id.* at 996; see also Br. for the United States at 28 (April 19, 2004) (“DOT’s regulations ... are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient.” (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress’s nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states’ implementation of TEA-21 was narrowly tailored to achieve Congress’s remedial objective. *Id.* The Eighth Circuit thus looked to the states’ independent evidence of discrimination because “to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed.” *Id.* (internal citations omitted). The Eighth Circuit relied on the states’ statistical analyses of the

availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington's DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington's transportation contracting industry. *Id.* at 997-98. "If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex." *Id.* at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6<sup>th</sup> Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, citing *Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9<sup>th</sup> Cir. 1997), it had "previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination." *Id.* In *Monterey Mechanical*, the court held that "the overly inclusive designation of benefited minority groups was a 'red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.'" *Id.*, citing *Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, citing *Builders Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7<sup>th</sup> Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6<sup>th</sup> Cir. 2000); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT's DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." *Id.*

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (*i.e.*, 9% participation could be

achieved through race-neutral means). *Id.* at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id.*

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State's transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action's component. *Id.* The court found that the State's methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without "does not provide any evidence of discrimination against DBEs." *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to "little weight" because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State's argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress's compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court's grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State's liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

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

This case was before the district court pursuant to the Ninth Circuit's remand order in *Western States Paving Co. v. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (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. The remedy available to Western States remains for further adjudication and the case is currently pending.

### **10. *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9<sup>th</sup> Cir. 1997)**

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term "goals" as opposed to "quotas," the Ninth Circuit rejected such a distinction, holding "[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." The case also is instructive because it found the use of "goals" and the application of "good faith efforts" in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the "plaintiff") submitted the low bid for a construction project for the California Polytechnic State University (the "University"). 125 F.3d 702, 704 (9<sup>th</sup> Cir. 1994). The University rejected the plaintiff's bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

Importantly, the University did not conduct a disparity study, and instead argued that because "the 'goal requirements' of the scheme '[did] not involve racial or gender quotas, set-asides or preferences,'" the University did not need a disparity study. *Id.* at 705. The plaintiff protested the contract award and sued the University's trustees, and a number of other individuals (collectively the "defendants") alleging the state law was violative of the Equal Protection Clause. *Id.* The district court denied the plaintiff's motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. *Id.* at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. *Id.* at 709. The court held that contrary to the district court's finding, such a difference was not *de minimis*. *Id.*

The defendant's also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id.* at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, "they are rigid in requiring precisely described and monitored efforts to attain those goals." *Id.* The court cited its own earlier precedent to hold that "the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas ... [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." *Id.* at 710-11 (internal citations and quotations omitted). The court found that the statute

encouraged set asides and cited *Concrete Works of Colorado v. Denver*, 36 F.3d 1512 (10<sup>th</sup> Cir. 1994), as analogous support for the proposition. *Id.* at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although “worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness.” *Id.* The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (*e.g.*, advertising) to MBE/WBE firms. *Id.* at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id.* at 712-13. The court found the University presented “no evidence” to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id.* at 713. The court found that the statute was not narrowly tailored because the definition of “minority” was overbroad (*e.g.*, inclusion of Aleuts). *Id.* at 714, citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found “[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny.” *Id.* at 714, citing *Hopwood v. State of Texas*, 78 F.3d 932, 951 (5<sup>th</sup> Cir. 1996). The court held that the statute violated the Equal Protection Clause.

### ***11. Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”), 950 F.2d 1401 (9th Cir. 1991)***

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”)*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city’s bid preference program. 950 F.2d 1401 (9<sup>th</sup> Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the five percent preference given Local Business Enterprises (“LBEs”) and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined “MBE” as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. “WBE” was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC’s constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to

the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities' legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, citing *Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review." *Id.* at 1413, quoting *Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9<sup>th</sup> Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id.* at 1413 quoting *Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are "an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, citing to *Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring "the cold numbers convincingly to life. *Id.* at 1414, quoting *Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an "old boy network" still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a "combination of convincing

anecdotal and statistical evidence is potent.” *Id.* at 1415 quoting *Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 quoting *Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 quoting *Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, quoting *Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

## ***12. Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991)***

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9<sup>th</sup> Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington’s minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County’s MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a prima facie case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where “gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.” *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics “convincingly to life.” *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, citing *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11<sup>th</sup> Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, citing *Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, citing *Croson*, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at five percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King

County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id.* Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

## **E. Recent Decisions Involving the Federal DBE Program and its Implementation by State and Local Governments**

There are several recent and pending cases involving challenges to the United States Federal DBE Program and its implementation by the states and their governmental entities for federally-funded projects. These cases could have a significant impact on the nature and provisions of contracting and procurement on federally-funded projects, including and relating to the utilization of DBEs. In addition, these cases provide an instructive analysis of the recent application of the strict scrutiny test to MBE/WBE- and DBE-type programs.

### ***Recent Decisions in Federal Circuit Courts of Appeal***

#### ***1. Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017)***

Plaintiff Midwest Fence Corporation is a guardrails and fencing specialty contractor that usually bids on projects as a subcontractor. 2016 WL 6543514 at \*1. Midwest Fence is not a DBE. *Id.* Midwest Fence alleges that the defendants' DBE programs violated its Fourteenth Amendment right to equal protection under the law, and challenges the United States DOT



Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT (IDOT). *Id.* Midwest Fence also challenges the Illinois State Toll Highway Authority (Tollway) and its implementation of its DBE Program. *Id.*

The district court granted all the defendants' motions for summary judgment. *Id.* at \*1. See *Midwest Fence Corp. v. U.S. Department of Transportation, et al.*, 84 F. Supp. 3d 705 (N.D. Ill. 2015) (see discussion of district court decision below). The Seventh Circuit Court of Appeals affirmed the grant of summary judgment by the district court. *Id.* The court held that it joins the other federal circuit courts of appeal in holding that the Federal DBE Program is facially constitutional, the program serves a compelling government interest in remedying a history of discrimination in highway construction contracting, the program provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race- and gender-neutral measures before turning to race- and gender-conscious measures. *Id.*

The court of appeals also held the IDOT and Tollway programs survive strict scrutiny because these state defendants establish a substantial basis in evidence to support the need to remedy the effects of past discrimination in their markets, and the programs are narrowly tailored to serve that remedial purpose. *Id.* at \*1.

**Procedural history.** Midwest Fence asserted the following primary theories in its challenge to the Federal DBE Program, IDOT's implementation of it, and the Tollway's own program:

1. The federal regulations prescribe a method for setting individual contract goals that places an undue burden on non-DBE subcontractors, especially certain kinds of subcontractors, including guardrail and fencing contractors like Midwest Fence.
2. The presumption of social and economic disadvantage is not tailored adequately to reflect differences in the circumstances actually faced by women and the various racial and ethnic groups who receive that presumption.
3. The federal regulations are unconstitutionally vague, particularly with respect to good faith efforts to justify a front-end waiver.

*Id.* at \*3-4. Midwest Fence also asserted that IDOT's implementation of the Federal DBE Program is unconstitutional for essentially the same reasons. And, Midwest Fence challenges the Tollway's program on its face and as applied. *Id.* at \*4.

The district court found that Midwest Fence had standing to bring most of its claims and on the merits, and the court upheld the facial constitutionality of the Federal DBE Program. 84 F. Supp. 3d at 722-23 729; *id.* at \*4.

The district court also concluded Midwest Fence did not rebut the evidence of discrimination that IDOT offered to justify its program, and Midwest Fence had presented no "affirmative evidence" that IDOT's implementation unduly burdened non-DBEs, failed to make use of race-neutral alternatives, or lacked flexibility. 84 F. Supp. 3d at 733, 737; *id.* at \*4.

The district court noted that Midwest Fence's challenge to the Tollway's program paralleled the challenge to IDOT's program, and concluded that the Tollway, like IDOT, had established a strong basis in evidence for its program. 84 F. Supp. 3d at 737, 739; *id.* at \*4. In addition, the court concluded that, like IDOT's program, the Tollway's program imposed a minimal

burden on non-DBEs, employed a number of race-neutral measures, and offered substantial flexibility. 84 F. Supp. 3d at 739-740; *id.* at \*4.

**Standing to challenge the DBE Programs generally.** The defendants argued that Midwest Fence lacked standing. The court of appeals held that the district court correctly found that Midwest Fence has standing. *Id.* at \*5. The court of appeals stated that by alleging and then offering evidence of lost bids, decreased revenue, difficulties keeping its business afloat as a result of the DBE program, and its inability to compete for contracts on an equal footing with DBEs, Midwest Fence showed both causation and redressability. *Id.* at \*5.

The court of appeals distinguished its ruling in the *Dunnet Bay Construction Co. v. Borggren*, 799 F. 3d 676 (7th Cir. 2015), holding that there was no standing for the plaintiff Dunnet Bay based on an unusual and complex set of facts under which it would have been impossible for the plaintiff Dunnet Bay to have won the contract it sought and for which it sought damages. IDOT did not award the contract to anyone under the first bid and had relet the contract, thus Dunnet Bay suffered no injury because of the DBE program in the first bid. *Id.* at \*5. The court of appeals held this case is distinguishable from *Dunnet Bay* because Midwest Fence seeks prospective relief that would enable it to compete with DBEs on an equal basis more generally than in *Dunnet Bay*. *Id.* at \*5.

**Standing to challenge the IDOT Target Market Program.** The district court had carved out one narrow exception to its finding that Midwest Fence had standing generally, finding that Midwest Fence lacked standing to challenge the IDOT “target market program.” *Id.* at \*6. The court of appeals found that no evidence in the record established Midwest Fence bid on or lost any contracts subject to the IDOT target market program. *Id.* at \*6. The court stated that IDOT had not set aside any guardrail and fencing contracts under the target market program. *Id.* Therefore, Midwest Fence did not show that it had suffered from an inability to compete on an equal footing in the bidding process with respect to contracts within the target market program. *Id.*

**Facial versus as-applied challenge to the USDOT Program.** In this appeal, Midwest Fence did not challenge whether USDOT had established a “compelling interest” to remedy the effects of past or present discrimination. Thus, it did not challenge the national compelling interest in remedying past discrimination in its claims against the Federal DBE Program. *Id.* at \*6. Therefore, the court of appeals focused on whether the federal program is narrowly tailored. *Id.*

First, the court addressed a preliminary issue, namely, whether Midwest Fence could maintain an as-applied challenge against USDOT and the Federal DBE Program or whether, as the district court held, the claim against USDOT is limited to a facial challenge. *Id.* Midwest Fence sought a declaration that the federal regulations are unconstitutional as applied in Illinois. *Id.* The district court rejected the attempt to bring that claim against USDOT, treating it as applying only to IDOT. *Id.* at \*6 citing *Midwest Fence*, 84 F. Supp. 3d at 718. The court of appeals agreed with the district court. *Id.*

The court of appeals pointed out that a principal feature of the federal regulations is their flexibility and adaptability to local conditions, and that flexibility is important to the constitutionality of the Federal DBE Program, including because a race- and gender-conscious program must be narrowly tailored to serve the compelling governmental interest. *Id.* at \*6. The flexibility in regulations, according to the court, makes the state, not USDOT, primarily responsible for implementing their own programs in ways that comply

with the Equal Protection Clause. *Id.* at \*6. The court said that a state, not USDOT, is the correct party to defend a challenge to its implementation of its program. *Id.* Thus, the court held the district court did not err by treating the claims against USDOT as only a facial challenge to the federal regulations. *Id.*

**Federal DBE Program: Narrow Tailoring.** The Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits all found the Federal DBE Program constitutional on its face, and the Seventh Circuit agreed with these other circuits. *Id.* at \*7. The court found that narrow tailoring requires “a close match between the evil against which the remedy is directed and the terms of the remedy.” *Id.* The court stated it looks to four factors in determining narrow tailoring: (a) “the necessity for the relief and the efficacy of alternative [race-neutral] remedies,” (b) “the flexibility and duration of the relief, including the availability of waiver provisions,” (c) “the relationship of the numerical goals to the relevant labor [or here, contracting] market,” and (d) “the impact of the relief on the rights of third parties.” *Id.* at \*7 quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987). The Seventh Circuit also pointed out that the Tenth Circuit added to this analysis the question of over- or under-inclusiveness. *Id.* at \*7.

In applying these factors to determine narrow tailoring, the court said that first, the Federal DBE Program requires states to meet as much as possible of their overall DBE participation goals through race- and gender-neutral means. *Id.* at \*7, citing 49 C.F.R. § 26.51(a). Next, on its face, the federal program is both flexible and limited in duration. *Id.* Quotas are flatly prohibited, and states may apply for waivers, including waivers of “any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts,” § 26.15(b). *Id.* at \*7. The regulations also require states to remain flexible as they administer the program over the course of the year, including continually reassessing their DBE participation goals and whether contract goals are necessary. *Id.*

The court pointed out that a state need not set a contract goal on every USDOT-assisted contract, nor must they set those goals at the same percentage as the overall participation goal. *Id.* at \*7. Together, the court found, all of these provisions allow for significant and ongoing flexibility. *Id.* at \*8. States are not locked into their initial DBE participation goals. *Id.* Their use of contract goals is meant to remain fluid, reflecting a state’s progress towards overall DBE goal. *Id.*

As for duration, the court said that Congress has repeatedly reauthorized the program after taking new looks at the need for it. *Id.* at \*8. And, as noted, states must monitor progress toward meeting DBE goals on a regular basis and alter the goals if necessary. *Id.* They must stop using race- and gender-conscious measures if those measures are no longer needed. *Id.*

The court found that the numerical goals are also tied to the relevant markets. *Id.* at \*8. In addition, the regulations prescribe a process for setting a DBE participation goal that focuses on information about the specific market, and that it is intended to reflect the level of DBE participation you would expect absent the effects of discrimination. *Id.* at \*8, citing § 26.45(b). The court stated that the regulations thus instruct states to set their DBE participation goals to reflect actual DBE availability in their jurisdictions, as modified by other relevant factors like DBE capacity. *Id.* at \*8.

**Midwest Fence “mismatch” argument: burden on third parties.** Midwest Fence, the court said, focuses its criticism on the burden of third parties and argues the program is over-inclusive. *Id.* at \*8. But, the court found, the regulations include mechanisms to

minimize the burdens the program places on non-DBE third parties. *Id.* A primary example, the court points out, is supplied in § 26.33(a), which requires states to take steps to address overconcentration of DBEs in certain types of work if the overconcentration unduly burdens non-DBEs to the point that they can no longer participate in the market. *Id.* at \*8. The court concluded that standards can be relaxed if uncompromising enforcement would yield negative consequences, for example, states can obtain waivers if special circumstances make the state's compliance with part of the federal program "impractical," and contractors who fail to meet a DBE contract goal can still be awarded the contract if they have documented good faith efforts to meet the goal. *Id.* at \*8, citing § 26.51(a) and § 26.53(a)(2).

Midwest Fence argued that a "mismatch" in the way contract goals are calculated results in a burden that falls disproportionately on specialty subcontractors. *Id.* at \*8. Under the federal regulations, the court noted, states' overall goals are set as a percentage of all their USDOT-assisted contracts. *Id.* However, states may set contract goals "only on those [USDOT]-assisted contracts that have subcontracting possibilities." *Id.*, quoting § 26.51(e)(1)(emphasis added).

Midwest Fence argued that because DBEs must be small, they are generally unable to compete for prime contracts, and this they argue is the "mismatch." *Id.* at \*8. Where contract goals are necessary to meet an overall DBE participation goal, those contract goals are met almost entirely with *subcontractor* dollars, which, Midwest Fence asserts, places a heavy burden on non-DBE subcontractors while leaving non-DBE prime contractors in the clear. *Id.* at \*8.

The court goes through a hypothetical example to explain the issue Midwest Fence has raised as a mismatch that imposes a disproportionate burden on specialty subcontractors like Midwest Fence. *Id.* at \*8. In the example provided by the court, the overall participation goal for a state calls for DBEs to receive a certain percentage of *total* funds, but in practice in the hypothetical it requires the state to award DBEs for less than all of the available subcontractor funds because it determines that there are no subcontracting possibilities on half the contracts, thus rendering them ineligible for contract goals. *Id.* The mismatch is that the federal program requires the state to set its overall goal on all funds it will spend on contracts, but at the same time the contracts eligible for contract goals must be ones that have subcontracting possibilities. *Id.* Therefore, according to Midwest Fence, in practice the participation goals set would require the state to award DBEs from the available subcontractor funds while taking no business away from the prime contractors. *Id.*

The court stated that it found "[t]his prospect is troubling." *Id.* at \*9. The court said that the DBE program can impose a disproportionate burden on small, specialized non-DBE subcontractors, especially when compared to larger prime contractors with whom DBEs would compete less frequently. *Id.* This potential, according to the court, for a disproportionate burden, however, does not render the program facially unconstitutional. *Id.* The court said that the constitutionality of the Federal DBE Program depends on how it is implemented. *Id.*

The court pointed out that some of the suggested race- and gender-neutral means that states can use under the federal program are designed to increase DBE participation in prime contracting and other fields where DBE participation has historically been low, such as specifically encouraging states to make contracts more accessible to small businesses. *Id.* at \*9, citing § 26.39(b). The court also noted that the federal program contemplates DBEs'

ability to compete equally requiring states to report DBE participation as prime contractors and makes efforts to develop that potential. *Id.* at \*9.

The court stated that states will continue to resort to contract goals that open the door to the type of mismatch that Midwest Fence describes, but the program on its face does not compel an unfair distribution of burdens. *Id.* at \*9. Small specialty contractors may have to bear at least some of the burdens created by remedying past discrimination under the Federal DBE Program, but the Supreme Court has indicated that innocent third parties may constitutionally be required to bear at least some of the burden of the remedy. *Id.* at \*9.

**Over-Inclusive argument.** Midwest Fence also argued that the federal program is over-inclusive because it grants preferences to groups without analyzing the extent to which each group is actually disadvantaged. *Id.* at \*9. In response, the court mentioned two federal-specific arguments, noting that Midwest Fence’s criticisms are best analyzed as part of its as-applied challenge against the state defendants. *Id.* First, Midwest Fence contends nothing proves that the disparities relied upon by the study consultant were caused by discrimination. *Id.* at \*9. The court found that to justify its program, USDOT does not need definitive proof of discrimination, but must have a strong basis in evidence that remedial action is necessary to remedy past discrimination. *Id.*

Second, Midwest Fence attacks what it perceives as the one-size-fits-all nature of the program, suggesting that the regulations ought to provide different remedies for different groups, but instead the federal program offers a single approach to all the disadvantaged groups, regardless of the degree of disparities. *Id.* at \*9. The court pointed out Midwest Fence did not argue that any of the groups were not in fact disadvantaged at all, and that the federal regulations ultimately require individualized determinations. *Id.* at \*10. Each presumptively disadvantaged firm owner must certify that he or she is, in fact, socially and economically disadvantaged, and that presumption can be rebutted. *Id.* In this way, the court said, the federal program requires states to extend benefits only to those who are actually disadvantaged. *Id.*

Therefore the court agreed with the district court that the Federal DBE Program is narrowly tailored on its face, so it survives strict scrutiny.

**Claims against IDOT and the Tollway: void for vagueness.** Midwest Fence argued that the federal regulations are unconstitutionally vague as applied by IDOT because the regulations fail to specify what good faith efforts a contractor must make to qualify for a waiver, and focuses its attack on the provisions of the regulations, which address possible cost differentials in the use of DBEs. *Id.* at \*11. Midwest Fence argued that Appendix A of 49 C.F.R., Part 26 at ¶ IV(D)(2) is too vague in its language on when a difference in price is significant enough to justify falling short of the DBE contract goal. *Id.* The court found if the standard seems vague, that is likely because it was meant to be flexible, and a more rigid standard could easily be too arbitrary and hinder prime contractors’ ability to adjust their approaches to the circumstances of particular projects. *Id.* at \*11.

The court said Midwest Fence’s real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. *Id.* at \*12. Midwest Fence contends this creates a *de facto* system of quotas because contractors believe they must meet the DBE goal or lose the contract. *Id.* But Appendix A to the regulations, the court noted, cautions against this very approach. *Id.* The court found

flexibility and the availability of waivers affect whether a program is narrowly tailored, and that the regulations caution against quotas, provide examples of good faith efforts prime contractors can make and states can consider, and instruct a bidder to use good business judgment to decide whether a price difference is reasonable or excessive. *Id.* For purposes of contract awards, the court holds this is enough to give fair notice of conduct that is forbidden or required. *Id.* at \*12.

**Equal Protection challenge: compelling interest with strong basis in evidence.** In ruling on the merits of Midwest Fence’s equal protection claims based on the actions of IDOT and the Tollway, the first issue the court addresses is whether the state defendants had a compelling interest in enacting their programs. *Id.* at \*12. The court stated that it, along with the other circuit courts of appeal, have held a state agency is entitled to rely on the federal government’s compelling interest in remedying the effects of past discrimination to justify its own DBE plan for highway construction contracting. *Id.* But, since not all of IDOT’s contracts are federally funded, and the Tollway did not receive federal funding at all, with respect to those contracts, the court said it must consider whether IDOT and the Tollway established a strong basis in evidence to support their programs. *Id.*

**IDOT program.** IDOT relied on an availability and a disparity study to support its program. The disparity study found that DBEs were significantly underutilized as prime contractors comparing firm availability of prime contractors in the construction field to the amount of dollars they received in prime contracts. The disparity study collected utilization records, defined IDOT’s market area, identified businesses that were willing and able to provide needed services, weighted firm availability to reflect IDOT’s contracting pattern with weights assigned to different areas based on the percentage of dollars expended in those areas, determined whether there was a statistically significant under-utilization of DBEs by calculating the dollars each group would be expected to receive based on availability, calculated the difference between the expected and actual amount of contract dollars received, and ensured that results were not attributable to chance. *Id.* at \*13.

The court said that the disparity study determined disparity ratios that were statistically significant and the study found that DBEs were significantly underutilized as prime contractors, noting that a figure below 0.80 is generally considered “solid evidence of systematic under-utilization calling for affirmative action to correct it.” *Id.* at \*13. The study found that DBEs made up 25.55% of prime contractors in the construction field, received 9.13% of prime contracts valued below \$500,000 and 8.25% of the available contract dollars in that range, yielding a disparity ratio of 0.32 for prime contracts under \$500,000. *Id.*

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

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

contracts advertised without a DBE goal, the DBE subcontractor participation rate was 0.84%.

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

The study found that out of 115 disparity indices, 80 showed statistically significant under-utilization of DBEs. *Id.* at \*14. The study discussed statistical disparities in earnings and the formation of businesses by minorities and women, and concluded that a statistically significant adverse impact on earnings was observed in both the economy at large and in the construction and construction-related professional services sector." *Id.* at \*14. The study also found women and minorities are not as likely to start their own business, and that minority business formation rates would likely be substantially and significantly higher if markets operated in a race- and sex-neutral manner. *Id.*

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

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

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

The court pointed out that one major problem with Midwest Fence's report is that the consultant did not perform any substantive analysis of his own. *Id.* at \*15. The evidence offered by Midwest Fence and its consultant was, according to the court, "speculative at best." *Id.* at \*15. The court said the consultant's relative capacity analysis was similarly

speculative, arguing that the assumption that firms have the same ability to provide services up to \$500,000 may not be true in practice, and that if the estimates of capacity are too low the resulting disparity index overstates the degree of disparity that exists. *Id.* at \*15.

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

The court rejected Midwest Fence's argument that requiring it to provide an independent statistical analysis places an impossible burden on it due to the time and expense that would be required. *Id.* at \*15. The court noted that the burden is initially on the government to justify its programs, and that since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. *Id.* Speculative criticism about potential problems, the court found, will not carry that burden. *Id.*

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

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

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

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

In connection with Midwest Fence's argument relating to the Tollway defendant, Midwest Fence argued that the Tollway's supporting data was from before it instituted its DBE program. *Id.* at \*16. The Tollway responded by arguing that it used the best data available and that in any event its data sets show disparities. *Id.* at \*16. The court found this point persuasive even assuming some of the Tollway's data were not exact. *Id.* The court said that



while every single number in the Tollway’s “arsenal of evidence” may not be exact, the overall picture still shows beyond reasonable dispute a marketplace with systemic under-utilization of DBEs far below the disparity index lower than 80 as an indication of discrimination, and that Midwest Fence’s “abstract criticisms” do not undermine that core of evidence. *Id.* at \*16.

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

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.* The court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

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

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

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

The court stated that Midwest’s “best argument” against narrowed tailoring is its “mismatch” argument, which was discussed above. *Id.* at \*17. The court said Midwest’s broad condemnation of the IDOT and Tollway programs as failing to create a “light” and “diffuse” burden for third parties was not persuasive. *Id.* The court noted that the DBE

programs, which set DBE goals on only some contracts and allow those goals to be waived if necessary, may end up foreclosing one of several opportunities for a non-DBE specialty subcontractor like Midwest Fence. *Id.* But, there was no evidence that they impose the entire burden on that subcontractor by shutting it out of the market entirely. *Id.* However, the court found that Midwest Fence's point that subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors "is troubling." *Id.* at \*17.

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

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely "theoretical." *Id.* at \*18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use neutral measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that DBE trucking and material suppliers count toward fulfillment of a contract's DBE goal, even though they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

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

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

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

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

**2. *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, *Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al.*, 2016 WL 193809 (Oct. 3, 2016).**

Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT's DBE Program discriminates on the basis of race. The district court granted summary judgment to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 799 F.3d at 679. (See 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (See summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

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

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

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

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

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

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

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

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at 687. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at 688. (See discussion of the district court decision in *Dunnet Bay* below in Section E).

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

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

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

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

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project

estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

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

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at 693. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* at 694, quoting, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's size. *Id.*

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

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

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

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.*, at 697, quoting *Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state

is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id.* quoting *Northern Contracting*, 473 F.3d at 721.

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

In challenging the DBE contract goal, Dunnet Bay asserts that the 22% goal was "arbitrary" and that IDOT manipulated the process to justify a preordained goal. *Id.* at 698. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

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

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

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

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

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith

efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at 700. The court said Dunnet Bay's efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

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

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

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

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's ("IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7<sup>th</sup> Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id.* at 719. The district court granted the USDOT's Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id.* at 720. NCI also forfeited the argument that IDOT's DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT's program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id.* This initial list was corrected for errors in the data by surveying the D&B list. *Id.* In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along with other data, including DBE utilization on IDOT's "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id.* at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id.*

Despite the fact the NCI forfeited the argument that IDOT's DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id.* at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government's compelling interest in implementing a local DBE plan. *Id.* at 720-21,

citing *Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9<sup>th</sup> Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8<sup>th</sup> Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that “[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government .... If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution.” *Id.* at 721, quoting *Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7<sup>th</sup> Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT’s DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit’s opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law “when the 10 percent federal set-aside was more mandatory”) was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes more clear now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id.* at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI’s collateral attack on the federal regulations was impermissible. *Id.* at 722.

The remainder of the court’s opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI’s arguments failed. *Id.* First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id.* NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id.* The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id.* at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled “Alternative Methods,” and states: “You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.” *Id.* (citing 49 CFR § 26.45(c)(5)). According to the court, the regulations make clear that “relative availability” means “the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate” on DOT contracts. *Id.* The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id.* The court agreed with the district court that the



remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id.*

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id.* The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id.* According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id.*

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id.* at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id.* at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id.* According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id.*

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id.*

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

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26 ). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the federal regulations governing the states' implementation of the Federal DBE Program were narrowly tailored, and the state DOT's implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and Gross Seed both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment's Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads ("Nebraska DOR") under a strict scrutiny analysis and held

that the Federal DBE Program was valid and constitutional and that the Minnesota DOT's and Nebraska DOR's implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, Sherbrooke and Gross Seed argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side's position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state's implementation becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id.* The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id.* Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally-funded highway contracts. *See*, 49 CFR § 26.45(f)(1). The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 CFR § 26.45(b). The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See*, 49 CFR § 26.45(d).

The state must meet the “maximum feasible portion” of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See*, 49 CFR § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 CFR § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods “[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination.” 49 CFR § 26.51(f).

Absent bad faith administration of the program, a state’s failure to achieve its overall goal will not be penalized. *See*, 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See*, 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 CFR § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court’s narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, *citing Grutter v. Bollinger*, 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$750,000.00 cannot qualify as economically disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.*; 49 CFR § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See*, 49 CFR § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contracting markets. *Id.* at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the

court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and Gross Seed also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, *citing* 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id.* The precipitous drop in DBE participation when no race-conscious methods were employed, the court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id.* On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like Sherbrooke, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (*See* district court opinions discussed *infra*.)

***5. Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta, 532 U.S. 941, 534 U.S. 103 (2001)***

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari “as improvidently granted” without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is “narrowly tailored,” and therefore upheld the constitutionality of the Federal DBE Program.

Following the Supreme Court’s vacation of the Tenth Circuit’s dismissal on mootness grounds, the court addressed the merits of this appeal, namely, the federal government’s challenge to the district court’s grant of summary judgment to plaintiff-appellee Adarand Constructors, Inc. In so doing, the court resolved the constitutionality of the use in federal subcontracting procurement of the Subcontractor Compensation Clause (“SCC”), which employs race-conscious presumptions designed to favor minority enterprises and other “disadvantaged business enterprises” (“DBEs”). The court’s evaluation of the SCC program utilizes the “strict scrutiny” standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case. *Id.* at 1155.

The court addressed the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality. *Id.* at 1160. It was the judgment of the court that the SCC program and the DBE certification programs as currently structured, though not as they were structured in 1997 when the district court last rendered judgment, passed constitutional muster: The court held they were narrowly tailored to serve a compelling governmental interest. *Id.*

**“Compelling Interest” in race-conscious measures defined.** The court stated that there may be a compelling interest that supports the enactment of race-conscious measures. Justice

O'Connor explicitly states: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand III*, 515 U.S. at 237; see also *Shaw v. Hunt*, 517 U.S. 899, 909, (1996) (stating that "remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions" (citing *Croson*, 488 U.S. at 498–506)). Interpreting *Croson*, the court recognized that "the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry' by allowing tax dollars 'to finance the evil of private prejudice.'" *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1519 (10th Cir.1994) (quoting *Croson*, 488 U.S. at 492, 109 S.Ct. 706). *Id.* at 1164.

The government identified the compelling interest at stake in the use of racial presumptions in the SCC program as "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups." *Id.*

**Evidence required to show compelling interest.** While the government's articulated interest was compelling as a theoretical matter, the court determined whether the actual evidence proffered by the government supported the existence of past and present discrimination in the publicly-funded highway construction subcontracting market. *Id.* at 1166.

The "benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation [i]s whether there exists a 'strong basis in evidence for [the government's] conclusion that remedial action was necessary.'" *Concrete Works*, 36 F.3d at 1521 (quoting *Croson*, 488 U.S. at 500, (quoting (plurality))) (emphasis in *Concrete Works*). Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not. *Id.* at 1166, citing *Concrete Works*, 36 F.3d at 1520–21.

After the government's initial showing, the burden shifted to *Adarand* to rebut that showing: "Notwithstanding the burden of initial production that rests" with the government, "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id.* (quoting *Wygant*, 476 U.S. at 277–78, (plurality)). "[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.* at 1166, quoting, *Concrete Works*, at 1522–23.

In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, the court considered both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* at 1166, citing, *Concrete Works*, 36 F.3d at 1521, 1529 n. 23 (considering post-enactment evidence). The court stated it may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus, any findings Congress has made as to the entire construction industry are relevant. *Id.* at 1166–67 citing, *Concrete Works*, at 1523, 1529, and *Croson*, 488 U.S. at 492 (Op. of O'Connor, J.).

**Evidence in the present case.** There can be no doubt, the court found, that Congress repeatedly has considered the issue of discrimination in government construction procurement

contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts—especially construction contracts—necessitating a race-conscious remedy. *Id.* at 1167, citing, *Appendix—The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed.Reg. 26,050, 26,051–52 & nn. 12–21 (1996) (“*The Compelling Interest*”) (citing approximately thirty congressional hearings since 1980 concerning minority-owned businesses). But, the court said, the question is not merely *whether* the government has considered evidence, but rather the *nature and extent* of the evidence it has considered. *Id.*

In *Concrete Works*, the court noted that:

Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality’s affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality’s showing that “it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Croson*, 488 U.S. at 492, 109 S.Ct. 706. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality’s factual predicate for a race- and gender-conscious program.

*Id.* at 1167, quoting, *Concrete Works*, 36 F.3d at 1529. Unlike *Concrete Works*, the evidence presented by the government in the present case demonstrated the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government’s disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at 1168. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presented further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs. *Id.* at 1168.

**a. Barriers to minority business formation in construction subcontracting.** As to the first kind of barrier, the government’s evidence consisted of numerous congressional investigations and hearings as well as outside studies of statistical and anecdotal evidence—cited and discussed in *The Compelling Interest*, 61 Fed.Reg. 26,054–58—and demonstrated that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide. *Id.* at 1168. The evidence demonstrated that prime contractors in the construction industry often refuse to employ minority subcontractors due to “old boy” networks—based on a familial history of participation in the subcontracting market—from which minority firms have traditionally been excluded. *Id.*

Also, the court found, subcontractors’ unions placed before minority firms a plethora of barriers to membership, thereby effectively blocking them from participation in a subcontracting market in which union membership is an important condition for

success. *Id.* at 1169. The court stated that the government’s evidence was particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied. *Id.* at 1169.

**b. Barriers to competition by existing minority enterprises.** With regard to barriers faced by existing minority enterprises, the government presented evidence tending to show that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies fosters a decidedly uneven playing field for minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts. *Id.* at 1170. The court said it was clear that Congress devoted considerable energy to investigating and considering this systematic exclusion of existing minority enterprises from opportunities to bid on construction projects resulting from the insularity and sometimes outright racism of non-minority firms in the construction industry. *Id.* at 1171.

The government’s evidence, the court found, strongly supported the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms. *Id.* Minority subcontracting enterprises in the construction industry, the court pointed out, found themselves unable to compete with non-minority firms on an equal playing field due to racial discrimination by bonding companies, without whom those minority enterprises cannot obtain subcontracting opportunities. The government presented evidence that bonding is an essential requirement of participation in federal subcontracting procurement. *Id.* Finally, the government presented evidence of discrimination by suppliers, the result of which was that nonminority subcontractors received special prices and discounts from suppliers not available to minority subcontractors, driving up “anticipated costs, and therefore the bid, for minority-owned businesses.” *Id.* at 1172.

Contrary to Adarand’s contentions, on the basis of the foregoing survey of evidence regarding minority business formation and competition in the subcontracting industry, the court found the government’s evidence as to the kinds of obstacles minority subcontracting businesses face constituted a strong basis for the conclusion that those obstacles are not “the same problems faced by any new business, regardless of the race of the owners.” *Id.* at 1172.

**c. Local disparity studies.** The court noted that following the Supreme Court’s decision in *Croson*, numerous state and local governments undertook statistical studies to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting. *Id.* at 1172. The government’s review of those studies revealed that although such disparity was least glaring in the category of construction subcontracting, even in that area “minority firms still receive only 87 cents for every dollar they would be expected to receive” based on their availability. *The Compelling Interest*, 61 Fed.Reg. at 26,062. *Id.* In that regard, the *Croson* majority stated that “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government’s] prime contractors, an inference of discriminatory exclusion could arise.” *Id.* quoting, 488 U.S. at 509 (Op. of O’Connor, J.) (citations omitted).

The court said that it was mindful that “where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.” *Id.* at 1172, quoting, *Croson* at 501–02. But the court found that here, it was unaware of such “special qualifications”



aside from the general qualifications necessary to operate a construction subcontracting business. *Id.* At a minimum, the disparity indicated that there had been under-utilization of the existing pool of minority subcontractors; and there is no evidence either in the record on appeal or in the legislative history before the court that those minority subcontractors who *have* been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications. *Id.* at 1173.

The court found the disparity between minority DBE availability and market utilization in the subcontracting industry raised an inference that the various discriminatory factors the government cites have created that disparity. *Id.* at 1173. In *Concrete Works*, the court stated that “[w]e agree with the other circuits which have interpreted *Croson* impliedly to permit a municipality to rely ... on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger’s summary judgment motion,” and the court here said it did not see any different standard in the case of an analogous suit against the federal government. *Id.* at 1173, *citing, Concrete Works*, 36 F.3d at 1528. Although the government’s aggregate figure of a 13% disparity between minority enterprise availability and utilization was not overwhelming evidence, the court stated it was significant. *Id.*

It was made more significant by the evidence showing that discriminatory factors discourage both enterprise formation of minority businesses and utilization of existing minority enterprises in public contracting. *Id.* at 1173. The court said that it would be “sheer speculation” to even attempt to attach a particular figure to the hypothetical number of minority enterprises that would exist without discriminatory barriers to minority DBE formation. *Id.* at 1173, *quoting, Croson*, 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers, the court found was nevertheless relevant to the assessment of whether a disparity was sufficiently significant to give rise to an inference of discriminatory exclusion. *Id.* at 1174.

**d. Results of removing affirmative action programs.** The court took notice of an additional source of evidence of the link between compelling interest and remedy. There was ample evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears. *Id.* at 1174. Although that evidence standing alone the court found was not dispositive, it strongly supported the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination. *Id.* “Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” *Id.* at 1174, *quoting, Croson*, 488 U.S. at 509 (Op. of O’Connor, J.) (citations omitted).

In sum, on the basis of the foregoing body of evidence, the court concluded that the government had met its initial burden of presenting a “strong basis in evidence” sufficient to support its articulated, constitutionally valid, compelling interest. *Id.* at 1175, *citing, Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

**Adarand’s rebuttal failed to meet their burden.** Adarand, the court found utterly failed to meet their “ultimate burden” of introducing credible, particularized evidence to rebut the government’s initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement

subcontracting market. *Id.* at 1175. The court rejected Adarand’s characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous “disparity studies” cited by the government and its amici curiae as supplemental evidence of discrimination. *Id.* The evidence cited by the government and its amici curiae and examined by the court only reinforced the conclusion that “racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation’s contracting markets.” *Id.*

The government’s evidence permitted a finding that as a matter of law Congress had the requisite strong basis in evidence to take action to remedy racial discrimination and its lingering effects in the construction industry. *Id.* at 1175. This evidence demonstrated that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises—both discussed above—were caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at 1176. Congress was not limited to simply proscribing federal discrimination against minority contractors, as it had already done. The court held that the Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice. *Id.* at 1176.

The court also rejected Adarand’s contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. *Id.* at 1176. If Congress had valid evidence, for example that Asian-American individuals are subject to discrimination because of their status as Asian-Americans, the court noted it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. *Id.* “Race” the court said is often a classification of dubious validity—scientifically, legally, and morally. The court did not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities.” *Id.* at 1176, note 18, *citing*, 15 U.S.C. § 637(d)(3)(C).

The court stated that it was not suggesting that the evidence cited by the government was un rebuttable. *Id.* at 1176. Rather, the court indicated it was pointing out that under precedent it is for Adarand to rebut that evidence, and it has not done so to the extent required to raise a genuine issue of material fact as to whether the government has met its evidentiary burden. *Id.* The court reiterated that “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* at 1522 (quoting *Wygant*, 476 U.S. at 277–78, 106 S.Ct. 1842 (plurality)). “[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity’s] evidence did not support an inference of prior discrimination and thus a remedial purpose.” *Id.* (quoting *Wygant*, 476 U.S. at 293, 106 S.Ct. 1842 (O’Connor, J., concurring)). Because Adarand had failed utterly to meet its burden, the court held the government’s initial showing stands. *Id.*

In sum, guided by *Concrete Works*, the court concluded that the evidence cited by the government and its amici, particularly that contained in *The Compelling Interest*, 61 Fed.Reg. 26,050, more than satisfied the government’s burden of production regarding the

compelling interest for a race-conscious remedy. *Id.* at 1176. Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies. *Id.* The court therefore affirmed the district court’s finding of a compelling interest. *Id.*

**Narrow Tailoring.** The court stated it was guided in its inquiry by the Supreme Court cases that have applied the narrow-tailoring analysis to government affirmative action programs. *Id.* at 1177. In applying strict scrutiny to a court-ordered program remedying the failure to promote black police officers, a plurality of the Court stated that

[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

*Id.* at 1177, quoting, *Paradise*, 480 U.S. at 171 (1986) (plurality op. of Brennan, J.) (citations omitted).

Regarding flexibility, “the availability of waiver” is of particular importance. *Id.* As for numerical proportionality, *Croson* admonished the courts to beware of the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, quoting, *Croson*, 488 U.S. at 507 (quoting *Sheet Metal Workers*, 478 U.S. at 494 (O’Connor, J., concurring in part and dissenting in part)). In that context, a “rigid numerical quota,” the court noted particularly disservices the cause of narrow tailoring. *Id.* at 1177, citing, *Croson*, 508. As for burdens imposed on third parties, the court pointed to a plurality of the Court in *Wygant* that stated:

As part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. “When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a ‘sharing of the burden’ by innocent parties is not impermissible.” 476 U.S. at 280–81 (Op. of Powell, J.) (quoting *Fullilove*, 448 U.S. at 484 (plurality)) (further quotations and footnote omitted). We are guided by that benchmark.

*Id.* at 1177.

Justice O’Connor’s majority opinion in *Croson* added a further factor to the court’s analysis: under- or over-inclusiveness of the DBE classification. *Id.* at 1177. In *Croson*, the Supreme Court struck down an affirmative action program as insufficiently narrowly tailored in part because “there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination.... [T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.” *Id.*, quoting, *Croson*, 488 U.S. at 508 (citation omitted). Thus, the court said it must be especially careful to inquire into whether there has been an effort to identify worthy participants in DBE programs or whether the programs in question paint with too broad—or too narrow—a brush. *Id.*

The court stated more specific guidance was found in *Adarand III*, where in remanding for strict scrutiny, the Supreme Court identified two questions apparently of particular importance in the instant case: (1) “[c]onsideration of the use of race-neutral means;” and (2) “whether the program [is] appropriately limited [so as] not to last longer than the discriminatory effects it is designed to eliminate.” *Id.* at 1177, quoting *Adarand III*, 515 U.S. at 237–38 (internal quotations and citations omitted). The court thus engaged in a thorough analysis of the federal program in light of *Adarand III*’s specific questions on remand, and the foregoing narrow-tailoring factors: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the SCC and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1178.

It is significant to note that the court in determining the Federal DBE Program is “narrowly tailored” focused on the federal regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

[y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 CFR § 26.51(a)(2000); see also 49 CFR § 26.51(f)(2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, see 49 CFR § 26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See 49 CFR § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 228 F.3d at 1178-1179.

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state’s construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress’s power to enact nationwide legislation. *Id.* at 1185-1186.

The court stated that because of the “unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications,” extrapolating findings of discrimination against the various ethnic groups “is more a question of nomenclature than of narrow tailoring.” *Id.* The court found that the “Constitution does not erect a barrier to the government’s effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications.” *Id.*

**Holding.** Mindful of the Supreme Court’s mandate to exercise particular care in examining governmental racial classifications, the court concluded that the 1996 SCC was insufficiently narrowly tailored as applied in this case, and was thus unconstitutional under *Adarand III*’s strict standard of scrutiny. Nonetheless, after examining the current (post 1996) SCC and DBE

certification programs, the court held that the 1996 defects have been remedied, and the current federal DBE programs now met the requirements of narrow tailoring. *Id.* at 1178.

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally-funded construction contracts by state departments of transportation. The court pointed out that plaintiff Adarand “conceded that its challenge in the instant case is to ‘the federal program, implemented by federal officials,’ and not to the letting of federally-funded construction contracts by state agencies.” 228 F.3d at 1187. The court held that it did not have before it a sufficient record to enable it to evaluate the separate question of Colorado DOT’s implementation of race-conscious policies. *Id.* at 1187-1188. Therefore, the court did not address the constitutionality of an as applied attack on the implementation of the federal program by the Colorado DOT or other local or state governments implementing the Federal DBE Program.

The court thus reversed the district court and remanded the case.

### **Recent District Court Decisions**

#### **6. *Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al.*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, 2015), affirmed, 840 F.3d 932 (7<sup>th</sup> Cir. 2016).**<sup>221</sup>

In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise (“DBE”) Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation’s (“IDOT”) implementation of the Federal DBE Program for federally-funded projects, IDOT’s implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority’s (“Tollway”) separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants’ Motion to Dismiss for lack of standing, denying the Federal Defendants’ Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants’ Motion to Dismiss certain Counts and granting the Tollway Defendants’ Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT’s implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that

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<sup>221</sup> 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs (“Federal DBE Program”). See the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized (“MAP-21,” “SAFETEA” and “SAFETEA-LU”), and the United States Department of Transportation (“USDOT” or “DOT”) regulations promulgated to implement TEA-21 the Federal regulations known as Moving Ahead for Progress in the 21st Century Act (“MAP-21”), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107.

SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT's DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway's DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants' Motion to Dismiss Midwest Fence's request for punitive damages.

**Equal protection framework, strict scrutiny and burden of proof.** The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 84 F. Supp. 3d at 720. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing "hard proof" to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at 720. While narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," the court said it does not require "exhaustion of every conceivable race-neutral alternative." *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 84 F. Supp. 3d at 721. To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

This can be accomplished, according to the court, by providing a neutral explanation for the disparity between DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. *Id.* Conjecture and unsupported criticisms of the government's methodology are insufficient. *Id.*

**Standing.** The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at 722. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at 722-723.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would

have hindered its ability to compete for fencing and guardrails work. *Id.* at 723. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest's ability to compete for work in these Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing. *Id.*

**Facial challenge to the Federal DBE Program.** The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at 725. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program's 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority- and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at 726. Sixty-four of the studies had previously been presented to Congress. *Id.* The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id.* The consultant's report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all "likely to be influenced by the presence of discrimination if it exists" and could potentially result in a built-in downward bias in the availability measure. *Id.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a "disparity index" for each study. *Id.* at 726. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep't. of Def.*, 545 F. 3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government's compelling interest in implementing a national program. *Id.* at 727, *citing Rothe*, 545 F. 3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a "strong basis in evidence" to support the conclusion that race- and gender-conscious action is necessary. *Id.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at 727. The Midwest expert's suggestion that the studies used in consultant's report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court *quoting Adarand VII*, 228 F.3d at 1173 (10<sup>th</sup> Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the

particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id.* Midwest failed to present “affirmative evidence” that no remedial action was necessary. *Id.*

**Federal DBE Program is narrowly tailored.** Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at 727. In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is “overinclusive.” *Id.* at 728. The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at 728. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program’s duration and ensure its flexibility. *Id.* at 728. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at 728. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a “good faith efforts waiver” on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at 728. The court rejected Midwest’s argument that the federal regulations impose a quota in light of the Program’s explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at 728. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program’s goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program’s burden on non-DBEs. *Id.* at 729. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program’s presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become “overconcentrated” in a particular area of



contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.*

The court said Midwest's primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at 729. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at 729. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id.* at 729. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at 729. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

**As-applied challenge to IDOT's implementation of the Federal DBE Program.** In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* at 730. The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT*, the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at 730, citing *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7<sup>th</sup> Cir. 2007). The court, quoting *Northern Contracting*, held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at 730. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at 730. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

**IDOT's evidence of discrimination and DBE availability in Illinois.** The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at 730. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* at 730. The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* at 731. This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at 731. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* at 731. For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under \$500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at 731. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at 731. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at 731. The study and the Goal-Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.* at 732.

**Court rejected Midwest arguments as to the data and evidence.** The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at 732. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at 732. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at 732. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.*

IDOT argued that on prime contracts under \$500,000, capacity is a variable that makes little difference. *Id.* at 732-733. Prime contracts of varying sizes under \$500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at 733. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id.* at 733, quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

**Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations.** The court found Midwest's criticisms insufficient to rebut IDOT's evidence of discrimination or discredit IDOT's methods of calculating DBE availability. *Id.* at 733. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity, or contrasting statistical data. *Id.* The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT's method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at 733. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data,

and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the “custom census” approach as consistent with the federal regulations. *Id.* at 733, citing to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at 733-734.

The court held that through the 2004 and 2011 studies, and Goal-Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at 734. The court said that in response to the Seventh Circuit decision and IDOT’s evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies’ result. *Id.*

The court pointed out that although Midwest’s expert’s reports “cast doubt on the validity of IDOT’s methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias.” *Id.* at 734. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT’s availability calculations. *Id.*

**Burden on non-DBE subcontractors; overconcentration.** The court addressed the narrow tailoring factor concerning whether a program’s burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at 734-735. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* at 735. The court found that Midwest did not show IDOT’s determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at 735.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at 735. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

**Use of race-neutral alternatives.** The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor-Protégé, and Model Contractor Programs. *Id.* at 735. The programs provide workshops and training that help small businesses build bonding capacity, gain access to

financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at 735. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

**Duration and flexibility.** The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at 736. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over \$36 million in contracting dollars. *Id.* The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

The court held the undisputed facts established that IDOT did not have a “no-waiver policy.” *Id.* at 736. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* at 736-737. Because Midwest’s own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at 737.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT’s implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at 737. Accordingly, the court granted IDOT’s motion for summary judgment.

**Facial and as-applied challenges to the Tollway program.** The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at 737. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway’s utilization of DBEs and their availability. *Id.*

The study employed a “custom census” approach to calculate DBE availability, and examined the Tollway’s contract data to determine utilization. *Id.* at 737.. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an “economy-wide analysis” examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person’s race or sex and their earning power and ability to form a business. *Id.*

**Midwest’s challenges to the Tollway evidence insufficient and speculative.** In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was

an “economy-wide analysis” similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at 737-738. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.* at 738.

Midwest attacked the Tollway’s 2006 study similar to how it attacked the other studies with regard to IDOT’s DBE Program. *Id.* at 738. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the “economy-wide analysis” revealed a negative correlation between an individual’s race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at 738.

To successfully rebut the Tollway’s evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway’s statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at 738-739. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at 739. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

**Tollway Program is narrowly tailored.** As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at 739.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway’s method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at 739. The court stated that the sharing of a remedial program’s burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 739. The court held the Tollway Program’s burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at 739-740. The court held the Tollway’s race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT’s, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at 740.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at 740. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* at 740. Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.*

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at 740. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment. *Id.*

**Notice of Appeal.** Midwest Fence Corporation filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is discussed above in the Seventh Circuit decision in 2016.

### ***7. Geyer Signal, Inc. v. Minnesota, DOT, 2014 WL 1309092 (D. Minn. March 31, 2014)***

In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT's implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT's implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

**Procedural background.** Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Intervenors requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Intervenors and the plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-

Intervenor's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in this case.

The Federal Defendants moved for summary judgment and the State defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal Defendants and the State defendants' motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at \*10) Additionally, plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. *Id.* \*10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are "reasonable." *Id.*

**Constitutional claims.** The Court states that the "heart of plaintiffs' claims is that the DBE Program and MnDOT's implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work." *Id.* at \*11. The Court noted that because DBEs are, by definition, small businesses, plaintiffs contend they "simply cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work. *Id.*

As a result, plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. *Id.* Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non-DBEs in those areas of work are forced to bear the entire burden of "correcting discrimination", while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id.*

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id.* Plaintiffs allege that the DBE Program is facially unconstitutional because it is "fatally prone to overconcentration" where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id.* at 11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if



the DBE bids are higher than those from non-DBEs, provided the increased cost is “reasonable” without defining a reasonable increase in cost. *Id.*

Plaintiffs also brought three as-applied challenges based on MnDOT’s implementation of the DBE Program. *Id.* at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

**A. Strict scrutiny.** It is undisputed that strict scrutiny applied to the Court’s evaluation of the Federal DBE Program, whether the challenge is facial or as - applied. *Id.* at \*12. Under strict scrutiny, a “statute’s race-based measures ‘are constitutional only if they are narrowly tailored to further compelling governmental interests.’” *Id.* at \*12, quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id.* at \*12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id.*

**B. Facial challenge based on overconcentration.** The Court says that in order to prevail on a facial challenge, the plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at \*12. The Court states that plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id.* at \*.

**1. Compelling governmental interest.** The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id.* \*13, quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id.* at \*13. In assessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at \*13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government’s evidence did not support an inference of prior discrimination. *Id.*

**Congressional evidence of discrimination: disparity studies and barriers.** Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional

record produced by the Federal Defendants. *Id.* at \*13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* \*14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id.* \*14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at \*14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at \*6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* \*6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at \*5.

The Court concluded that neither of the plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id.* at \*14. The Court rejected plaintiffs' argument that because Congress found multiple forms of discrimination against minority- and women-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand*, the Court found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at \*14.

The Court, citing again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at \*14, quoting, *Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination. *Id.* Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id.*

Accordingly, the Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the Federal DBE Program. *Id.* at \*14.

**Court rejects Plaintiffs’ general critique of evidence as failing to meet their burden of proof.** The Court held that plaintiffs’ general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at \*14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs’ argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at \*14.

Finally, the Court pointed out that plaintiffs have failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. *Id.* at \*15. Thus, the Court concluded that plaintiffs failed to meet their ultimate burden to prove that the Federal DBE Program is unconstitutional on this ground. *Id.* at \*15, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 971–73.

Therefore, the Court held that plaintiffs did not meet their burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the DBE Federal Program, and granted summary judgment in favor of the Federal Defendants with respect to the government’s compelling interest. *Id.* at \*15.

**2. Narrowly tailored.** The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the DBE Federal Program is narrowly tailored. *Id.* at \*15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to demonstrate narrowly tailoring. *Id.* Instead, plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

**Overconcentration.** Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id.* at \*15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or necessary for large highway projects, and if they had the capital to do it, they would not be small businesses. *Id.* at \*16. Therefore, plaintiffs argued the DBE Program will always be overconcentrated. *Id.*

The Court states that in order for plaintiffs to prevail on this facial challenge, plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.* The Court concludes that plaintiffs’ claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.*

First, the Court found that plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id.* at \*16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing and able DBEs to participate on DOT-assisted contracts. *Id.* The DBE Program, according to the Court, necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital

requirements. *Id.* In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id.*

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id.* at \*16. The Court notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id.* If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id.*

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id.* Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id.*

The Court also rejects plaintiffs claim that 49 CFR § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into "group-specific goals", but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. *Id.* at \*16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and therefore the provision does not appear to prohibit recipients from identifying particular overconcentrated areas and remedying overconcentration in those areas. *Id.* at \*16. And, even if the provision operated as plaintiffs suggested, that provision is subject to waiver and does not affect a recipient's ability to tailor specific contract goals to combat overconcentration. *Id.* at \*16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which the recipient has determined that non-DBEs are unduly burdened. *Id.* at \*17. All of these measures could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. *Id.* at \*17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that plaintiffs' facial challenge to the Program fails, and granted the Federal Defendants' motion for summary judgment. *Id.*

**C. Facial challenged based on vagueness.** The Court held that plaintiffs could not maintain a facial challenge against the Federal DBE Program for vagueness, as their constitutional challenges to the Program are not based in the First Amendment. *Id.* at \*17.

The Court states that the Eighth Circuit Court of Appeals has held that courts need not consider facial vagueness challenges based upon constitutional grounds other than the First Amendment. *Id.*

The Court thus granted Federal Defendants' motion for summary judgment with respect to plaintiffs' facial claim for vagueness based on the allegation that the Federal DBE Program does not define "reasonable" for purposes of when a prime contractor is entitled to reject a DBEs' bid on the basis of price alone. *Id.*

**D. As-Applied Challenges to MnDOT's DBE Program: MnDOT's program held narrowly tailored.** Plaintiffs brought three as-applied challenges against MnDOT's implementation of the Federal DBE Program, alleging that MnDOT has failed to support its implementation of the Program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and has failed to respond to overconcentration in the traffic control industry. *Id.* at \*17.

**1. Alleged failure to find evidence of discrimination.** The Court held that a state's implementation of the Federal DBE Program must be narrowly tailored. *Id.* at \*18. To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that "better data was available" and the recipient of federal funds "was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results." *Id.*, quoting *Sherbrook Turf, Inc.* at 973.

Plaintiffs' expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at \*18. Plaintiffs' expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

**Plaintiffs present no affirmative evidence that discrimination does not exist.** The Court held that plaintiffs' disputes with MnDOT's conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT's implementation of the Federal DBE Program is not narrowly tailored. *Id.* at \*18. First, the Court found that it is insufficient to show that "data was susceptible to multiple interpretations," instead, plaintiffs must "present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts." *Id.* at \*18, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs' expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota's public contracting. *Id.* at \*18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at \*18. The Court found that it would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal. *Id.* at \*18, quoting *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT's compliance with narrow tailoring in *Sherbrooke Turf*, the Court

concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at \*18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at \*18. Accordingly, the Court granted the State defendants' motion for summary judgment with respect to this claim.

**2. Alleged inappropriate goal setting.** Plaintiffs second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. *Id.* at \*19. The Court found that the goal setting violations the plaintiffs alleged are not the types of violations that could reasonably be expected to recur. *Id.* Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. *Id.* But, plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. *Id.* Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. *Id.* Thus, the Court only considered plaintiffs' challenges to the 2013–2015 goals. *Id.*

Plaintiffs raised the same challenges to the 2013–2015 goals as it did to MnDOT's finding of discrimination, namely that the goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets. *Id.* at \*19. Because these challenges identify only a different interpretation of the data and do not establish that MnDOT was unreasonable in relying on the outcome of the consultants' studies, plaintiffs have failed to demonstrate a material issue of fact related to MnDOT's narrow tailoring as it relates to goal setting. *Id.*

**3. Alleged overconcentration in the traffic control market.** Plaintiffs' final argument was that MnDOT's implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration in the traffic control market and correct for such overconcentration. *Id.* at \*20. MnDOT presented an expert report that reviewed four different industries into which plaintiffs' work falls based on NAICs codes that firms conducting traffic control-type work identify themselves by. *Id.* After conducting a disproportionality comparison, the consultant concluded that there was not statistically significant overconcentration of DBEs in plaintiffs' type of work.

Plaintiffs' expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which plaintiffs believe perform the same type of work as plaintiff. *Id.* at \*20. But, the Court found plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business' self-assessment of what industry group they fall into and what other businesses are similar. *Id.*

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id.* at \*20. This, the Court states, would require the government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id.*

Because plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. *Id.* at \*20. Therefore, the Court granted the State defendants' motion for summary judgment with respect to this claim.

**III. Claims Under 42 U.S.C. § 1981 and 42 U.S.C. § 2000.** Because the Court concluded that MnDOT's actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id.* at \*21. In addition, because the Court concluded that plaintiffs failed to establish a violation of the Equal Protection Clause, it granted the defendants' motions for summary judgment on the 42 U.S.C. § 2000d claim.

**Holding.** Therefore, the Court granted the Federal Defendants' motion for summary judgment and the States' defendants' motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the plaintiffs.

***8. Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. 2014), affirmed, Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7<sup>th</sup> Cir. 2015).***

In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten "no waiver" policy, and claiming that the IDOT's program is not narrowly tailored.

**Motion to Dismiss certain claims granted.** IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT's DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

**Motions for Summary Judgment.** Subsequent to the Court's Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT's implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at \* 1. IDOT also filed a Motion for Summary

Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT's DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project, was based upon Dunnet Bay's race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

**Factual background.** Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at \*3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at \*4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at \*4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at \*9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at \*23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its



owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at \*23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at \*25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

**IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority.** The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.* at \*26, quoting *Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7<sup>th</sup> Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority." *Id.* at \*26, quoting *Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at \*26, quoting *Northern Contracting, Inc.*, 473 F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenges are foreclosed by *Northern Contracting*. *Id.* at \*26.

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

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

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

**IDOT's decision to reject Dunnet Bay's bid based on lack of good faith efforts did not exceed IDOT's authority under federal law.** The Court found that IDOT has significant discretion under federal regulations and is often called upon to make a "judgment call" regarding the efforts of the bidder in terms of establishing good faith attempt to meet the DBE goals. *Id.* at \*28. The Court stated it was unable to conclude that IDOT erred in

determining Dunnet Bay did not make adequate good faith efforts. *Id.* The Court surmised that the strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is that its DBE participation was under 9 percent while other bidders were able to reach the 22 percent goal. *Id.* Accordingly, the Court concluded that IDOT's decision rejecting Dunnet Bay's bid was consistent with the regulations and did not exceed IDOT's authority under the federal regulations. *Id.*

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

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

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

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

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

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

would have been awarded the contract. The Court again noted the record established that IDOT did not have a “no-waiver” policy. *Id.* at \*31.

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

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

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

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

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. (“Weeden”) against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

**Factual background and claims.** Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT’s DBE Program. 2013 WL 4774517 at \*1. MDT had established an overall goal of 5.83 percent DBE participation in Montana’s highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at \*1. Weeden claimed that its bid relied upon only 1.87

percent DBE subcontractors (although the court points out that Weeden's bid actually identified only .81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at \*2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at \*2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at \*2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at \*2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at \*2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

**No proof of irreparable harm and balance of equities favor MDT.** First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at \*3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at \*3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

**No standing.** The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at \*3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at \*3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as if it were a non-DBE subcontractor. *Id.*

**Court applies *AGC v. California DOT* case; evidence supports narrowly tailored DBE program.** Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at \*4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013)(holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id.* at 4, citing *Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry." 2013 WL 4774517 at \*4, quoting *AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* at \*4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at \*4. Therefore, the Court concluded that given the similarities between Weeden's claim and AGC's equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at \*4.

**Due Process claim.** The Court also rejected Weeden's bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such

as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at \*5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT's decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at \*5.

**Holding and Voluntary Dismissal.** The Court denied plaintiff Weeden's application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

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

Plaintiffs, white male owners of Geod Corporation ("Geod"), brought this action against the New Jersey Transit Corporation ("NJT") alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT's DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

**New Jersey Transit Program and Disparity Study.** NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, "conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the "three-step process pursuant to USDOT regulations to establish the NJT DBE goal." *Id.* at 649. First, the consultant determined "the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn." *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified "the relevant industries in which NJ Transit contracts," and (3) calculated "the weighted availability measure." *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of 28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year

2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, *citing Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 *citing Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7<sup>th</sup> Cir. 2007).

**Applying *Northern Contracting v. Illinois*.** The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at 652 *quoting Northern Contracting*, 473 F.3d at 721. The district court in *Geod* followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id.* at 652, *citing Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id.* at 652-653, *quoting Northern Contracting*, 473 F.3d at 722 and *citing also Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6<sup>th</sup> Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8<sup>th</sup> Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 *citing Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id.* at 653 *quoting Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and *citing South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the



regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT's use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the "examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, *citing* 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT's list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only "when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal." *Id.* at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing

supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." *Id.* at 656, quoting *Western States Paving*, 407 F.3d at 997.

**Applying *Western States Paving*.** The district court then analyzed whether the NJT program was narrowly tailored applying *Western States Paving*. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id.* at 656, citing *Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id.* at 656. However, the court found that the plaintiffs' argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id.* at 656. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id.* In addition, plaintiff's expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id.* at 656. The court held this was insufficient to overcome the consultant's determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id.* at 656.

The district court rejected Plaintiffs' argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT's expert identified "prime contracting" as the area in which NJT procurements evidence discrimination. *Id.* at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative but it does require serious, good faith consideration of workable race-neutral alternatives. *Id.* at 656, citing *Sherbrook Turf*, 345 F.3d at 972 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id.* at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the "relationship of the numerical goals to the relevant labor market." *Id.* at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id.* at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended

to minimize the burden on non-DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id.*

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* at 657.

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

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5<sup>th</sup> and 14<sup>th</sup> Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at \*4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id.*

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id.* The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no

exceedingly persuasive justification was found to support gender based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9<sup>th</sup> Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id.* at \*5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at \*5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id.*, citing *Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at \*5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to

comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at \*6, citing *Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id.* at \*6, citing 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at \*6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id.* at \*6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id.* at \*6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id.* at \*6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id.* at \*7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id.* A decomposition analysis was also performed. *Id.*

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id.*

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral means. The district court concluded that “critically,” plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT’s DBE goal. *Id.* at \*7. The court held that genuine issues of material fact remain only as to whether NJT’s adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id.*

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id.* at \*7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id.* at \*8.

The court found, however, that what was “gravely critical” about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and “unknown,” but did not include an analysis of past discrimination for the ethnic group “Iraqi,” which is now a group considered to be a DBE by the NJT. *Id.* Because the disparity report included a category entitled “unknown,” the court held a genuine issue of material fact remains as to whether “Iraqi” is legitimately within NJT’s defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs’ and defendants’ Motions for Summary Judgment as to the constitutionality of NJT’s DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff’s Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff’s claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT’s Motion for Summary Judgment was granted as to that claim.

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

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County’s implementation of the Federal DBE Program and Broward County’s issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005) should govern the Court’s consideration of the merits of plaintiffs’ claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, “whether compliance with the federal regulations is all that is required of Defendant Broward County.” *Id.* at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007). The plaintiffs disagreed, and contended that the County must take additional steps beyond those

explicitly provided for in the federal regulations to ensure the constitutionality of the County's implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id.* at 1338.

Ninth Circuit Approach: *Western States*. The district court analyzed the Ninth Circuit Court of Appeals approach in *Western States Paving* and the Seventh Circuit approach in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991) and *Northern Contracting*, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in *Western States Paving* held that whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry, and that it was error for the district court in *Western States Paving* to uphold Washington's DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in *Western States Paving* concluded it would be necessary to undertake an as-applied inquiry into whether the state's program is narrowly tailored. 544 F.Supp.2d at 1339, *citing Western States Paving*, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT "appears not to be of one mind on this issue, however." 544 F.Supp.2d at 1339, n. 3. The district court stated that the "United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this agency may not concur with the 'opinion of the United States' as represented in *Western States*." 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the "state would have to have evidence of past or current effects of discrimination to use race-conscious goals." 544 F.Supp.2d at 1338, *quoting Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, "concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states' compliance with the federal regulations." 544 F.Supp.2d at 1339.

Seventh Circuit Approach: *Milwaukee County* and *Northern Contracting*. The district court in Broward County next considered the Seventh Circuit approach. The Defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. *Id.* In support of this position, the County relied primarily on the Seventh Circuit's approach, first articulated in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), then *reaffirmed* in *Northern Contracting*, 473 F.3d 715 (7th Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible

collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state's role in the federal program is simply as an agent, and insofar "as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." 544 F.Supp.2d at 1340, quoting *Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id.* The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state DOT's program. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v. Farris*, 942 F.2d 969 (6<sup>th</sup> Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10<sup>th</sup> Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these Circuit Courts of Appeal have concluded that "where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations." 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that "the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program." 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is "simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations." *Id.*

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

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



This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the "plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at \*1 (N.D. Ill. Sept, 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the "maximum feasible portion" of its DBE goal through race-neutral means. *Id.* at \*4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id.* (citing regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

**Statistical evidence.** To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at \*6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at \*6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at \*7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id.* at \*8. One study examined disparities in earnings and business

formation rates as between DBEs and their white male-owned counterparts. *Id.* Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id.*

IDOT considered three reports prepared by expert witnesses. *Id.* at \*9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling for relevant variables such as credit worthiness, “that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males.” *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses’ formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they “were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals.” *Id.* Additionally, witnesses identified 20 prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. *Id.* The prime contractors did not respond to IDOT’s requests for information concerning their utilization of DBEs. *Id.*

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County’s public construction contracts, and a “non-goals” experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id.* at \*11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id.*

IDOT’s representative testified that the DBE program was administered on a “contract-by-contract basis.” *Id.* She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the “lowest responsible bidder.” IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id.* at \*12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id.*

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court’s earlier summary judgment order, including:

1. A “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger

contractors and to encourage the involvement of small firms in major construction projects);

3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. “Unbundling” large contracts; and
5. Allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses.

*Id.* (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. *Id.*

The court found that IDOT attempted to achieve the “maximum feasible portion” of its overall DBE goal through race- and gender-neutral measures. *Id.* at \*13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id.*

**Anecdotal evidence.** A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and “unanimously reported that they were rarely invited to bid on such contracts.” *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at \*13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who “frequently are forced to pay higher insurance rates due to racial and gender discrimination.” *Id.* at \*14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they “occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT.” *Id.* A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at \*15.

**Strict scrutiny.** The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id.* at \*16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a “‘strong basis in evidence’ to conclude that remedial action was necessary, before it embarks on an affirmative action program ... If the government makes such a showing, the party challenging the affirmative action plan bears the ‘ultimate burden’ of demonstrating the unconstitutionality of the program.” *Id.* The court held that challenging party’s burden “can only be met by presenting credible evidence to rebut the government’s proffered data.” *Id.* at \*17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show “that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction.” *Id.* at \*16.

The court found that IDOT presented “an abundance” of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at \*17. The plaintiff argued that the study was “erroneous because it failed to limit its DBE availability figures to those firms ... registered and pre-qualified with IDOT.” *Id.* The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT’s calculation of DBE availability and utilization rates was incorrect. *Id.*

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id.* at \*18. Additionally, the court found “that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability.” *Id.* at \*19. The court found that IDOT presented “an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets.” *Id.* at \*21. The court also found that the statistical studies were consistent with the anecdotal evidence. *Id.* The court did find, however, that “there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This ... is [also] supported by the statistical data ... which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability.” *Id.* at \*21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id.* at \*21, n. 32.

The court further found:

That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: ‘[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced *because* of industry discrimination.’

*Id.* at \*21, citing *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id.* at \*22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id.* The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT’s fiscal year 2005 goal was a “plausible lower-bound estimate” of DBE participation in the absence of discrimination.” *Id.* The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT’s data. *Id.*

The plaintiff argued that even if accepted at face value, IDOT’s marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id.* The court found first that IDOT’s

indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id.* Second, the court found:

[M]ore importantly, plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally-funded highway contracts. This is a fundamental distinction ... [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

*Id.* at \*23. The court distinguished *Builders Ass'n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff'd* 256 F.3d 642 (7<sup>th</sup> Cir. 2001), noting that the program in that case was not federally-funded. *Id.* at \*23, n. 34.

The court also found that “IDOT has done its best to maximize the portion of its DBE goal” through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at \*24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id.* The small business initiative included: “unbundling” large contracts; allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses; a “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found “[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures.” *Id.* at \*25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id.*, citing *Adarand Constructors, Inc. v. Slater* “*Adarand VII*”, 228 F.3d 1147, 1177 (10<sup>th</sup> Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT’s DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

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

This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *see above*, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal

DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (*i.e.*, the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT's DBE Program is narrowly tailored to achieve the federal government's compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT's implementation of the Federal DBE Program.

The court in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the Federal defendants' Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000) ("*Adarand VII*"), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at \*34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith consideration of workable race-neutral alternatives." 2004 WL422704 at \*36, *citing and quoting Sherbrooke Turf*, 345 F.3d at 972, *quoting Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith

consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds \$750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the *Sherbrooke Turf* court's assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every 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.

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

This is another case that involved a challenge to the USDOT Regulations that implement TEA-21 (49 CFR Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation ("DOT") from enforcing its DBE Program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct constitutional challenge to racial and gender preferences in federally-funded state highway contracts. This case concerned the constitutionality of the Kansas DOT's implementation of the Federal DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The court granted the federal and state defendants' (USDOT and Kansas DOT) Motions to Dismiss based on lack of standing. The court held the contractor could not show the specific aspects of the DBE Program that it contends are unconstitutional have caused its alleged injuries.

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

*Sherbrooke* involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the "federal affirmative action programs," the USDOT implementing regulations, and the Minnesota DOT's participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at \*1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of "random inclusion" of various groups as being within the Program in connection with whether the Federal DBE Program is "narrowly tailored." The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the "potentially invidious effects of providing blanket benefits to minorities" in part,

by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in



such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

*Sherbrooke*, 2001 WL 1502841 at \*10 (D. Minn.).

The court rejected plaintiff's claim that the Minnesota DOT must independently demonstrate how its program comports with *Croson's* strict scrutiny standard. The court held that the "Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program." *Id.* at \*11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, "relieves the state of any burden to independently carry the strict scrutiny burden." *Id.* at \*11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 CFR Part 26 are implementing a Congressionally-required program and not establishing a local one. As such, the court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. *Id.*

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

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads ("Nebraska DOR") DBE Program adopted and implemented solely to comply with the Federal DBE Program is "approved" by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR's proposed DBE goals for fiscal year 2001, pending completion of USDOT's review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist "in the construction industry" and that racial and gender discrimination "within the construction industry" is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently "narrowly tailored" to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

## **F. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in Other Jurisdictions**

### ***Recent Decisions in Federal Circuit Courts of Appeal***

#### ***1. H. B. Rowe Co., Inc. v. W. Lyndo 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 (10<sup>th</sup> Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina’s highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to “establish annual aspirational goals, not mandatory goals, ... for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses ... [that] shall not be applied rigidly on specific contracts or projects.” *Id.* at 239, *quoting*, N.C. Gen.Stat. § 136-28.4(b)(2010). The statute

further mandates that the NCDOT set “contract-specific goals or project-specific goals ... for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization” based on availability, as determined by the study. *Id.*

Third, the amended statute narrowed the definition of “minority” to encompass only those groups that have suffered discrimination. *Id.* at 239. The amended statute replaced a list of defined minorities to any certain groups by defining “minority” as “only those racial or ethnicity classifications identified by [the study] ... that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department.” *Id.* at 239 quoting section 136-28.4(c)(2)(2010).

Fourth, the amended statute required the NCDOT to reevaluate the Program over time and respond to changing conditions. 615 F.3d 233 at 239. Accordingly, the NCDOT must conduct a study similar to the 2004 study at least every five years. *Id.* § 136-28.4(b). Finally, the amended statute contained a sunset provision which was set to expire on August 31, 2009, but the General Assembly subsequently extended the sunset provision to August 31, 2010. *Id.* Section 136-28.4(e) (2010).

The Court also noted that the statute required only good faith efforts by the prime contractors to utilize subcontractors, and that the good faith requirement, the Court found, proved permissive in practice: prime contractors satisfied the requirement in 98.5 percent of cases, failing to do so in only 13 of 878 attempts. 615 F.3d 233 at 239.

**Strict scrutiny.** The Court stated the strict scrutiny standard was applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.” 615 F.3d 233 at 241. The Court pointed out that “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Id.* at 241 quoting *Alexander v. Estep*, 95 F.3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.” *Id.*, quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

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

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

The Court held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F.3d 233 at 241, citing *Concrete Works*, 321 F.3d at 958. “Instead, a

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

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

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

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

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

**Plaintiff’s burden.** The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff “has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance.” *Id.*

at 243, quoting *West Virginia v. U.S. Department of Health & Human Services*, 289 F.3d 281, 292 (4th Cir. 2002).

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

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

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

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

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

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3)

contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

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

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

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

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

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

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

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

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

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

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

**Anecdotal evidence.** The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal “good old boy” network of white

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

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

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

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

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

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



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

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

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

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

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

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

small business contracts of \$500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id.* at 252.

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

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

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

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

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

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

**Overinclusive.** The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

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

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

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

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

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

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in

question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id.* Thus, the Court held that the State failed to present sufficient evidence to support the Program's current inclusion of women subcontractors in setting participation goals. *Id.*

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

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

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

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

This recent case is instructive in connection with the determination of the groups that may be included in a MBE/WBE-type program, and the standard of analysis utilized to evaluate a local government's non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as "under-inclusive" (*i.e.*, those that exclude persons from a particular racial classification) are subject to a "rational basis" review, not strict scrutiny.

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 CFR § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." *Id.* at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. *Id.*

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of

persons from, Spain or Portugal. *Id.* Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. *Id.* at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of “Hispanic” was fatally under-inclusive. *Id.* at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis “allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program.” *Id.* at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. *Id.* at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of “Hispanic,” finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. *Id.* at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the “federal USDOT definition of Hispanic without at least making an independent assessment of discrimination against Hispanics of Spanish Origin in New York.” *Id.* Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. *Id.* at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York’s decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. *Id.* at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

### ***3. Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc., 460 F.3d 859 (7<sup>th</sup> Cir. 2006)***

In *Rapid Test Products, Inc. v. Durham School Services Inc.*, the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an “entitlement” in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. (“Durham”), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. (“Rapid Test”), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the

school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test's competitor's, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid's owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties' dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that "§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate."

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the Seventh Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham's decision to hire Rapid Test's competitor.

#### ***4. Virdi v. DeKalb County School District, 135 Fed. Appx. 262, 2005 WL 138942 (11<sup>th</sup> Cir. 2005) (unpublished opinion)***

Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down a MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the "District") to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the "Board") and the Superintendent (both individually and in his official capacity) (collectively "defendants") pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11<sup>th</sup> Cir. 2005). Virdi also alleged the school district's Minority Vendor Involvement Program was facially unconstitutional. *Id.*

The district court initially granted the defendants' Motions for Summary Judgment on all of Virdi's claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id.* On remand, the district court granted the defendants' Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants' motion for a judgment as a matter of law on the remaining claims at the close of Virdi's case. *Id.*

In 1989, the Board appointed the Tillman Committee (the "Committee") to study participation of female- and minority-owned businesses with the District. *Id.* The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id.*

Based upon a “general feeling” that minorities were under-represented, the Committee issued the Tillman Report (the “Report”) stating “the Committee’s impression that ‘[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community.’” *Id.* The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id.*

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a “how to” booklet to be made available to any business interested in doing business with the District.

*Id.* The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id.* The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id.*

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the “how to” booklet. *Id.* The Board also implemented the Minority Vendor Involvement Program (the “MVP”) which adopted the participation goals set forth in the Report. *Id.* at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id.* Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id.* Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id.* In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id.* In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the “District was only looking for ‘black-owned firms.’” *Id.* Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id.*

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id.* at 267. The court first questioned whether the identified government interest was compelling. *Id.* at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id.*

The court held the MVP was not narrowly tailored for two reasons. *Id.* First, because no evidence existed that the District considered race-neutral alternatives to “avoid unwitting discrimination.” The court found that “[w]hile narrow tailoring does not require exhaustion

of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id.* at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id.* at 268.

Second, the court held that the unlimited duration of the MVP’s racial goals negated a finding of narrow tailoring. *Id.* “[R]ace conscious ... policies must be limited in time.” *Id.*, citing *Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5<sup>th</sup> Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id.* at 268.

With respect to Virdi’s claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. *Id.* Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court’s grant of judgment on that issue. *Id.* at 269. Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court’s order pertaining to the facial constitutionality of the MVP’s racial goals, and affirmed the district court’s order granting defendants’ motion on the issue of intentional discrimination against Virdi. *Id.* at 270.

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

This case is instructive to the disparity study because it is a recent decision that upheld the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

In *Concrete Works* the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In *Concrete Works*, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.



**Case history.** Plaintiff, Concrete Works of Colorado, Inc. (“CWC”) challenged the constitutionality of an “affirmative action” ordinance enacted by the City and County of Denver (hereinafter the “City” or “Denver”). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 (“1990 Ordinance”) containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id.* at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using “good faith efforts.” *Id.* In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the “1996 Ordinance”). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id.* at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the “1998 Ordinance”). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. *Id.* at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. *Id.* The district court conducted a bench trial on the constitutionality of the three ordinances. *Id.* The district court ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. *Id.* The City then appealed to the Tenth Circuit Court of Appeals. *Id.* The Court of Appeals reversed and remanded. *Id.* at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.” 488 U.S. 469, 492 (1989) (plurality opinion). Because “an effort to alleviate the effects of *societal* discrimination is not a compelling interest,” the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination “with some specificity,” and (2) demonstrated that a “strong basis in evidence” supports its conclusion that remedial action is necessary. *Id.* at 958, *quoting Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. *Id.* Rather, Denver could rely on “empirical evidence that demonstrates ‘a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.’” *Id.*, *quoting Croson*, 488 U.S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. *Id.*

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. *Id.* The Court of Appeals held that once Denver met its burden, CWC had to introduce “credible, particularized evidence to rebut [Denver’s] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that CWC could also rebut Denver’s statistical evidence “by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. *Id.* at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.*, quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

**The studies.** Denver presented historical, statistical and anecdotal evidence in support of its MBE/WBE programs. Denver commissioned a number of studies to assess its MBE/WBE programs. *Id.* at 962. The consulting firm hired by Denver utilized disparity indices in part. *Id.* at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. *Id.* at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. *Id.* Based on this information, the 1990 Study concluded that, despite Denver’s efforts to increase MBE and WBE participation in Denver Public Works projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. *Id.* After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. *Id.*

After the Tenth Circuit decided *Concrete Works II*, Denver commissioned another study (the “1995 Study”). *Id.* at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. *Id.* The 1995 Study concluded that MBEs and WBEs were more likely to be one-person or family-run businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than white-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than white- or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the Census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. *Id.* at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The

1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id.* at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, *inter alia*, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the “1997 Study”). *Id.* at 966. The 1997 Study used geographic and specialization information to calculate MBE/WBE availability. Availability was defined as “the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City’s contracts.” *Id.*

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. *Id.* The statewide market was used because necessary information was unavailable for the Denver MSA. *Id.* at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 41 for African American firms, 40 for Hispanic firms, 14 for Asian and other minorities, and 74 for women-owned firms. *Id.*

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed than similarly situated whites. *Id.* Using data from the Public Use Microdata Samples (“PUMS”) of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id.* Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id.* at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after

controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. *Id.*

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: “How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements ... also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?” Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were “seldom or never” used on non-goals projects. *Id.*

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm’s size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. *Id.* at 968-69.

After the 1997 Study was completed, the City enacted the 1998 Ordinance. The 1998 Ordinance reduced the annual goals to 10 percent for both MBEs and WBEs and eliminated a provision which previously allowed MBE/WBEs to count their own work toward project goals. *Id.* at 969.

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects but their applications were denied even though they met the prequalification requirements. *Id.*

Other MBE/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that they were required to do additional work not part of the subcontracting

arrangement; and that they found it difficult to join unions and trade associations. *Id.* There was testimony detailing the difficulties MBE/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. *Id.*

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. *Id.* at 969-70.

**The legal framework applied by the court.** The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver's evidence showed that there is pervasive discrimination. *Id.* at 970. The court, quoting *Concrete Works II*, stated that "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." *Id.* at 970, quoting *Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a prima facie case of a constitutional or statutory violation," not irrefutable or definitive proof of discrimination. *Id.* at 97, quoting *Croson*, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.*, quoting *Adarand VII*, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson*. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a "city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market." *Id.* at 971, quoting *Croson*, 488 U.S. 503. Thus, the Court held Denver's burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. *Id.*, citing *Croson*, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination.

Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. *Id.* at 972.

The court found Denver's statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver's evidence on that basis. *Id.*

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id.* at 973. The court rejected the district court's erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson*. *Id.* The court held it previously recognized in this case that "a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area." *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added). In *Concrete Works II*, the court stated that "we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination." *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. *Id.* at 973. Thus, Denver was not required to demonstrate that it is "guilty of prohibited discrimination" to meet its initial burden. *Id.*

Additionally, the court had previously concluded that Denver's statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that "local prime contractors" are engaged in racial and gender discrimination. *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529. Thus, the court held Denver's disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id.*

### **The Court's rejection of CWC's arguments and the district court findings.**

**Use of marketplace data.** The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court's conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt*. *Id.* at 975. In *Shaw*, a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity's "interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." *Id.*, quoting *Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did

set out two conditions that must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” *Id.* at 976, quoting *Shaw*, 517 U.S. at 910. The City can satisfy this condition by identifying the discrimination, “‘public or private, with some specificity.’” *Id.* at 976, citing *Shaw*, 517 U.S. at 910, quoting *Croson*, 488 U.S. at 504 (emphasis added). The governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.” *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality’s burden of producing strong evidence. *Id.* at 976.

In *Adarand VII*, the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67 (“[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*” (emphasis added)). Further, the court pointed out in this case it earlier rejected the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to “the Denver MSA evidence of industry-wide discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529. The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to Denver’s burden of producing strong evidence. *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

Consistent with the court’s mandate in *Concrete Works II*, the City attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.” *Id.* The City can demonstrate that it is a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, quoting *Croson*, 488 U.S. at 492.

The court rejected CWC’s argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.” *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City’s showing that it indirectly participates in industry discrimination. *Id.* at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to

business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that “despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial.” *Id.* at 977-78. In *Adarand VII*, the court concluded that this study, among other evidence, “strongly support[ed] an initial showing of discrimination in lending.” *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170, n. 13 (“Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination ... supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded.”). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court’s criticism did not undermine the study’s reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in *Adarand VII* it took “judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects.” *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra*, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id.* at 978.

The court held that the district court’s conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. “[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.” *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City’s burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. *Id.* at 979-80.



**Variables.** CWC challenged Denver’s disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm’s size has little effect on its qualifications or its ability to provide construction services and that MBE/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; MBE/WBEs are less capable of expanding because they are smaller and less experienced. *Id.* at 980.

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver’s argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that MBE/WBE construction firms are generally smaller and less experienced *because* of industry discrimination. *Id.* at 981. The lending discrimination and business formation studies, according to the court, both strongly supported Denver’s argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver’s expert testified that discrimination by banks or bonding companies would reduce a firm’s revenue and the number of employees it could hire. *Id.*

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for MBE/WBEs and concluded that the resulting disparities, “suggest[ ] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male-owned firms.” *Id.* at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia*, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver’s disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City’s position that a firm’s size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver’s studies would decrease or disappear if the studies controlled for size and experience to CWC’s satisfaction. Consequently, the court held CWC’s rebuttal evidence was insufficient to meet its burden of discrediting Denver’s disparity studies on the issue of size and experience. *Id.* at 982.

**Specialization.** The district court also faulted Denver’s disparity studies because they did not control for firm specialization. The court noted the district court’s criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id.* at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found

relevant the testimony of the City's expert, that the data he reviewed showed that MBEs were represented "widely across the different [construction] specializations." *Id.* at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver's studies. *Id.* at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver's studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver's argument that firm specialization does not explain the disparities. *Id.* at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id.* at 983.

**Utilization of MBE/WBEs on City projects.** CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC's argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC's argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver's evidence. *Id.* at 984.

Consistent with the court's mandate in *Concrete Works II*, at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and "reflect[ed] the intended remedial effect on MBE and WBE utilization." *Id.* at 984, quoting *Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id.* at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id.* at 985.

The court rejected CWC's argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver's burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. *Id.* at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver's position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

**Anecdotal evidence.** The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. *Id.* at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory

is experienced by all contractors, Denver's witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. *Id.*

The court held there was no merit to CWC's argument that the witnesses' accounts must be verified to provide support for Denver's burden. The court stated that anecdotal evidence is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions. *Id.*

After considering Denver's anecdotal evidence, the district court found that the evidence "shows that race, ethnicity and gender affect the construction industry and those who work in it" and that the egregious mistreatment of minority and women employees "had direct financial consequences" on construction firms. *Id.* at 989, quoting *Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court's findings regarding Denver's anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, un rebutted support for Denver's initial burden. *Id.* at 989-90, citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it "brought the cold [statistics] convincingly to life").

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

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

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

The court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court

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

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

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

This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. *Id.* The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.

The district court had ruled that the City could not introduce a post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. *Id.* at 350-351. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue. *Id.* at 350-351.

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id.* This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id.* The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (6<sup>th</sup> Cir. 2000), which held that under *Croson* a State must have sufficient evidentiary justification for a racially-conscious statute in advance of its enactment, and that governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Memphis*, 293 F.3d at 350-351, *citing Drabik*, 214 F.3d at 738.

The Court in *Memphis* said that although *Drabik* did not directly address the admissibility of post-enactment evidence, it held a governmental entity must have pre-enactment evidence sufficient to justify a racially-conscious statute. 293 R.3d at 351. The court concluded *Drabik* indicates the Sixth Circuit would not favor using post-enactment evidence to make that showing. *Id.* at 351. Under *Drabik*, the Court in *Memphis* held the City must present pre-enactment evidence to show a compelling state interest. *Id.* at 351.

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

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7<sup>th</sup> Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contracts discriminated against any of the groups “favored” by the Program. The court also found that the Program was not “narrowly tailored” to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* (“*VMI*”), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become “vanishingly small.” *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that “parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive’ justification for that action ...” and, realistically, the law can ask no more of race-based remedies either.” 256 F.3d at 644, *quoting in part VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11<sup>th</sup> Cir. 1997) decision created the “paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes.” 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women’s “set aside programs,” the women’s program the court determined must clear the same “hurdles” as the minority program.” 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is “to be expected that there would be more soliciting of these contractors on public than on private projects.” *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County “conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance.” 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a “public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.” 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry “tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County.” 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that “[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit ... to be entitled to take remedial action.” *Id.* But, the court found “of that there is no evidence either.” *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found “puzzling” to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would “flunk the constitutional test” by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* “Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons.” *Id.* The court, therefore, held that the ordinance was not “narrowly tailored” to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of “favored minorities” included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to “presume” discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—“that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project.” 256 F.3d at 647-648.

***8. Associated Gen. Contractors v. Drabik, 214 F.3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998)***

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a “set-aside” contract based on the State of Ohio’s MBE program with the award of construction contracts.

The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court concluded the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court said the statute failed the narrow tailoring test, including because there was no evidence that the State had considered race-neutral remedies.

This case involves a suit by the Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio, representing Ohio building contractors to stop the award of a construction contract for the Toledo Correctional Facility to a minority-owned business

(“MBE”), in a bidding process from which non-minority-owned firms were statutorily excluded from participating under Ohio’s state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act (“MBEA”) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court’s Order. *Id.* at 733. The Sixth Circuit Court of Appeals affirmed the Order of the district court, holding unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. *Id.*

Ohio passed the MBEA in 1980. *Id.* at 733. This legislation “set aside” 5%, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id.* Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility’s Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id.*

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

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

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

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

**Statistical evidence: compelling interest.** The Court pointed out that proponents of “racially discriminatory systems” such as the MBEA have sought to generate the necessary evidence by a variety of means, however, such efforts have generally focused on “mere underrepresentation” by showing a lesser percentage of contracts awarded to a particular group than that group’s percentage in the general population. *Id.* at 735. “Raw statistical disparity” of this sort is part of the evidence offered by Ohio in this case, according to the Court. *Id.* at 736. The Court stated

however, “such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court, particularly in a context such as contracting, where special qualifications are so relevant.” *Id.*

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

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

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

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

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

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



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

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

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

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

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id.* at 738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id.* at 739.

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

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

A non-minority general contractor brought this action against the City of Jackson and City officials asserting that a City policy and its minority business enterprise program for participation and construction contracts violated the Equal Protection Clause of the U.S. Constitution.

City of Jackson MBE Program. In 1985 the City of Jackson adopted a MBE Program, which initially had a goal of 5% of all city contracts. 199 F.3d at 208. *Id.* The 5% goal was not based on any objective data. *Id.* at 209. Instead, it was a “guess” that was adopted by the City. *Id.* The goal was later increased to 15% because it was found that 10% of businesses in Mississippi were minority-owned. *Id.*

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

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

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

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

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

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

District court decision. The district court granted Scott’s motion for summary judgment agreeing with Scott that the relevant Policy included not just the Special Notice, but that it also included the MBE Program and Policy document regarding MBE participation. *Id.* at 211. The district court found that the MBE Policy was unconstitutional because it lacked requisite findings to justify the 15% minority-participation goal and survive strict scrutiny based on the 1989 decision in the *City of Richmond, v. J.A. Croson Co.* *Id.* The district court struck down minority-

participation goals for the City's construction contracts only. *Id.* at 211. The district court found that Scott's bid was rejected because Scott lacked sufficient minority participation, not because it exceeded the City's budget. *Id.* In addition, the district court awarded Scott lost profits. *Id.*

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

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

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

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

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

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

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

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

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

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

### ***10. Eng’g Contractors Ass’n of S. Florida v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997)***

*Engineering Contractors Association of South Florida v. Metropolitan Engineering Contractors Association* is a paramount case in the Eleventh Circuit and is instructive to the disparity study. This decision has been cited and applied by the courts in various circuits that have addressed MBE/WBE-type programs or legislation involving local government contracting and procurement.

In *Engineering Contractors Association*, six trade organizations (the “plaintiffs”) filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the “County”) as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11<sup>th</sup> Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program (“BBE”), the Hispanic Business Enterprise program (“HBE”), and the Woman Business Enterprise program, (“WBE”), (collectively “MWBE” programs). *Id.* The plaintiffs challenged the application of the program to County construction contracts. *Id.*

For certain classes of construction contracts valued over \$25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. *Id.* at 901. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5)

selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County Commission would make the final determination and its decision was appealable to the County Manager. *Id.* The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id.*

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite “strong basis in evidence” to support the race- and ethnicity-conscious measures. *Id.* at 902. The district court applied intermediate scrutiny to the WBE program and found that the “County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference.” *Id.* Therefore, the County had failed to demonstrate a “compelling interest” necessary to support the BBE and HBE programs, and failed to demonstrate an “important interest” necessary to support the WBE program. *Id.* The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id.* The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id.* at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];
2. Whether the district court erred in finding the County lacked a “strong basis in evidence” to justify the existence of the BBE and HBE programs;
3. Whether the district court erred in finding the County lacked a “sufficient probative basis in evidence” to justify the existence of the WBE program; and
4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve.

*Id.* at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* at 906. Under this standard, “an affirmative action program must be based upon a ‘compelling government interest’ and must be ‘narrowly tailored’ to achieve that interest.” *Id.* The Eleventh Circuit further noted:

“In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government’s interest, but rather the adequacy of the evidence of discrimination offered to show that interest.”

*Id.* (internal citations omitted).

Therefore, strict scrutiny requires a finding of a “strong basis in evidence’ to support the conclusion that remedial action is necessary.” *Id.*, citing *Croson*, 488 U.S. at 500). The requisite “strong basis in evidence’ cannot rest on ‘an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.’” *Id.* at 907, citing *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11<sup>th</sup> Cir. 1994) (citing and applying *Croson*). However, the Eleventh Circuit found that a governmental entity can “justify affirmative action by demonstrating ‘gross statistical disparities’ between the proportion of minorities hired ... and the proportion of minorities willing and able to do the work ... Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.” *Id.* (internal citations omitted).

Notwithstanding the “exceedingly persuasive justification” language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id.* at 908. Under this standard, the government must provide “sufficient probative evidence” of discrimination, which is a lesser standard than the “strong basis in evidence” under strict scrutiny. *Id.* at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical “anecdotal” evidence. *Id.* at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially “post-enactment” evidence (*i.e.*, evidence based on data related to years following the initial enactment of the BBE program). *Id.* However, “such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market.” *Id.* at 912. A district court should not “speculate about what the data *might* have shown had the BBE program never been enacted.” *Id.*

**The statistical evidence.** The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County’s statistical evidence (described more fully below) was subject to more than one interpretation. *Id.* at 924. The district court found that the evidence was “insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County’s stated rationale for imposing a gender preference.” *Id.* The district court’s view of the evidence was a permissible one. *Id.*

**County contracting statistics.** The County presented a study comparing three factors for County non-procurement construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no “consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate ‘share’ ... when the bidder percentages are used as the baseline.” *Id.* at 913. For the WBE statistics, the bidder/awardee statistics were “decidedly mixed” as across the range of County construction contracts. *Id.*

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating “disparity indices” for each program and classification of construction contract. The Eleventh Circuit explained:

“[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group’s bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group’s contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent.”

*Id.* at 914. “The utility of disparity indices or similar measures ... has been recognized by a number of federal circuit courts.” *Id.*

The Eleventh Circuit found that “[i]n general ... disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination.” *Id.* The Eleventh Circuit noted that “the EEOC’s disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination.” *Id.*, citing 29 CFR § 1607.4D. In addition, no circuit that has “explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination.” *Id.*, citing *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10<sup>th</sup> Cir. 1994) (crediting disparity indices ranging from 0 % to 3.8%); *Contractors Ass’n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id.* at 914. “The standard deviation figure describes the probability that the measured disparity is the result of mere chance.” *Id.* The Eleventh Circuit had previously recognized “[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance.” *Id.*

The statistics presented by the County indicated “statistically significant underutilization of BBEs in County construction contracting.” *Id.* at 916. The results were “less dramatic” for HBEs and mixed as between favorable and unfavorable for WBEs. *Id.*

The Eleventh Circuit then explained the burden of proof:

“[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant’s] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently ‘narrowly tailored.’”

*Id.* (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a “neutral explanation” by: “(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced “sufficient evidence to establish a neutral explanation for the disparities.” *Id.*

The plaintiffs alleged that the disparities were “better explained by firm size than by discrimination ... [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts.” *Id.* at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id.* at 917. The Eleventh Circuit found that the plaintiff’s explanation of the disparities was a “plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms.” *Id.*

Additionally, the Eleventh Circuit noted that the County’s own expert admitted that “firm size plays a significant role in determining which firms win contracts.” *Id.* The expert stated:

The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. *Id.*

The Eleventh Circuit then summarized:

Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. *Id.*

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is “a statistical procedure for determining the relationship between a dependent and independent variable, *e.g.*, the dollar value of a contract award and firm size.” *Id.* (internal citations omitted). The purpose of the regression analysis is “to determine whether the relationship between the two variables is statistically meaningful.” *Id.*

The County’s regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (*i.e.*, most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at



918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite “strong basis in evidence” of discrimination of BBEs and HBEs. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. *Id.* However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. *Id.* The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this evidence was not “sufficiently probative of discrimination.” *Id.*

The County argued that the district court erroneously relied on the disaggregated data (*i.e.*, broken down by contract type) as opposed to the consolidated statistics. *Id.* at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) “the County’s own expert testified as to the utility of examining the disaggregated data ‘insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another.’” *Id.*

Additionally, the district court noted, and the Eleventh Circuit found that “the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as ‘Simpson’s Paradox,’ which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated.” *Id.* at 919, n. 4 (internal citations omitted). “Under those circumstances,” the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a “strong basis in evidence” of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

**County subcontracting statistics.** The County performed a subcontracting study to measure MBE/WBE participation in the County’s subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), “the study compared the proportion of the designated group that filed a subcontractor’s release of lien on a County construction

project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period.” *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor’s release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor’s release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation.

*Id.* The County’s argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court’s decision to fail to credit the study erroneous. *Id.*

**Marketplace data statistics.** The County conducted another statistical study “to see what the differences are in the marketplace and what the relationships are in the marketplace.” *Id.* The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a “certificate of competency” with Dade County as of January 1995. *Id.* The selected firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm’s owner, and asked for information on the firm’s total sales and receipts from all sources. *Id.* The County’s expert then studied the data to determine “whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. *Id.* The expert’s hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id.*

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.” *Id.*, quoting *Croson*, 488 U.S. at 501, quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id.* Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id.*

**The Wainwright Study.** The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing “the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database” (derived from the decennial census). *Id.* The study “(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners.” *Id.* “The study concluded that blacks, Hispanics, and women are less likely to own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males.” *Id.*

With respect to the first conclusion, Wainwright controlled for “human capital” variables (education, years of labor market experience, marital status, and English proficiency) and “financial capital” variables (interest and dividend income, and home ownership). *Id.* The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id.* The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id.* at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id.*

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id.* The Eleventh Circuit quoted *Croson*, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: “There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.” *Id.*, quoting *Croson*, 488 U.S. at 503. Following the Supreme Court in *Croson*, the Eleventh Circuit held “the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason.” *Id.*, quoting *Croson*, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. *Id.* at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id.* at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed supra, which did regress for firm size. *Id.*

**The Brimmer Study.** The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id.* The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau’s Survey of Minority- and Women-Owned Businesses, produced every five years. *Id.* The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id.*

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id.* The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id.* However, the study made no attempt to filter for the Metrorail project and “complete[ly] fail[ed]” to account for firm size. *Id.* Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id.* at 924.

**Anecdotal evidence.** In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBes, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBes. *Id.* The County presented three basic forms of anecdotal evidence: “(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms.” *Id.*

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id.* They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than their non-MBE/WBE counterparts. *Id.* They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id.*

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was “shopped” to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a “letter of unavailability” for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project.

*Id.* at 924-25.

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id.* at 925. The interviewees reported similar instances of perceived discrimination, including: “difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms.” *Id.*

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County

employees also believed that discrimination could taint the County's construction contracting process. *Id.* However, such anecdotal evidence is helpful "only when it [is] combined with and reinforced by sufficiently probative statistical evidence." *Id.* In her plurality opinion in *Croson*, Justice O'Connor found that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified." *Id.*, quoting *Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that "anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a "constitutionally sufficient evidentiary foundation." *Id.*

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, *i.e.*, "remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market." *Id.*

**Narrow tailoring.** "The essence of the 'narrowly tailored' inquiry is the notion that explicitly racial preferences ... must only be a 'last resort' option." *Id.*, quoting *Hayes v. North Side Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993) and citing *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he strict scrutiny standard ... forbids the use of even narrowly drawn racial classifications except as a last resort.").

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) "the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties." *Id.* at 927, citing *Ensley Branch*, 31 F.3d at 1569. The four factors provide "a useful analytical structure." *Id.* at 927. The Eleventh Circuit focused only on the first factor in the present case "because that is where the County's MBE/WBE programs are most problematic." *Id.*

#### The Eleventh Circuit

flatly reject[ed] the County's assertion that 'given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.' That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id.*, citing *Croson*, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting") ... Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential

side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment.

*Id.* at 927.

The Eleventh Circuit held that the County “clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures.” *Id.* Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an “equally conclusory analysis” in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id.*

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County’s own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County’s own processes and procedures, including: “the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information.” *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were “institutional barriers” to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the “institutional youth” of black- and Hispanic-owned construction firms. *Id.* “It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part.” *Id.*

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O’Connor in *Croson*:

[T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect ... The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks.

*Id.*, quoting *Croson*, 488 U.S. at 509-10. The Eleventh Circuit found that except for some “half-hearted programs” consisting of “limited technical and financial aid that might benefit BBEs and HBEs,” the County had not “seriously considered” or tried most of the race- and ethnicity-neutral alternatives available. *Id.* at 928. “Most notably ... the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County’s own contracting process.” *Id.*

The Eleventh Circuit found that the County had taken no steps to “inform, educate, discipline, or penalize” discriminatory misconduct by its own employees. *Id.* at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local

contractors, subcontractors, suppliers, bankers, or insurers. *Id.* “Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort.” Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. *Id.*

**Substantial relationship.** The Eleventh Circuit held that due to the relaxed “substantial relationship” standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. *Id.* However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. *Id.*

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

### ***11. Contractor’s Association of E. Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996)***

The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appealed from the district court’s judgment declaring that the City’s DBE/MBE/WBE program for black construction contractors, violated the Equal Protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors). The Third Circuit affirmed the district court that the Ordinance was not narrowly tailored to serve a compelling state interest. 91 F. 3d 586, 591 (3d Cir. 1996), *affirming, Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 893 F.Supp. 419 (E.D.Pa.1995).

**The Ordinance.** The City’s Ordinance sought to increase the participation of “disadvantaged business enterprises” (DBEs) in City contracting. *Id.* at 591. DBEs are businesses defined as those at least 51% owned by “socially and economically disadvantaged” persons. “Socially and economically disadvantaged” persons are, in turn, defined as “individuals who have ... been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* The Third Circuit found in *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990, 999 (3d Cir.1993) (*Contractors II*), this definition “includes only individuals who are both victims of prejudice based on status and economically deprived.” Businesses majority-owned by racial minorities (minority business enterprises or MBEs) and women are rebuttably presumed to be DBEs, but businesses that would otherwise qualify as DBEs are rebuttably presumed not to be DBEs if they have received more than \$5 million in City contracts. *Id.* at 591-592.

The Ordinance set participation “goals” for different categories of DBEs: racial minorities (15%), women (10%) and handicapped (2%). *Id.* at 592. These percentage goals were percentages of the total dollar amount spent by the City in each of the three contract categories: vending contracts, construction contracts, and personal and professional service contracts. Dollars received by DBE *subcontractors* in connection with City financed prime contracts are counted towards the goals as well as dollars received by DBE *prime* contractors. *Id.*

Two different strategies were authorized. When there were sufficient DBEs qualified to perform a City contract to ensure competitive bidding, a contract could be let on a sheltered market basis—i.e., only DBEs will be permitted to bid. In other instances, the contract would be let on a non-sheltered basis—i.e., any firm may bid—with the goals requirements being met through subcontracting. *Id.* at 592 The sheltered market strategy saw little use. It was attempted on a trial basis, but there were too few DBEs in any given area of expertise to ensure reasonable prices, and the program was abandoned. *Id.* Evidence submitted by the City indicated that no construction contract was let on a sheltered market basis from 1988 to 1990, and there was no evidence that the City had since pursued that approach. *Id.* Consequently, the Ordinance’s participation goals were achieved almost entirely by requiring that prime contractors subcontract work to DBEs in accordance with the goals. *Id.*

The Court stated that the significance of complying with the goals is determined by a series of presumptions. *Id.* at 593. Where at least one bidding contractor submitted a satisfactory Schedule for Participation, it was presumed that all contractors who did not submit a satisfactory Schedule did not exert good faith efforts to meet the program goals, and the “lowest responsible, responsive contractor” received the contract. *Id.* Where none of the bidders submitted a satisfactory Schedule, it was presumed that all but the bidder who proposed “the highest goals” of DBE participation at a “reasonable price” did not exert good faith efforts, and the contract was awarded to the “lowest, responsible, responsive contractor” who was granted a Waiver and proposed the highest level of DBE participation at a reasonable price. *Id.* Non-complying bidders in either situation must rebut the presumption in order to secure a waiver.

**Procedural History.** This appeal is the third appeal to consider this challenge to the Ordinance. On the first appeal, the Third Circuit affirmed the district court’s ruling that the Contractors had standing to challenge the set-aside program, but reversed the grant of summary judgment in their favor because UMEA had not been afforded a fair opportunity to develop the record. *Id.* at 593 citing, *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991) (*Contractors I*).

On the second appeal, the Third Circuit reviewed a second grant of summary judgment for the Contractors. *Id.*, citing, *Contractors II*, 6 F.3d 990. The Court in that appeal concluded that the Contractors had standing to challenge the program only as it applied to the award of construction contracts, and held that the pre-enactment evidence available to the City Council in 1982 did “not provide a sufficient evidentiary basis” for a conclusion that there had been discrimination against women and minorities in the construction industry. *Id.* citing, 6 F.3d at 1003. The Court further held, however, that evidence of discrimination obtained after 1982 could be considered in determining whether there was a sufficient evidentiary basis for the Ordinance. *Id.*

In the second appeal, 6 F.3d 990 (3d. Cir. 1993), after evaluating both the pre-enactment and post-enactment evidence in the summary judgment record, the Court affirmed the grant of summary judgment insofar as it declared to be unconstitutional those portions of the program requiring set-asides for women and non-black minority contractors. *Id.* at 594. The Court also held that the two percent set-aside for the handicapped passed rational basis review and ordered the court to enter summary judgment for the City with respect to that portion of the program. *Id.* In addition, the Court concluded that the portions of the program requiring a set-aside for black contractors could stand only if they met the “strict scrutiny” standard of Equal Protection review and that the record reflected a genuine issue of



material fact as to whether they were narrowly tailored to serve a compelling interest of the City as required under that standard. *Id.*

This third appeal followed a nine-day bench trial and a resolution by the district court of the issues thus presented. That trial and this appeal thus concerned only the constitutionality of the Ordinance's preferences for black contractors. *Id.*

**Trial.** At trial, the City presented a study done in 1992 after the filing of this suit, which was reflected in two pretrial affidavits by the expert study consultant and his trial testimony. *Id.* at 594. The core of his analysis concerning discrimination by the City centered on disparity indices prepared using data from fiscal years 1979–81. The disparity indices were calculated by dividing the percentage of all City construction dollars received by black construction firms by their percentage representation among all area construction firms, multiplied by 100.

The consultant testified that the disparity index for black construction firms in the Philadelphia metropolitan area for the period studied was about 22.5. According to the consultant, the smaller the resulting figure was, the greater the inference of discrimination, and he believed that 22.5 was a disparity attributable to discrimination. *Id.* at 595. A number of witnesses testified to discrimination in City contracting before the City Council, prior to the enactment of the Ordinance, and the consultant testified that his statistical evidence was corroborated by their testimony. *Id.* at 595.

Based on information provided in an affidavit by a former City employee (John Macklin), the study consultant also concluded that black representation in contractor associations was disproportionately low in 1981 and that between 1979 and 1981 black firms had received no subcontracts on City-financed construction projects. *Id.* at 595. The City also offered evidence concerning two programs instituted by others prior to 1982 which were intended to remedy the effects of discrimination in the construction industry but which, according to the City, had been unsuccessful. *Id.* The first was the Philadelphia Plan, a program initiated in the late 1960s to increase the hiring of minorities on public construction sites.

The second program was a series of programs implemented by the Philadelphia Urban Coalition, a non-profit organization (Urban Coalition programs). These programs were established around 1970, and offered loans, loan guarantees, bonding assistance, training, and various forms of non-financial assistance concerning the management of a construction firm and the procurement of public contracts. *Id.* According to testimony from a former City Council member and others, neither program succeeded in eradicating the effects of discrimination. *Id.*

The City pointed to the waiver and exemption sections of the Ordinance as proof that there was adequate flexibility in its program. The City contended that its fifteen percent goal was appropriate. The City maintained that the goal of fifteen percent may be required to account for waivers and exemptions allowed by the City, was a flexible goal rather than a rigid quota in light of the waivers and exemptions allowed by the Ordinance, and was justified in light of the discrimination in the construction industry. *Id.* at 595.

The Contractors presented testimony from an expert witness challenging the validity and reliability of the study and its conclusions, including, *inter alia*, the data used, the assumptions underlying the study, and the failure to include federally-funded contracts let through the City Procurement Department. *Id.* at 595. The Contractors relied heavily on the

legislative history of the Ordinance, pointing out that it reflected no identification of any specific discrimination against black contractors and no data from which a Council person could find that specific discrimination against black contractors existed or that it was an appropriate remedy for any such discrimination. *Id.* at 595 They pointed as well to the absence of any consideration of race-neutral alternatives by the City Council prior to enacting the Ordinance. *Id.* at 596.

On cross-examination, the Contractors elicited testimony that indicated that the Urban Coalition programs were relatively successful, which the Court stated undermined the contention that race-based preferences were needed. *Id.* The Contractors argued that the fifteen percent figure must have been simply picked from the air and had no relationship to any legitimate remedial goal because the City Council had no evidence of identified discrimination before it. *Id.*

At the conclusion of the trial, the district court made findings of fact and conclusions of law. It determined that the record reflected no “strong basis in evidence” for a conclusion that discrimination against black contractors was practiced by the City, non-minority prime contractors, or contractors associations during any relevant period. *Id.* at 596 *citing*, 893 F.Supp. at 447. The court also determined that the Ordinance was “not ‘narrowly tailored’ to even the perceived objective declared by City Council as the reason for the Ordinance.” *Id.* at 596, *citing*, 893 F. Supp. at 441.

**Burden of Persuasion.** The Court held affirmative action programs, when challenged, must be subjected to “strict scrutiny” review. *Id.* at 596. Accordingly, a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a “passive participant;” race-based preferences cannot be justified by reference to past “societal” discrimination in which the municipality played no material role. *Id.* Moreover, the Court found the remedy must be tailored to the discrimination identified. *Id.*

The Court said that a municipality must justify its conclusions regarding discrimination in connection with the award of its construction contracts and the necessity for a remedy of the scope chosen. *Id.* at 597. While this does not mean the municipality must convince a court of the accuracy of its conclusions, the Court stated that it does mean the program cannot be sustained unless there is a strong basis in evidence for those conclusions. *Id.* The party challenging the race-based preferences can succeed by showing either (1) the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) there is no “strong basis in evidence” for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. *Id.*

The Third Circuit noted it and other courts have concluded that when the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination. *Id.* at 597. Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not “fit” the identified discrimination. *Id.*

Ultimately, however, the Court found that plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred. *Id.* at 597. This means that the plaintiffs bear the burden of persuading the court that the race-based preferences were not intended to serve the identified compelling interest or that there is no strong basis in the evidence as a whole for the conclusions the municipality needed to have reached with respect to the identified discrimination and the necessity of the remedy chosen. *Id.*

The Court explained the significance of the allocation of the burden of persuasion differs depending on the theory of constitutional invalidity that is being considered. If the theory is that the race-based preferences were adopted by the municipality with an intent unrelated to remedying its past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else. *Id.* at 597. As noted in *Contractors II*, the Third Circuit held the burden of persuasion here is analogous to the burden of persuasion in Title VII cases. *Id.* at 598, *citing*, 6 F.3d at 1006. The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important. *Id.*

The Court said the situation is different when the plaintiff's theory of constitutional invalidity is that, although the municipality may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, when the municipality comes forward with evidence of facts alleged to justify its conclusions, the Court found that the plaintiff has the burden of persuading the court that those facts are not accurate. *Id.* The ultimate issue as to whether a strong basis in evidence exists is an issue of law, however. The burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue. *Id.*

The Court held the district court's opinion explicitly demonstrates its recognition that the plaintiffs bore the burden of persuading it that an equal protection violation occurred. *Id.* at 598. The Court found the district court applied the appropriate burdens of production and persuasion, conducted the required evaluation of the evidence, examined the credited record evidence as a whole, and concluded that the "strong basis in evidence" for the City's position did not exist. *Id.*

**Three forms of discrimination advanced by the City.** The Court pointed out that several distinct forms of racial discrimination were advanced by the City as establishing a pattern of discrimination against minority contractors. The first was discrimination by prime contractors in the awarding of subcontracts. The second was discrimination by contractor associations in admitting members. The third was discrimination by the City in the awarding of prime contracts. The City and UMEA argued that the City may have "passively participated" in the first two forms of discrimination. *Id.* at 599.

**A. The evidence of discrimination by private prime contractors.** One of the City's theories is that discrimination by prime contractors in the selection of subcontractors existed and may be remedied by the City. The Court noted that as Justice O'Connor observed in *Croson*: if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, ... the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity ... has a compelling government interest in assuring that public dollars ... do not serve to finance the evil of private prejudice. *Id.* at 599, *citing*, 488 U.S. at 492.

The Court found the disparity study focused on just one aspect of the Philadelphia construction industry—the award of prime contracts by the City. *Id.* at 600. The City’s expert consultant acknowledged that the only information he had about subcontracting came from an affidavit of one person, John Macklin, supplied to him in the course of his study. As he stated on cross-examination, “I have made no presentation to the Court as to participation by black minorities or blacks in subcontracting.” *Id.* at 600. The only record evidence with respect to black participation in the subcontracting market comes from Mr. Macklin who was a member of the MBEC staff and a proponent of the Ordinance. *Id.* Based on a review of City records, found by the district court to be “cursory,” Mr. Macklin reported that not a single subcontract was awarded to minority subcontractors in connection with City-financed construction contracts during fiscal years 1979 through 1981. The district court did not credit this assertion. *Id.*

Prior to 1982, for solely City-financed projects, the City did not require subcontractors to prequalify, did not keep consolidated records of the subcontractors working on prime contracts let by the City, and did not record whether a particular contractor was an MBE. *Id.* at 600. To prepare a report concerning the participation of minority businesses in public works, Mr. Macklin examined the records at the City’s Procurement Department. The department kept procurement logs, project engineer logs, and contract folders. The subcontractors involved in a project were only listed in the engineer’s log. The court found Mr. Macklin’s testimony concerning his methodology was hesitant and unclear, but it does appear that he examined only 25 to 30 percent of the project engineer logs, and that his only basis for identifying a name in that segment of the logs as an MBE was his personal memory of the information he had received in the course of approximately a year of work with the OMO that certified minority contractors. *Id.* The Court quoted the district court finding as to Macklin’s testimony:

Macklin] went to the contract files and looked for contracts in excess of \$30,000.00 that in his view appeared to provide opportunities for subcontracting. (*Id.* at 13.) With that information, Macklin examined some of the project engineer logs for those projects to determine whether minority subcontractors were used by the prime contractors. (*Id.*) Macklin did not look at every available project engineer log. (*Id.*) Rather, he looked at a random 25 to 30 percent of all the project engineer logs. (*Id.*) As with his review of the Procurement Department log, Macklin determined that a minority subcontractor was used on the project only if he personally recognized the firm to be a minority. (*Id.*) Quite plainly, Macklin was unable to determine whether minorities were used on the remaining 65 to 70 percent of the projects that he did not review. When questioned whether it was possible that minority subcontractors did perform work on some City public works projects during fiscal years 1979 to 1981, and that he just did not see them in the project logs that he looked at, Macklin answered “it is a very good possibility.” 893 F.Supp. at 434.

*Id.* at 600.

The district court found two other portions of the record significant on this point. First, during the trial, the City presented Oscar Gaskins (“Gaskins”), former general counsel to the General and Specialty Contractors Association of Philadelphia (“GASCAP”) and the Philadelphia Urban Coalition, to testify about minority participation in the Philadelphia construction industry during the 1970s and early 1980s. Gaskins testified that, in his opinion, black contractors are still being subjected to racial discrimination in the private construction industry, and in subcontracting within the City limits. However, the Court pointed out, when Gaskins was asked by the district court to identify even one instance

where a minority contractor was denied a private contract or subcontract after submitting the lowest bid, Gaskins was unable to do so. *Id.* at 600-601.

Second, the district court noted that since 1979 the City's "standard requirements warn [would-be prime contractors] that discrimination will be deemed a 'substantial breach' of the public works contract which could subject the prime contractor to an investigation by the Commission and, if warranted, fines, penalties, termination of the contract and forfeiture of all money due." Like the Supreme Court in *Croson*, the Court stated the district court found significant the City's inability to point to any allegations that this requirement was being violated. *Id.* at 601.

The Court held the district court did not err by declining to accept Mr. Macklin's conclusion that there were no subcontracts awarded to black contractors in connection with City-financed construction contracts in fiscal years 1979 to 1981. *Id.* at 601. Accepting that refusal, the Court agreed with the district court's conclusion that the record provides no firm basis for inferring discrimination by prime contractors in the subcontracting market during that period. *Id.*

**B. The evidence of discrimination by contractor associations.** The Court stated that a city may seek to remedy discrimination by local trade associations to prevent its passive participation in a system of private discrimination. Evidence of "extremely low" membership by MBEs, standing by itself, however, is not sufficient to support remedial action; the city must "link [low MBE membership] to the number of local MBEs eligible for membership." *Id.* at 601.

The City's expert opined that there was statistically low representation of eligible MBEs in the local trade associations. He testified that, while numerous MBEs were eligible to join these associations, three such associations had only one MBE member, and one had only three MBEs. In concluding that there were many eligible MBEs not in the associations, however, he again relied entirely upon the work of Mr. Macklin. The district court rejected the expert's conclusions because it found his reliance on Mr. Macklin's work misplaced. *Id.* at 601. Mr. Macklin formed an opinion that a listed number of MBE and WBE firms were eligible to be members of the plaintiff Associations. *Id.* Because Mr. Macklin did not set forth the criteria for association membership and because the OMO certification list did not provide any information about the MBEs and WBEs other than their names and the fact that they were such, the Court found the district court was without a basis for evaluating Mr. Macklin's opinions. *Id.*

On the other hand, the district court credited "the uncontroverted testimony of John Smith [a former general manager of the CAEP and member of the MBEC] that no black contractor who has ever applied for membership in the CAEP has been denied." *Id.* at 601 *citing*, 893 F.Supp. at 440. The Court pointed out the district court noted as well that the City had not "identified even a single black contractor who was eligible for membership in any of the plaintiffs' associations, who applied for membership, and was denied." *Id.* at 601, *quoting*, 893 F.Supp at 441.

The Court held that given the City's failure to present more than the essentially unexplained opinion of Mr. Macklin, the opposing, uncontradicted testimony of Mr. Smith, and the failure of anyone to identify a single victim of the alleged discrimination, it was appropriate for the district court to conclude that a constitutionally sufficient basis was not established in the evidence. *Id.* at 601. The Court found that even if it accepted Mr. Macklin's opinions,

however, it could not hold that the Ordinance was justified by that discrimination. *Id.* at 602. Racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination. *Id.* The Court said that this record would not support a finding that this occurred. *Id.*

Contrary to the City's argument, the Court stated nothing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations. *Id.* Prior to 1982, the City let construction contracts on a competitive bid basis. It did not require bidders to be association members, and nothing in the record suggests that it otherwise favored the associations or their members. *Id.*

**C. The evidence of discrimination by the City.** The Court found the record provided substantially more support for the proposition that there was discrimination on the basis of race in the award of prime contracts by the City in the fiscal 1979–1981 period. *Id.* The Court also found the Contractors' critique of that evidence less cogent than did the district court. *Id.*

The centerpiece of the City's evidence was its expert's calculation of disparity indices which gauge the disparity in the award of prime contracts by the City. *Id.* at 602. Following *Contractors II*, the expert calculated a disparity index for black construction firms of 11.4, based on a figure of 114 such firms available to perform City contracts. At trial, he recognized that the 114 figure included black engineering and architecture firms, so he recalculated the index, using only black construction firms (i.e., 57 firms). This produced a disparity index of 22.5. Thus, based on this analysis, black construction firms would have to have received approximately 4.5 times more public works dollars than they did receive in order to have achieved an amount proportionate to their representation among all construction firms. The expert found the disparity sufficiently large to be attributable to discrimination against black contractors. *Id.*

The district court found the study did not provide a strong basis in evidence for an inference of discrimination in the prime contract market. It reached this conclusion primarily for three reasons. The study, in the district court's view, (1) did not take into account whether the black construction firms were qualified and willing to perform City contracts; (2) mixed statistical data from different sources; and (3) did not account for the "neutral" explanation that qualified black firms were too preoccupied with large, federally-assisted projects to perform City projects. *Id.* at 602-3.

The Court said the district court was correct in concluding that a statistical analysis should focus on the minority population capable of performing the relevant work. *Id.* at 603. As *Croson* indicates, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, citing, 488 U.S. at 501. In *Croson* and other cases, the Court pointed out, however, the discussion by the Supreme Court concerning qualifications came in the context of a rejection of an analysis using the percentage of a particular minority in the general population. *Id.*

The issue of qualifications can be approached at different levels of specificity, however, the Court stated, and some consideration of the practicality of various approaches is required.

An analysis is not devoid of probative value, the Court concluded, simply because it may theoretically be possible to adopt a more refined approach. *Id.* at 603.

To the extent the district court found fault with the analysis for failing to limit its consideration to those black contractors “willing” to undertake City work, the Court found its criticism more problematic. *Id.* at 603. In the absence of some reason to believe otherwise, the Court said one can normally assume that participants in a market with the ability to undertake gainful work will be “willing” to undertake it. Moreover, past discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. *Id.* at 603.

The Court stated that it seemed a substantial overstatement to assert that the study failed to take into account the qualifications and willingness of black contractors to participate in public works. *Id.* at 603. During the time period in question, fiscal years 1979–81, those firms seeking to bid on City contracts had to prequalify for *each and every* contract they bid on, and the criteria could be set differently from contract to contract. *Id.* The Court said it would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE. *Id.* The expert chose instead to use as the relevant minority population the black firms listed in the 1982 OMO Directory. The Court found this would appear to be a reasonable choice that, if anything, may have been on the conservative side. *Id.*

When a firm applied to be certified, the OMO required it to detail its bonding experience, prior experience, the size of prior contracts, number of employees, financial integrity, and equipment owned. *Id.* at 603. The OMO visited each firm to substantiate its claims. Although this additional information did not go into the final directory, the OMO was confident that those firms on the list were capable of doing the work required on large scale construction projects. *Id.*

The Contractors point to the small number of black firms that sought to prequalify for City-funded contracts as evidence that black firms were unwilling to work on projects funded solely by the City. *Id.* at 603. During the time period in question, City records showed that only seven black firms sought to prequalify, and only three succeeded in prequalifying. The Court found it inappropriate, however, to conclude that this evidence undermines the inference of discrimination. As the expert indicated in his testimony, the Court noted, if there has been discrimination in City contracting, it is to be expected that black firms may be discouraged from applying, and the low numbers may tend to corroborate the existence of discrimination rather than belie it. The Court stated that in a sense, to weigh this evidence for or against either party required it to presume the conclusion to be proved. *Id.* at 604.

The Court found that while it was true that the study “mixed data,” the weight given that fact by the district court seemed excessive. *Id.* at 604. The study expert used data from only two sources in calculating the disparity index of 22.5. He used data that originated from the City to determine the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of black construction firms. *Id.* He “mixed” this with data from the Bureau of the Census concerning the number of total construction firms in the Philadelphia Standard Metropolitan Statistical Area (PSMSA). The data from the City is not geographically bounded to the same extent that the Census information is. *Id.* Any firm could bid on City work, and any firm could seek certification from the OMO.

Nevertheless, the Court found that due to the burdens of conducting construction at a distant location, the vast majority of the firms were from the Philadelphia region and the Census data offers a reasonable approximation of the total number of firms that might vie for City contracts. *Id.* Although there is a minor mismatch in the geographic scope of the data, given the size of the disparity index calculated by the study, the Court was not persuaded that it was significant. *Id.* at 604.

Considering the use of the OMO Directory and the Census data, the Court found that the index of 22.5 may be a conservative estimate of the actual disparity. *Id.* at 604. While the study used a figure for black firms that took into account qualifications and willingness, it used a figure for total firms that did not. *Id.* If the study under-counted the number of black firms qualified and willing to undertake City construction contracts or over-counted the total number of firms qualified and willing to undertake City construction contracts, the actual disparity would be greater than 22.5. *Id.* Further, while the study limited the index to black firms, the study did not similarly reduce the dollars awarded to minority firms. The study used the figure of \$667,501, which represented the total amount going to all MBEs. If minorities other than blacks received some of that amount, the actual disparity would again be greater. *Id.* at 604.

The Court then considered the district court's suggestion that the extensive participation of black firms in federally-assisted projects, which were also procured through the City's Procurement Office, accounted for their low participation in the other construction contracts awarded by the City. *Id.* The Court found the district court was right in suggesting that the availability of substantial amounts of federally funded work and the federal set-aside undoubtedly had an impact on the number of black contractors available to bid on other City contracts. *Id.* at 605.

The extent of that impact, according to the Court, was more difficult to gauge, however. That such an impact existed does not necessarily mean that the study's analysis was without probative force. *Id.* at 605. If, the Court noted for example, one reduced the 57 available black contractors by the 20 to 22 that participated in federally assisted projects in fiscal years 1979–81 and used 35 as a fair approximation of the black contractors available to bid on the remaining City work, the study's analysis produces a disparity index of 37, which the Court found would be a disparity that still suggests a substantial under-participation of black contractors among the successful bidders on City prime contracts. *Id.*

The court in conclusion stated whether this record provided a strong basis in evidence for an inference of discrimination in the prime contract market "was a close call." *Id.* at 605. In the final analysis, however, the Court held it was a call that it found unnecessary to make, and thus it chose not to make it. *Id.* Even assuming that the record presents an adequately firm basis for that inference, the Court held the judgment of the district court must be affirmed because the Ordinance was clearly not narrowly tailored to remedy that discrimination. *Id.*

**Narrowly Tailored.** The Court said that strict scrutiny review requires it to examine the "fit" between the identified discrimination and the remedy chosen in an affirmative action plan. *Croson* teaches that there must be a strong basis in evidence not only for a conclusion that there is, or has been, discrimination, but also for a conclusion that the particular remedy chosen is made "necessary" by that discrimination. *Id.* at 605. The Court concluded that issue is shaped by its prior conclusions regarding the absence of a strong basis in



evidence reflecting discrimination by prime contractors in selecting subcontractors and by contractor associations in admitting members. *Id.* at 606.

This left as a possible justification for the Ordinance only the assumption that the record provided a strong basis in evidence for believing the City discriminated against black contractors in the award of prime contracts during fiscal years 1979 to 1981. *Id.* at 606. If the remedy reflected in the Ordinance cannot fairly be said to be necessary in light of the assumed discrimination in awarding prime construction projects, the Court said that the Ordinance cannot stand. The Court held, as did the district court, that the Ordinance was not narrowly tailored. *Id.*

**A. Inclusion of preferences in the subcontracting market.** The Court found the primary focus of the City’s program was the market for subcontracts to perform work included in prime contracts awarded by the City. *Id.* at 606. While the program included authorization for the award of prime contracts on a “sheltered market” basis, that authorization had been sparsely invoked by the City. Its goal with respect to dollars for black contractors had been pursued primarily through requiring that bidding prime contractors subcontract to black contractors in stipulated percentages. *Id.* The 15 percent participation goal and the system of presumptions, which in practice required non-black contractors to meet the goal on virtually every contract, the Court found resulted in a 15% set-aside for black contractors in the subcontracting market. *Id.*

Here, as in *Croson*, the Court stated “[t]o a large extent, the set aside of subcontracting dollars seems to rest on the unsupported assumption that white contractors simply will not hire minority firms.” *Id.* at 606, *citing*, 488 U.S. at 502. Here, as in *Croson*, the Court found there is no firm evidentiary basis for believing that non-minority contractors will not hire black subcontractors. *Id.* Rather, the Court concluded the evidence, to the extent it suggests that racial discrimination had occurred, suggested discrimination by the City’s Procurement Department against black contractors who were capable of bidding on prime City construction contracts. *Id.* To the considerable extent that the program sought to constrain decision making by private contractors and favor black participation in the subcontracting market, the Court held it was ill-suited as a remedy for the discrimination identified. *Id.*

The Court pointed out it did not suggest that an appropriate remedial program for discrimination by a municipality in the award of primary contracts could never include a component that affects the subcontracting market in some way. *Id.* at 606. It held, however, that a program, like Philadelphia’s program, which focused almost exclusively on the subcontracting market, was not narrowly tailored to address discrimination by the City in the market for prime contracts. *Id.*

**B. The amount of the set-aside in the prime contract market.** Having decided that the Ordinance is overbroad in its inclusion of subcontracting, the Court considered whether the 15 percent goal was narrowly tailored to address discrimination in prime contracting. *Id.* at 606. The Court found the record supported the district court’s findings that the Council’s attention at the time of the original enactment and at the time of the subsequent extension was focused solely on the percentage of minorities and women in the general population, and that Council made no effort at either time to determine how the Ordinance might be drafted to remedy particular discrimination—to achieve, for example, the approximate market share for black contractors that would have existed, had the purported discrimination not occurred. *Id.* at 607. While the City Council did not tie the 15% participation goal directly to the proportion of minorities in the local population, the Court

said the goal was either arbitrarily chosen or, at least, the Council's sole reference point was the minority percentage in the local population. *Id.*

The Court stated that it was clear that the City, in the entire course of this litigation, had been unable to provide an evidentiary basis from which to conclude that a 15% set-aside was necessary to remedy discrimination against black contractors in the market for prime contracts. *Id.* at 607. The study data indicated that, at most, only 0.7% of the construction firms qualified to perform City-financed prime contracts in the 1979–1981 period were black construction firms. *Id.* at 607. This, the Court found, indicated that the 15 percent figure chosen is an impermissible one. *Id.*

The Court said it was not suggesting that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides. It well may be that some premium could be justified under some circumstances. *Id.* at 608. However, the Court noted that the *only* evidentiary basis in the record that appeared at all relevant to fashioning a remedy for discrimination in the prime contracting market was the 0.7% figure. That figure did not provide a strong basis in evidence for concluding that a 15% set-aside was necessary to remedy discrimination against black contractors in the prime contract market. *Id.*

**C. Program alternatives that are either race-neutral or less burdensome to non-minority contractors.** In holding that the Richmond plan was not narrowly tailored, the Court pointed out, the Supreme Court in *Croson* considered it significant that race-neutral remedial alternatives were available and that the City had not considered the use of these means to increase minority business participation in City contracting. *Id.* at 608. It noted, in particular, that barriers to entry like capital and bonding requirements could be addressed by a race-neutral program of city financing for small firms and could be expected to lead to greater minority participation. Nevertheless, such alternatives were not pursued or even considered in connection with the Richmond's efforts to remedy past discrimination. *Id.*

The district court found that the City's procurement practices created significant barriers to entering the market for City-awarded construction contracts. *Id.* at 608. Small contractors, in particular, were deterred by the City's prequalification and bonding requirements from competing in that market. *Id.* Relaxation of those requirements, the district court found, was an available race-neutral alternative that would be likely to lead to greater participation by black contractors. No effort was made by the City, however, to identify barriers to entry in its procurement process and that process was not altered before or in conjunction with the adoption of the Ordinance. *Id.*

The district court also found that the City could have implemented training and financial assistance programs to assist disadvantaged contractors of all races. *Id.* at 608. The record established that certain neutral City programs had achieved substantial success in fulfilling its goals. The district court concluded, however, that the City had not supported the programs and had not considered emulating and/or expanding the programs in conjunction with the adoption of the Ordinance. *Id.*

The Court held the record provided ample support for the finding of the district court that alternatives to race-based preferences were available in 1982, which would have been either race neutral or, at least, less burdensome to non-minority contractors. *Id.* at 609. The Court found the City could have lowered administrative barriers to entry, instituted a training and financial assistance program, and carried forward the OMO's certification of

minority contractor qualifications. *Id.* The record likewise provided ample support for the district court’s conclusion that the “City Council was not interested in considering race-neutral measures, and it did not do so.” *Id.* at 609. To the extent the City failed to consider or adopt these alternatives, the Court held it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors. *Id.*

The Court found it particularly noteworthy that the Ordinance, since its extension, in 1987, for an additional 12 years, had been targeted exclusively toward benefiting only minority and women contractors “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.” *Id.* at 609. The City’s failure to consider a race-neutral program designed to encourage investment in and/or credit extension to small contractors or minority contractors, the Court stated, seemed particularly telling in light of the limited classification of victims of discrimination that the Ordinance sought to favor. *Id.*

**Conclusion.** The Court held the remedy provided by the program substantially exceeds the limited justification that the record provided. *Id.* at 609. The program provided race-based preferences for blacks in the market for subcontracts where the Court found there was no strong basis in the evidence for concluding that discrimination occurred. *Id.* at 610. The program authorized a 15% set-aside applicable to all prime City contracts for black contractors when, the Court concluded there was no basis in the record for believing that such a set-aside of that magnitude was necessary to remedy discrimination by the City in that market. *Id.* Finally, the Court stated the City’s program failed to include race-neutral or less burdensome remedial steps to encourage and facilitate greater participation of black contractors, measures that the record showed to be available. *Id.*

The Court concluded that a city may adopt race-based preferences only when there is a “strong basis in evidence for its conclusion that [the] remedial action was necessary.” *Id.* at 610. Only when such a basis exists is there sufficient assurance that the racial classification is not “merely the product of unthinking stereotypes or a form of racial politics.” *Id.* at 610. That assurance, the Court held was lacking here, and, accordingly, found that the race-based preferences provided by the Ordinance could not stand. *Id.*

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

An association of construction contractors filed suit challenging, on equal protection grounds, a city of Philadelphia ordinance that established a set-aside program for “disadvantaged business enterprises” owned by minorities, women, and handicapped persons. 6 F.3d. at 993. The United States District Court for the Eastern District of Pennsylvania, [735 F.Supp. 1274 \(E.D. Phila. 1990\)](#), granted summary judgment for the contractors [739 F.Supp. 227](#), and denied the City’s motion to stay the injunctive relief. Appeal was taken. The Third Circuit Court of Appeals, [945 F.2d 1260 \(3d Cir. 1991\)](#), affirmed in part and vacated in part the district court’s decision. *Id.* On remand, the district court again granted summary judgment for the contractors. The City appealed. The Third Circuit Court of Appeals, held that: (1) the contractors association had standing, but only to challenge the portions of the ordinance that applied to construction contracts; (2) the City presented sufficient evidence to withstand summary judgment with respect to the race and gender preferences; and (3) the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection. *Id.*

**Procedural history.** Nine associations of construction contractors challenged on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. *Id.* at 993. The district court granted summary judgment to the Contractors, holding they had standing to bring this lawsuit and invalidating the Ordinance in all respects. [Contractors Association v. City of Philadelphia, 735 F.Supp. 1274 \(E.D.Pa.1990\)](#). In an earlier opinion, the Third Circuit affirmed the district court’s ruling on standing, but vacated summary judgment on the merits because the City had outstanding discovery requests. [Contractors Association v. City of Philadelphia, 945 F.2d 1260 \(3d Cir.1991\)](#). On remand after discovery, the district court again entered summary judgment for the Contractors. The Third Circuit in this case affirmed in part, vacated in part, and reversed in part. 6 F.3d 990, 993.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and women-owned businesses. Phila.Code § 17-500. *Id.* The Ordinance established “goals” for the participation of “disadvantaged business enterprises.” § 17-503. “Disadvantaged business enterprises” (DBEs) were defined as those enterprises at least 51 percent owned by “socially and economically disadvantaged individuals,” defined in turn as: those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* at 994. The Ordinance further provided that racial minorities and women are rebuttably presumed to be socially and economically disadvantaged individuals, § 17-501(11)(a), but that a business which has received more than \$5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17-501(10). *Id.* at 994.

The Ordinance set goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for women-owned businesses, and 2 percent for businesses owned by handicapped persons. § 17-503(1). *Id.* at 994. The Ordinance applied to all City contracts, which are divided into three types—vending, construction, and personal and

professional services. § 17-501(6). The percentage goals related to the total dollar amounts of City contracts and are calculated separately for each category of contracts and each City agency. *Id.* at 994.

In 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 994. After the City moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the merits. The district court granted the Contractors' motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. *Id.* at 995 *citing*, [735 F.Supp. at 1283 & n. 3](#).

Turning to the merits of the Contractors' equal protection claim, the district court held that [City of Richmond v. J.A. Croson Co., 488 U.S. 469 \(1989\)](#), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. *Id.* Under that standard, the Third Circuit held a law will be invalidated if it is not "narrowly tailored" to a "compelling government interest." *Id.* at 995.

Applying *Croson*, the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a "compelling government interest." *Id.* at 995, *quoting*, [735 F.Supp. at 1295-98](#). The court also held the Ordinance was not "narrowly tailored," emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id.* at 995; [735 F.Supp. at 1298-99](#). The court held the Ordinance's preferences for businesses owned by women and handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id.* at 995 *citing*, [735 F.Supp. at 1299-1309](#).

On appeal, the Third Circuit in 1991 affirmed the district court's ruling on standing, but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. [945 F.2d 1260 \(3d Cir.1991\)](#). The Court remanded so discovery could be completed and explicitly reserved judgment on the merits. *Id.* at 1268. On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the Philadelphia construction industry against businesses owned by racial minorities, women, and handicapped persons to withstand summary judgment. The City and United Minority Enterprise Associates, Inc. (UMEA), which had intervened filed an appeal. *Id.*

This appeal, the Court said, presented three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. *Id.* at 995.

**Standing.** The Supreme Court has confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are "able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis." *Id.* at 995. Because the affidavits submitted to the district court established the Contractors were able and ready to bid on construction contracts, but

could not do so for failure to meet the DBE percentage requirements, the court held they had standing to challenge the sections of the Ordinance covering construction contracts. *Id.* at 996.

**Standards of equal protection review.** The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons. In analyzing these classifications separately, the Court first considered which standard of equal protection review applies to each classification. *Id.* at 999.

**Race, ethnicity, and gender.** The Court found that choice of the appropriate standard of review turns on the nature of the classification. *Id.* at 999. Because under equal protection analysis classifications based on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *Id.* Accordingly, the Court determined whether the Ordinance contains race- or gender-based classifications. The Ordinance’s classification scheme is spelled out in its definition of “socially and economically disadvantaged.” *Id.* The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition’s economic criteria as in addition to rather than in lieu of race, ethnicity, gender, and handicap. *Id.* Therefore, it applied strict scrutiny to the racial preference under *Croson* and intermediate scrutiny to the gender preference under [Mississippi University for Women v. Hogan, 458 U.S. 718, 724 \(1982\)](#). *Id.* at 999.

**A. Strict scrutiny.** Under strict scrutiny, a law may only stand if it is “narrowly tailored” to a “compelling government interest.” *Id.* at 999. Under intermediate scrutiny, a law must be “substantially related” to the achievement of “important government objectives.” *Id.*

The Court agreed with the district court that the definition of “socially and economically disadvantaged individuals” included only individuals who are both victims of prejudice based on status and economically deprived. *Id.* at 999. Additionally, the last clause of the definition described economically disadvantaged individuals as those “whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged.” *Id.* This clause, the Court found, demonstrated the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. *Id.* The Court said the plain language of the Ordinance foreclosed the City’s argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage. *Id.* at 1000.

**B. Intermediate scrutiny.** The Court considered the proper standard of review for the Ordinance’s gender preference. The Court held a gender-based classification favoring women merited intermediate scrutiny. *Id.* at 1000, citing, [Hogan 458 U.S. at 728](#). The Ordinance, the Court stated, is such a program. *Id.* Several federal courts, the Court noted, have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Id.* at 1001, citing, [Coral Constr. Co. v. King County, 941 F.2d 910, 930 \(9th Cir.1991\)](#), cert. denied, [502 U.S. 1033 \(1992\)](#); [Michigan Road Builders Ass’n, Inc. v. Milliken, 834 F.2d 583, 595 \(6th Cir.1987\)](#), aff’d mem., [489 U.S. 1061\(1989\)](#); [Associated General Contractors of Cal. v. City and County of San Francisco, 813 F.2d 922, 942 \(9th Cir.1987\)](#); [Main Line Paving Co. v. Board of Educ., 725 F.Supp. 1349, 1362 \(E.D.Pa.1989\)](#).

Application of intermediate scrutiny to the Ordinance's gender preference, the Court said, also follows logically from *Croson*, which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. *Id.* For these reasons, the Third Circuit rejected, as did the district court, those cases applying strict scrutiny to gender-based classifications. [Cone Corp. v. Hillsborough County](#), 908 F.2d 908 (11th Cir.), cert. denied, 498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990). *Id.* at 1000-1001. The Court agreed with the district court's choice of intermediate scrutiny to review the Ordinance's gender preference. *Id.*

**Handicap.** The district court reviewed the preference for handicapped business owners under the rational basis test. *Id.* at 1000, citing [735 F.Supp. at 1307](#). That standard validates the classification if it is "rationally related to a legitimate governmental purpose." *Id.* at 1001, citing [Cleburne](#), 473 U.S. at 445. The Court held the district court properly chose the rational basis standard in reviewing the Ordinance's preference for handicapped persons. *Id.*

**Constitutionality of the ordinance: race and ethnicity.** Because strict scrutiny applies to the Ordinance's racial and ethnic preferences, the Court stated it may only uphold them if they are "narrowly tailored" to a "compelling government interest." *Id.* at 1001-2. The Court noted that in *Croson*, the Supreme Court made clear that combatting racial discrimination is a "compelling government interest." *Id.* at 1002, quoting, [488 U.S. at 492, 509](#). It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry." *Id.* at [1002, quoting, 488 U.S. at 492](#).

In the Supreme Court's view, the "relevant statistical pool" was not the minority population, but the number of qualified minority contractors. It stressed the city did not know the number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. *Id.* at [1002, citing 488 U.S. at 502](#).

Ruling the Philadelphia Ordinance's racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance "possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan," *Id.* at 1002, quoting, [735 F.Supp. at 1298](#). As in *Croson*, the district court reasoned, the City relied on national statistics, a comparison between prime contract awards and the percentage of minorities in Philadelphia's population, the Ordinance's declaration it was remedial, and "conclusory" testimony of witnesses regarding discrimination in the Philadelphia construction industry. *Id.* at [1002, quoting, 1295-98](#).

In a footnote, the Court pointed out the district court also interpreted *Croson* to require "specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit" enacting the ordinance. [735 F.Supp. at 1295](#). The Court said this reading overlooked the statement in *Croson* that a City can be a "passive participant" in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city "has a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice." *Id.* at 1002, n. 10, quoting, [488 U.S. at 492](#).

**Anecdotal evidence of racial discrimination.** The City contended the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received

testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. *Id.* at 1002. In certain instances, these contractors lost out despite being low bidders. The Court found this anecdotal evidence significantly outweighed that presented in *Croson*, where the Richmond City Council heard “no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.” *Id.*, quoting, [488 U.S. at 480](#).

Although the district court acknowledged the minority contractors’ testimony was relevant under *Croson*, it discounted this evidence because “other evidence of the type deemed impermissible by the Supreme Court ... unsupported general testimony, impermissible statistics and information on the national set-aside program, ... overwhelmingly formed the basis for the enactment of the set-aside ... and therefore taint[ed] the minds of city councilmembers.” *Id.* at 1002, quoting, [735 F.Supp. at 1296](#).

The Third Circuit held, however, given *Croson*’s emphasis on statistical evidence, even had the district court credited the City’s anecdotal evidence, the Court did not believe this amount of anecdotal evidence was sufficient to satisfy strict scrutiny. *Id.* at 1003, quoting, [Coral Constr., 941 F.2d at 919](#) (“anecdotal evidence ... rarely, if ever, can ... show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”). Although anecdotal evidence alone may, the Court said, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here. *Id.* But because the combination of “anecdotal and statistical evidence is potent,” [Coral Constr., 941 F.2d at 919](#), the Court considered the statistical evidence proffered in support of the Ordinance.

**Statistical evidence of racial discrimination.** There are two categories of statistical evidence here, evidence undisputedly considered by City Council before it enacted the Ordinance in 1982 (the “pre-enactment” evidence), and evidence developed by the City on remand (the “post-enactment” evidence). *Id.* at 1003.

**Pre-Enactment statistical evidence.** The principal pre-enactment statistical evidence appeared in the 1982 Report of the City Council Finance Committee and recited that minority contractors were awarded only .09 percent of City contract dollars during the preceding three years, 1979 through 1981, although businesses owned by Blacks and Hispanics accounted for 6.4 percent of all businesses licensed to operate in Philadelphia. The Court found these statistics did not satisfy *Croson* because they did not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts. *Id.* at 1003. Under *Croson*, available minority-owned businesses comprise the “relevant statistical pool.” *Id.* at 1003. Therefore, the Court held the data in the Finance Committee Report did not provide a sufficient evidentiary basis for the Ordinance.

**Post-Enactment statistical evidence.** The “post-enactment” evidence consists of a study conducted by an economic consultant to demonstrate the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia. The study provided the “relevant statistical pool” needed to satisfy *Croson*—the percentage of minority businesses engaged in the Philadelphia construction industry. *Id.* at 1003. The study also presented data showing that minority subcontractors were underrepresented in the private sector construction market. This data may be



relevant, the Court said, if at trial the City can link it to discrimination occurring in the public sector construction market because the Ordinance covers subcontracting. *Id.* at n. 13.

The Court noted that several courts have held post-enactment evidence is admissible in determining whether an Ordinance satisfies *Croson*. *Id.* at 1004. Consideration of post-enactment evidence, the Court found was appropriate here, where the principal relief sought and the only relief granted by the district court, was an injunction. Because injunctions are prospective only, it makes sense the Court said to consider all available evidence before the district court, including the post-enactment evidence, which the district court did. *Id.*

**Sufficiency of the statistical and anecdotal evidence and burden of proof.** In determining whether the statistical evidence was adequate, the Court looked to what it referred to as its critical component—the “disparity index.” The index consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the “population” of Philadelphia area construction firms. This equation yields a percentage figure which is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise. *Id.* at 1005.

The Court noted that other courts considering equal protection challenges to similar ordinances have relied on disparity indices in determining whether *Croson*’s evidentiary burden is satisfied. *Id.* Disparity indices are highly probative evidence of discrimination because they ensure that the “relevant statistical pool” of minority contractors is being considered. *Id.*

**A. Statistical evidence.** The study reported a disparity index for City of Philadelphia construction contracts during the years 1979 through 1981 of 4 out of a possible 100. This index, the Court stated, was significantly worse than that in other cases where ordinances have withstood constitutional attack. *Id.* at 1004, citing, [Cone Corp., 908 F.2d at 916 \(10.78 disparity index\)](#); [AGC of California, 950 F.2d at 1414 \(22.4 disparity index\)](#); [Concrete Works, 823 F.Supp. at 834](#) (disparity index “significantly less than” 100); see also [Stuart, 951 F.2d at 451](#) (disparity index of 10 in police promotion program); compare [O’Donnell, 963 F.2d at 426](#) (striking down ordinance given disparity indices of approximately 100 in two categories). Therefore, the Court found the disparity index probative of discrimination in City contracting in the Philadelphia construction industry prior to enactment of the Ordinance. *Id.*

The Contractors contended the study was methodologically flawed because it considered only prime contractors and because it failed to consider the qualifications of the minority businesses or their interest in performing City contracts. The Contractors maintained the study did not indicate why there was a disparity between available minority contractors and their participation in contracting. The Contractors contended that these objections, without more, entitled them to summary judgment, arguing that under the strict scrutiny standard they do not bear the burden of proof, and therefore need not offer a neutral explanation for the disparity to prevail. *Id.* at 1005.

The Contractors, the Court found, misconceived the allocation of the burden of proof in affirmative action cases. *Id.* at 1005. The Supreme Court has indicated that “[t]he ultimate burden remains with [plaintiffs] to demonstrate the unconstitutionality of an affirmative

action program.” *Id.* 1005. Thus, the Court held the Contractors, not the City, bear the burden of proof. *Id.* Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise. *Id.* Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified. *Id.*

The Court, following *Croson*, held where a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. *Id.* at 1006. *Croson*’s reference to an “inference of discriminatory exclusion” based on statistics, as well as its citation to Title VII pattern cases, the Court stated, supports this interpretation. *Id.* The plaintiff bears the burden in such a case. *Id.* The Court noted the Third Circuit has indicated statistical proof of discrimination is handled similarly under Title VII and equal protection principles. *Id.*

The Court found the City’s statistical evidence had created an inference of discrimination which the Contractors would have to rebut at trial either by proving a “neutral explanation” for the disparity, “showing the statistics are flawed, ... demonstrating that the disparities shown by the statistics are not significant or actionable, ... or presenting contrasting statistical data.” *Id.* at 1007. *A fortiori*, this evidence, the Court said is sufficient for the City to withstand summary judgment. The Court stated that the Contractors’ objections to the study were properly presented to the trier of fact. *Id.* Accordingly, the Court found the City’s statistical evidence established a prima facie case of racial discrimination in the award of City of Philadelphia construction contracts. *Id.*

Consistent with strict scrutiny, the Court stated it must examine the data for each minority group contained in the Ordinance. *Id.* The Census data on which the study relied demonstrated that in 1982, the year the Ordinance was enacted, there were construction firms owned in Philadelphia by Blacks, Hispanics, and Asian–Americans, but not Native Americans. *Id.* Therefore, the Court held neither the City nor prime contractors could have discriminated against construction companies owned by Native Americans at the time of the Ordinance, and the Court affirmed summary judgment as to them. *Id.*

The Census Report indicated there were 12 construction firms owned by Hispanic persons, 6 firms owned by Asian–American persons, 3 firms owned by persons of Pacific Islands descent, and 1 other minority-owned firm. *Id.* at 1008. The study calculated Hispanic firms represented .15% of the available firms and Asian–American, Pacific–Islander, and “other” minorities represented .12% of the available firms, and that these firms received no City contracts during the years 1979 through 1981. The Court did not believe these numbers were large enough to create a triable issue of discrimination. The mere fact that .27 percent of City construction firms—the percentage of all of these groups combined—received no contracts does not rise to the “significant statistical disparity” . *Id.* at 1008.

**B. Anecdotal evidence.** Nor, the Court found, does it appear that there was any anecdotal evidence of discrimination against construction businesses owned by people of Hispanic or Asian–American descent. *Id.* at 1008. The district court found “there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts,” *Id.* at 1008, quoting, [735 F.Supp. at 1299](#), and there was no evidence of any witnesses who were members of these groups or who were Hispanic. *Id.*

The Court recognized that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian-American persons did not eliminate the possibility of discrimination against these firms. *Id.* at 1008. The small number itself, the Court said, may reflect barriers to entry caused in part by discrimination. *Id.* But, the Court held, plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. *Id.*

**Conclusion on compelling government interest.** The Court found that nothing in its decision prevented the City from re-enacting a preference for construction firms owned by Hispanic, Asian-American, or Native American persons based on more concrete evidence of discrimination. *Id.* In sum, the Court held, the City adduced enough evidence of racial discrimination against Blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test. *Id.*

**Narrowly Tailored.** The Court then decided whether the Ordinance’s racial preference was “narrowly tailored” to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Id.* at 1008. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective “race-neutral measures,” such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance. *Id.*

The City contended it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. *Id.* It relied on the affidavits of City Council President and former Philadelphia Urban Coalition General Counsel who testified regarding the race-neutral precursors of the Ordinance—the Philadelphia Plan, which set goals for employment of minorities on public construction sites, and the Urban Coalition’s programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. *Id.* The Court found the information in these affidavits sufficiently established the City’s prior consideration of race-neutral programs to withstand summary judgment. *Id.* at 1009.

Unlike the Richmond Ordinance, the Philadelphia Ordinance provided for several types of waivers of the fifteen percent goal. *Id.* at 1009. It exempted individual contracts or classes of contracts from the Ordinance where there were an insufficient number of available minority-owned businesses “to ensure adequate competition and an expectation of reasonable prices on bids or proposals,” and allowed a prime contractor to request a waiver of the fifteen percent requirement where the contractor shows he has been unable after “a good faith effort to comply with the goals for DBE participation.” *Id.*

Furthermore, as the district court noted, the Ordinance eliminated from the program successful minority businesses—those who have won \$5 million in city contracts. *Id.* Also unlike the Richmond program, the City’s program was geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs “within the Philadelphia Standard Metropolitan Statistical Area.” *Id.* The Court noted other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored. *Id.*

The Court said a closer question was presented by the Ordinance's fifteen percent goal. The City's data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. The Court found that the goal need not correspond precisely to the percentage of available contractors. *Id.* *Croson* does not impose this requirement, the Third Circuit concluded, as the Supreme Court stated only that Richmond's 30 percent goal inappropriately assumed "minorities [would] choose a particular trade in lockstep proportion to their representation in the local population." *Id.*, quoting, [488 U.S. at 507.](#)

The Court pointed out that imposing a fifteen percent goal for each contract may reflect the need to account for those contractors who received a waiver because insufficient minority businesses were available, and the contracts exempted from the program. *Id.* Given the strength of the Ordinance's showing with respect to other *Croson* factors, the Court concluded the City had created a dispute of fact on whether the minority preference in the Ordinance was "narrowly tailored." *Id.*

**Gender and intermediate scrutiny.** Under the intermediate scrutiny standard, the gender preference is valid if it was "substantially related to an important governmental objective." *Id.*, at 1009.

The City contended the gender preference was aimed at the "important government objective" of remedying economic discrimination against women, and that the ten percent goal was substantially related to this objective. In assessing this argument, the Court noted that "[i]n the context of women-business enterprise preferences, the two prongs of this intermediate scrutiny test tend to converge into one." *Id.* at 1009. The Court held it could uphold the construction provisions of this program if the City had established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the ten percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was "a product of analysis rather than a stereotyped reaction based on habit." *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.* But, the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id.* at 1011.

The Court concluded the evidence offered by the City regarding women-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id.* at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. *Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination. *Id.* at 1011.

**Handicap and rational basis.** The Court then addressed the two-percent preference for businesses owned by handicapped persons. *Id.* at 1011. The district court struck down this preference under the rational basis test, based on the belief according to the Third Circuit, that *Croson* required some evidence of discrimination against business enterprises owned by handicapped persons and therefore that the City could not rely on testimony of discrimination against handicapped individuals. *Id.*, citing [735 F.Supp. at 1308](#). The Court stated that a classification will pass the rational basis test if it is “rationally related to a legitimate government purpose,” *Id.*, citing, [Cleburne, 473 U.S. at 440](#).

The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in [Heller v. Doe, 509 U.S. 312–43 \(1993\)](#), indicating that “a [statutory] classification” subject to rational basis review “is accorded a strong presumption of validity,” and that “a state ... has no obligation to produce evidence to sustain the rationality of [the] classification.” *Id.* at 1011. Moreover, “the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Id.* at 1011.

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Court held the two-percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id.* at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force. *Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negating every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. *Id.* at 1012. Therefore, the Court reversed the district court's grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue. *Id.*

**Holding.** The Court vacated the district court's grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian-American, or Native American persons or women, and remanded the case for further proceedings and a trial in accordance with the opinion.

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

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC")*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city's bid preference program. 950 F.2d 1401 (9<sup>th</sup> Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the five percent preference given Local Business Enterprises ("LBEs") and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined "MBE" as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. "WBE" was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC's constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities' legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the

program. *Id.* at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, “the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review.” *Id.* at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9<sup>th</sup> Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong.” *Id.* at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the “old boy network” in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found “discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City’s procurement practices.” *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the “relevant market,” the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are “an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, *citing to Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring “the cold numbers convincingly to life. *Id.* at 1414, *quoting Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” *Id.* at 1415 *quoting Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order

to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City's findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the "narrowly tailored" requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of "rigid numerical quotas." *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, "an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 quoting *Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that "while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be." *Id.* at 1417 quoting *Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy "superfluous," and



would thwart the Supreme Court's directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear "relatively light and well distributed." *Id.* at 1417. The court stated that the Ordinance was "limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, quoting *Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City's borders. *Id.* 1418.

#### **14. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513 (10<sup>th</sup> Cir. 1994)**

The court considered whether the City and County of Denver's race- and gender-conscious public contract award program complied with the Fourteenth Amendment's guarantee of equal protection of the laws. Plaintiff-Appellant Concrete Works of Colorado, Inc. ("Concrete Works") appealed the district court's summary judgment order upholding the constitutionality of Denver's public contract program. The court concluded that genuine issues of material fact exist with regard to the evidentiary support that Denver presents to demonstrate that its program satisfies the requirements of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Accordingly, the court reversed and remanded. 36 F.3d 1513 (10<sup>th</sup> Cir. 1994).

**Background.** In, 1990, the Denver City Council enacted Ordinance ("Ordinance") to enable certified racial minority business enterprises ("MBEs")<sup>1</sup> and women-owned business enterprises ("WBEs") to participate in public works projects "to an extent approximating the level of [their] availability and capacity." *Id.* at 1515. This Ordinance was the most recent in a series of provisions that the Denver City Council has adopted since 1983 to remedy perceived race and gender discrimination in the distribution of public and private construction contracts. *Id.* at 1516.

In 1992, Concrete Works, a nonminority and male-owned construction firm, filed this Equal Protection Clause challenge to the Ordinance. *Id.* Concrete Works alleged that the Ordinance caused it to lose three construction contracts for failure to comply with either the stated MBE and WBE participation goals or the good-faith requirements. Rather than pursuing administrative or state court review of the OCC's findings, Concrete Works initiated this action, seeking a permanent injunction against enforcement of the Ordinance and damages for lost contracts. *Id.*

In 1993, and after extensive discovery, the district court granted Denver's summary judgment motion. *Concrete Works, Inc. v. City and County of Denver*, 823 F.Supp. 821 (D.Colo.1993). The court concluded that Concrete Works had standing to bring this claim. *Id.* With respect to the merits, the court held that Denver's program satisfied the strict scrutiny standard embraced by a majority of the Supreme Court in *Croson* because it was narrowly tailored to achieve a compelling government interest. *Id.*

**Standing.** At the outset, the Tenth Circuit on appeal considered Denver's contention that Concrete Works fails to satisfy its burden of establishing standing to challenge the Ordinance's constitutionality. *Id.* at 1518. The court concluded that Concrete Works demonstrated "injury in fact" because it submitted bids on three projects and the Ordinance prevented it from competing on an equal basis with minority and women-owned prime contractors. *Id.*

Specifically, the unequal nature of the bidding process lied in the Ordinance’s requirement that a nonminority prime contractor must meet MBE and WBE participation goals by entering into joint ventures with MBEs and WBEs or hiring them as subcontractors (or satisfying the ten-step good faith requirement). *Id.* In contrast, minority and women-owned prime contractors could use their own work to satisfy MBE and WBE participation goals. *Id.* Thus, the extra requirements, the court found imposed costs and burdens on nonminority firms that precluded them from competing with MBEs and WBEs on an equal basis. *Id.* at 1519.

In addition to demonstrating “injury in fact,” Concrete Works, the court held, also satisfied the two remaining elements to establish standing: (1) a causal relationship between the injury and the challenged conduct; and (2) a likelihood that the injury will be redressed by a favorable ruling. Thus, the court concluded that Concrete Works had standing to challenge the constitutionality of Denver’s race- and gender-conscious contract program. *Id.*

**Equal Protection Clause Standards.** The court determined the appropriate standard of equal protection review by examining the nature of the classifications embodied in the statute. The court applied strict scrutiny to the Ordinance’s race-based preference scheme, and thus inquired whether the statute was narrowly tailored to achieve a compelling government interest. *Id.* Gender-based classifications, in contrast, the court concluded are evaluated under the intermediate scrutiny rubric, which provides that the law must be substantially related to an important government objective. *Id.*

**Permissible Evidence and Burdens of Proof.** In *Croson*, a plurality of the Court concluded that state and local governments have a compelling interest in remedying identified past and present discrimination within their borders. *Id. citing, Croson*, 488 U.S. at 492, 509. The plurality explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a “ ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by allowing tax dollars “to finance the evil of private prejudice.” *Id. citing, Croson* at 492.

**A. Geographic Scope of the Data.** Concrete Works contended that *Croson* precluded the court from considering empirical evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA). Instead, it argued *Croson* would allow Denver only to use data describing discrimination within the City and County of Denver. *Id.* at 1520.

The court stated that a majority in *Croson* observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the construction industry to draw conclusions about prevailing market conditions in their own regions. *Id.* at 1520, *citing Croson* at 504. The relevant area in which to measure discrimination, then, is the local construction market, but that is not necessarily confined by jurisdictional boundaries. *Id.*

The court said that *Croson* supported its consideration of data from the Denver MSA because this data was sufficiently geographically targeted to the relevant market area. *Id.* The record revealed that over 80 percent of Denver Department of Public Works (“DPW”) construction and design contracts were awarded to firms located within the Denver MSA. *Id.* at 1520. To confine the permissible data to a governmental body’s strict geographical boundaries, the court found, would ignore the economic reality that contracts are often awarded to firms situated in adjacent areas. *Id.*

The court said that it is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program is scrutinized, but here Denver's contracting activity, insofar as construction work was concerned, was closely related to the Denver MSA. *Id.* at 1520. Therefore, the court held that data from the Denver MSA was adequately particularized for strict scrutiny purposes. *Id.*

**B. Anecdotal Evidence.** Concrete Works argued that the district court committed reversible error by considering such non-empirical evidence of discrimination as testimony from minority and women-owned firms delivered during public hearings, affidavits from MBEs and WBEs, summaries of telephone interviews that Denver officials conducted with MBEs and WBEs, and reports generated during Office of Affirmative Action compliance investigations. *Id.*

The court stated that selective anecdotal evidence about minority contractors' experiences, without more, would not provide a strong basis in evidence to demonstrate public or private discrimination in Denver's construction industry sufficient to pass constitutional muster under *Croson*. *Id.* at 1520.

Personal accounts of actual discrimination or the effects of discriminatory practices may, according to the court, however, vividly complement empirical evidence. *Id.* The court concluded that anecdotal evidence of a municipality's institutional practices that exacerbate discriminatory market conditions are often particularly probative. *Id.* Therefore, the government may include anecdotal evidence in its evidentiary mosaic of past or present discrimination. *Id.*

The court pointed out that in the context of employment discrimination suits arising under Title VII of the Civil Rights Act of 1964, the Supreme Court has stated that anecdotal evidence may bring "cold numbers convincingly to life." *Id.* at 1520, quoting, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). In fact, the court found, the majority in *Croson* impliedly endorsed the inclusion of personal accounts of discrimination. *Id.* at 1521. The court thus deemed anecdotal evidence of public and private race and gender discrimination appropriate supplementary evidence in the strict scrutiny calculus. *Id.*

**C. Post-Enactment Evidence.** Concrete Works argued that the court should consider only evidence of discrimination that existed prior to Denver's enactment of the Ordinance. *Id.* In *Croson*, the court noted that the Supreme Court underscored that a municipality "must identify [the] discrimination ... with some specificity *before* [it] may use race-conscious relief." *Id.* at 1521, quoting, *Croson*, 488 U.S. at 504 (emphasis added). Absent any pre-enactment evidence of discrimination, the court said a municipality would be unable to satisfy *Croson*. *Id.*

However, the court did not read *Croson's* evidentiary requirement as foreclosing the consideration of post-enactment evidence. *Id.* at 1521. Post-enactment evidence, if carefully scrutinized for its accuracy, the court found would often prove quite useful in evaluating the remedial effects or shortcomings of the race-conscious program. *Id.* This, the court noted was especially true in this case, where Denver first implemented a limited affirmative action program in 1983 and has since modified and expanded its scope. *Id.*

The court held the strong weight of authority endorses the admissibility of post-enactment evidence to determine whether an affirmative action contract program complies with

*Croson*. *Id.* at 1521. The court agreed that post-enactment evidence may prove useful for a court’s determination of whether an ordinance’s deviation from the norm of equal treatment is necessary. *Id.* Thus, evidence of discrimination existing subsequent to enactment of the 1990 Ordinance, the court concluded was properly before it. *Id.*

**D. Burdens of Production and Proof.** The court stated that the Supreme Court in *Croson* struck down the City of Richmond’s minority set-aside program because the City failed to provide an adequate evidentiary showing of past or present discrimination. *Id.* at 1521, *citing, Croson*, 488 U.S. at 498–506. The court pointed out that because the Fourteenth Amendment only tolerates race-conscious programs that narrowly seek to remedy identified discrimination, the Supreme Court in *Croson* explained that state and local governments “must identify that discrimination ... with some specificity before they may use race-conscious relief.” *Id., citing Croson*, at 504. The court said that the Supreme Court’s benchmark for judging the adequacy of the government’s factual predicate for affirmative action legislation was whether there exists a “*strong basis in evidence* for [the government’s] conclusion that remedial action was necessary.” *Id., quoting, Croson*, at 500.

Although *Croson* places the burden of production on the municipality to demonstrate a “strong basis in evidence” that its race- and gender-conscious contract program aims to remedy specifically identified past or present discrimination, the court held the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before a municipality may take affirmative steps to eradicate discrimination. *Id.* at 1521, *citing, Wygant*, 476 U.S. at 292 (O’Connor, J., concurring in part and concurring in the judgment). An affirmative action response to discrimination is sustainable against an equal protection challenge so long as it is predicated upon strong evidence of discrimination. *Id.* at 1522, *citing, Croson*, 488 U.S. at 504.

An inference of discrimination, the court found, may be made with empirical evidence that demonstrates “a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” *Id.* at 1522, *quoting, Croson* at 509 (plurality). The court concluded that it did not read *Croson* to require an attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* “strong basis in evidence” benchmark. *Id.* That, the court stated, must be evaluated on a case-by-case basis. *Id.*

The court said that the adequacy of a municipality’s showing of discrimination must be evaluated in the context of the breadth of the remedial program advanced by the municipality. *Id.* at 1522, *citing, Croson* at 498. Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, the court found is a question of law. *Id.* Underlying that legal conclusion, however, the court noted are factual determinations about the accuracy and validity of a municipality’s evidentiary support for its program. *Id.*

Notwithstanding the burden of initial production that rests with the municipality, “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* at 1522, *quoting, Wygant*, 476 U.S. at 277–78(plurality). Thus, the court stated that once Denver presented adequate statistical evidence of precisely defined discrimination in the Denver area construction market, it became incumbent upon Concrete Works either to establish that Denver’s evidence did not

constitute strong evidence of such discrimination or that the remedial statute was not narrowly drawn. *Id.* at 1523. Absent such a showing by Concrete Works, the court said, summary judgment upholding Denver’s Ordinance would be appropriate. *Id.*

**E. Evidentiary Predicate Underlying Denver’s Ordinance.** The evidence of discrimination that Denver presents to demonstrate a compelling government interest in enacting the Ordinance consisted of three categories: (1) evidence of discrimination in city contracting from the mid-1970s to 1990; (2) data about MBE and WBE utilization in the overall Denver MSA construction market between 1977 and 1992; and (3) anecdotal evidence that included personal accounts by MBEs and WBEs who have experienced both public and private discrimination and testimony from city officials who describe institutional governmental practices that perpetuate public discrimination. *Id.* at 1523.

**1. Discrimination in the Award of Public Contracts.** The court considered the evidence that Denver presented to demonstrate underutilization of MBEs and WBEs in the award of city contracts from the mid 1970s to 1990. The court found that Denver offered persuasive pieces of evidence that, considered in the abstract, could give rise to an inference of race- and gender-based public discrimination on isolated public works projects. *Id.* at 1523. However, the court also found the record showed that MBE and WBE utilization on public contracts as a whole during this period was strong in comparison to the total number of MBEs and WBEs within the local construction industry. *Id.* at 1524. Denver offered a rebuttal to this more general evidence, but the court stated it was clear that the weight to be given both to the general evidence and to the specific evidence relating to individual contracts presented genuine disputes of material facts.

The court then engaged in an analysis of the factual record and an identification of the genuine material issues of fact arising from the parties’ competing evidence.

**(a) Federal Agency Reports of Discrimination in Denver.** Denver submitted federal agency reports of discrimination in Denver public contract awards. *Id.* at 1524. The record contained a summary of a 1978 study by the United States General Accounting Office (“GAO”), which showed that between 1975 and 1977 minority businesses were significantly underrepresented in the performance of Denver public contracts that were financed in whole or in part by federal grants. *Id.*

Concrete Works argued that a material fact issue arose about the validity of this evidence because “the 1978 GAO Report was nothing more than a listing of the problems faced by all small firms, first starting out in business.” *Id.* at 1524. The court pointed out, however, Concrete Works ignored the GAO Report’s empirical data, which quantified the actual disparity between the utilization of minority contractors and their representation in the local construction industry. *Id.* In addition, the court noted that the GAO Report reflected the findings of an objective third party. *Id.* Because this data remained uncontested, notwithstanding Concrete Works’ conclusory allegations to the contrary, the court found the 1978 GAO Report provided evidence to support Denver’s showing of discrimination. *Id.*

Added to the GAO findings was a 1979 letter from the United States Department of Transportation (“US DOT”) to the Mayor of the City of Denver, describing the US DOT Office of Civil Rights’ study of Denver’s discriminatory contracting practices at Stapleton International Airport. *Id.* at 1524. US DOT threatened to withhold additional federal funding for Stapleton because Denver had “denied minority contractors the benefits of, excluded them from, or otherwise discriminated against them concerning contracting

opportunities at Stapleton,” in violation of Title VI of the Civil Rights Act of 1964 and other federal laws. *Id.*

The court discussed the following data as reflected of the low level of MBE and WBE utilization on Stapleton contracts prior to Denver’s adoption of an MBE and WBE goals program at Stapleton in 1981: for the years 1977 to 1980, respectively, MBE utilization was 0 percent, 3.8 percent, .7 percent, and 2.1 percent; data on WBE utilization was unknown for the years 1977 to 1979, and it was .05 percent for 1980. *Id.* at 1524.

The court stated that like its unconvincing attempt to discredit the GAO Report, Concrete Works presented no evidence to challenge the validity of US DOT’s allegations. *Id.* Concrete Works, the court said, failed to introduce evidence refuting the substance of US DOT’s information, attacking its methodology, or challenging the low utilization figures for MBEs at Stapleton before 1981. *Id.* at 1525. Thus, according to the court, Concrete Works failed to create a genuine issue of fact about the conclusions in the US DOT’s report. *Id.* In sum, the court found the federal agency reports of discrimination in Denver’s contract awards supported Denver’s contention that race and gender discrimination existed prior to the enactment of the challenged Ordinance. *Id.*

**(b) Denver’s Reports of Discrimination.** Denver pointed to evidence of public discrimination prior to 1983, the year that the first Denver ordinance was enacted. *Id.* at 1525. A 1979 DPW “Major Bond Projects Final Report,” which reviewed MBE and WBE utilization on projects funded by the 1972 and 1974 bond referenda and the 1975 and 1976 revenue bonds, the court said, showed strong evidence of underutilization of MBEs and WBEs. *Id.* Based on this Report’s description of the approximately \$85 million in contract awards, there was 0 percent MBE and WBE utilization for professional design and construction management projects, and less than 1 percent utilization for construction. *Id.* The Report concluded that if MBEs and WBEs had been utilized in the same proportion as found in the construction industry, 5 percent of the contract dollars would have been awarded to MBEs and WBEs. *Id.*

To undermine this data, Concrete Works alleged that the DPW Report contained “no information about the number of minority or women owned firms that were used” on these bond projects. *Id.* at 1525. However, the court concluded the Report’s description of MBE and WBE utilization in terms of contract dollars provided a more accurate depiction of total utilization than would the mere number of MBE and WBE firms participating in these projects. *Id.* Thus, the court said this line of attack by Concrete Works was unavailing. *Id.*

Concrete Works also advanced expert testimony that Denver’s data demonstrated strong MBE and WBE utilization on the total DPW contracts awarded between 1978 and 1982. *Id.* Denver responded by pointing out that because federal and city affirmative action programs were in place from the mid-1970s to the present, this overall DPW data reflected the intended remedial effect on MBE and WBE utilization of these programs. *Id.* at 1526. Based on its contention that the overall DPW data was therefore “tainted” and distorted by these pre-existing affirmative action goals programs, Denver asked the court to focus instead on the data generated from specific public contract programs that were, for one reason or another, insulated from federal and local affirmative action goals programs, i.e. “non-goals public projects.” *Id.*

Given that the same local construction industry performed both goals and non-goals public contracts, Denver argued that data generated on non-goals public projects offered a control

group with which the court could compare MBE and WBE utilization on public contracts governed by a goals program and those insulated from such goal requirements. *Id.* Denver argued that the utilization of MBEs and WBEs on non-goals projects was the better test of whether there had been discrimination historically in Denver contracting practices. *Id.* at 1526.

**DGS data.** The first set of data from non-goals public projects that Denver identified were MBE and WBE disparity indices on Denver Department of General Services (“DGS”) contracts, which represented one-third of all city construction funding and which, prior to the enactment of the 1990 Ordinance, were not subject to the goals program instituted in the earlier ordinances for DPW contracts. *Id.* at 1526. The DGS data, the court found, revealed extremely low MBE and WBE utilization. *Id.* For MBEs, the DGS data showed a .14 disparity index in 1989 and a .19 disparity index in 1990—evidence the court stated was of significant underutilization. *Id.* For WBEs, the disparity index was .47 in 1989 and 1.36 in 1990—the latter, the court said showed greater than full participation and the former demonstrating underutilization. *Id.*

The court noted that it did not have the benefit of relevant authority with which to compare Denver’s disparity indices for WBEs. Nevertheless, the court concluded Denver’s data indicated significant WBE underutilization such that the Ordinance’s gender classification arose from “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 1526, n.19, quoting, *Mississippi Univ. of Women*, 458 U.S. at 726.

**DPW data.** The second set of data presented by Denver, the court said, reflected distinct MBE and WBE underutilization on non-goals public projects consisting of separate DPW projects on which no goals program was imposed. *Id.* at 1527. Concrete Works, according to the court, attempted to trivialize the significance of this data by contending that the projects, in dollar terms, reflected a small fraction of the total Denver MSA construction market. *Id.* But, the court noted that Concrete Works missed the point because the data was not intended to reflect conditions in the overall market. *Id.* Instead the data dealt solely with the utilization levels for city-funded projects on which no MBE and WBE goals were imposed. *Id.* The court found that it was particularly telling that the disparity index significantly deteriorated on projects for which the city did not establish minority and gender participation goals. *Id.* Insofar as Concrete Works did not attack the data on any other grounds, the court considered it was persuasive evidence of underlying discrimination in the Denver construction market. *Id.*

**Empirical data.** The third evidentiary item supporting Denver’s contention that public discrimination existed prior to enactment of the challenged Ordinance was empirical data from 1989, generated after Denver modified its race- and gender-conscious program. *Id.* at 1527. In the wake of *Croson*, Denver amended its program by eliminating the minimum annual goals program for MBE and WBE participation and by requiring MBEs and WBEs to demonstrate that they had suffered from past discrimination. *Id.*

This modification, the court said, resulted in a noticeable decline in the share of DPW construction dollars awarded to MBEs. *Id.* From 1985 to 1988 (prior to the 1989 modification of Denver’s program), DPW construction dollars awarded to MBEs ranged from 17 to nearly 20 percent of total dollars. *Id.* However, the court noted the figure dropped to 10.4 percent in 1989, after the program modifications took effect. *Id.* at 1527. Like the DGS and non-goals DPW projects, this 1989 data, the court concluded, further

supported the inference that MBE and WBE utilization significantly declined after deletion of a goals program or relaxation of the minimum MBE and WBE utilization goal requirements. *Id.*

Nonetheless, the court stated it must consider Denver's empirical support for its contention that public discrimination existed prior to the enactment of the Ordinance in the context of the overall DPW data, which showed consistently strong MBE and WBE utilization from 1978 to the present. *Id.* at 1528. The court noted that although Denver's argument may prove persuasive at trial that the non-goals projects were the most reliable indicia of discrimination, the record on summary judgment contained two sets of data, one that gave rise to an inference of discrimination and the other that undermined such an inference. *Id.* This discrepancy, the court found, highlighted why summary judgment was inappropriate on this record. *Id.*

**Availability data.** The court concluded that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.* at 1528. Although Denver's data used as its baseline the percentage of firms in the local construction market that were MBEs and WBEs, Concrete Works argued that a more accurate indicator would consider the capacity of local MBEs and WBEs to undertake the work. *Id.* The court said that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.*

The court agreed with the other circuits which had at that time interpreted Croson impliedly to permit a municipality to rely, as did Denver, on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion or request for a preliminary injunction. *Id.* at 1527 *citing, Contractors Ass'n*, 6 F.3d at 1005 (comparing MBE participation in city contracts with the "percentage of [MBE] availability or composition in the 'population' of Philadelphia area construction firms"); *Associated Gen. Contractors*, 950 F.2d at 1414 (relying on availability data to conclude that city presented "detailed findings of prior discrimination"); *Cone Corp.*, 908 F.2d at 916 (statistical disparity between "the total percentage of minorities involved in construction and the work going to minorities" shows that "the racial classification in the County plan [was] necessary").

But, the court found Concrete Works had identified a legitimate factual dispute about the accuracy of Denver's data and questioned whether Denver's reliance on the percentage of MBEs and WBEs available in the marketplace overstated "the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than nonminority-owned firms." *Id.* at 1528. In other words, the court said, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs. *Id.*

The court stated that it was not implying that availability was not an appropriate barometer to calculate MBE and WBE utilization, nor did it cast aspersions on data that simply used raw numbers of MBEs and WBEs compared to numbers of total firms in the market. *Id.* The court concluded, however, once credible information about the size or capacity of the firms was introduced in the record, it became a factor that the court should consider. *Id.*



Denver presented several responses. *Id.* at 1528. It argued that a construction firm's precise "capacity" at a given moment in time belied quantification due to the industry's highly elastic nature. *Id.* DPW contracts represented less than 4 percent of total MBE revenues and less than 2 percent of WBE revenues in 1989, thereby the court said, strongly implied that MBE and WBE participation in DPW contracts did not render these firms incapable of concurrently undertaking additional work. *Id.* at 1529. Denver presented evidence that most MBEs and WBEs had never participated in city contracts, "although almost all firms contacted indicated that they were interested in City work." *Id.* Of those MBEs and WBEs who have received work from DPW, available data showed that less than 10 percent of their total revenues were from DPW contracts. *Id.*

The court held all of the back and forth arguments highlighted that there were genuine and material factual disputes in the record, and that such disputes about the accuracy of Denver's data should not be resolved at summary judgment. *Id.* at 1529.

**(c) Evidence of Private Discrimination in the Denver MSA.** In recognition that a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area, the court also considered data about conditions in the overall Denver MSA construction industry between 1977 and 1992. *Id.* at 1529. The court stated that given DPW and DGS construction contracts represented approximately 2 percent of all construction in the Denver MSA, Denver MSA industry data sharpened the picture of local market conditions for MBEs and WBEs. *Id.*

According to Denver's expert affidavits, the MBE disparity index in the Denver MSA was .44 in 1977, .26 in 1982, and .43 in 1990. *Id.* The corresponding WBE disparity indices were .46 in 1977, .30 in 1982, and .42 in 1989. *Id.* This pre-enactment evidence of the overall Denver MSA construction market—i.e. combined public and private sector utilization of MBEs and WBEs—the court found gave rise to an inference that local prime contractors discriminated on the basis of race and gender. *Id.*

The court pointed out that rather than offering any evidence in rebuttal, Concrete Works merely stated that this empirical evidence did not prove that the Denver government itself discriminated against MBEs and WBEs. *Id.* at 1529. Concrete Works asked the court to define the appropriate market as limited to contracts with the City and County of Denver. *Id.* But, the court said that such a request ignored the lesson of *Croson* that a municipality may design programs to prevent tax dollars from "financ[ing] the evil of private prejudice." *Id.*, quoting, *Croson*, 488 U.S. at 492.

The court found that what the Denver MSA data did not indicate, however, was whether there was any linkage between Denver's award of public contracts and the Denver MSA evidence of industry-wide discrimination. *Id.* at 1529. The court said it could not tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. *Id.*

Neither *Croson* nor its progeny, the court pointed out, clearly stated whether private discrimination that was in no way funded with public tax dollars could, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. *Id.* The court said a plurality in *Croson* suggested that remedial measures could be justified upon a municipality's showing that "it had essentially become a 'passive

participant' in a system of racial exclusion practiced by elements of the local construction industry." *Id.* at 1529, quoting, *Croson*, 488 U.S. at 492.

The court concluded that *Croson* did not require the municipality to identify an exact linkage between its award of public contracts and private discrimination, but such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program. *Id.* at 1529. The record before the court did not explain the Denver government's role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and the court stated that this may be a fruitful issue to explore at trial. *Id.* at 1530.

**(d). Anecdotal Evidence.** The record, according to the court, contained numerous personal accounts by MBEs and WBEs, as well as prime contractors and city officials, describing discriminatory practices in the Denver construction industry. *Id.* at 1530. Such anecdotal evidence was collected during public hearings in 1983 and 1988, interviews, the submission of affidavits, and case studies performed by a consulting firm that Denver employed to investigate public and private market conditions in 1990, prior to the enactment of the 1990 Ordinance. *Id.*

The court indicated again that anecdotal evidence about minority- and women-owned contractors' experiences could bolster empirical data that gave rise to an inference of discrimination. *Id.* at 1530. While a factfinder, the court stated, should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carry more weight due to the systemic impact that such institutional practices have on market conditions. *Id.*

The court noted that in addition to the individual accounts of discrimination that MBEs and WBEs had encountered in the Denver MSA, City affirmative action officials explained that change orders offered a convenient means of skirting project goals by permitting what would otherwise be a new construction project (and thus subject to the MBE and WBE participation requirements) to be characterized as an extension of an existing project and thus within DGS's bailiwick. *Id.* at 1530. An assistant city attorney, the court said, also revealed that projects have been labelled "remodeling," as opposed to "reconstruction," because the former fall within DGS, and thus were not subject to MBE and WBE goals prior to the enactment of the 1990 Ordinance. *Id.* at 1530. The court concluded over the object of Concrete Works that this anecdotal evidence could be considered in conjunction with Denver's statistical analysis. *Id.*

**2. Summary.** The court summarized its ruling by indicating Denver had compiled substantial evidence to support its contention that the Ordinance was enacted to remedy past race- and gender-based discrimination. *Id.* at 1530. The court found in contrast to the predicate facts on which Richmond unsuccessfully relied in *Croson*, that Denver's evidence of discrimination both in the award of public contracts and within the overall Denver MSA was particularized and geographically targeted. *Id.* The court emphasized that Denver need not negate all evidence of non-discrimination, nor was it Denver's burden to prove judicially that discrimination did exist. *Id.* Rather, the court held, Denver need only come forward with a "strong basis in evidence" that its Ordinance was a narrowly-tailored response to specifically identified discrimination. *Id.* Then, the court said it became Concrete Works' burden to show that there was no such strong basis in evidence to support Denver's affirmative action legislation. *Id.*

The court also stated that Concrete Works had specifically identified potential flaws in Denver's data and had put forth evidence that Denver's data failed to support an inference of either public or private discrimination. *Id.* at 1530. With respect to Denver's evidence of public discrimination, for example, the court found overall DPW data demonstrated strong MBE and WBE utilization, yet data for isolated DPW projects and DGS contract awards suggested to the contrary. *Id.* The parties offered conflicting rationales for this disparate data, and the court concluded the record did not provide a clear explanation. *Id.* In addition, the court said that Concrete Works presented a legitimate contention that Denver's disparity indices failed to consider the relatively small size of MBEs and WBEs, which the court noted further impeded its ability to draw conclusions from the existing record. *Id.* at 1531.

Significantly, the court pointed out that because Concrete Works did not challenge the district court's conclusion with respect to the second prong of Croson's strict scrutiny standard—i.e. that the Ordinance was narrowly tailored to remedy past and present discrimination—the court need not and did not address this issue. *Id.* at 1531.

On remand, the court stated the parties should be permitted to develop a factual record to support their competing interpretations of the empirical data. *Id.* at 1531. Accordingly, the court reversed the district court ruling granting summary judgment and remanded the case for further proceedings. See *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

### ***15. Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991)***

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9<sup>th</sup> Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington's minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a *prima facie* case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where "gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of

discrimination.” *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics “convincingly to life.” *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, citing *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11<sup>th</sup> Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, citing *Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive

tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, citing Croson, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust every alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at five percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id.* Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

### ***Recent District Court Decisions***

#### ***16. United States v. Taylor, 232 F.Supp. 3d 741 (W.D. Penn. 2017)***

In a criminal case that is noteworthy because it involved a challenge to the Federal DBE Program, a federal district court in the Western District of Pennsylvania upheld the Indictment by the United States against Defendant Taylor who had been indicted on multiple counts arising out of a scheme to defraud the United States Department of Transportation's Disadvantaged Business Enterprise Program ("Federal DBE Program"). *United States v. Taylor, 232 F.Supp. 3d 741, 743 (W.D. Penn. 2017).* Also, the court in

denying the motion to dismiss the Indictment upheld the federal regulations in issue against a challenge to the Federal DBE Program.

**Procedural and case history.** This was a white collar criminal case arising from a fraud on the Federal DBE Program by Century Steel Erectors (“CSE”) and WMCC, Inc., and their respective principals. In this case, the Government charged one of the owners of CSE, Defendant Donald Taylor, with fourteen separate criminal offenses. The Government asserted that Defendant and CSE used WMCC, Inc., a certified DBE as a “front” to obtain 13 federally funded highway construction contracts requiring DBE status, and that CSE performed the work on the jobs while it was represented to agencies and contractors that WMCC would be performing the work. *Id.* at 743.

The Government contended that WMCC did not perform a “commercially useful function” on the jobs as the DBE regulations require and that CSE personnel did the actual work concealing from general contractors and government entities that CSE and its personnel were doing the work. *Id.* WMCC’s principal was paid a relatively nominal “fixed-fee” for permitting use of WMCC’s name on each of these subcontracts. *Id.* at 744.

**Defendant’s contentions.** This case concerned *inter alia* a motion to dismiss the Indictment. Defendant argued that Count One must be dismissed because he had been mischarged under the “defraud clause” of [18 U.S.C. § 371](#), in that the allegations did not support a charge that he defrauded the United States. *Id.* at 745. He contended that the DBE program is administered through state and county entities, such that he could not have defrauded the United States, which he argued merely provides funding to the states to administer the DBE program. *Id.*

Defendant also argued that the Indictment must be dismissed because the underlying federal regulations, [49 C.F.R. § 26.55\(c\)](#), that support the counts against him were void for vagueness as applied to the facts at issue. *Id.* More specifically, he challenged the definition of “commercially useful function” set forth in the regulations and also contended that Congress improperly delegated its duties to the Executive branch in promulgating the federal regulations at issue. *Id.* at 745.

**Federal government position.** The Government argued that the charge at Count One was supported by the allegations in the Indictment which made clear that the charge was for defrauding the United States’ Federal DBE Program rather than the state and county entities. *Id.* The Government also argued that the challenged federal regulations are neither unconstitutionally vague nor were they promulgated in violation of the principles of separation of powers. *Id.*

**Material facts in Indictment.** The court pointed out that the Pennsylvania Department of Transportation (“PennDOT”) and the Pennsylvania Turnpike Commission (“PTC”) receive federal funds from FHWA for federally funded highway projects and, as a result, are required to establish goals and objectives in administering the DBE Program. *Id.* at 745. State and local authorities, the court stated, are also delegated the responsibility to administer the program by, among other things, certifying entities as DBEs; tracking the usage of DBEs on federally funded highway projects through the award of credits to general contractors on specific projects; and reporting compliance with the participation goals to the federal authorities. *Id.* at 745-746.

WMCC received 13 federally-funded subcontracts totaling approximately \$2.34 million under PennDOT's and PTC's DBE program and WMCC was paid a total of \$1.89 million." *Id.* at 746 . These subcontracts were between WMCC and a general contractor, and required WMCC to furnish and erect steel and/or precast concrete on federally funded Pennsylvania highway projects. *Id.* Under PennDOT's program, the entire amount of WMCC's subcontract with the general contractor, including the cost of materials and labor, was counted toward the general contractor's DBE goal because WMCC was certified as a DBE and "ostensibly performed a commercially useful function in connection with the subcontract." *Id.*

The stated purpose of the conspiracy was for Defendant and his co-conspirators to enrich themselves by using WMCC as a "front" company to fraudulently obtain the profits on DBE subcontracts slotted for legitimate DBE's and to increase CSE profits by marketing CSE to general contractors as a "one-stop shop," which could not only provide the concrete or steel beams, but also erect the beams and provide the general contractor with DBE credits. *Id.* at 746 .

As a result of these efforts, the court said the "conspirators" caused the general contractors to pay WMCC for DBE subcontracts and were deceived into crediting expenditures toward DBE participation goals, although they were not eligible for such credits because WMCC was not performing a commercially useful function on the jobs. *Id.* at 747. CSE also obtained profits from DBE subcontracts that it was not entitled to receive as it was not a DBE and thereby precluded legitimate DBE's from obtaining such contracts. *Id.*

**Motion to Dismiss—challenges to Federal DBE Regulations.** Defendant sought dismissal of the Indictment by contesting the propriety of the underlying federal regulations in several different respects, including claiming that [49 C.F.R. § 26.55\(c\)](#) was "void for vagueness" because the phrase "commercially useful function" and other phrases therein were not sufficiently defined. *Id.* at 754. Defendant also presented a non-delegation challenge to the regulatory scheme involving the DBE Program. *Id.* The Government countered that dismissal of the Indictment was not justified under these theories and that the challenges to the regulations should be overruled. The court agreed with the Government's position and denied the motion to dismiss. *Id.* at 754.

The court disagreed with Defendant's assessment that the challenged DBE regulations are so vague that people of ordinary intelligence cannot ascertain the meaning of same, including the phrases "commercially useful function;" "industry practices;" and "other relevant factors." *Id.* at 755, *citing*, [49 C.F.R. § 26.55\(c\)](#). The court noted that other federal courts have rejected vagueness and related challenges to the federal DBE regulations in both civil, *see* [Midwest Fence Corp. v. United States Dep't of Transp.](#), 840 F.3d 932 (7th Cir. 2016) (rejecting vagueness challenge to [49 C.F.R. § 26.53\(a\)](#) and "good faith efforts" language), and criminal matters, *United States v. Maxwell*, 579 F.3d 1282, at 1302 (11th Cir. 2009).

With respect to the alleged vagueness of the phrase "commercially useful function," the court found the regulations both specifically describes the types of activities that: (1) fall within the definition of that phrase in [§ 26.55\(c\)\(1\)](#); and, (2) are beyond the scope of the definition of that phrase in [§ 26.55\(c\)\(2\)](#). *Id.* at 755, *citing*, [49 C.F.R. §§ 26.55\(c\)\(1\)-\(2\)](#). The phrases "industry practices" and "other relevant factors" are undefined, the court said, but "an undefined word or phrase does not render a statute void when a court could ascertain the term's meaning by reading it in context." *Id.* at 756.



The context, according to the court, is that these federal DBE regulations are used in a comprehensive regulatory scheme by the DOT and FHWA to ensure participation of DBEs in federally funded highway construction projects. *Id.* at 756. These particular phrases, the court pointed out, are also not the most prominently featured in the regulations as they are utilized in a sentence describing how to determine if the activities of a DBE constitute a “commercially useful function.” *Id.*, citing, [49 C.F.R. § 26.55\(c\)](#).

While Defendant suggested that the language of these undefined phrases was overbroad, the court held it is necessarily limited by [§ 26.55\(c\)\(2\)](#), expressly stating that “[a] DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.” *Id.* at 756, quoting, [49 C.F.R. § 26.55\(c\)](#).

The district court in this case also found persuasive the reasoning of both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, construing the federal DBE regulations in [United States v. Maxwell](#). *Id.* at 756. The court noted that in [Maxwell](#), the defendant argued in a post-trial motion that [§ 26.55\(c\)](#) was “ambiguous” and the evidence presented at trial showing that he violated this regulation could not support his convictions for various mail and wire fraud offenses. *Id.* at 756. The trial court disagreed, holding that:

the rules involving which entities must do the DBE/CSBE work are not ambiguous, or susceptible to different but equally plausible interpretations. Rather, the rules clearly state that a DBE [...] is required to do its own work, which includes managing, supervising and performing the work involved.... And, under the federal program, it is clear that the DBE is also required to negotiate, order, pay for, and install its own materials.

*Id.* at 756, quoting, [United States v. Maxwell](#), 579 F.3d 1282, 1302 (11th Cir. 2009). The defendant in [Maxwell](#), the court said, made this same argument on appeal to the Eleventh Circuit, which soundly rejected it, explaining that:

[b]oth the County and federal regulations explicitly say that a CSBE or DBE is required to perform a commercially useful function. Both regulatory schemes define a commercially useful function as being responsible for the execution of the contract and actually performing, managing, and supervising the work involved. And the DBE regulations make clear that a DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. [49 C.F.R. § 26.55\(c\)\(2\)](#). There is no obvious ambiguity about whether a CSBE or DBE subcontractor performs a commercially useful function when the job is managed by the primary contractor, the work is performed by the employees of the primary contractor, the primary contractor does all of the negotiations, evaluations, and payments for the necessary materials, and the subcontractor does nothing more than provide a minimal amount of labor and serve as a signatory on two-party checks. In short, no matter how these regulations are read, the jury could conclude that what FLP did was not the performance of a “commercially useful function.”

*Id.* at 756, quoting, [United States v. Maxwell](#), 579 F.3d 1282, 1302 (11th Cir. 2009).

Thus, the Western District of Pennsylvania federal district court in this case concluded the Eleventh Circuit in [Maxwell](#) found that the federal regulations were sufficient in the context of a scheme similar to that charged against Defendant Taylor in this case: WMCC was

“fronted” as the DBE, receiving a fixed fee for passing through funds to CSE, which utilized its personnel to perform virtually all of the work under the subcontracts. *Id.* at 757.

**Federal DBE regulations are authorized by Congress and the Federal DBE Program has been upheld by the courts.** The court stated Defendant’s final argument to dismiss the charges relied upon his unsupported claims that the U.S. DOT lacked the authority to promulgate the DBE regulations and that it exceeded its authority in doing so. *Id.* at 757. The court found that the Government’s exhaustive summary of the legislative history and executive rulemaking that has taken place with respect to the relevant statutory provisions and regulations suffices to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id.*, citing, [49 U.S.C. § 322\(a\)](#) (“The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.”); [23 U.S.C. § 304](#) (The Secretary of Transportation “should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway system.”); [23 U.S.C. § 315](#) (“[Subject to certain exceptions related to tribal lands and national forests], the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Title.”).

Also, significantly, the court pointed out that the Federal DBE Program has been upheld in various contexts, “even surviving strict scrutiny review,” with courts holding that the program is narrowly tailored to further compelling governmental interests. *Id.* at 757, citing, [Midwest Fence Corp.](#), 840 F.3d at 942 (citing [Western States Paving Co. v. Washington State Dep’t of Transportation](#), 407 F.3d 983, 993 (9th Cir. 2005); [Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transportation](#), 345 F.3d 964, 973 (8th Cir. 2003); [Adarand Constructors, Inc. v. Slater](#), 228 F.3d 1147, 1155 (10th Cir. 2000) ).

In light of this authority as to the validity of the federal regulations and the Federal DBE Program, the Western District of Pennsylvania federal district court in this case held that Defendant failed to meet his burden to demonstrate that dismissal of the Indictment was warranted. *Id.*

**Conclusion.** The court denied the Defendant’s motion to dismiss the Indictment. The Defendant subsequently pleaded guilty. Recently on March 13, 2018, the court issued the final Judgment sentencing the Defendant to Probation for 3 years; ordered Restitution in the amount of \$85,221.21; and a \$30,000 fine. The case also was terminated on March 13, 2018.

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

Plaintiff Kossman is a company engaged in the business of providing erosion control services and is majority owned by a white male. 2016 WL 1104363 at \*1. Kossman brought this action as an equal protection challenge to the City of Houston’s Minority and Women Owned Business Enterprise (“MWBE”) program. *Id.* The MWBE program that is challenged has been in effect since 2013 and sets a 34 percent MWBE goal for construction projects. *Id.* Houston set this goal based on a disparity study issued in 2012. *Id.* The study analyzed the status of minority-owned

and women-owned business enterprises in the geographic and product markets of Houston's construction contracts. *Id.*

Kossman alleges that the MWBE program is unconstitutional on the ground that it denies non-MWBEs equal protection of the law, and asserts that it has lost business as a result of the MWBE program because prime contractors are unwilling to subcontract work to a non-MWBE firm like Kossman. *Id.* at \*1. Kossman filed a motion for summary judgment; Houston filed a motion to exclude the testimony of Kossman's expert; and Houston filed a motion for summary judgment. *Id.*

The district court referred these motions to the Magistrate Judge. The Magistrate Judge, on February 17, 2016, issued its Memorandum & Recommendation to the district court in which it found that Houston's motion to exclude Kossman's expert should be granted because the expert articulated no method and had no training in statistics or economics that would allow him to comment on the validity of the disparity study. *Id.* at \*1 The Magistrate Judge also found that the MWBE program was constitutional under strict scrutiny, except with respect to the inclusion of Native-American-owned businesses. *Id.* The Magistrate Judge found there was insufficient evidence to establish a need for remedial action for businesses owned by Native Americans, but found there was sufficient evidence to justify remedial action and inclusion of other racial and ethnic minorities and women-owned businesses. *Id.*

After the Magistrate Judge issued its Memorandum & Recommendation, Kossman filed objections, which the district court subsequently in its order adopting Memorandum & Recommendation, decided on March 22, 2016, affirmed and adopted the Memorandum & Recommendation of the magistrate judge and overruled the objections by Kossman. *Id.* at \*2.

#### **District court order adopting Memorandum & Recommendation of Magistrate Judge.**

**Dun & Bradstreet underlying data properly withheld and Kossman's proposed expert properly excluded.** The district court first rejected Kossman's objection that the City of Houston improperly withheld the Dun & Bradstreet data that was utilized in the disparity study. This ruling was in connection with the district court's affirming the decision of the Magistrate Judge granting the motion of Houston to exclude the testimony of Kossman's proposed expert. Kossman had conceded that the Magistrate Judge correctly determined that Kossman's proposed expert articulated no method and relied on untested hypotheses. *Id.* at \*2. Kossman also acknowledged that the expert was unable to produce data to confront the disparity study. *Id.*

Kossman had alleged that Houston withheld the underlying data from Dun & Bradstreet. The court found that under the contractual agreement between Houston and its consultant, the consultant for Houston had a licensing agreement with Dun & Bradstreet that prohibited it from providing the Dun & Bradstreet data to any third-party. *Id.* at \*2. In addition, the court agreed with Houston that Kossman would not be able to offer admissible analysis of the Dun & Bradstreet data, even if it had access to the data. *Id.* As the Magistrate Judge pointed out, the court found Kossman's expert had no training in statistics or economics, and thus would not be qualified to interpret the Dun & Bradstreet data or challenge the disparity study's methods. *Id.* Therefore, the court affirmed the grant of Houston's motion to exclude Kossman's expert.

**Dun & Bradstreet data is reliable and accepted by courts; bidding data rejected as problematic.** The court rejected Kossman's argument that the disparity study was based on

insufficient, unverified information furnished by others, and rejected Kossman's argument that bidding data is a superior measure of determining availability. *Id.* at \*3.

The district court held that because the disparity study consultant did not collect the data, but instead utilized data that Dun & Bradstreet had collected, the consultant could not guarantee the information it relied on in creating the study and recommendations. *Id.* at \*3. The consultant's role was to analyze that data and make recommendations based on that analysis, and it had no reason to doubt the authenticity or accuracy of the Dun & Bradstreet data, nor had Kossman presented any evidence that would call that data into question. *Id.* As Houston pointed out, Dun & Bradstreet data is extremely reliable, is frequently used in disparity studies, and has been consistently accepted by courts throughout the country. *Id.*

Kossman presented no evidence indicating that bidding data is a comparably more accurate indicator of availability than the Dun & Bradstreet data, but rather Kossman relied on pure argument. *Id.* at \*3. The court agreed with the Magistrate Judge that bidding data is inherently problematic because it reflects only those firms actually solicited for bids. *Id.* Therefore, the court found the bidding data would fail to identify those firms that were not solicited for bids due to discrimination. *Id.*

**The anecdotal evidence is valid and reliable.** The district court rejected Kossman's argument that the study improperly relied on anecdotal evidence, in that the evidence was unreliable and unverified. *Id.* at \*3. The district court held that anecdotal evidence is a valid supplement to the statistical study. *Id.* The MWBE program is supported by both statistical and anecdotal evidence, and anecdotal evidence provides a valuable narrative perspective that statistics alone cannot provide. *Id.*

The district court also found that Houston was not required to independently verify the anecdotes. *Id.* at \*3. Kossman, the district court concluded, could have presented contrary evidence, but it did not. *Id.* The district court cited other courts for the proposition that the combination of anecdotal and statistical evidence is potent, and that anecdotal evidence is nothing more than a witness's narrative of an incident told from the witness's perspective and including the witness's perceptions. *Id.* Also, the court held the city was not required to present corroborating evidence, and the plaintiff was free to present its own witness to either refute the incident described by the city's witnesses or to relate their own perceptions on discrimination in the construction industry. *Id.*

**The data relied upon by the study was not stale.** The court rejected Kossman's argument that the study relied on data that is too old and no longer relevant. *Id.* at \*4. The court found that the data was not stale and that the study used the most current available data at the time of the study, including Census Bureau data (2006-2008) and Federal Reserve data (1993, 1998 and 2003), and the study performed regression analyses on the data. *Id.*

Moreover, Kossman presented no evidence to suggest that Houston's consultant could have accessed more recent data or that the consultant would have reached different conclusions with more recent data. *Id.*

**The Houston MWBE program is narrowly tailored.** The district court agreed with the Magistrate Judge that the study provided substantial evidence that Houston engaged in race-neutral alternatives, which were insufficient to eliminate disparities, and that despite race-neutral alternatives in place in Houston, adverse disparities for MWBEs were consistently observed. *Id.* at \*4. Therefore, the court found there was strong evidence that a remedial

program was necessary to address discrimination against MWBEs. *Id.* Moreover, Houston was not required to exhaust every possible race-neutral alternative before instituting the MWBE program. *Id.*

The district court also found that the MWBE program did not place an undue burden on Kossman or similarly situated companies. *Id.* at \*4. Under the MWBE program, a prime contractor may substitute a small business enterprise like Kossman for an MWBE on a race and gender-neutral basis for up to four percent of the value of a contract. *Id.* Kossman did not present evidence that he ever bid on more than four percent of a Houston contract. *Id.* In addition, the court stated the fact the MWBE program placed *some* burden on Kossman is insufficient to support the conclusion that the program is not nearly tailored. *Id.* The court concurred with the Magistrate Judge's observation that the proportional sharing of opportunities is, at the core, the point of a remedial program. *Id.* The district court agreed with the Magistrate Judge's conclusion that the MWBE program is nearly tailored.

**Native-American-owned businesses.** The study found that Native-American-owned businesses were utilized at a higher rate in Houston's construction contracts than would be anticipated based on their rate of availability in the relevant market area. *Id.* at \*4. The court noted this finding would tend to negate the presence of discrimination against Native Americans in Houston's construction industry. *Id.*

This Houston disparity study consultant stated that the high utilization rate for Native Americans stems largely from the work of two Native-American-owned firms. *Id.* The Houston consultant suggested that without these two firms, the utilization rate for Native Americans would decline significantly, yielding a statistically significant disparity ratio. *Id.*

The Magistrate Judge, according to the district court, correctly held and found that there was insufficient evidence to support including Native Americans in the MWBE program. *Id.* The court approved and adopted the Magistrate Judge explanation that the opinion of the disparity study consultant that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, is not evidence of the need for remedial action. *Id.* at \*5. The district court found no equal-protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms. *Id.* Therefore, the utilization goal for businesses owned by Native Americans is not supported by a strong evidentiary basis. *Id.* at \*5.

The district court agreed with the Magistrate Judge's recommendation that the district court grant summary judgment in favor of Kossman with respect to the utilization goal for Native-American-owned business. *Id.* The court found there was limited significance to the Houston consultant's opinion that utilization of Native-American-owned businesses would drop to statistically significant levels if two Native-American-owned businesses were ignored. *Id.* at \*5.

The court stated the situation presented by the Houston disparity study consultant of a "hypothetical non-existence" of these firms is not evidence and cannot satisfy strict scrutiny. *Id.* at \*5. Therefore, the district court adopted the Magistrate Judge's recommendation with respect to excluding the utilization goal for Native-American-owned businesses. *Id.* The court noted that a preference for Native-American-owned businesses could become constitutionally valid in the future if there were sufficient evidence of discrimination against Native-American-owned businesses in Houston's construction contracts. *Id.* at \*5.

**Conclusion.** The district court held that the Memorandum & Recommendation of the Magistrate Judge is adopted in full; Houston’s motion to exclude the Kossman’s proposed expert witness is granted; Kossman’s motion for summary judgment is granted with respect to excluding the utilization goal for Native-American-owned businesses and denied in all other respects; Houston’s motion for summary judgment is denied with respect to including the utilization goal for Native-American-owned businesses and granted in all other respects as to the MWBE program for other minorities and women-owned firms. *Id.* at \*5.

**Memorandum and Recommendation by Magistrate Judge, dated February 17, 2016, S.D. Texas, Civil Action No. H-14-1203.**

**Kossman’s proposed expert excluded and not admissible.** Kossman in its motion for summary judgment solely relied on the testimony of its proposed expert, and submitted no other evidence in support of its motion. The Magistrate Judge (hereinafter “MJ”) granted Houston’s motion to exclude testimony of Kossman’s proposed expert, which the district court adopted and approved, for multiple reasons. The MJ found that his experience does not include designing or conducting statistical studies, and he has no education or training in statistics or economics. *See*, MJ, Memorandum and Recommendation (“M&R”) by MJ, dated February 17, 2016, at 31, S.D. Texas, Civil Action No. H-14-1203. The MJ found he was not qualified to collect, organize or interpret numerical data, has no experience extrapolating general conclusions about a subset of the population by sampling it, has demonstrated no knowledge of sampling methods or understanding of the mathematical concepts used in the interpretation of raw data, and thus, is not qualified to challenge the methods and calculations of the disparity study. *Id.*

The MJ found that the proposed expert report is only a theoretical attack on the study with no basis and objective evidence, such as data or testimony of construction firms in the relative market area that support his assumptions regarding available MWBEs or comparative studies that control the factors about which he complained. *Id.* at 31. The MJ stated that the proposed expert is not an economist and thus is not qualified to challenge the disparity study explanation of its economic considerations. *Id.* at 31. The proposed expert failed to provide econometric support for the use of bidder data, which he argued was the better source for determining availability, cited no personal experience for the use of bidder data, and provided no proof that would more accurately reflect availability of MWBEs absent discriminatory influence. *Id.* Moreover, he acknowledged that no bidder data had been collected for the years covered by the study. *Id.*

The court found that the proposed expert articulated no method at all to do a disparity study, but merely provided untested hypotheses. *Id.* at 33. The proposed expert’s criticisms of the study, according to the MJ, were not founded in cited professional social science or econometric standards. *Id.* at 33. The MJ concludes that the proposed expert is not qualified to offer the opinions contained in his report, and that his report is not relevant, not reliable, and, therefore, not admissible. *Id.* at 34.

**Relevant geographic market area.** The MJ found the market area of the disparity analysis was geographically confined to area codes in which the majority of the public contracting construction firms were located. *Id.* at 3-4, 51. The relevant market area, the MJ said, was weighted by industry, and therefore the study limited the relevant market area by geography and industry based on Houston’s past years’ records from prior construction contracts. *Id.* at 3-4, 51.

**Availability of MWBEs.** The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its public dollars do not finance racial discrimination. *Id.* at 52-53. Here, the study defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. *Id.* at 3-4, 53. Those parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and MWBEs that had been utilized in Houston's construction contracting over the last five and one-half years. *Id.* at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. *Id.* at 6, 53.

Kossman produced no evidence that the availability estimate was inadequate. *Id.* at 53. Plaintiff's criticisms of the availability analysis, including for capacity, the court stated was not supported by any contrary evidence or expert opinion. *Id.* at 53-54. The MJ rejected Plaintiff's proposed expert's suggestion that analysis of bidder data is a better way to identify MWBEs. *Id.* at 54. The MJ noted that Kossman's proposed expert presented no comparative evidence based on bidder data, and the MJ found that bidder data may produce availability statistics that are skewed by active and passive discrimination in the market. *Id.*

In addition to being underinclusive due to discrimination, the MJ said bidder data may be overinclusive due to inaccurate self-evaluation by firms offering bids despite the inability to fulfill the contract. *Id.* at 54. It is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. *Id.* The MJ concluded that the law does not require an individualized approach that measures whether MWBEs are qualified on a contract-by-contract basis. *Id.* at 55.

**Disparity analysis.** The study indicated significant statistical adverse disparities as to businesses owned by African Americans and Asians, which the MJ found provided a *prima facie* case of a strong basis in evidence that justified the Program's utilization goals for businesses owned by African Americans, Asian-Pacific Americans, and subcontinent Asian Americans. *Id.* at 55.

The disparity analysis did not reflect significant statistical disparities as to businesses owned by Hispanic Americans, Native Americans or non-minority women. *Id.* at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id.* at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id.* at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by fifty percent when they no longer benefitted from remedial goals. *Id.* at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the period as a whole. *Id.* at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id.* at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id.*

The MJ rejected Plaintiff's argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that contracted with Houston by industry and those available in the relevant market by industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston's awarding of construction contracts and to reach constitutionally sound results. *Id.*

**Anecdotal evidence.** Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. *Id.* at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. *Id.* at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. *Id.* The court rejected any requirement that the anecdotal evidence be verified and investigated. *Id.* at 59.

**Regression analyses.** Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id.* The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60. Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id.* at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

**Narrow Tailoring factors.** The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that



the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston’s race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for MWBEs for up to four percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to meet contract goals or MWSBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*

The MJ concluded that the thirty-four percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on non-minorities. *Id.* at 62. The burden on non-minority SBEs, such as Kossman, is lessened by the four-percent substitution provision. *Id.* at 62. The MJ noted another district court’s opinion that the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 62.

**Holding.** The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native-American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.

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

In *H.B. Rowe Company v. Tippett, North Carolina Department of Transportation, et al.* (“Rowe”), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina “affirmative action” program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

**Background.** In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff’s bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff’s bid was rejected because of plaintiff’s failure to demonstrate “good faith efforts” to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff’s bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff’s good faith efforts to obtain MBE participation. The

next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT's MWBE Program "largely mirrors" the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippett. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

**March 29, 2007 Order of the District Court.** The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the

plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines “minority” as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants’ Motion to Dismiss Claim for Mootness as to plaintiff’s suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff’s pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

**September 28, 2007 Order of the District Court.** On September 28, 2007, the district court issued a new order in which it denied both the plaintiff’s and the defendants’ Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

**December 9, 2008 Order of the District Court (589 F.Supp.2d 587).** The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women’s Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff’s rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

**North Carolina's MWBE program.** The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, *et seq.* The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT;

established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT “dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of ‘good faith’ attempts to do so.” 589 F.Supp.2d 587.

**Compelling interest.** The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina’s road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program’s suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, “based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination.” 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

**Narrowly tailored.** The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court’s

analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to “those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department.” § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4<sup>th</sup> Cir. 2010), discussed above.

***19. Thomas v. City of Saint Paul, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009)***

In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program (“VOP”) that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City's work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and

the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City's projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

**The VOP.** Under the VOP, the City sets annual bench marks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various "good faith" requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id.* The VOP further imposes obligations on the City with respect to vendor contracts. *Id.* The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

**Analysis and Order of the Court.** The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt "aggressive race-based affirmative action programs" in order to award specific groups publicly-funded contracts. *Id.* at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day's notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

**Plaintiff's claims.** The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City "intentionally" treated plaintiffs unfavorably because of their race. *Id.* at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state action. *Id.* Plaintiffs must offer facts and evidence that constitute proof of "racially discriminatory intent or purpose." *Id.* at 967. Here, the court found that plaintiff failed to allege any single instance showing the City "intentionally" rejected VOP bids based on their race. *Id.*

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a subcontract, or showed any case where their bids were rejected on the basis of race. *Id.* The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id.*

The City rejected the plaintiff's claims of discrimination because the plaintiffs did not establish by evidence that the City "intentionally" rejected their bid due to race or that the City "intentionally" discriminated against these plaintiffs. *Id.* at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a "discriminatory motive." *Id.* at 968. The court concluded that plaintiffs had failed to show that the City's actions were "racially motivated." *Id.*

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul*, 2009 WL 777932 (8<sup>th</sup> Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

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

This case considered the validity of the City of Augusta's local minority DBE program. The district court enjoined the City from favoring any contract bid on the basis of racial classification and based its decision principally upon the outdated and insufficient data proffered by the City in support of its program. 2007 WL 926153 at \*9-10.

The City of Augusta enacted a local DBE program based upon the results of a disparity study completed in 1994. The disparity study examined the disparity in socioeconomic status among races, compared black-owned businesses in Augusta with those in other regions and those owned by other racial groups, examined "Georgia's racist history" in contracting and procurement, and examined certain data related to Augusta's contracting and procurement. *Id.* at \*1-4. The plaintiff contractors and subcontractors challenged the constitutionality of the DBE program and sought to extend a temporary injunction enjoining the City's implementation of racial preferences in public bidding and procurement.

The City defended the DBE program arguing that it did not utilize racial classifications because it only required vendors to make a "good faith effort" to ensure DBE participation. *Id.* at \*6. The court rejected this argument noting that bidders were required to submit a "Proposed DBE Participation" form and that bids containing DBE participation were treated more favorably than those bids without DBE participation. The court stated: "Because a person's business can qualify for the favorable treatment based on that person's race, while



a similarly situated person of another race would not qualify, the program contains a racial classification.” *Id.*

The court noted that the DBE program harmed subcontractors in two ways: first, because prime contractors will discriminate between DBE and non-DBE subcontractors and a bid with a DBE subcontractor would be treated more favorably; and second, because the City would favor a bid containing DBE participation over an equal or even superior bid containing no DBE participation. *Id.*

The court applied the strict scrutiny standard set forth in *Croson* and *Engineering Contractors Association* to determine whether the City had a compelling interest for its program and whether the program was narrowly tailored to that end. The court noted that pursuant to *Croson*, the City would have a compelling interest in assuring that tax dollars would not perpetuate private prejudice. But, the court found (*citing to Croson*), that a state or local government must identify that discrimination, “public or private, with some specificity before they may use race-conscious relief.” The court cited the Eleventh Circuit’s position that “‘gross statistical disparities’ between the proportion of minorities hired by the public employer and the proportion of minorities willing and able to work” may justify an affirmative action program. *Id.* at \*7. The court also stated that anecdotal evidence is relevant to the analysis.

The court determined that while the City’s disparity study showed some statistical disparities buttressed by anecdotal evidence, the study suffered from multiple issues. *Id.* at \*7-8. Specifically, the court found that those portions of the study examining discrimination outside the area of subcontracting (*e.g.*, socioeconomic status of racial groups in the Augusta area) were irrelevant for purposes of showing a compelling interest. The court also cited the failure of the study to differentiate between different minority races as well as the improper aggregation of race- and gender-based discrimination referred to as Simpson’s Paradox.

The court assumed for purposes of its analysis that the City could show a compelling interest but concluded that the program was not narrowly tailored and thus could not satisfy strict scrutiny. The court found that it need look no further beyond the fact of the thirteen-year duration of the program absent further investigation, and the absence of a sunset or expiration provision, to conclude that the DBE program was not narrowly tailored. *Id.* at \*8. Noting that affirmative action is permitted only sparingly, the court found: “[i]t would be impossible for Augusta to argue that, 13 years after last studying the issue, racial discrimination is so rampant in the Augusta contracting industry that the City must affirmatively act to avoid being complicit.” *Id.* The court held in conclusion, that the plaintiffs were “substantially likely to succeed in proving that, when the City requests bids with minority participation and in fact favors bids with such, the plaintiffs will suffer racial discrimination in violation of the Equal Protection Clause.” *Id.* at \*9.

In a subsequent Order dated September 5, 2007, the court denied the City’s motion to continue plaintiff’s Motion for Summary Judgment, denied the City’s Rule 12(b)(6) motion to dismiss, and stayed the action for 30 days pending mediation between the parties. Importantly, in this Order, the court reiterated that the female- and locally-owned business components of the program (challenged in plaintiff’s Motion for Summary Judgment) would be subject to intermediate scrutiny and rational basis scrutiny, respectively. The court also reiterated its rejection of the City’s challenge to the plaintiffs’ standing. The court noted that under *Adarand*, preventing a contractor from competing on an equal footing satisfies the particularized injury prong of standing. And showing that the contractor will sometime in

the future bid on a City contract “that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors” satisfies the second requirement that the particularized injury be actual or imminent. Accordingly, the court concluded that the plaintiffs have standing to pursue this action.

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

The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court’s finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10<sup>th</sup> Cir. 2003). See discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the “plaintiffs”) brought suit against Engineering Contractors Association (the “County”), the former County Manager, and various current County Commissioners (the “Commissioners”) in their official and personal capacities (collectively the “defendants”), seeking to enjoin the same “participation goals” in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit’s decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise (“CSBE”) program for construction contracts, “but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services.” *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively “MBE/WBE”). *Id.* The MBE/WBE programs applied to A&E contracts in excess of \$25,000. *Id.* at 1312. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313. However, the district court found “the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994.” *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the “County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services.” The final report further stated “Based on all the analyses that have been performed, the County does

not have a basis for the establishment of participation goals which would allow staff to apply contract measures.” *Id.* at 1315. The district court also found that the Commissioners were informed that “there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers than there was in contract construction.” *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

*Id.* The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present “a strong basis of evidence” indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the “gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective.” *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present “sufficient probative evidence” of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a “last resort.” *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal’s report, most of which consisted of “post-enactment” evidence. *Id.* Dr. Carvajal’s analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County’s Department of Public Works to compile a list of the

“universe” of firms competing in the market. *Id.* For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses “in order to determine the effect a firm owner’s gender or race had on certain dependent variables.” *Id.* Dr. Carvajal used the firm’s annual volume of business as a dependent variable and determined the disparities were due in each case to the firm’s gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms.” *Id.* Dr. Carvajal’s results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the “gross statistical disparities” in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he “did not find sufficient evidence of discrimination against blacks.” *Id.*

The court held that Dr. Carvajal’s study constituted neither a “strong basis in evidence” of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute “sufficient probative evidence” necessary to justify the gender-conscious measures. *Id.* The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated, “[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace.” *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it “unreliable and inaccurate” for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10<sup>th</sup> Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the “Tenth Circuit’s decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari.” *Id.* at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County’s A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, “nearly all” of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal’s study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition “that only in the rare case will anecdotal evidence suffice standing alone.” *Id.*

(internal citations omitted). The court held that “[t]his is not one of those rare cases.” The district court concluded that the statistical evidence was “unreliable and fail[ed] to establish the existence of discrimination,” and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal’s report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to “identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished ... it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone.” *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.* The court held that the County’s failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, “not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry,” leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id.* The court found this even “more problematic” because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences “must be limited in time.” *Id.* at 1332, citing *Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that “the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination.” *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated “clearly established statutory or constitutional rights of which a reasonable person would have known ... Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them ‘fair warning’ that their actions were unconstitutional.” *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they “had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs ... were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*].” *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law was “clearly established” and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs \$100 each in nominal damages and reasonable attorneys’ fees and costs, for which it held the County and the Commissioners jointly and severally liable.

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

This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a “race-conscious” program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious “preferences” in order to increase the numeric representation of “MBEs” in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity (“OSD”) to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute’s purpose. The statute provided that each State agency is “encouraged” to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were “precatory.” The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, “if true,” constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as “simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.” *Florida A.G.C. Council*, 303 F.Supp.2d at 1315, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 928, quoting *Crosby*, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is “permissive.” The court, however, held that “there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute ‘induces an employer to hire with an eye toward meeting ... [a] numerical target.’ *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting a MBE utilization plan. If the State agency deviated from

the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all solicitations and contract awards of the agency as deemed necessary until such time as the agency met its utilization plan. The court held that based on these factors, although alleged to be “permissive,” the statute textually was not.

Therefore, the court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.

### ***23. The Builders Ass’n of Greater Chicago v. The City of Chicago, 298 F. Supp.2d 725 (N.D. Ill. 2003)***

This case is instructive because of the court’s focus and analysis on whether the City of Chicago’s MBE/WBE program was narrowly tailored. The basis of the court’s holding that the program was not narrowly tailored is instructive for any program considered because of the reasons provided as to why the program did not pass muster.

The plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago’s construction Minority- and Women-Owned Business (“MWBE”) Program. The court held that the City of Chicago’s MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The court held that it was not narrowly tailored for several reasons, including because there was no “meaningful individualized review” of MBE/WBEs; it had no termination date nor did it have any means for determining a termination; the “graduation” revenue amount for firms to graduate out of the program was very high, \$27,500,000, and in fact very few firms graduated; there was no net worth threshold; and, waivers were rarely or never granted on construction contracts. The court found that the City program was a “rigid numerical quota,” not related to the number of available, willing and able firms. Formulistic percentages, the court held, could not survive the strict scrutiny.

The court held that the goals plan did not address issues raised as to discrimination regarding market access and credit. The court found that a goals program does not directly impact prime contractor’s selection of subcontractors on non-goals private projects. The court found that a set-aside or goals program does not directly impact difficulties in accessing credit, and does not address discriminatory loan denials or higher interest rates. The court found the City has not sought to attack discrimination by primes directly, “but it could.” 298 F.2d 725. “To monitor possible discriminatory conduct it could maintain its certification list and require those contracting with the City to consider unsolicited bids, to maintain bidding records, and to justify rejection of any certified firm submitting the lowest bid. It could also require firms seeking City work to post private jobs above a certain minimum on a website or otherwise provide public notice ...” *Id.*

The court concluded that other race-neutral means were available to impact credit, high interest rates, and other potential marketplace discrimination. The court pointed to race-neutral means including linked deposits, with the City banking at institutions making loans to startup and smaller firms. Other race-neutral programs referenced included quick pay and contract downsizing; restricting self-performance by prime contractors; a direct loan program; waiver of bonds on contracts under \$100,000; a bank participation loan program; a 2 percent local business preference; outreach programs and technical assistance and workshops; and seminars presented to new construction firms.



The court held that race and ethnicity do matter, but that racial and ethnic classifications are highly suspect, can be used only as a last resort, and cannot be made by some mechanical formulation. Therefore, the court concluded the City's MWBE Program could not stand in its present guise. The court held that the present program was not narrowly tailored to remedy past discrimination and the discrimination demonstrated to now exist.

The court entered an injunction, but delayed the effective date for six months from the date of its Order, December 29, 2003. The court held that the City had a "compelling interest in not having its construction projects slip back to near monopoly domination by white male firms." The court ruled a brief continuation of the program for six months was appropriate "as the City rethinks the many tools of redress it has available." Subsequently, the court declared unconstitutional the City's MWBE Program with respect to construction contracts and permanently enjoined the City from enforcing the Program. 2004 WL 757697 (N.D. Ill. 2004).

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

This case is instructive because the court found the Executive Order of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. ("AUC") sued the City of Baltimore challenging its ordinance providing for minority and women-owned business enterprise ("MWBE") participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35 percent of all City contracting dollars to MBE/WBEs. The court found this goal of 35 percent participation was aspirational only and the Executive Order contained no enforcement mechanism or penalties for noncompliance. The Executive Order also specified many "noncoercive" outreach measures to be taken by the City agencies relating to increasing participation of MBE/WBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC did not have any of its individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a "case or

controversy” in connection with a facial attack. The court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the court on October 22, 2003 dismissing the case with prejudice.

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

Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act (“MBE Act”). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10<sup>th</sup> Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

**Compelling state interest.** The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment’s Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id.* The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a “passive participant” in a system of racial exclusion practiced by private businesses. *Id.* at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

The district court stated that a “mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice.” *Id.* Rather, the court held that the “benchmark for judging the adequacy of a state’s factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state’s conclusion that remedial action was necessary.” *Id.* The district court found that the Supreme Court made it clear that the state

bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was “a passive participant” in private industry’s discriminatory practices. *Id.* at 1240, citing to *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6<sup>th</sup> Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest “is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts.” *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act’s bid preference “is not based on past discrimination,” rather, it is based on a desire to “encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenors’ evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenors did not identify “a single qualified, minority-owned bidder who was excluded from a state contract.” *Id.* The district court, thus, held that broad allegations of “systematic” exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the “State’s admission here that the State’s governmental interest was not in remedying past discrimination in the state competitive bidding process, but in ‘encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.’” *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio’s statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority

firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

**Narrow tailoring.** The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 citing *Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help

alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, “and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act.” *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the “goal” of 10 percent of the state’s contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to “graduate” from preference eligibility. *Id.* The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act’s duration was not tied in any way to the eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the “questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable.” *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act’s minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of “numerical proportionality” between the MBE Act’s aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act’s 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id.* at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is “not necessarily an absolute cap” on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, citing *Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer “substantial evidence” that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act’s bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id.* The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state’s Central Purchasing Act with no time limitation. *Id.*

In terms of the “under- and over-inclusiveness” factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id.* at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id.*

Second, the district court found the MBE Act’s bidding preference extends to all contracts for goods and services awarded under the State’s Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id.*

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id.* The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id.*

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution’s Fifth Amendment guarantee of equal protection and granted the plaintiffs’ Motion for Summary Judgment.

**26. *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore and Maryland Minority Contractors Association, Inc.*, 83 F. Supp.2d 613 (D. Md. 2000)**

Plaintiff Associated Utility Contractors of Maryland, Inc. (“AUC”) filed this action to challenge the continued implementation of the affirmative action program created by Baltimore City Ordinance (“the Ordinance”). 83 F.Supp.2d 613 (D. Md. 2000)

The Ordinance was enacted in 1990 and authorized the City to establish annually numerical set-aside goals applicable to a wide range of public contracts, including construction subcontracts. *Id.*

AUC filed a motion for summary judgment, which the City and intervening defendant Maryland Minority Contractors Association, Inc. (“MMCA”) opposed. *Id.* at 614. In 1999, the court issued an order granting in part and denying in part the motion for summary judgment (“the December injunction”). *Id.* Specifically, as to construction contracts entered into by the City, the court enjoined enforcement of the Ordinance (and, consequently, continued implementation of the affirmative action program it authorized) in respect to the City’s 1999 numerical set-aside goals for Minority- and Women-Owned Business Enterprises (“MWBES”), which had been established at 20% and 3%, respectively. *Id.* The court denied the motion for summary judgment as to the plaintiff’s facial attack on the constitutionality of the Ordinance, concluding that there existed “a dispute of material fact as to whether the enactment of the Ordinance was adequately supported by a factual record of unlawful discrimination properly remediable through race- and gender-based affirmative action.” *Id.*

The City appealed the entry of the December injunction to the United States Court of Appeals for the Fourth Circuit. In addition, the City filed a motion for stay of the injunction. *Id.* In support of the motion for stay, the City contended that AUC lacked organizational standing to challenge the Ordinance. The court held the plaintiff satisfied the requirements for organizational standing as to the set-aside goals established by the City for 1999. *Id.*

The City also contended that the court erred in failing to forebear from the adjudication of this case and of the motion for summary judgment until after it had completed an alleged disparity study which, it contended, would establish a justification for the set-aside goals established for 1999. *Id.* The court said this argument, which the court rejected, rested on the notion that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.*

Therefore, because the City offered no contemporaneous justification for the 1999 set-aside goals it adopted on the authority of the Ordinance, the court issued an injunction in its 1999 decision and declined to stay its effectiveness. *Id.* Since the injunction awarded complete relief to the AUC, and any effort to adjudicate the issue of whether the City would adopt revised set-aside goals on the authority of the Ordinance was wholly speculative undertaking, the court dismissed the case without prejudice. *Id.*

**Facts and Procedural History.** In 1986, the City Council enacted in Ordinance 790 the first city-wide affirmative action set-aside goals, which required, *inter alia*, that for all City contracts, 20% of the value of subcontracts be awarded to Minority-Owned Business Enterprises (“MBEs”) and 3% to Women-Owned Business Enterprises (“WBEs”). *Id.* at 615.

As permitted under then controlling Supreme Court precedent, the court said Ordinance 790 was justified by a finding that general societal discrimination had disadvantaged MWBEs. Apparently, no disparity statistics were offered to justify Ordinance 790. *Id.*

After the Supreme Court announced its decision in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), the City convened a Task Force to study the constitutionality of Ordinance 790. *Id.* The Task Force held hearings and issued a Public Comment Draft Report on November 1, 1989. *Id.* It held additional hearings, reviewed public comments and issued its final report on April 11, 1990, recommending several amendments to Ordinance 790. *Id.* The City Council conducted hearings, and in June 1990, enacted Ordinance 610, the law under attack in this case. *Id.*

In enacting Ordinance 610, the City Council found that it was justified as an appropriate remedy of “[p]ast discrimination in the City’s contracting process by prime contractors against minority and women’s business enterprises....” *Id.* The City Council also found that “[m]inority and women’s business enterprises ... have had difficulties in obtaining financing, bonding, credit and insurance;” that “[t]he City of Baltimore has created a number of different assistance programs to help small businesses with these problems ... [but that t]hese assistance programs have not been effective in either remedying the effects of past discrimination ... or in preventing ongoing discrimination.” *Id.*

The operative section of Ordinance 610 relevant to this case mandated a procedure by which set-aside goals were to be established each year for minority and women owned business participation in City contracts. *Id.* The Ordinance itself did not establish any goals, but directed the Mayor to consult with the Chief of Equal Opportunity Compliance and “contract authorities” and to annually specify goals for each separate category of contracting “such as public works, professional services, concession and purchasing contracts, as well as any other categories that the Mayor deems appropriate.” *Id.*

In 1990, upon its enactment of the Ordinance, the City established across-the-board set-aside goals of 20% MBE and 3% WBE for all City contracts with no variation by market. *Id.* The court found the City simply readopted the 20% MBE and 3% WBE subcontractor participation goals from the prior law, Ordinance 790, which the Ordinance had specifically repealed. *Id.* at 616. These same set-aside goals, the court said, were adopted without change and without factual support in each succeeding year since 1990. *Id.*

No annual study ever was undertaken to support the implementation of the affirmative action program generally or to support the establishment of any annual goals, the court concluded, and the City did not collect the data which could have permitted such findings. *Id.* No disparity study existed or was undertaken until the commencement of this law suit. *Id.* Thus, the court held the City had no reliable record of the availability of MWBEs for each category of contracting, and thus no way of determining whether its 20% and 3% goals were rationally related to extant discrimination (or the continuing effects thereof) in the letting of public construction contracts. *Id.*

**AUC has associational standing.** AUC established that it had associational standing to challenge the set-aside goals adopted by the City in 1999. *Id.* Specifically, AUC sufficiently established that its members were “ready and able” to bid for City public works contracts. *Id.* No more, the court noted, was required. *Id.*



The court found that AUC's members were disadvantaged by the goals in the bidding process, and this alone was a cognizable injury. *Id.* For the purposes of an equal protection challenge to affirmative action set-aside goals, the court stated the Supreme Court has held that the " 'injury in fact' is the inability to compete on an equal footing in the bidding process ..." *Id.* at 617, quoting *Northeastern Florida Chapter*, 508 U.S. at 666, and citing *Adarand Constructors, Inc. v. 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% MBE participation in City construction subcontracts, and for analogous reasons, the 3% WBE preference must also be justified by preenactment evidence. *Id.* at 621.

The court said the Fourth Circuit has not ruled on the issue whether affirmative action measures must be justified by a strong basis in preenactment evidence. The court found that in the Fourth Circuit decisions invalidating state affirmative action policies in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir.1994), and *Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072 (4th Cir.1993), the court apparently relied without comment upon post enactment evidence when evaluating the policies for Croson “strong basis in evidence.” *Id.* at 621, n.6, citing *Podberesky*, 38 F.3d at 154 (referring to post enactment surveys of African-American students at College Park campus); *Maryland Troopers*, 993 F.2d at 1078 (evaluating statistics about the percentage of black troopers in 1991 when deciding whether there was a statistical disparity great enough to justify the affirmative action measures in a 1990 consent decree). The court concluded, however, this issue was apparently not raised in these cases, and both were decided before the 1996 Supreme Court decision in *Shaw v. Hunt*, 517 U.S. 899, which clarified that the *Wygant* plurality decision was controlling authority on this issue. *Id.* at 621, n.6.

The court noted that three courts had held, prior to *Shaw*, that post enactment evidence may be relied upon to satisfy the *Croson* “strong basis in evidence” requirement. *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir.1994), *cert. denied*, 514 U.S. 1004, 115 S.Ct. 1315, 131 L.Ed.2d 196 (1995); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir.1992); *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir.1991). *Id.* In addition, the Eleventh Circuit held in 1997 that “post enactment evidence is admissible to determine whether an affirmative action program” satisfies *Croson*. *Engineering Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 911–12 (11th Cir.1997), *cert. denied*, 523 U.S. 1004 (1998). Because the court believed that *Shaw* and *Wygant* provided controlling authority on the role of post enactment evidence in the “strong basis in evidence” inquiry, it did not find these cases persuasive. *Id.* at 621.

**City did not satisfy strict or intermediate scrutiny: no disparity study was completed or preenactment evidence established.** In this case, the court found that the City considered no evidence in 1999 before promulgating the construction subcontracting set-aside goals of 20% for MBEs and 3% for WBEs. *Id.* at 621. Based on the absence of any record of what evidence the City considered prior to promulgating the set-aside goals for 1999, the court held there was no dispute of material fact foreclosing summary judgment in favor of plaintiff. *Id.* The court thus found that the 20% preference is not supported by a “strong basis in evidence” showing a need for a race-conscious remedial plan in 1999; nor is the 3% preference shown to be “substantially related to achievement” of the important objective of remedying gender discrimination in 1999, in the construction industry in Baltimore. *Id.*

The court rejected the City’s assertions throughout the case that the court should uphold the set-aside goals based upon statistics, which the City was in the process of gathering in a disparity study it had commissioned. *Id.* at 622. The court said the City did not provide any legal support for the proposition that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.* The in process study was not complete as of the date of this decision by the court. *Id.* The court thus stated the study could not have produced data upon which the City actually relied in establishing the set-aside goals for 1999. *Id.*

The court noted that if the data the study produced were reliable and complete, the City could have the statistical basis upon which to make the findings Ordinance 610 required, and which could satisfy the constitutionally required standards for the promulgation and implementation of narrowly tailored set-aside race-and gender conscious goals. *Id.* at 622. Nonetheless, as the record stood when the court entered the December 1999 injunction and as it stood as of the date of the decision, there were no data in evidence showing a disparity, let alone a gross disparity, between MWBE availability and utilization in the subcontracting construction market in Baltimore City. *Id.* The City possessed no such evidence when it established the 1999 set-aside goals challenged in the case. *Id.*

A percentage set-aside measure, like the MWBE goals at issue, the court held could only be justified by reference to the overall availability of minority- and women-owned businesses in the relevant markets. *Id.* In the absence of such figures, the 20% MBE and 3% WBE set aside figures were arbitrary and unenforceable in light of controlling Supreme Court and Fourth Circuit authority. *Id.*

**Holding.** The court held that for these reasons it entered the injunction against the City on December 1999 and it remained fully in effect. *Id.* at 622. Accordingly, the City’s motion for stay of the injunction order was denied and the action was dismissed without prejudice. *Id.* at 622.

The court held unconstitutional the City of Baltimore’s “affirmative action” program, which had construction subcontracting “set-aside” goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

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

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County’s (the “County”) minority and female business enterprise program (“M/FBE”) program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, citing *Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11<sup>th</sup> Cir. 1997), held that “[e]xplicit racial preferences may not be used except as a ‘last resort.’” *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a “strong basis in evidence” for strict scrutiny, and “sufficient probative evidence” for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods “to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data.” *Id.*, citing *Eng’g Contractors Ass’n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, citing *Eng’g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County’s pre-

1994 disparity study (the “Brimmer-Marshall Study”) and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a “passive participant” in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are “exacerbating a pattern of prior discrimination that can be identified with specificity.” *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a “strong basis in evidence” of discrimination to justify the County’s racial and ethnic preferences. *Id.*

The court next considered the County’s post-1994 disparity study. *Id.* at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id.* The court explained:

Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.

*Id.* The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id.* Additionally, the court found that the County’s standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County’s anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that “[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice

standing alone.” *Id.*, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. “The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a ‘last resort.’” *Id.* at 1380, citing *Eng’g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit’s four-part test and concluded that the County’s M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. “If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity ....  
*Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County’s argument that its program was permissible because it set “goals” as opposed to “quotas,” because the program in *Engineering Contractors Association* also utilized “goals” and was struck down. *Id.*

Per the M/FBE program’s gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present “sufficient probative evidence” of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11<sup>th</sup> Cir. 2000).

## **28. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999)**

The district court in this case pointed out that it had struck down Ohio's MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District*, 31 F.Supp.2d 571 (N.D. Ohio 1998). *Id.* at 741.

The state defendant's appealed this court's decision to the United States court of Appeals for the Sixth Circuit. *Id.* Thereafter, the Supreme Court of Ohio held in the case of *Ritchey Produce, Co., Inc. v. The State of Ohio, Department of Administrative*, 704 N.E. 2d 874 (1999), that the Ohio statute, which provided race-based preferences in the state's purchase of nonconstruction-related goods and services, was constitutional. *Id.* at 744.

While this court's decision related to construction contracts and the Ohio Supreme Court's decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id.* at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court's decision in *Ritchey Produce*. The district court took the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a "blatantly unconstitutional program of race-based benefits. *Id.* at 745.

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited to *F. Buddie Contracting v. Cuyahoga Community College*, 31 F. Supp.2d 571 (N.D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court's holding in *Ritchey Produce*, 707 N.E. 2d 871 (Ohio 1999), which held that the State of Ohio's MBE program as applied to the state's purchase of non-construction-related goods and services was constitutional. The court found the evidence to be insufficient to justify the Ohio MBE program. The court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

**Strict Scrutiny.** The district court held that the Supreme Court of Ohio decision in *Ritchey Produce* was wrongly decided for the following reasons:

- (1) Ohio's MBE program of race-based preferences in the award of state contracts was unconstitutional because it is unlimited in duration. *Id.* at 745.
- (2) a program of race-based benefits can not be supported by evidence of discrimination which is over 20 years old. *Id.*



(3) the state Supreme Court found that there was a severe numerical imbalance in the amount of business the State did with minority-owned enterprises, based on its uncritical acceptance of essentially “worthless calculations contained in a twenty-one year-old report, which miscalculated the percentage of minority-owned businesses in Ohio and misrepresented data on the percentage of state purchase contracts they had received, all of which was easily detectable by examining the data cited by the authors of the report.” *Id.* at 745.

(4) The state Supreme Court failed to recognize that the incorrectly calculated percentage of minority-owned businesses in Ohio (6.7 percent) bears no relationship to the 15 percent set-aside goal of the Ohio Act. *Id.*

(5) the state Supreme Court applied an incorrect rule of law when it announced that Ohio’s program must be upheld unless it is clearly unconstitutional beyond a reasonable doubt, whereas according to the district court in this case, the Supreme Court of the United States has said that all racial class classifications are highly suspect and must be subjected to strict judicial scrutiny. *Id.*

(6) the evidence of past discrimination that the Ohio General Assembly had in 1980 did not provide a firm basis in evidence for a race-based remedy. *Id.*

Thus, the district court determined the evidence could not support a compelling state-interest for race-based preferences for the state of Ohio MBE Act, in part based on the fact evidence of past discrimination was stale and twenty years old, and the statistical analysis was insufficient because the state did not know how many MBE’s in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts. *Id.* at 763-771. The statistical evidence was fatally flawed because the relevant universe of minority businesses is not all minority businesses in the state of Ohio, but only those willing and able to enter into contracts with the state of Ohio. *Id.* at 761. In the case of set-aside program in state construction, the relevant universe is minority-owned construction firms willing and able to enter into state construction contracts. *Id.*

**Narrow Tailoring.** The court addressed the second prong of the strict scrutiny analysis, and found that the Ohio MBE program at issue was not narrowly tailored. The court concluded that the state could not satisfy the four factors to be considered in determining whether race-conscious remedies are appropriate. *Id.* at 763. First, the court stated that there was no consideration of race-neutral alternatives to increase minority participation in state contracting before resorting to “race-based quotas”. *Id.* at 763-764. The court held that failure to consider race-neutral means was fatal to the set-aside program in *Croson*, and the failure of the State of Ohio to consider race-neutral means before adopting the MBE Act in 1980 likewise “dooms Ohio’s program of race-based quotas”. *Id.* at 765.

Second, the court found the Ohio MBE Act was not flexible. The court stated that instead of allowing flexibility to ameliorate harmful effects of the program, the imprecision of the statutory goals has been used to justify bureaucratic decisions which increase its impact on non-minority business.” *Id.* at 765. The court said the waiver system for prime contracts focuses solely on the availability of MBEs. *Id.* at 766. The court noted the awarding agency may remove the contract from the set aside program and open it up for bidding by non-minority contractors if no certified MBE submits a bid, or if all bids submitted by MBEs are considered unacceptably high. *Id.* But, in either event, the court pointed out the agency is then required to set aside additional contracts to satisfy the numerical quota required by

the statute. *Id.* The court concluded that there is no consideration given to whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors. *Id.*

Third, the court found the Ohio MBE Act was not appropriately limited such that it will not last longer than the discriminatory effects it was designed to eliminate. *Id.* at 766. The court stated the 1980 MBE Act is unlimited in duration, and there is no evidence the state has ever reconsidered whether a compelling state interest exists that would justify the continuation of a race-based remedy at any time during the two decades the Act has been in effect. *Id.*

Fourth, the court found the goals of the Ohio MBE Act were not related to the relevant market and that the Act failed this element of the “narrowly tailored” requirement of strict scrutiny. *Id.* at 767-768. The court said the goal of 15 percent far exceeds the percentage of available minority firms, and thus bears no relationship to the relevant market. *Id.*

Fifth, the court found the conclusion of the Ohio Supreme Court that the burdens imposed on non-MBEs by virtue of the set-aside requirements were relatively light was incorrect. *Id.* at 768. The court concluded non-minority contractors in various trades were effectively excluded from the opportunity to bid on any work from large state agencies, departments, and institutions solely because of their race. *Id.* at 678.

Sixth, the court found the Ohio MBE Act provided race-based benefits based on a random inclusion of minority groups. *Id.* at 770-771. The court stated there was no evidence about the number of each racial or ethnic group or the respective shares of the total capital improvement expenditures they received. *Id.* at 770. None of the statistical information, the court said, broke down the percentage of all firms that were owned by specific minority groups or the dollar amounts of contracts received by firms in specific minority groups. *Id.* The court, thus, concluded that the Ohio MBE Act included minority groups randomly without any specific evidence that any group suffered from discrimination in the construction industry in Ohio. *Id.* at 771.

**Conclusion.** The court thus denied the motion of the state defendants to stay the court’s prior order holding unconstitutional the Ohio MBE Act pending the appeal of the court’s order. *Id.* at 771. This opinion underscored that governments must show several factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

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

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation’s (“FDOT”) program of “setting aside” certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts “set aside” for business enterprises owned by Hispanic and

African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT's claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities "supposedly willing and able to do road maintenance work," and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in "somebody's" discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

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

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

In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at \*1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id.* \*1. Businesses owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their

identity as a member of a group without regard to their individual qualities.” *Id.*, quoting 15 U.S.C. § 627(a)(5).

**The Section 8(a) statute is race-neutral.** The court rejected Rothe’s allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id.* \*1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA’s *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id.* \*2, citing 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe’s definition of the racial classification it attacks in this case, according to the court, does not include the SBA’s regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id.* at \*2. The court stated the statute “readily survives” the rational basis scrutiny standards. *Id.* \*2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id.*

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id.* \*2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id.* \*2.

The court found that the definition of the term “socially disadvantaged” does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id.* \*3. On its face, the court stated the term envisions a individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id.* The court said that the statute definition of the term “social disadvantaged” does not provide for preferential treatment based on an applicant’s race, but rather on an individual applicant’s experience of discrimination. *Id.* \*3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered “socially disadvantaged.” *Id.* \*3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id.*

The court pointed out that the SBA's implementation of the statute's definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id* \*4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA's implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id* \*4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id* \*5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner's experience of discrimination. *Id* \*6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id*.

The court noted that the Supreme Court and this court's discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id* \*8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id*. at \*7.

**The SBA statute does not trigger strict scrutiny.** The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id* \*10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id* \*9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id*. The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id*.

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id* \*10. Instead, the court considered whether the statute is supported by a rational basis. *Id*. The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id* \*10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id*. Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id* \*11. The statutory scheme, the court said, is rationally related to that end. *Id*.

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* \*11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id*.

**Other issues.** The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those

determinations. *Id* \*11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id*.

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id* \*11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id*.

**Dissenting Opinion.** There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id* \*12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id* \*13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id* \*16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id* \*22.

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

Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense ("DOD") to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the "Price Evaluation Adjustment Program" or "PEA").

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the "analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization." 413 F.3d 1327 (Fed. Cir.

2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, “the evidence must be proven to have been before Congress prior to enactment of the racial classification.” The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe*, 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals (“SDBs”). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was “stale,” that the plaintiff (*Rothe*) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

**2007 Order of the District Court (499 F.Supp.2d 775).** In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff *Rothe* did not qualify as an SDB because it was owned by a Caucasian female. Although *Rothe* was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the “lowest” bidder and was awarded the contract. *Id.* *Rothe* claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 782-83. The district court’s decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government's burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id.* at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10<sup>th</sup> Cir. 2003), established legal principles that are relevant to the court's strict scrutiny analysis. First, Rothe's claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce "credible, particularized" evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and "they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting." *Id.* at 838-39. The court found that the data used in these six disparity studies is not "stale" for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with Rothe's argument that all the data were stale (data in the studies from 1997



through 2002), “because this data was the most current data available at the time that these studies were performed.” *Id.* The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a “bright-line rule for determining staleness.” *Id.*

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are “stale.” *Id.* at n.86. The court also stated that it “accepts the reasoning of the *Appendix*, which the court found stated that for the most part “the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities.” *Id.* at 839, quoting 61 *Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the *Appendix*, the Benchmark Study, and the Urban Institute Report were “stale,” and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the *Appendix* to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the *Appendix*, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with “concrete, particularized” evidence to the contrary. *Id.* at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government's involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id.*, quoting *Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;
2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and
3. Over- and under-inclusiveness.

*Id.* The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

**November 4, 2008 decision by the Federal Circuit Court of Appeals.** On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a "strong basis in evidence" upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence

produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

**Strict scrutiny framework.** The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is “beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature’s decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

**Compelling interest – strong basis in evidence.** The Federal Circuit pointed out that the statistical and anecdotal evidence relied upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing to Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

**Six state and local disparity studies.** The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson’s* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices,

or to computations of disparity percentages, in determining whether Croson's evidentiary burden is satisfied. 545 F.3d at 1038, *quoting* *W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

**Staleness.** The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to* *Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress "should be able to rely on the most recently available data so long as that data is reasonably up-to-date." 545 F.3d at 1039. The Federal Circuit affirmed the district court's conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id.*

**Before Congress.** The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it "must be proven to have been before Congress prior to enactment of the racial classification." 545 F.3d at 1039, *quoting* *Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id.* at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD "which Congress was emphatically not required to make." *Id.* at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the "government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy." 545 F.3d at 1040, footnote 11 *quoting* *Dean v. City of Shreveport*, 438 F.3d 448, 445 (5<sup>th</sup> Cir. 2006).

**Methodology.** The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, “[a] disparity ratio less than 0.80” — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — “indicates a relevant degree of disparity,” and “might support an inference of discrimination.” 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and citing *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11<sup>th</sup> Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a “crucial question” in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by *Rothe*, that the six studies misapplied this “touchstone” of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because “the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists.” 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id.*

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id.* However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or “relative capacity,” of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 quoting *Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id.* at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* The court said that for a disparity ratio to

have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id.* at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing to Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id.* at 1044-1045.

The court stated, to “be clear,” that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id.* at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id.* The court recognized that a minority-owned firm’s capacity and qualifications may themselves be affected by discrimination. *Id.* The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id.*

**Geographic coverage.** The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, “we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest.” 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

**Anecdotal evidence.** The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, *citing Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in *Concrete Works* noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, quoting *Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and “should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no ‘precise mathematical formula’ to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 545 F.3d at 1049, quoting *W.H. Scott Constr. Co.*, 199 F.3d at 218 n. 11.

**Narrowly tailoring.** The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination.” 545 F.3d at 1049-1050.

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

Plaintiff Rothe Development, Inc. is a small business that filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) (collectively, “Defendants”) challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. See *DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic’s* court disagreed with the plaintiff’s facial attack and held the Section 8(a) Program as facially constitutional. See *DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (See also discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic’s* holding in the context of this case. 2015 WL 3536271 at \*1. Both the plaintiff Rothe and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other’s expert witnesses. The court concludes

that Defendants' experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff Rothe's motion to exclude Defendants' expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff's experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants' motions to exclude plaintiff's expert testimony.

In addition, the court in *Rothe* agrees with the court's reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff's motion for summary judgment and grants Defendants' cross-motion for summary judgment.

*DynaLantic Corp. v. Department of Defense.* The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. See 2015 WL 3536271 at \*4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at \*5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id.* at \*5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at \*5, citing *DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that DynaLantic had failed to present credible, particularized evidence that undermined the government's compelling interest or that demonstrated that the government's evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at \*5, citing *DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

**Defendants' expert evidence.** One of Defendants' experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a "logit model" to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at \*9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-



SDB firms. *Id.* In addition, the Defendants' expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0% of contract actions, 93.0% of dollars awarded, and in which 92.2% of non-8(a) minority-owned SDBs are registered. *Id.* Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe's contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at \*10. The court found convincing the expert's response to Rothe's critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert's reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, citing *DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, citing *DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants' additional expert's testimony as admissible in connection with that expert's review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id.* at \*11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at \*12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id.* The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

**Plaintiff's expert's testimony rejected.** The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at \*13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred methodology for conducting disparity studies "appears to be well outside of the mainstream in this particular field." *Id.* at \*14. The expert's methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

**The Section 8(a) Program is constitutional on its face.** The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. *Id.* at \*15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at \*17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at \*17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government's initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action – specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at \*17, citing *DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at \*17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at \*17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at \*18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; citing *DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at \*18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at \*18, citing *DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at \*18. The court concurred with the *DynaLantic* court's conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at \*18, citing *DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe's argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id.* at \*19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at \*19. The court pointed out that any person may present credible evidence challenging an individual's status as socially or economically disadvantaged. *Id.* The court said that Rothe's argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the "narrowness" of the narrow-tailoring mandate relates to the relationship between the government's interest and the remedy it prescribes. *Id.*

**Conclusion.** The court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government's racial classification, the purported need for remedial action is supported by strong and un rebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at \*20.

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

Plaintiff, the DynaLantic Corporation (“DynaLantic”), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense (“DoD”), the Department of the Navy, and the Small Business Administration (“SBA”) challenging the constitutionality of Section 8(a) of the Small Business Act (the “Section 8(a) program”), on its face and as applied: namely, the SBA’s determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at \*1, \*37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id.* at \*1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD’s use of the program, which is reserved for “socially and economically disadvantaged individuals,” constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id.* at \*1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic’s specific industry, defined as the military simulation and training industry. *Id.*

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

**The Section 8(a) Program.** The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. “Socially disadvantaged” individuals are persons who have been “subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities.” 13 CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). “Economically disadvantaged” individuals are those socially disadvantaged individuals “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.” 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.*, 2012WL 3356813 at \*2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id.* at \*2 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than \$250,000 upon entering the program, and a showing that the individual’s income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at \*3; *see* 13 CFR § 124.104(c)(2).

Congress has established an “aspirational goal” for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of five percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at \*3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id.* Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id.* DoD has established a goal of awarding approximately two percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at \*3. The Section 8(a) program allows the SBA, “whenever it determines such action is necessary and appropriate,” to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a “sole source” basis (i.e., reserved to one firm) or on a “competitive” basis (i.e., between two or more Section 8(a) firms). *DynaLantic*, at \*3-4; 13 CFR 124.501(b).

**Plaintiff’s business and the simulation and training industry.** DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic* at \*5.

**Compelling interest.** The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *DynaLantic*, at \*9. First, the government must “articulate a legislative goal that is properly considered a compelling government interest.” *Id.* quoting *Sherbrooke Turf v. Minn. DOT.*, 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, “the government must demonstrate ‘a strong basis in evidence’ supporting its conclusion that race-based remedial action was necessary to further that interest.” *DynaLantic*, at \*9, quoting *Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to DynaLantic to present “credible, particularized evidence” to rebut the government’s “initial showing of a compelling interest.” *DynaLantic*, at \*10 quoting *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 959 (10<sup>th</sup> Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at \*10, citing *Rothe Dev. Corp. v. U.S. Dep’t of Def.* (“*Rothe III*”), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a “passive participant.” *DynaLantic*, at \*11. The Court rejected *DynaLantic’s* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at \*11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at \*11, citing *Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at \*11 quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1995), and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-68 (10<sup>th</sup> Cir. 2000). In addition, private prejudice may also take the form of “discriminatory barriers” to “fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts.” *DynaLantic*, at \*11, quoting *Adarand VII*, 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a “passive participant” in private discrimination in the relevant industries or markets. *DynaLantic*, at \*11, citing *Concrete Works IV*, 321 F.3d at 958.

**Evidence before Congress.** The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic*, at \*16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic*, at \*17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10<sup>th</sup> Circuit Court of Appeals’ approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at \*17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or “old boy” business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at \*17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at \*21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

**State and local disparity studies.** Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from

28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at \*25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at \*26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at \*26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at \*26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at \*26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) “require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination.” *DynaLantic*, at \*26, n. 10.

**Analysis: Strong basis in evidence.** Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at \*29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at \*29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at \*31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at \*31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at \*31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at \*31, citing 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at \*31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at \*31, n. 13.

**Rejection of DynaLantic’s rebuttal arguments.** The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at \*32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government’s initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at \*32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a “passive participant” when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at \*34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at \*35, citing *Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id*, citing *Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic’s claim that the government must independently verify the evidence presented to it is unavailing. *Id*. *DynaLantic*, at \*35.

Also in terms of DynaLantic’s arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at \*35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id*. The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at \*35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic*, at \*35. In short, the Court found that DynaLantic’s “general criticism” of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at \*35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across



racial lines to justify a preference to all five groups. *DynaLantic*, at \*36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at \*36.

**Facial challenge: Conclusion.** The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different areas. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at \*37. Second, it provided “forceful” evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

**As-applied challenge.** *DynaLantic* also challenged the SBA and DoD’s use of the Section 8(a) program as applied: namely, the agencies’ determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at \*37. Significantly, the Court points out that the federal Defendants “concede that they do not have evidence of discrimination in this industry.” *Id.* Moreover, the Court points out that the federal Defendants admitted that there “is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry.” *DynaLantic*, at \*38. The federal Defendants also admit that they are “unaware of any discrimination in the simulation and training industry.” *Id.* In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at \*38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at \*38. The Court concludes that the federal Defendants’ position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court’s decision in *Croson*, as well as the Federal Circuit’s decision in *O’Donnell Construction Company*, which adopted *Croson*’s reasoning. *DynaLantic*, at \*38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at \*38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson*’s evidentiary requirement to show an inference of discrimination. *DynaLantic*, at \*39, citing *Croson*, 488 U.S. 501. The Court rejects the federal government’s position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at \*40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at \*40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program

constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at \*40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at \*40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at \*40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at \*40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at \*40.

**Narrowly tailoring.** In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at \*41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at \*41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at \*42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at \*43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at \*44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at \*44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic*, at \*44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at \*45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at \*46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than five percent of contract dollars, are facially constitutional. *DynaLantic*, at \*46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at \*47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at \*48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

**Conclusion.** The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at \*51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

**Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court.** A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the

sum of \$1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

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

*DynaLantic Corp.* involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id.* Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the

evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

# **APPENDIX C.**

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## **Quantitative Information**

# APPENDIX C.

## Quantitative Information

**Figure C-1.**  
**Percentage of all workers**  
**25 and older with at least a**  
**four-year degree, San**  
**Diego and the United**  
**States, 2013-2017**

Note:

\*\*/++ Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men) is statistically significant at the 95% confidence level for San Diego and the United States as a whole, respectively.

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

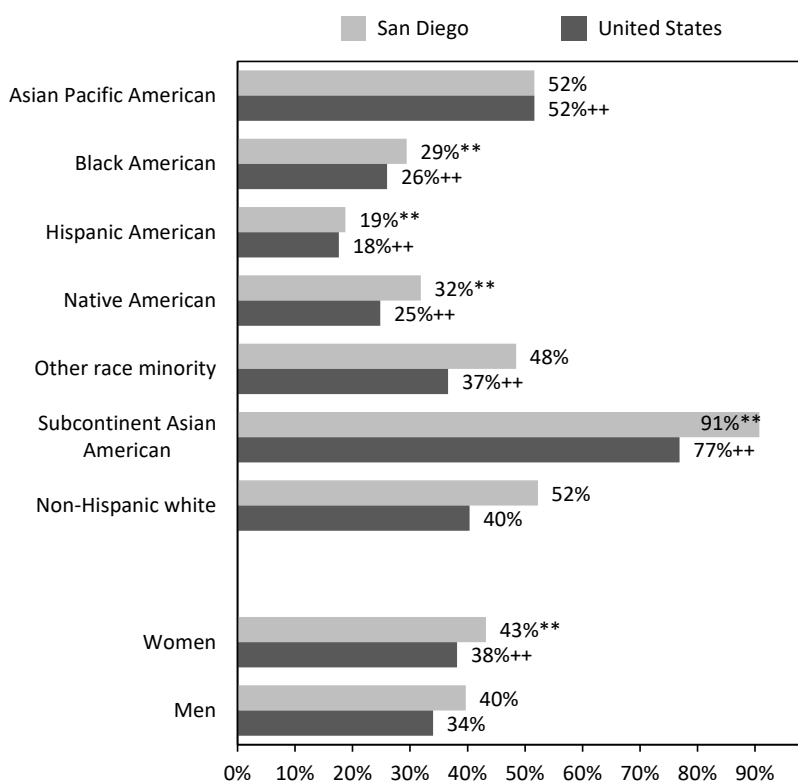
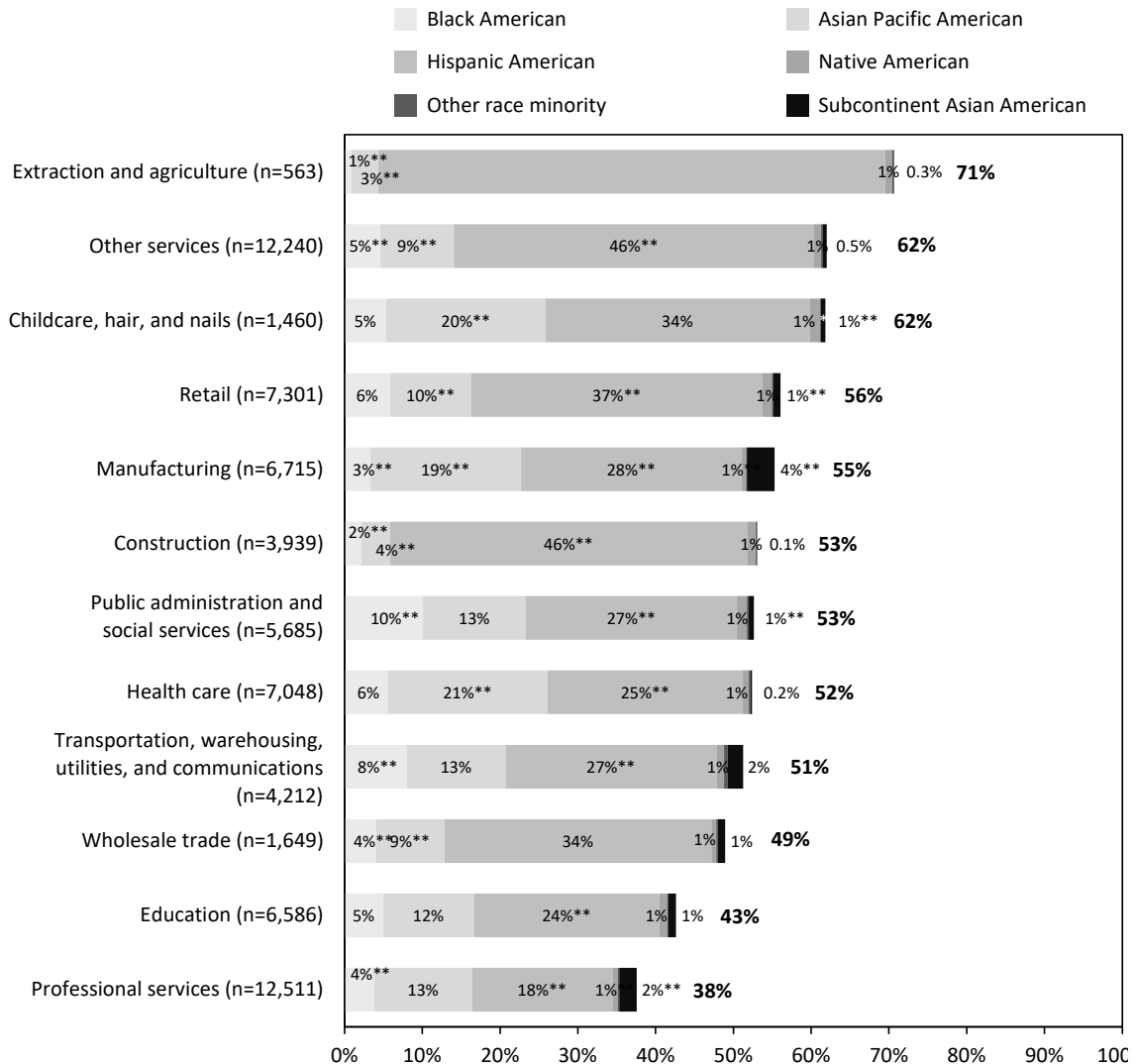


Figure C-1 indicates that, compared to non-Hispanic white Americans working in San Diego County, smaller percentages of Black Americans, Hispanic Americans, Native Americans, and other race minorities have four-year college degrees. In addition, a larger percentage of women than men working in San Diego County have four-year college degrees.

**Figure C-2.**  
**Percent representation of minorities in various industries in San Diego, 2013-2017**



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

The representation of minorities among all San Diego workers is 6% for Black Americans, 12% for Asian Pacific American, 1% for Subcontinent Asian American, 32% for Hispanic Americans, and 52% for all minorities considered together.

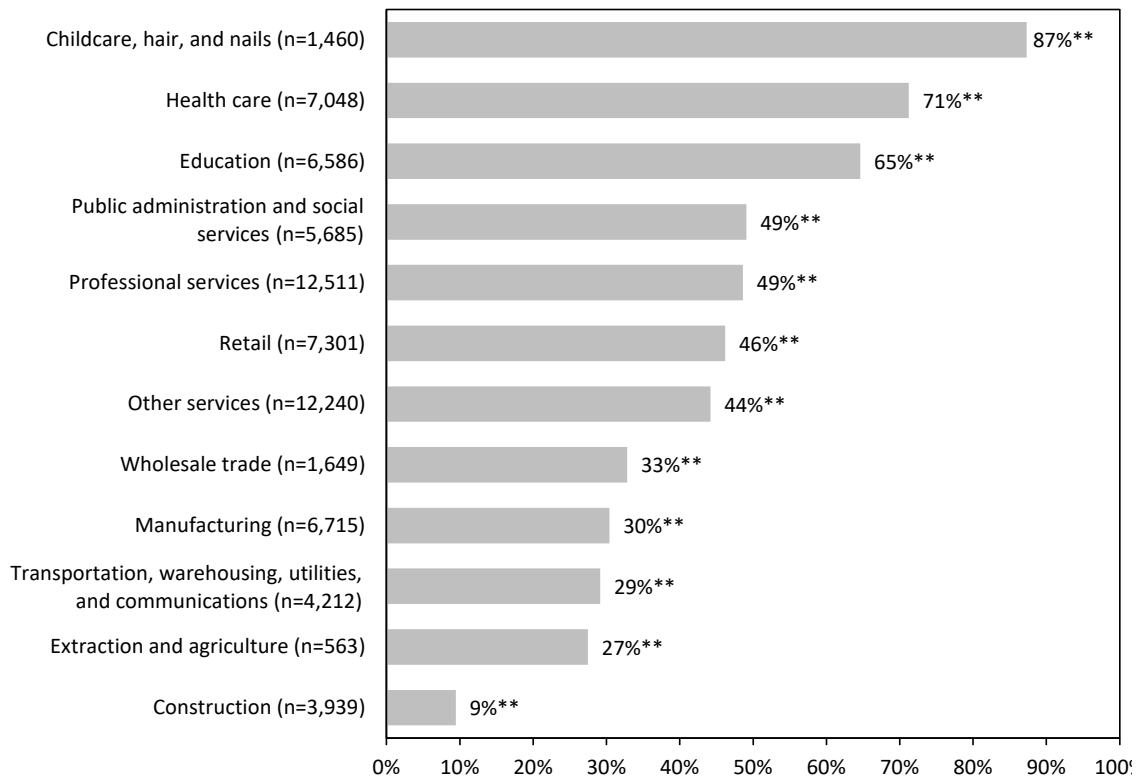
Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services; Workers in the rental and leasing, travel, investigation, waste remediation,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

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>

Figure C-2 indicates that the San Diego County industries with the highest representations of minority workers are extraction and agriculture; childcare, hair and nails; and other services. The San Diego industries with the lowest representations of minority workers are wholesale trade; education; and professional services.



**Figure C-3.**  
**Percent representation of women in various industries in San Diego, 2013-2017**



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 San Diego workers is 45%.

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

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

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

**Figure C-4.**  
**Demographic characteristics of workers in study-related industries and all industries, San Diego and the United States, 2013-2017**

San Diego	All Industries (n= 75,046)	Construction (n= 3,939)	Professional Services (n= 2,262)	Goods & Services (n= 414)
<b>Race/ethnicity</b>				
Asian Pacific American	12.4 %	3.7 % **	13.8 %	8.8 % **
Black American	5.5 %	2.2 % **	3.4 % **	15.7 % **
Hispanic American	31.6 %	45.9 % **	13.1 % **	27.8 %
Native American	0.9 %	1.1 %	0.8 %	2.0 %
Other race minority	0.2 %	0.0 % **	0.0 % **	1.2 %
Subcontinent Asian American	1.3 %	0.1 % **	2.2 %	0.4 % **
<b>Total minority</b>	<b>51.9 %</b>	<b>53.1 %</b>	<b>33.3 %</b>	<b>56.0 %</b>
Non-Hispanic white	48.1 %	46.9 %	66.7 % **	44.0 %
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>				
Women	44.5 %	9.5 % **	34.4 % **	23.4 % **
Men	55.5 %	90.5 % **	65.6 % **	76.6 % **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
United States	All Industries (n= 7,695,205)	Construction (n= 464,906)	Professional Services (n= 161,760)	Goods & Services (n= 65,419)
<b>Race/ethnicity</b>				
Asian Pacific American	4.8 %	1.7 % **	5.9 % **	3.8 % **
Black American	12.4 %	5.9 % **	6.5 % **	23.5 % **
Hispanic American	16.7 %	27.3 % **	8.4 % **	14.7 % **
Native American	1.2 %	1.3 % **	0.8 % **	1.1 %
Other race minority	0.2 %	0.2 %	0.2 % **	0.4 % **
Subcontinent Asian American	1.4 %	0.3 % **	2.9 % **	3.1 % **
<b>Total minority</b>	<b>36.8 %</b>	<b>36.8 %</b>	<b>24.7 %</b>	<b>46.7 %</b>
Non-Hispanic white	63.2 %	63.2 %	75.3 % **	53.3 % **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>				
Women	47.2 %	9.2 % **	34.2 % **	25.1 % **
Men	52.8 %	90.8 % **	65.8 % **	74.9 % **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>

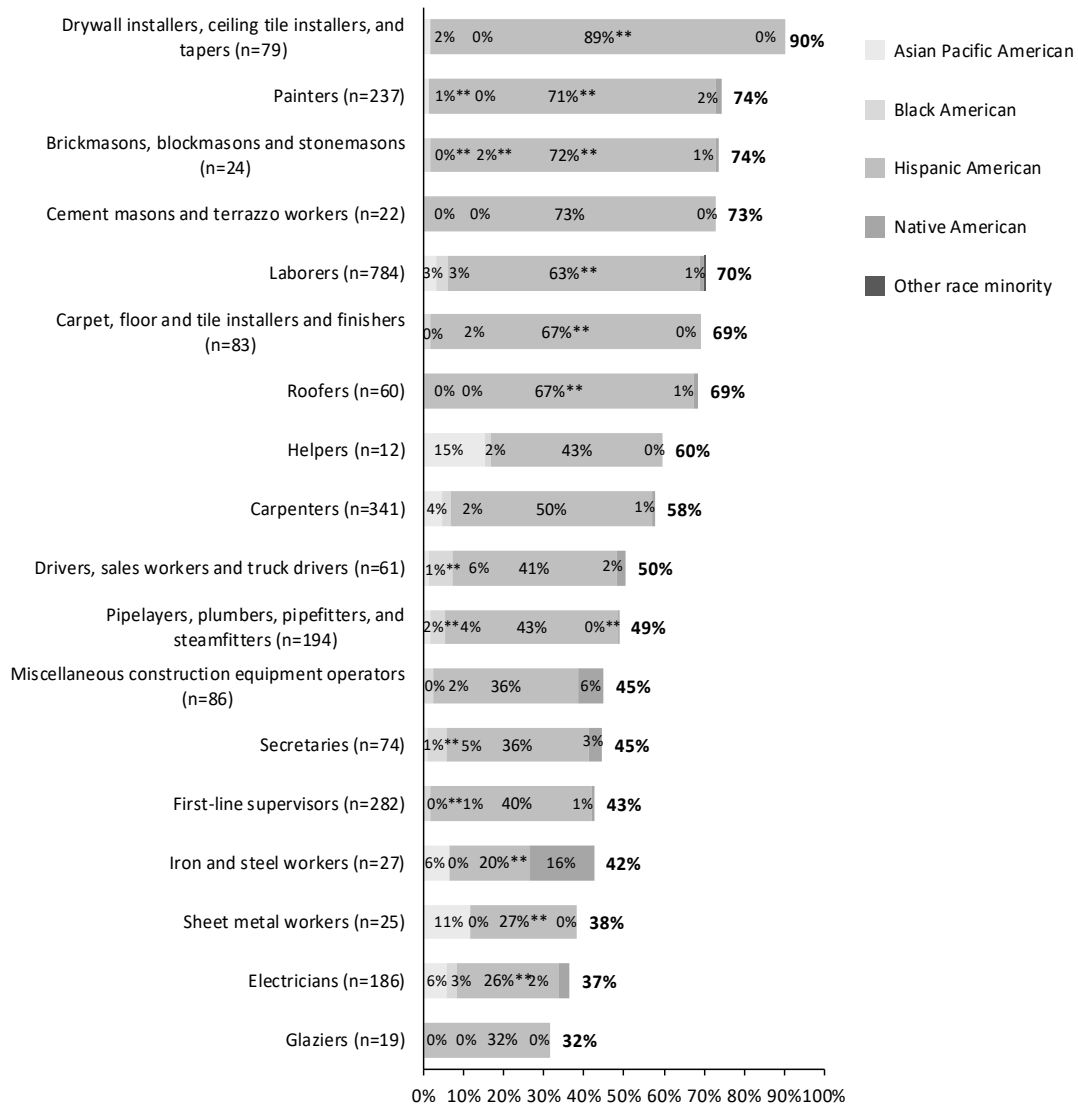
Note: \*\* Denotes that the difference in proportions between workers in each study-related industry and workers in all industries is statistically significant at the 95% confidence level.

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-4 indicates that there are smaller percentages of Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, and women working in the San Diego County construction industry than in all industries considered together. There are smaller percentages of Black Americans, Hispanic Americans, Native Americans, and women working in the San Diego County professional services industry than in all industries considered together. There are smaller percentages of Asian Pacific Americans, Hispanic American, Subcontinent Asian

Americans, and women working in the San Diego County goods and services industry than in all industries considered together.

**Figure C-5.**  
**Percent representation of minorities in selected construction occupations in San Diego, 2013-2017**



Note: \*\* Denotes that the difference in proportions between minority workers in the specified occupation and all construction occupations considered together is statistically significant at the 95% confidence level.

The representation of minorities among all San Diego construction workers is 4% for Asian Pacific American, 2% for Black American, 46% for Hispanic Americans, and 53% for all minorities considered together.

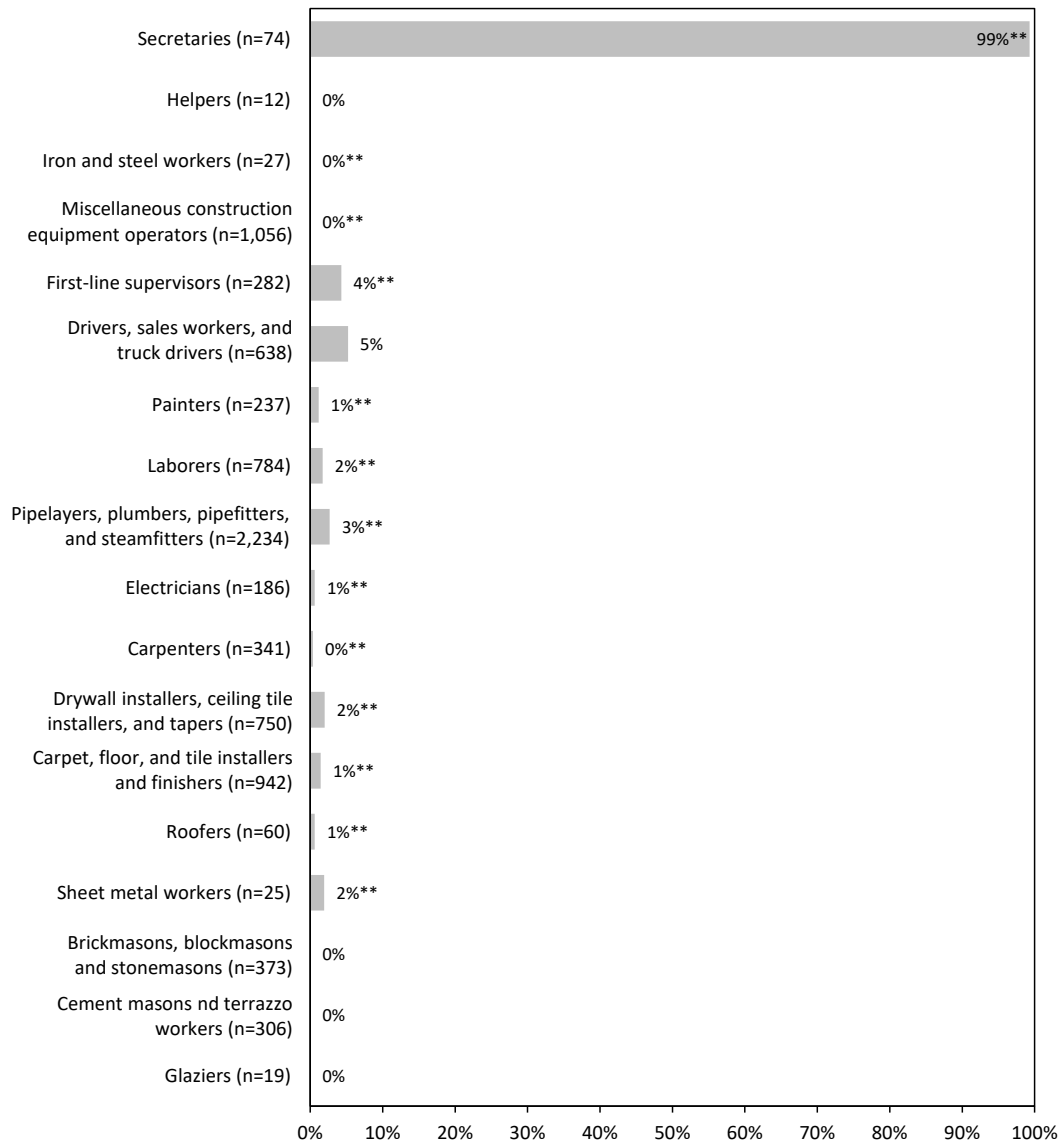
Plasterers and stucco masons are not depicted because none were not found in the Study Area's sample.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2013-2017 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-5 indicates that the San Diego County construction occupations with the highest representations of minority workers are drywall installers, ceiling tile installers, and tapers; painters; and brickmasons, blockmasons, and stonemasons. The San Diego County construction occupations with the lowest representations of minority workers are sheet metal workers; electricians; and glaziers.

**Figure C-6.**  
**Percent representation of women in selected construction occupations in San Diego, 2013-2017**



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 San Diego construction workers is 9%.

Plasterers and stucco masons are not depicted because none were not found in the Study Area's sample.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2013-2017 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-6 indicates that the San Diego County construction occupations with the highest representations of women workers are secretaries; drivers, sales workers, and truck drivers; and first line supervisors. The San Diego County construction occupations with the lowest representations of women workers are helpers; iron and steel workers; miscellaneous construction equipment operators; carpenters; brickmasons, blockmasons, and stonemasons; cement masons and terrazzo workers; and glaziers.

**Figure C-7.  
Percentage of workers who worked as a manager in each study-related industry, San Diego and the United States, 2013-2017**

Note:

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

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

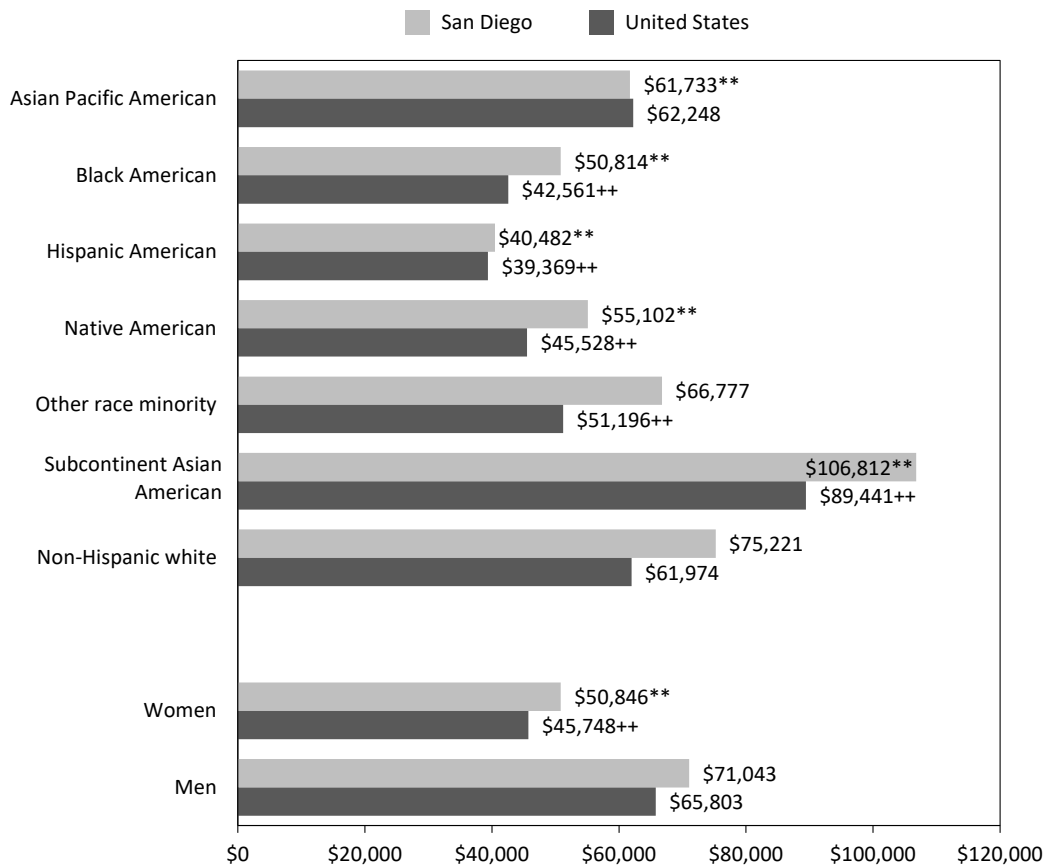
Source:

BBC Research & Consulting from 2013-2017 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/>.

San Diego	Construction	Professional Services	Goods & Services
<b>Race/ethnicity</b>			
Asian Pacific American	9.6 %	3.6 %	0.0 %
Black American	4.3 % **	2.7 %	0.0 %
Hispanic American	3.9 % **	3.5 %	1.9 %
Native American	4.9 % **	7.2 % †	0.0 % †
Other race minority	0.0 % †	0.0 % †	0.0 % †
Subcontinent Asian	8.1 % †	2.1 %	0.0 % †
Non-Hispanic white	14.2 %	5.0 %	1.1 %
<b>Gender</b>			
Women	10.8 %	3.3 % **	0.0 %
Men	8.8 %	5.2 %	1.3 %
<b>All individuals</b>	<b>9.0 %</b>	<b>4.5 %</b>	<b>1.0 %</b>
United States	Construction	Professional Services	Goods & Services
<b>Race/ethnicity</b>			
Asian Pacific American	9.7 %	2.6 % **	1.1 % **
Black American	4.3 % **	2.5 % **	0.8 % **
Hispanic American	3.0 % **	3.0 % **	0.9 % **
Native American	5.5 % **	4.3 %	1.7 %
Other race minority	5.8 % **	2.6 %	0.4 % **
Subcontinent Asian	12.3 % **	3.4 % **	0.9 % **
Non-Hispanic white	9.6 %	4.3 %	2.4 %
<b>Gender</b>			
Women	6.8 % **	2.6 % **	1.2 % **
Men	7.5 %	4.7 %	1.8 %
<b>All individuals</b>	<b>7.5 %</b>	<b>3.9 %</b>	<b>1.7 %</b>

Figure C-7 indicates that, compared to non-Hispanic white Americans, smaller percentages of Black Americans, Asian Pacific Americans, Hispanic Americans, Native Americans, Subcontinent Asian Americans, and other race minorities work as managers in the San Diego County construction industry. Compared to non-Hispanic white Americans, smaller percentages of Asian Pacific Americans, Black Americans, Hispanic Americans, Subcontinent Asian Americans, and other race minorities work as managers in the San Diego County professional services industry. Compared to non-Hispanic white Americans, smaller percentages of Black Americans, Asian Pacific Americans, Native Americans, Subcontinent Asian Americans, and other race minorities work as managers in the San Diego County goods and services industry. In addition, compared to men, a smaller percentage of women work as managers in both the San Diego County professional services industry and the goods and services industry.

**Figure C-8.**  
**Mean annual wages, San Diego and the United States, 2013-2017**



**Note:**

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

\*\*/++ Denotes statistically significant differences from non-Hispanic whites (for minority groups), from men (for women), from all others (for people with disabilities), and from non-veterans (for veterans) at the 95% confidence level for San Diego and the United States as a whole, respectively.

**Source:**

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-8 indicates that, compared to non-Hispanic white Americans, Black Americans, Asian Pacific Americans, Hispanic Americans, Native Americans, and other race minorities in San Diego County exhibit lower mean annual wages. In addition, women in San Diego County exhibit lower mean annual wages than men.

**Figure C-9.  
Predictors of annual wages  
(regression), San Diego, 2013-2017**

Notes:

The regression includes 36,243 observations.

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

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

\*, \*\* Denotes statistical significance at the 90% and 95% confidence levels, respectively.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, high school diploma for the education variables, manufacturing for industry variables.

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	7907.186 **
Asian Pacific American	0.859 **
Black American	0.831 **
Hispanic American	0.848 **
Native American	0.941
Other minority group	0.937
Subcontinent Asian American	1.005
Women	0.813 **
Less than high school education	0.894 **
Some college	1.202 **
Four-year degree	1.639 **
Advanced degree	2.212 **
Disabled	0.829 **
Military experience	0.993
Speaks English well	1.302 **
Age	1.066 **
Age-squared	0.999 **
Married	1.129 **
Children	1.000
Number of people over 65 in household	0.893 **
Public sector worker	1.182 **
Manager	1.258 **
Part time worker	0.363 **
Extraction and agriculture	0.712 **
Construction	0.845 **
Wholesale trade	0.883 **
Retail trade	0.691 **
Transportation, warehouse, & information	0.936 **
Professional services	0.958 **
Education	0.608 **
Health care	0.937 **
Other services	0.692 **
Public administration and social services	0.745 **

Figure C-9 indicates that, compared to being a non-Hispanic white American in San Diego County, being Black American, Asian Pacific American, Hispanic American, Native American, or other race minority is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately \$0.83 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man in San Diego County, even after accounting for various other personal characteristics.



**Figure C-10.  
Predictors of annual wages  
(regression), United States, 2013-  
2017**

Note:

The regression includes 4,070,460 observations.

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

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

\*, \*\* Denotes statistical significance at the 90% and 95% confidence levels, respectively.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, high school diploma for the education variables, manufacturing for industry variables, and Northeast for region variables.

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	8127.486 **
Asian Pacific American	0.958 **
Black American	0.853 **
Hispanic American	0.910 **
Native American	0.880 **
Other minority group	0.907 **
Subcontinent Asian American	0.984 **
Women	0.780 **
Less than high school education	0.856 **
Some college	1.196 **
Four-year degree	1.667 **
Advanced degree	2.304 **
Disabled	0.794 **
Military experience	1.001
Speaks English well	1.353 **
Age	1.057 **
Age-squared	0.999 **
Married	1.122 **
Children	1.010 **
Number of people over 65 in household	0.906 **
Midwest	0.884 **
South	0.895 **
West	0.992 **
Public sector worker	1.104 **
Manager	1.301 **
Part time worker	0.362 **
Extraction and agriculture	0.956 **
Construction	0.937 **
Wholesale trade	0.970 **
Retail trade	0.750 **
Transportation, warehouse, & information	1.029 **
Professional services	1.068 **
Education	0.656 **
Health care	0.998
Other services	0.713 **
Public administration and social services	0.821 **

Figure C-10 indicates that, compared to being a non-Hispanic white American in the United States, being Black American, Asian Pacific American, Subcontinent Asian American, Hispanic American, Native American, or other race minority is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately \$0.85 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man, even after accounting for various other personal characteristics.

**Figure C-11.  
Home Ownership  
Rates, San Diego  
and the United  
States, 2013-  
2017**

Note:  
The sample universe is all households.  
\*\*, ++ Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level for San Diego and the United States as a whole, respectively.  
Source:  
BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa/>.

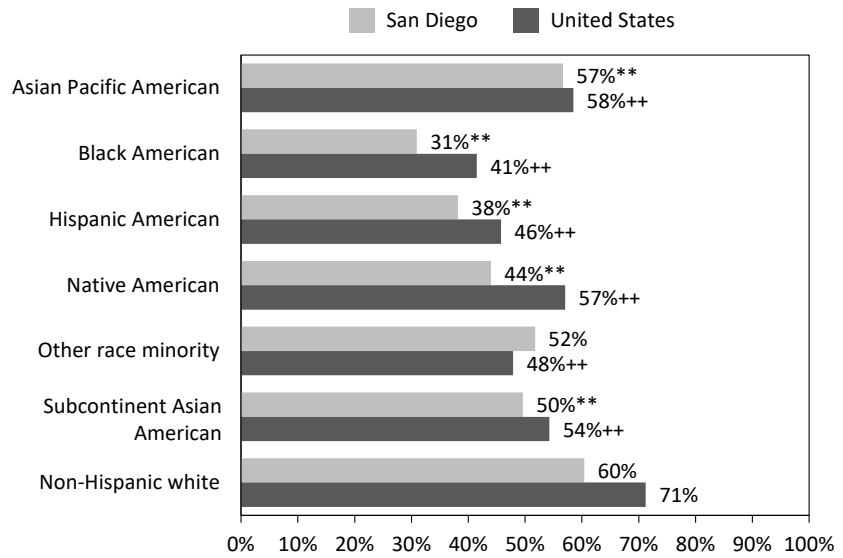


Figure C-11 indicates that, compared to non-Hispanic white Americans, smaller percentages of Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans, and other race minorities in San Diego County own homes.

**Figure C-12.  
Median home  
values, San Diego  
and the United  
States, 2013-2017**

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

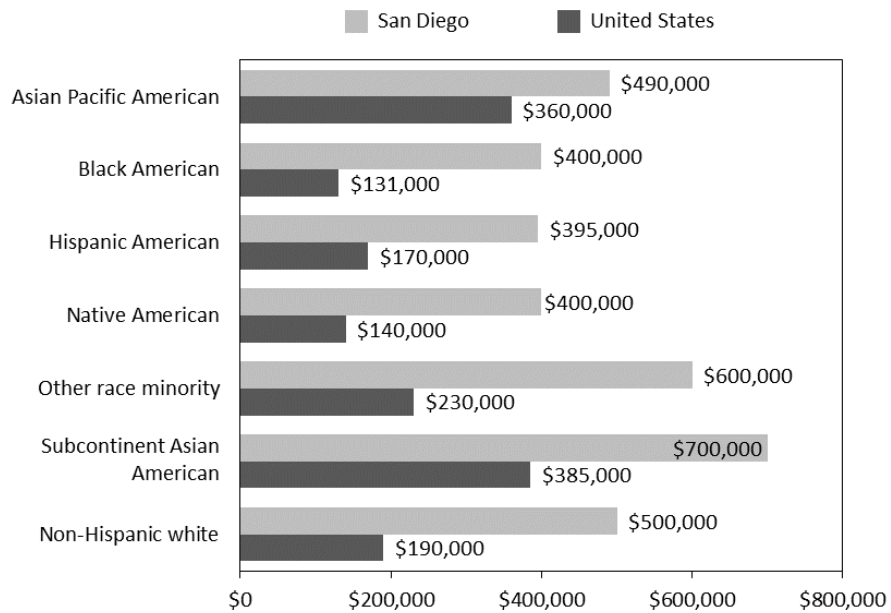


Figure C-12 indicates that Black American, Asian Pacific American, Hispanic American, and Native American in San Diego County own homes of lower median values than non-Hispanic white American homeowners.

**Figure C-13.**  
**Denial rates of**  
**conventional purchase**  
**loans for high-income**  
**households, San Diego and**  
**the United States, 2007**  
**and 2017**

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

Source:  
 FFIEC HMDA data 2016. The raw data  
 extract was obtained from the Consumer  
 Financial Protection Bureau HMDA data  
 tool:  
<http://www.consumerfinance.gov/hmda/explore>.

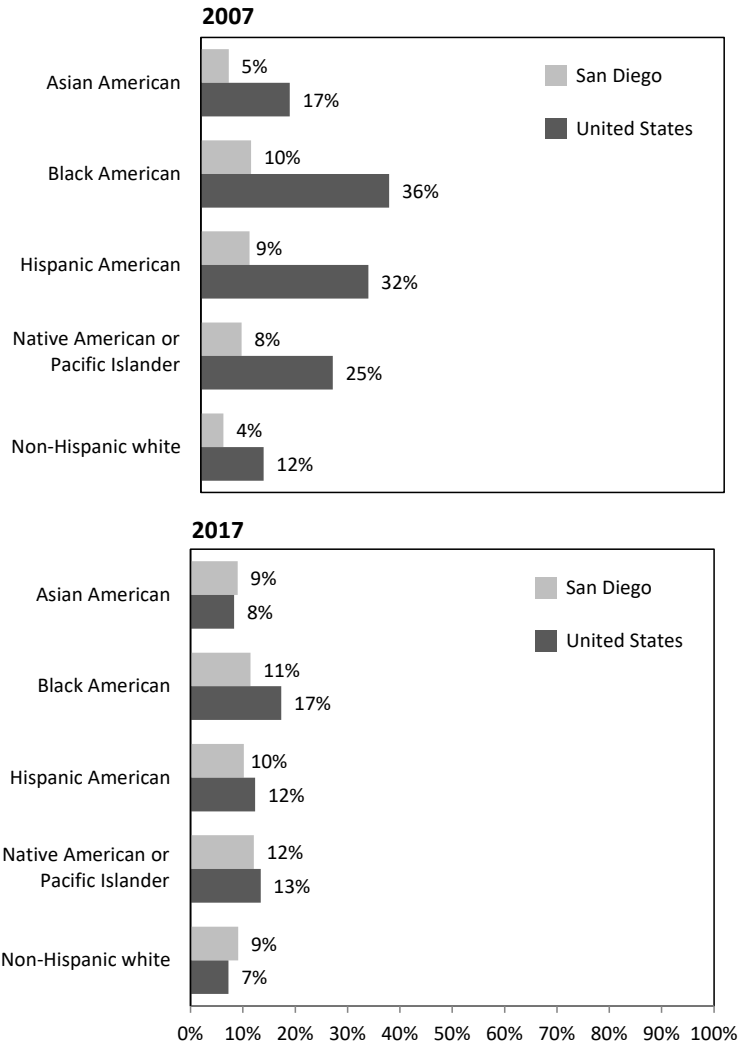


Figure C-13 indicates that in 2017 Black Americans, Hispanic Americans, Native Americans, and Native Hawaiian or Other Pacific Islanders in San Diego County were denied conventional home purchase loans at a greater rate than non-Hispanic white Americans.

**Figure C-14.**  
**Percent of conventional**  
**home purchase loans**  
**that were subprime, San**  
**Diego and the United**  
**States, 2007 and 2017**

Source:  
 FFIEC HMDA data 2016. The raw data  
 extract was obtained from the  
 Consumer Financial Protection Bureau  
 HMDA data tool:  
<http://www.consumerfinance.gov/hmda/explore>.

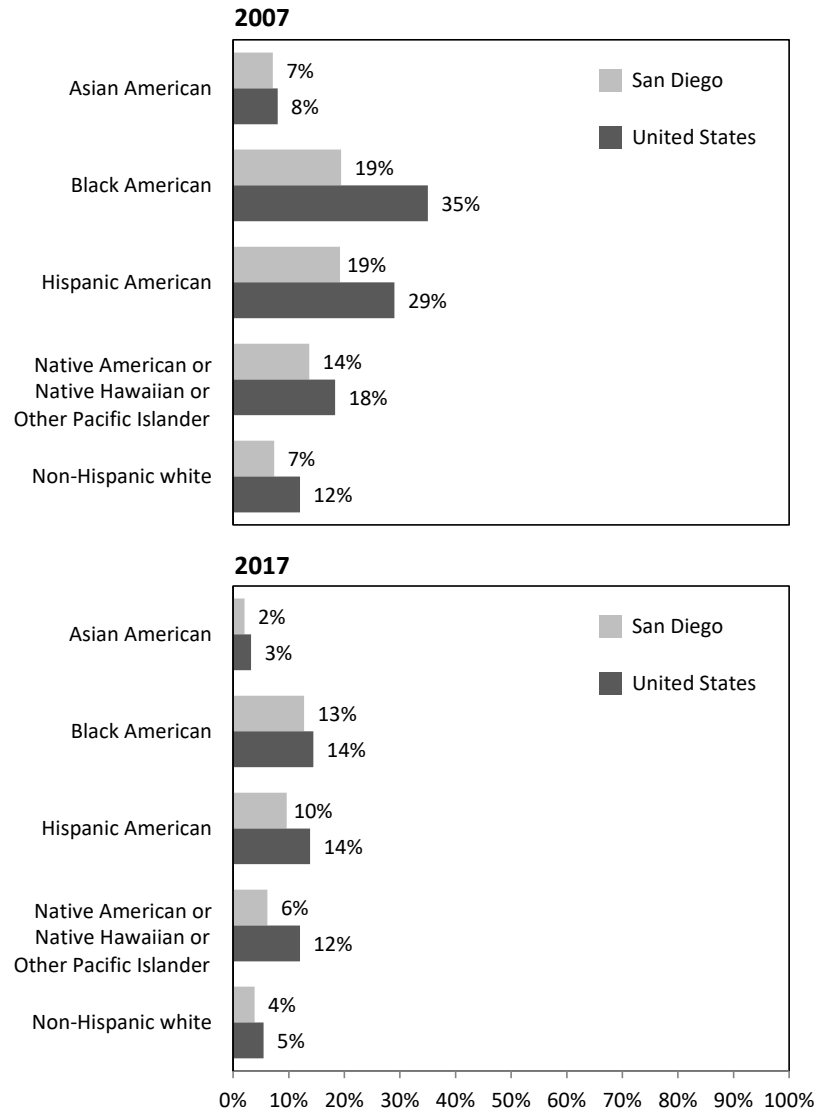


Figure C-14 indicates that in 2017 Black Americans, Hispanic Americans, Native Americans, and Native Hawaiian or Other Pacific Islanders in San Diego County were awarded conventional home purchase loans that were subprime at a greater rate than non-Hispanic white Americans.

**Figure C-15.**  
**Business loan denial rates,**  
**Pacific Division and the United**  
**States, 2003**

Note:

\*\* Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Pacific Division consists of Alaska, California, Hawaii, Oregon, and Washington.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

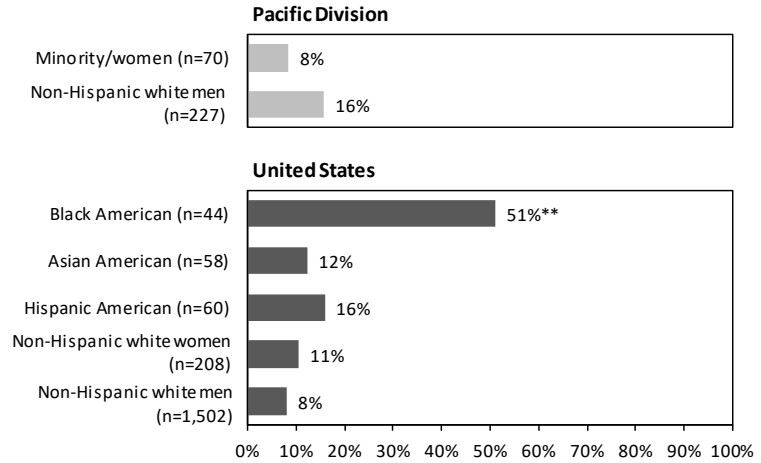


Figure C-15 indicates that in 2003, Black American, Asian American, Hispanic American, and non-Hispanic white women owned businesses in the United States were denied business loans at a greater rate than businesses owned by non-Hispanic white men.

**Figure C-16.**  
**Businesses that did not apply for loans due to fear of denial, Pacific Division and the United States, 2003**

Note:

\*\* Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Pacific Division consists of Alaska, California, Hawaii, Oregon, and Washington.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

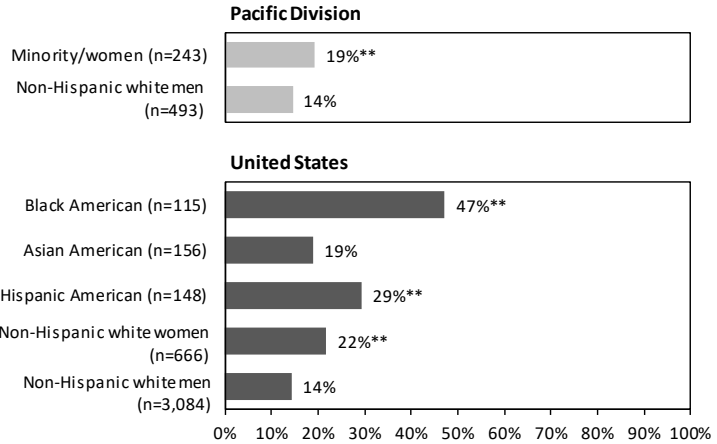


Figure C-16 indicates that in 2003, Black American, Asian American, Hispanic American, and non-Hispanic white women-owned businesses in the United States were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial.

**Figure C-17.**  
**Mean values of approved**  
**business loans, Pacific**  
**Division and the United**  
**States, 2003**

Note:

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

The Pacific Division consists of Alaska, California, Hawaii, Oregon, and Washington.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

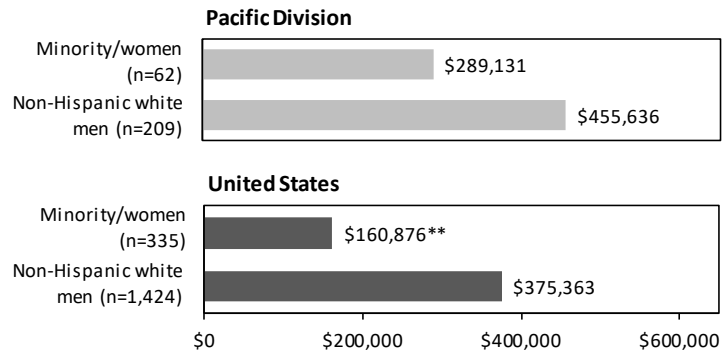


Figure C-17 indicates that in 2003, minority- and woman-owned businesses in the United States who received business loans were approved for loans that were worth less than those that businesses owned by non-Hispanic white men received.



**Figure C-18.**  
**Self-employment rates in**  
**study-related industries,**  
**San Diego and the United**  
**States, 2013-2017**

Note:

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

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

Source:

BBC Research & Consulting from 2013-2017 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/>.

San Diego	Construction	Professional Services	Goods & Services
<b>Race/ethnicity</b>			
Asian Pacific American	22.3 %	11.4 % **	29.3 %
Black American	15.4 % **	13.2 % **	41.5 %
Hispanic American	19.4 % **	22.5 % **	21.2 % **
Native American	15.0 % **	28.2 % †	63.7 % †
Other minority group	32.6 % †	0.0 % †	0.0 % †
Subcontinent Asian American	0.0 % †	11.8 % **	25.6 % †
Non-Hispanic white	27.5 %	29.8 %	37.8 %
<b>Gender</b>			
Women	12.1 % **	24.5 %	29.2 %
Men	24.3 %	25.7 %	34.2 %
<b>All individuals</b>	<b>23.2 %</b>	<b>25.3 %</b>	<b>33.0 %</b>
United States	Construction	Professional Services	Goods & Services
<b>Race/ethnicity</b>			
Asian Pacific American	23.1 % **	14.1 % **	24.3 % **
Black American	17.6 % **	16.6 % **	13.6 % **
Hispanic American	17.7 % **	15.3 % **	14.2 % **
Native American	18.1 % **	22.0 %	9.2 %
Other minority group	23.6 %	14.6 % **	18.2 % **
Subcontinent Asian American	21.8 % **	12.4 % **	45.1 % **
Non-Hispanic white	25.9 %	23.2 %	9.1 %
<b>Gender</b>			
Women	16.2 % **	20.1 % **	6.2 % **
Men	23.7 %	21.9 %	14.8 %
<b>All individuals</b>	<b>23.0 %</b>	<b>21.2 %</b>	<b>12.7 %</b>

Figure C-18 indicates that Black Americans, Asian Pacific Americans, Hispanic Americans, Native Americans, and Subcontinent Asian Americans working in the San Diego County construction industry exhibited lower rates of self-employment (i.e., business ownership) than non-Hispanic white Americans. In addition, women working in the San Diego County construction industry exhibited lower rates of self-employment than men. Black Americans, Asian Pacific Americans, Hispanic Americans, Native Americans, Subcontinent Asian Americans, and other race minorities working in the San Diego County professional services industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the San Diego County professional services industry exhibited lower rates of self-employment than men. Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, and other race minorities working in the San Diego County goods and services industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the San Diego County goods and services industry exhibited lower rates of self-employment than men.

**Figure C-19.**  
**Predictors of business ownership in**  
**construction (regression), San Diego, 2013-**  
**2017**

Note:

The regression included 3,410 observations.

\*, \*\* Denotes statistical significance at the 90% and 95% confidence levels, respectively.

† Denotes that Subcontinent Asian American were omitted from the regression due to small sample size.

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

Source:

BBC Research & Consulting from 2012-2016 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	-2.0624 **
Age	0.0287 *
Age-squared	0.0000
Married	0.1164
Number of children in household	-0.0064
Number of people over 65 in household	0.0022
Owens home	-0.2887 **
Home value (\$000s)	0.0003 **
Monthly mortgage payment (\$000s)	0.0472
Interest and dividend income (\$000s)	0.0027
Income of spouse or partner (\$000s)	-0.0001
Speaks English well	0.1752
Less than high school education	-0.0367
Some college	-0.0137
Four-year degree	0.0634
Advanced degree	-0.2740
Asian Pacific American	-0.0756
Black American	-0.3674
Hispanic American	-0.0791
Native American	-0.2386
Other minority group	0.2983
Subcontinent Asian American	0.0000 †
Women	-0.5182 **

Figure C-19 indicates that, compared to being a man in San Diego County, being a woman is related to a lower likelihood of owning a construction business, even after accounting for various other personal characteristics.

**Figure C-20.**  
**Predictors of business ownership in**  
**professional services (regression), San Diego,**  
**2013-2017**

Note:

The regression included 2,029 observations.

\*, \*\* Denotes statistical significance at the 90% and 95% confidence levels, respectively.

† Denotes that other minority group was omitted from the regression due to small sample size.

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

Source:

BBC Research & Consulting from 2013-2017 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	-3.7446 **
Age	0.0801 **
Age-squared	-0.0005 *
Married	-0.0452
Number of children in household	0.0541
Number of people over 65 in household	0.1460
Owns home	-0.4209 **
Home value (\$000s)	0.0002 *
Monthly mortgage payment (\$000s)	0.0782 **
Interest and dividend income (\$000s)	0.0008
Income of spouse or partner (\$000s)	0.0016 **
Speaks English well	0.2461
Less than high school education	0.4055
Some college	0.1584
Four-year degree	0.2630
Advanced degree	0.2415
Asian Pacific American	-0.5864 **
Black American	-0.6486 **
Hispanic American	-0.0052
Native American	-0.1654
Other minority group	0.0000 †
Subcontinent Asian American	-0.3987
Women	-0.0193

Figure C-20 indicates that compared to being a non-Hispanic white American, being a Black American or Asian Pacific American is related to a lower likelihood of owning a professional services business in San Diego County, even after accounting for various other personal characteristics.

**Figure C-21.**  
**Predictors of business ownership in goods and services (regression), San Diego, 2013-2017**

Note:

The regression included 348 observations.

\*, \*\* Denotes statistical significance at the 90% and 95% confidence levels, respectively.

† Denotes that other minority group was omitted from the regression due to small sample size.

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

Source:

BBC Research & Consulting from 2013-2017 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	-0.1377
Age	0.0499
Age-squared	-0.0007
Married	-0.2940
Number of children in household	0.0724
Number of people over 65 in household	0.3220
Owens home	-0.3511
Home value (\$000s)	-0.0001
Monthly mortgage payment (\$000s)	0.0344
Interest and dividend income (\$000s)	0.0082
Income of spouse or partner (\$000s)	0.0013
Speaks English well	-0.4503
Less than high school education	-0.3003
Some college	-0.1310
Four-year degree	-0.0110
Advanced degree	-0.0677
Asian Pacific American	-0.6106 *
Black American	-0.1933
Hispanic American	-0.6952 **
Native American	0.4119
Other minority group	0.0000 †
Subcontinent Asian American	-0.4321
Women	-0.4035

Figure C-21 indicates that, compared to being a non-Hispanic white American in San Diego County, being Asian Pacific American or Hispanic American is related to a lower likelihood of owning a goods and services business, even after accounting for various other personal characteristics.

**Figure C-22.**  
**Disparities in business ownership rates for San Diego construction workers, 2013-2017**

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Non-Hispanic white women	12.9%	30.4%	42

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-22 indicates that non-Hispanic white women own construction businesses in San Diego County at a rate that is 42 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).

**Figure C-23.**  
**Disparities in business ownership rates for San Diego professional services workers, 2013-2017**

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Black American	9.0%	22.8%	39
Asian Pacific American	11.4%	24.3%	47

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-23 indicates that Black Americans own professional service businesses in San Diego County at a rate that is 39 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics). Additionally, Asian Pacific Americans own professional services businesses in Los Angeles County at a rate that is 47 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).

**Figure C-24.**  
**Disparities in business ownership rates for San Diego goods and services workers, 2013-2017**

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Asian Pacific American	28.4%	46.8%	61
Hispanic American	22.8%	43.6%	52

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-24 indicates that Asian Pacific Americans own goods and other services businesses in San Diego County at a rate that is 61 percent that of similarly-situated non-Hispanic white Americans (i.e., non-Hispanic white Americans who share the same personal characteristics). Additionally, Hispanic Americans own goods and services businesses in San Diego County at a rate that is 52 percent that of similarly-situated non-Hispanic white Americans.

**Figure C-25.**  
**Rates of business closure,**  
**expansion, and contraction,**  
**California and the United States, 2002-2006**

Note:

Data include only non-publicly held businesses

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

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

Source:

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

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

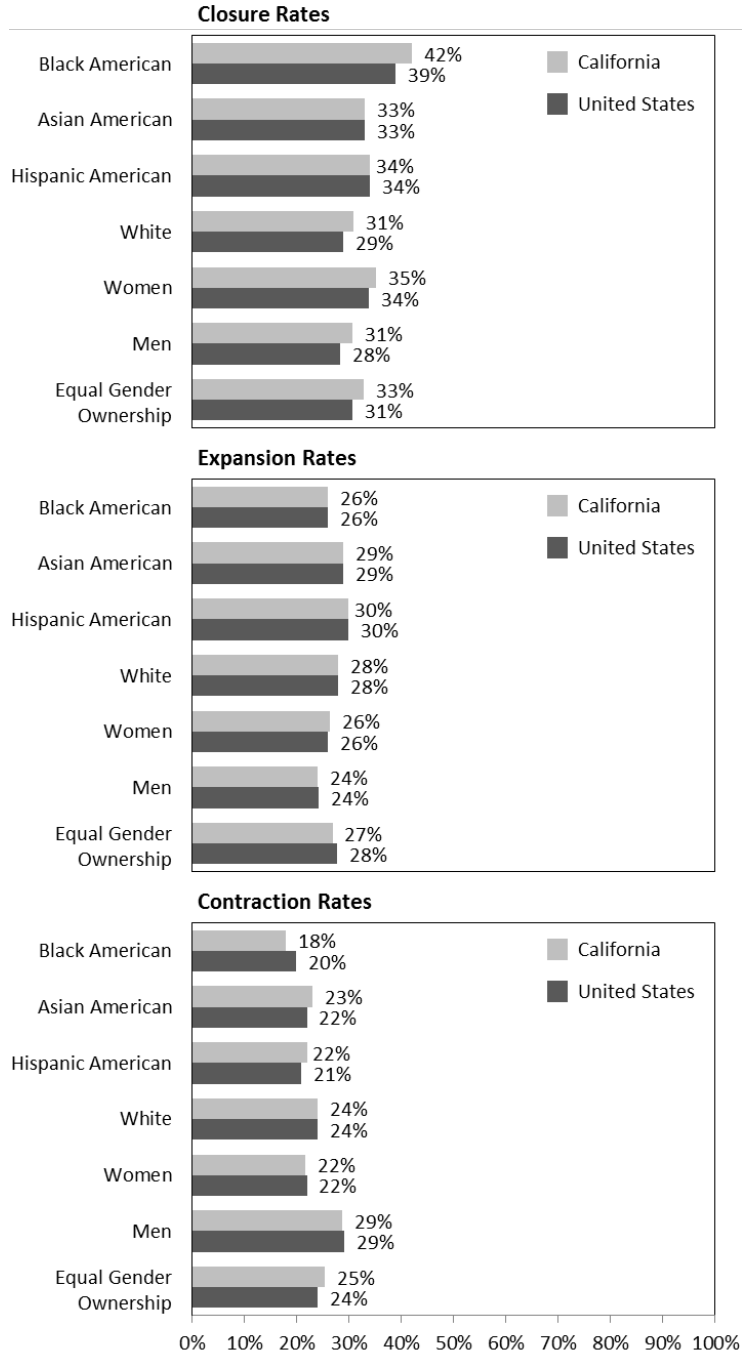


Figure C-25 indicates that Black American-, Asian American-, and Hispanic American-owned businesses in California show higher closure rates than white American-owned businesses. Woman-owned businesses in California show higher closure rates than businesses owned by men. Black American-owned businesses in California also show lower expansion rates than white American-owned businesses.



**Figure C-26.**  
**Mean annual business**  
**receipts (in thousands),**  
**San Diego 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.

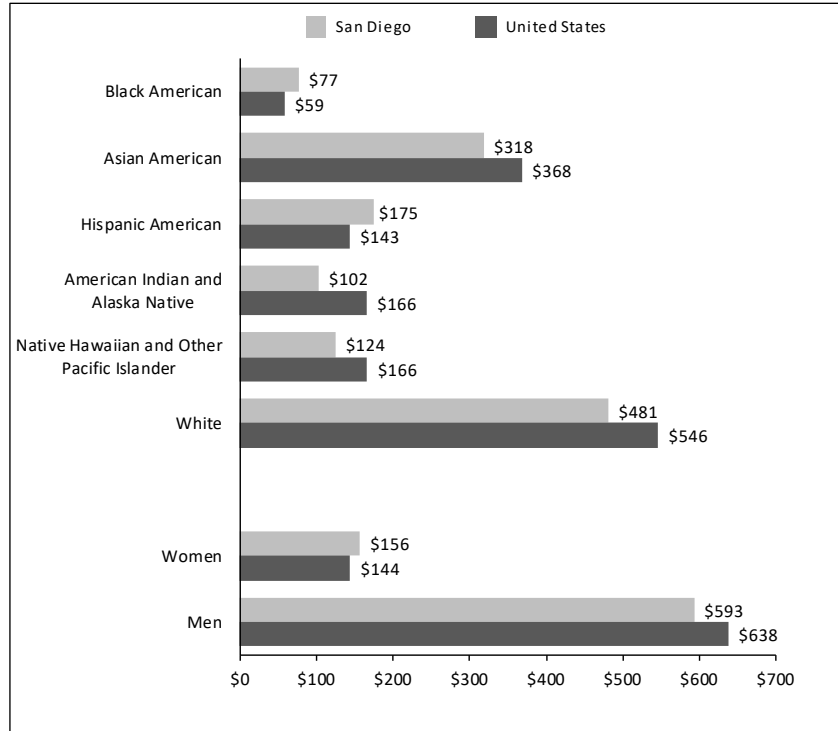


Figure C-26 indicates that in 2012 Black American-; Asian American-; Hispanic American-; American Indian and Alaskan Native-; and Native Hawaiian and Other Pacific Islander-owned businesses in Los Angeles County showed lower mean annual business receipts than white American-owned businesses. Additionally, women owned businesses showed lower mean annual business receipts than businesses owned by men.

**Figure C-27.**  
**Mean annual business**  
**owner earnings, San Diego**  
**and the United States,**  
**2013-2017**

Note:

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2017 dollars.

\*\*, ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) and from men (for women) and at the 95% confidence level for San Diego and the United States as a whole, respectively.

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

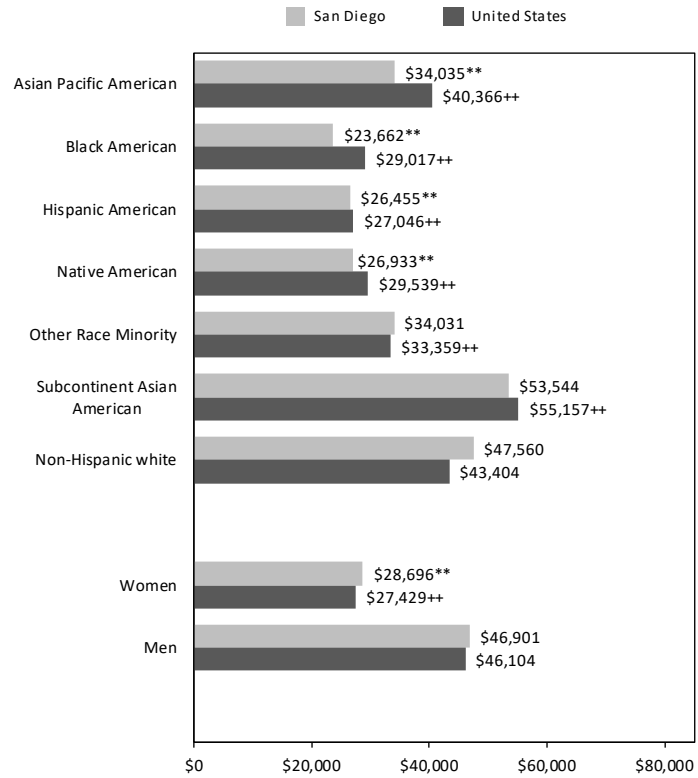


Figure C-27 indicates that the owners of Black American, Asian Pacific American, Hispanic American-, Native American-, and other race minority owned businesses in San Diego County earned less on average than the owners of non-Hispanic white American-owned businesses. In addition, the owners of woman-owned businesses in Los Angeles County earn less on average than the owners of businesses owned by men.

**Figure C-28.  
Predictors of business owner earnings  
(regression), San Diego, 2013-2017**

Note:

The regression includes 5,140 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2015 dollars.

The sample universe is business owners age 16 and over who reported positive earnings.

\*, \*\* Denotes statistical significance at the 90% and 95% confidence level, respectively.

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

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	966.498 **
Age	1.123 **
Age-squared	0.999 **
Married	1.220 **
Speaks English well	1.305 **
Disabled	0.765 **
Less than high school	0.933
Some college	1.031
Four-year degree	1.244 **
Advanced degree	1.739 **
Asian Pacific American	0.892
Black American	0.675 **
Hispanic American	0.970
Native American	0.402 **
Other Race Minority	0.147
Subcontinent Asian American	1.315
Women	0.587 **

Figure C-28 indicates that, compared to being the owner of a non-Hispanic white owned business in San Diego County, being the owner of a Black American and Native American owned business is related to lower business earnings, even after accounting for various other business and personal characteristics. Similarly, being the owner of a woman-owned business is related to lower business earnings compared to non-Hispanic white men owned businesses even after accounting for various other personal characteristics.

**Figure C-29.  
Predictors of business owner earnings  
(regression), United States, 2013-2017**

Note:

The regression includes 440,023 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners age 16 and over who reported positive earnings.

\*, \*\* Denotes statistical significance at the 90% and 95% confidence level, respectively.

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

Source:

BBC Research & Consulting from 2013-2017 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	613.868 **
Age	1.145 **
Age-squared	0.999 **
Married	1.228 **
Speaks English well	1.133 **
Disabled	0.587 **
Less than high school	0.757 **
Some college	1.038 **
Four-year degree	1.309 **
Advanced degree	1.836 **
Asian Pacific American	1.071 **
Black American	0.815 **
Hispanic American	1.048 **
Native American	0.696 **
Other Race Minority	1.063
Subcontinent Asian American	1.149 **
Women	0.534 **

Figure C-29 indicates that, compared to being the owner of a non-Hispanic white American-owned business in the United States, being an owner of a Black American- or Native American-owned business is related to lower owner earnings, even after accounting for various other personal characteristics. In addition, compared to a male business owner in the United States, women business owners report lower owner earnings, even after accounting for various other personal characteristics.

# **APPENDIX D.**

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## **Anecdotal Information about Marketplace Conditions**

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## Anecdotal Information about Marketplace Conditions

Appendix D describes the public engagement process used in the San Diego Association of Governments (SANDAG) and North County Transit District (NCTD) Disparity Study and presents the qualitative information that the study team collected and analyzed as part of the public engagement process. In total, more than 30 business owners and representatives provided written or spoken comments for Appendix D. Appendix D summarizes the key themes that developed from these narrative responses. This chapter is divided into the following sections:

**A. Introduction** describes the public engagement process for gathering and analyzing the qualitative information summarized in Appendix D. *(page 2)*

**B. Background on the Construction; Professional Services; and Goods and Other Services Industries** summarizes information about how businesses become established, what products and services they provide, the growth of the firm and how the firm markets itself. *(page 3)*

**C. Race/Ethnicity/Gender/Veteran Ownership and Certification** presents information about the business's race/ethnicity/gender and veteran status of ownership, the certification the firm holds, and business owners' experiences with California Unified Certification Program (CUCP). *(page 29)*

**D. Experiences in the Private Sector and Public Sector** presents business owners' experiences pursuing private and public sector work. *(page 44)*

**E. Doing Business as a Prime Contractor or as a Subcontractor** summarizes information about the mix of businesses' prime contract and subcontract work, how they obtain that work and experience working with other certified firms. *(page 62)*

**F. Doing Business with Public Agencies** describes business owners' experiences working with or attempting to work with public agencies in the San Diego area as well as surrounding counties and identifies potential barriers to doing work for public agencies. *(page 85)*

**G. Marketplace Conditions** presents information about business owners' and representatives' current perceptions of the San Diego marketplace economic conditions and what it takes for firms to be successful. *(page 102)*

**H. Barriers or Discrimination Based on Race/Ethnicity/Gender/Disability or Veteran status** describes the barriers and challenges firms face in the local marketplace, and details if and how race-/ethnicity-/gender-/disability- or veteran-based discrimination may be contributing to these issues. *(page 113)*

**I. Additional Information Regarding whether any Race/Ethnicity/Gender/Disability or Veteran Owned Discrimination Affects Business Opportunities** presents information about any experiences business owners or representatives have with discrimination in the local marketplace, and how this behavior affects minority-, woman-, disability-, or veteran-owned firms. *(page 155)*

**J. Insights Regarding Business Assistance Programs or Other Neutral Measures** describes business owners' and representatives' awareness of, and opinions about business assistance programs, and other steps to remove barriers for all businesses or small businesses in the San Diego area and surrounding counties. *(page 172)*

**K. Insights Regarding Any Other Race-/Ethnicity-/Gender-/Disability- or Veteran-based Measures** includes business owners' comments about other current or potential race-/ethnicity-/gender-/disability- or veteran-based programs. *(page 220)*

**L. Any Other Insights and Recommendations** presents additional comments and recommendation for the San Diego Association of Governments and North County Transit District to consider. *(page 230)*

## **A. Introduction**

During the study business owners and representatives had the opportunity to discuss their experiences working in the San Diego area and provide public testimony. The qualitative data were collected through participating in one of the following channels:

- Participating in an in-depth interview (n=30);
- Participating in an availability survey (n=69);
- Providing oral or written testimony during a public forum (n=31); and
- Submitting written testimony via fax or e-mail (n=4).

From February 2019 through January 2020, the study team used a variety of public engagement methods to gather comments and participated in several public engagement events. The study team's public engagement strategy consisted of the following:

**Public forums.** The San Diego Association of Governments, North County Transit District and the study team solicited written and verbal testimony at two public forums for the disparity study held at the Logan Heights Branch Public Library and the North County Transit District Headquarters. The meetings were held on October 23<sup>rd</sup> and 24<sup>th</sup> of 2019. The study team reviewed and analyzed all public comments from the three meetings and included many of those comments in Appendix D. The comments chosen for Appendix D highlight key themes from the public testimony. Public forum comments are denoted by the prefix "PT" throughout Appendix D.

**Written testimony.** Throughout the study, interested parties had the opportunity to submit written testimony directly to the BBC team via fax or e-mail. All written testimony received by e-

mail or fax (4 responses) were then analyzed by the study team and exemplary quotes are included in Appendix D. Written testimony is indicated by the prefix “WT” throughout Appendix D.

**In-depth interviews.** From October 2019 through January 2020, the study team conducted 30 unique in-depth interviews with owners and representatives of 30 businesses in the San Diego area. The interviews included discussions about interviewee’s perceptions of and experiences with the local contracting industry; State of California’s CUCP DBE program; the Federal DBE Program; and businesses’ experiences working or attempting to work with other public agencies in the San Diego area. Interviews were conducted by Action Research and PDA– California-based consulting firms.

Interviewees included individuals representing construction businesses, professional services firms, and goods and services suppliers. The study team identified interviewed participants primarily from a random sample of businesses stratified by business type; location; and the race/ethnicity and gender of the business owners. The study team conducted most of the interviews with the owner or another high-level manager of the business. Some of the businesses that the study team interviewed indicated that they work exclusively as prime contractors or subcontractors, and some indicated that they work as both. All of the businesses that participated in the interviews conduct work in the San Diego area.

All interviewees are identified in Appendix D by random interviewee numbers (i.e., #1, #2, #3, etc.). In order to protect the anonymity of individuals or businesses mentioned in interviews, the study team has generalized any comments that could potentially identify specific individuals or businesses. In addition, the study team indicates whether each interviewee represents a small business enterprise- (SBE-), a disadvantaged business (DBE-), Woman-owned Business Enterprise- (WBE-), Minority-owned Business Enterprise- (MBE-), Service Disabled Veteran-owned Business Enterprise (SDVBE-) or Veteran-owned Business Enterprise- (VBE-) or other certified business and reports the race/ethnicity and gender of the business owner.

**Availability surveys.** The study team conducted availability surveys for the disparity study from September through October 2019. As a part of the availability surveys, the study team asked business owners and managers whether their companies have experienced barriers or difficulties starting or expanding businesses in their industries or with obtaining work in the San Diego marketplace. A total of 69 businesses provided comments. The study team then analyzed those responses and included illustrative examples of the different comment types and themes in Appendix D. Availability survey comments are indicated throughout Appendix D by the prefix “AV”.

## **B. Background on Construction, Professional Services, and Goods and Services Industries in the San Diego Area.**

Part B describes the firms interviewed and includes the following information:

- Business characteristics (*page 4*);
- Business formation and establishment (*page 9*);
- Types, locations, and sizes of contracts (*page 16*);



- Employment size of businesses (*page 22*); and
- Growth of the firm (*page 24*).

**Business characteristics.** The business owners interviewed for the study represented a variety of different business types and business histories, they were from well-established firms to newly established firms, and worked on small-to-large contracts in the San Diego marketplace.

**Types of work.** Interviewees described the types of work that their firm performs. The study team interviewed and received comments from #17 construction firms, #18 firms providing professional services, and #1 firms supplying goods and services.

**#17 firms worked in the construction industry.** [#2, #4, #5, #7, #11, #12, #15, #16, #20, #23, #26, #27, #29, #31, #35, #37 WT#3] For example:

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company described their line of work as, “HVAC, new construction, renovation service, [and] maintenance repair.” [#2]
- The non-Hispanic white male representative of a majority owned construction firm elaborated on their business stating, “we do both temporary construction fence and new permanent install, so there’s kind of two sides of the company. And at this branch, we don’t do residential, we just do commercial and industrial permanent fence.” [#4]
- The non-Hispanic white female co-owner of a majority owned construction firm expanded on their business stating, “what landscape contracting means is that my husband contracts work that has to do with outdoor landscaping issues like actually installing a new yard, which can be an irrigation system, a new lawn, or a xeriscape which is like a drought resistant type lawn. So that’s a big part of what we do. Also, we do a maintenance route where we’re taking care of existing landscapes. Residential, we don’t do any commercial right now. So that’s mowing and trimming and you know, just keeping a yard tidy. And we also do demolitions, so you know, take a whole yard out, put a whole new installation in, and then we do some hardscape. Not a whole lot, because a lot of it has to be subcontracted, but like walkways, pavers or cement or sometimes we do small wood projects like fences or pergolas or gazebo installations.” [#5]
- The non-Hispanic white female representative of a majority owned construction firm commented on their business stating, “we do grading, we do asphalt. We also, to go with that, we’ll do concrete work, such as sidewalks, or what is called flat work, and curbs and gutters. And as well as we’ll do things like drains, French drains, and things like that to support the roof drain set, will lot of times come off the top of the buildings, and they’ll come out the curbs. As we do asphalt, we have to readjust those areas to make sure they will flow out and not back up.” [#7]
- The Hispanic American male and non-Hispanic white female owners of a construction firm clarified their work stating, “[we do] junk removal.” [#12]

- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company mentioned, “it’s trucking, yeah, commercial, trucking, local. They differentiate because, you know, there’s long-haul, and we’re just local.” [#15]
- The non-Hispanic white male representatives of an MBE-certified construction company elaborated on their company saying, “they were a very small auction and furniture retailer” and as the company expanded, “we got into the construction arena” to both build and furnish office buildings. [#16]
- The non-Hispanic white male owner of a construction company mentioned, “we’re an electrical contractor. We’re specifically focused on just solar power installation, electricity generation.” [#20]
- The male Hispanic American representative of an MBE-, SBE-, and DBE-certified construction company stated, “we are a pipe and steel fabrication company.” [#23]
- The Asian Pacific American male owner of a SBE- and DBE-certified construction company stated, “we are a general contractor. We do landscaping, tree trimming, janitorial, general contracting.” [#26]
- The non-Hispanic white male co-owner of a construction company described their work as, “construction business, [we do] wood framing.” [#27]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, “we mostly do construction inspection.” [#29]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, “we’re subcontractors that do specialty concrete cutting demolition and scanning.” [#31]
- A representative from a majority owned construction company stated, “we’re a construction company, mainly working on asphalt paving.” [#35]

**#18 firms worked in the engineering and professional services industry.** [#1, #3, #6, #8, #9, #10, #11, #17, #18, #22, #24, #25, #28, #30, #32, #33, #34, #36] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm explained, “I provide companies a strategic plan for companies to have a roadmap to obtain their vision, growth, and goals. Things like project management, production management, and SWOT analysis.” [#1]
- The Asian-Pacific male owner of an DBE-certified civil engineering firm described their business as a firm where, “the contract is based on a consulting design contract. Coming up with the design, getting the client the permits, and then while it’s under construction we would do construction administration, construction support, and then we would close out the project by doing as-builts, bond releases. So, from start to finish. But as a small company, you try to do as much as you can. Sometimes we do processing, dealing with

permits, dealing with walls, so it's just a lot of coordination. Whatever the client asks us to do then typically we would do it." [#3]

- The non-Hispanic white male representative of a majority owned professional services company describe their work as landscape architects saying, "we design outdoor spaces from as small as a courtyard to as large as a master planned community of hundreds or a thousand acres" [#6]
- The non-Hispanic white male owner of a construction management firm stated, "construction and program management." [#10]
- The Hispanic American male owner of an uncertified MBE civil engineering firm explained, "we're civil engineering consultants, so we offer the whole field from design work, construction management, coordinating other disciplines in the field of civil engineering design." [#11]
- The non-Hispanic white male owner of an inspection services company described his work as, "smog inspections" in which they "test only." [#17]
- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, "I provide repairs, smog, and I'm a certified smog tester." [#18]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm explained their work, "we are geospatial. So that incorporates survey mapping and LIDAR, remote sensing." [#22]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "we do a lot of engineering design and construction support services for geotechnical engineering." [#25]
- The female owner of a DBE- and WBE-certified professional services company stated, "I'm a licensed landscape architect." [#30]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "we're architecture and land planning specialist for public and private sector clients." [#33]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "we're environmental consultants." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "we do environmental consulting." [#36]

**#1 firm worked in the goods and services industry.** [#13] For example:

- The Black American male owner of an MBE- and SDVBE-certified construction company described his company as, "a supplier of highway market material. As of now, we just

supply the material to the Caltrans and whatever stripers that need it. But the end game would be for us to produce our own material, and that's what we're trying to work on now. We're trying to raise the revenue enough to produce our own material. They are thermal plastics material, which is a material that, when heated, it will actually bond to the highways. You may have noticed them around the City, which is the red, white, and blue interstate signs, finishing that's on the roads. Some of them are green and white." [#13]

**Years in business.** 34 businesses reported their date of establishment. The majority of firms (22 out of 33) reported that they were well-established businesses; they had been in business for more than ten years. Six out of the 32 businesses had been in business for between five and nine years. Six firms were newly established, having been in business for less than four years.

**#6 firms reported they had been in business for fewer than four years.** [#1, #3, #9, #13, #28, #34] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm started their firm on, "March 14<sup>th</sup>, 2019." [#1]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "we incorporated in November 2015, but kind of really kicked things off January 2017. So, we're just finishing up really our third year in business. It's been over four, but really the first year was just kind of getting things up and running, and I was finishing up other jobs and things." [#9]
- The Black American male owner of an MBE- and SDVBE-certified construction company mentioned, "one year, last month." [#13]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency mentioned, "one and a half [years]. In May of 2017, is when I filed the paperwork with the state." [#28]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "we started two years ago." [#34]

**#6 firms reported they had been in business for five to ten years.** [#8, #15, #17, #22, #29, #37] For example:

- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "October 17th this year made five years in business." [#8]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "nine years. I started the company in 2010 and I put in my wife as my partner." [#29]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, "it's been in business I think since 2012, 8 years." [#37]

**#22 firms reported they had been in business for more than ten years.** [#2, #4, #5, #6, #7, #10, #11, #12, #16, #18, #20, #23, #24, #25, #26, #27, #30, #31, #32, #33, #35, #36] For example:

- When asked how long their company had been operating, the non-Hispanic white female representative of a WBE- and SBE-certified construction company said, “eight. We’re on the eighth year.” [#2]
- The non-Hispanic white male representative of a majority owned professional services company stated, “I founded the company 33 years ago.” [#6]
- The Hispanic American male owner of an uncertified MBE civil engineering firm explained, “I opened it in 2005. 14 years.” [#11]
- The Hispanic American male and Non-Hispanic white female owners of a construction firm stated, “I bought that hauling trailer in 2005.” [#12]
- The non-Hispanic white male representatives of an MBE-certified construction company said their firm, “was started back in 2004” [#16]
- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, “we have been in business 24 years at this point.” [#18]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, “we’ve been in business about 14 years now.” [#23]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, “the company has been around since 1979.” [#25]
- The Asian Pacific American male owner of a SBE- and DBE-certified construction company stated, “it’s been 24 years.” [#26]
- The non-Hispanic white male co-owner of a construction company said, “I guess it is 11 years. I think that I am out there at 11 years.” [#27]
- The female owner of a DBE- and WBE-certified professional services company stated, “it’s been 36 years.” [#30]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, “since 1980, March 1980.” [#31]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, “about 25 years now.” [#33]
- A representative from a majority owned construction company stated, “about 60 years. I guess it’s officially 1963, and he started out in Chicago and then moved to San Diego.” [#35]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, “since 1976.” [#36]

**Business formation and establishment.** Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

**The majority of business owners and founders (22 of 32) had worked in the industry or a related industry before starting their own businesses.** [#1, #3, #5, #6, #7, #8, #9, #11, #12, #13, #15, #18, #20, #22, #23, #27, #28, #29, #31, #33, #34. #36] This experience helped founders build up industry contacts and expertise. Business people were often motivated to start their own firms by the prospects of self-sufficiency and business improvement. Here are some of the founder stories from interviews:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “I founded my company around March 14<sup>th</sup>, after I left my former employer. I was an engineer for many years and Vice President of the western market and Manager of development for Parson. There was not a lot of opportunity in San Diego at that level, so I decided to start my own business.” [#1]
- The Asian-Pacific male owner of an DBE-certified civil engineering firm explained his company’s formation, “I started engineering in about July of 1997, so I worked with the private sector for a while and then I went to work with the City of San Diego. So about five years at private, almost five years as a public staff. And then due to budget crisis and stuff like that within the City, so I went back out to the private sector. So total, we started business in 2016, so about 19 years of working with both private and public, and then so I decided to start my own business. So, I worked with a big company, so majority of the time that's my public works background. And then on the private sectors with another company, so their land development, and then of course I have agency experience with reviewing plans and whatnot. So, a little bit of everything, so as diversified as you can get. So basically, when I had my first kid, I decided to quit my job, stay home for seven months trying to figure out whether I can do a business on my own, meantime allowing my wife to keep her job. She's a computer consultant. So, our philosophy is, my job is civil engineering, it's curb, gutter, sidewalk, everything's not going to change. This design will always be the same, whereas her job, you need to kind of keep up with the system or else you'll lose track. So that's the main thing, for my wife and for my kid. And then as I was at home, I had a chance to kind of understand what it takes to go into business, the risks or reward, of course the seed money and finding the right partners to take this. It's a big risk, because we're not getting a stable paycheck as if you were to work with a large company. So, my last job was full-time and then I started doing part-time, so that's how I came up with coming up with my own company. And then once the partner presented itself, and the—one of our biggest clients is company X, so we pitched to them, we did our business plan, and everything kind of makes sense. And then we—all three of us took the chance and took the risk. Our mentality is, if we can't do it within a year and a half, then we can always go back and look for a full-time job. So, it all makes sense to us. We're all engineers, we're bean counters in a sense where it makes sense on paper then we would go with it.” [#3]

- The non-Hispanic white female co-owner of a majority owned construction firm said, “he bought the business before we were married, a year before we were married, and then he was just a sole proprietor for a while, for a couple years, and then decided to upgrade that to a partnership husband and wife, so that’s how it came to be. To start our firm, my husband had been in the industry since high school, so what happened is that we had a friend who had a very, very small, just a maintenance route, and he found out he couldn’t do it. His physically couldn’t do it and was looking for a buyer, and my husband and I talked while we were still dating. He said, ‘Well, this looks like it might be a good opportunity for me to own my own business and grow my own business.’ So, he bought that company, changed names, got our business license, but then he went to school to be a licensed contractor. I think it was about the time that he became a licensed contractor was when we also became a partnership. So, he was doing the field work and I was doing the office work, and it was a nice little partnership.” [#5]
- The non-Hispanic white male representative of a majority owned professional services company explained, “I started in landscape architecture as a result of one of my first jobs when I was in high school when I worked for my uncle who was a custom pool builder. And as a result, I was very intrigued at the setting that we were in, in numerous situations. And wondering how these beautiful sites came about. And that’s how I learned of landscape architecture. And then eventually pursued it through college, and, which eventually led to my company. In fact, the start of the company was really more doing land planning, which is why the name planning is in the name of the company. And we started off doing mostly large-scale master plans. And that was in the early eighties. And then when I went on my own continued to do that starting in late 86, 87.” [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, “well, to begin with, his father actually did asphalt work in New Jersey. So, he’s always been around this work. And then he moved out here to California and went to college. And then, the person that had this before called it by another name. And he came in and started working for him. And when he got ready to retire, the owner that currently has it took over and bought him out and has been doing it ever since.” [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "I did 20 years in the military, I did a lot of armed and unarmed personal escort services while I was still on active duty. Got all my permits while I was on active duty. And then as I transitioned out, because of my identity being stolen and my actual background, I'm an IT. I'm an IT by trade build wide networks. But once my identity got screwed up, it prevented me from getting a good clearance job. So, when that happened, I continued to do the armed security because same amount of money that I would have made as an IT was the kind of money I was making as an armed actually executive protection type person. And the money worked out pretty good. Like I started getting my retirement check, somebody did the full tax return in my name, and then that made it even worse after the tax return was done in my name by this person that then it just became a challenge to try to find work because every time I applied for a job that was a decent job and they ran my credit, it was a done deal. And by the time you try to explain yourself filling out all these jobs on USAJobs, by the time you go through all the headache,

it's already too late. And I still believe USAJobs is kind of a rigged game anyway because they posted ... you go to apply for these jobs and then all of a sudden you get a letter saying thank you very much for applying. They found somebody else and either somebody else is somebody that's internally in the company or somebody else is somebody's family or friend. So, I continued to do security and then that's what spurred me on to, I don't want to work for anybody anymore I want to start my own business. I actually had to get a loan. I got a loan from another older gentleman that was a Vet that gave me a loan for about \$50,000 to start the company." [#8]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I met my partner through when he had his own firm and I was with another firm, an engineering firm, in the right of way real estate department, and we were working on some projects together. So, we had developed a relationship that way. And we just saw an opportunity to team together where my experience in right of way and public agency work would team well with my partner's sort of general commercial experience, and just the connections that we both had on different sides. We thought that there was a partnership that could ... I don't know if it's called a partnership, but that we could get together and tap a section of the market that needed some additional appraisers. And we just worked really well together, so that's how it came about." [#9]
- The Hispanic American male owner of an uncertified MBE civil engineering firm explained, "well I had a principle position with another engineering firm and was faced with a need to go independently ... separate from that other joint venture. So, went ahead and did it in 2005. Opened up my own office. Obviously, the business, the best way would be to open an office and have work to continue to support the business. So, fortunately some of the clients that we had on the other firm moved their accounts. Most of the accounts were the accounts that I was managing, obviously. My partner was looking at moving out of the area, and so he was basically an absentee partner for a couple years. He moved out to Atlanta, tried that, and it didn't work for him. Then came back, and said, "Look I'm going to try a new time." So, I figured well, it's really not working the way we had planned that joint venture. Because [when] I joined that office, never anticipated him moving out of the area. So, I figured if he's going to move out and take whatever he takes with him, then I may as well just go on my own." [#11]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "I've been in the construction business since I was a teenager. I got the trailer to do Bobcat work. It started for personal use and it just grew from there, and it was an asset to use. So, I started doing the yard cleanups, hauling, all kinds of stuff. With my construction background, I'm able to do other things that they might need done while I'm there. I can do a little more complicated stuff than the norm. I'm also a painter in construction. I used to redo, remodel homes and apartment buildings and stuff like that, turn them over, and that requires a lot of painting granite counter tops, flooring, all that stuff. Being able to do all that, the nice thing about the junk removal is that I'm in and out and I don't have that long-term customer I just like it because it's in and out. I think for me, that was more attractive than having to get the house just right. I think it's a little more stressful in the construction area versus the junk removal, so I guess less stress." [#12]



- The Black American male owner of an MBE- and SDVBE-certified construction company mentioned, “I worked for one of the larger highway marketing materials companies for 20 years, and I had to leave because where I lived was in Georgia, and my allergies were acting up real bad, so I had to move to California. Since I did that, I just decided to start my own business. It was always something that was in the back of my mind to do, because what I did was, I used to go for the company that I work for and build plants for the production of this material. So, I have experience along those levels.” [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company elaborated on their firm’s formation, “actually, my father is in trucking, same sort of business, and my husband drove for him, initially. We relocated from Los Angeles, basically to help my father out because he fell ill, and my husband basically started driving for my father. And then when my father got on his feet again, he asked my husband, you know, “do you want me to help you purchase your own truck?” So, then my father helped us purchase our own truck, and my husband started driving for himself. And as time went on we applied for our DBE, and basically I wanted to see, you know, where our DBE could take us, and I started attending different meet-the-buyer events, and basically stalking the personnel at the Mid-Coast Project and eventually we obtained our own contract.” [#15]
- The non-Hispanic white female owner of an uncertified WBE inspection firm recalled, “prior to that I worked for someone and I was in a different location. I was just totally engrossed, and my daughter was graduating college, my son was in high school, and I didn't want to go to work for somebody else. So, I just purchased the equipment that we had and moved to the location. What actually happened was my former boss lost the lease and decided to give up working. He had a full-time job, so he didn't need the hassle. So, I bought the equipment and moved to a different location for a year, and then I moved here the following year. I've been here since, in 1996.” [#18]
- The non-Hispanic white male owner of a construction company explained, “I was working as an unlicensed electrician, and I just started doing larger and larger projects, and then solar came along, and I studied up on that and basically self-taught, I started doing solar power installations. My wife's an attorney, and she was averse to risk and so she said, ‘You need to incorporate in case something drastic happens to somebody or somebody who you're working with or whatever, you get sued. And then we won't lose our house.’” [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm commented, “so, the owner, he is a land surveyor, licensed land surveyor. And he had his own small land survey company that he ran since I think 2002 or something. And then he met our other owner, who was on the GIS mapping side. They met somewhere at a conference or something, and then they decided to merge their services so we could provide survey and mapping under one roof.” [#22]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, “basically, it was a welder, one welder and a truck. And he went to school and got his welding license and then he got a job for a company and would give this company that he worked for a lot of work. And they liked him, and he did really

good work and he went over and above his duties. And one of the overseers of that plant told [our owner], 'look, we like your work, bro, we like your work and if you go get your contractor's license I can feed you a lot of work and not have to go to the guy...' Because I guess the owners of the other company... I don't know if they weren't good people or they just weren't jiving. So, [our owner] was like, 'okay.' So, he went and got his license, contractor's license, and he began to get business like that. In the beginning all he had was a truck. And he would rent a little patch of land from somebody with dirt and rock and when they would get work in, they would have to stay late. They would go into that patch of land and set up the lights with this truck and portable lights and they would work there at night to get the stuff fabricated. And the next day they would get up and go install it. So, he grew the company from just a truck. So that's how that started." [#23]

- The non-Hispanic white male co-owner of a construction company explained, "I am old. So, people do not know me and would not hire anybody like me. So that is one of the reasons. This is our second run at this type of business. We had a business like this before, which recession took us out. We are making a second run at it so. But we came to be because you know we are carpenters; we are for any contractor. My dad was a carpenter so it is all I know, and it is all I have ever done; it is all I know how to do. 2008, is when we started. So, the recession was still on, but we started during the recession because we knew the recession would end and things will get better. It was time where business times were good, and 10 times went bad. So, at this time, we figured we would start when times are bad, so it would be nothing but good from there." [#27]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "I was a previous partner with another firm and chose to leave that firm and to start my own business." [#28]
- The Hispanic male owner of an DBE- and DVBE-certified construction management company recalled, "I worked in the industry since I got out of college in 1990. I worked for Caltrans for a few years and then I went to work for three consulting companies. I was working for this other consultant company and then I had already passed my PE, and so I saw how much the company made on inspectors like myself and I wasn't even getting a third of what they were taking on me keeping them busy. My type of work, my ethics that kept us busy. So, it was mostly my ethics that kept that company busy because they wanted to keep me as an inspector. And so, since I wasn't getting enough recognition from the company that I was working for, I decided to start my own company. That's why it came about." [#29]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "the two owners, they were both coming from different types of industries. Mr. Owner had a background in construction. Mrs. Owner had become aware of the opportunities in the public works arena. They weren't married, they actually formed the company just before they got married. And Mr. Owner was actually, between the union and was a worker in the field and she ran the company administratively, accounting." [#31]

- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "I was a partner of a real large firm here in San Diego and I had become more of a manager as opposed to practicing architecture, doing marketing and HR and everything and I was getting away from being an architect, I was more of a business man, so I just wanted to become an architect again." [#33]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "I'm actually from Alabama, originally. I went to school at Auburn, for five years, yeah. I graduated there and I was, basically, two days later, I was in California to start a job for a non-profit organization. It was only supposed to be a 10-month position but that turned into a full-time position and so I worked for the same company for seven years. It was basically wildlife, well, it's wildlife populations control. I worked as a project manager for that company for about six years. And during this time, I pretty much, I did everything from the initiation of the contract to the hiring, basically writing proposals, essentially, I did it from the ground up for multiple contracts and it got to the point where people were coming to me to ask if I could just do it outside the company. So, I realized that, yeah, I'm making a small portion of the pie and doing a lot of work for it and I realized that I could do this myself. I mean, I don't have the training in business so that was going to be the hardest part but I talked to enough people in the consulting world to get a good understanding of what I was going to be looking at. So, after six years, well, I rolled the dice, left the company and started my own. It's been a lot of sleepless nights but it's working right now. It's been very stressful and it's been lots of work and the work hasn't ended but, to tell you the truth, I'm happier with more stress in my life and more worry in my life than I was at the other company." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I formed an association with another individual who was a Zoologist, a bird person, he can identify birds. He and I started the company and I was the President and he was whatever. Vice President, I guess... [the main factor was] the National Environmental Policy Act Federal level and the California Environment Act State level. So that there was a need for somebody who can identify the resources and property. And I have that ability. The bird guy I must say [has] the ability too." [#36]

**Other motivations.** There were also other reasons and motivations for the establishment of interviewees' businesses. [#2, #4, #10, #16, #17, #24] For example:

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company mentioned, "they own the other company and started the smaller company to give the kids something when they retire. Because of another partner on the west side that's younger and not going to retire soon. So, when the three of them retire, they want the kids to have something to take over. It's super family owned. I'm the only non-family office personnel." [#2]
- The non-Hispanic white male representative of a majority owned construction firm described the company formation, "it's a family but mostly it's like a corporation. So, I guess you would say it's pretty much father to son, you know, all the way down, father and son."

They are, you know, white males. The company was started in 1948. He was a military veteran, and he started a small company in Phoenix, and slowly but surely just developed the company into, you know, we've got I think 17 or 18 branches in 6 different states now. And he's passed the company down to son after son. There were 2 sons that owned the company at one point. That's the current CEO who bought his brother out. Maybe 10 or 15 years ago. So, he's still the CEO, but his son has taken over the President position, which was interesting because they didn't just hire him out of college. He went to college, and his dad said "oh better start looking for a job," so he went out and had to go find a job and work for another company for 4 or 5 years before his dad would hire him to come work for our company. It's really neat. They're amazing people, they truly are amazing. I couldn't be more pleased with the formation, how the company is held. Just a well-developed company, I mean, they've been around a long time, very fiscally responsible, as they own this building, they own most of our properties. Everything's paid for, all of our vehicles." [#4]

- The non-Hispanic white male owner of a construction management firm described their company formation, "we started trying to do data migration and data managing between online or publicly available data, and the construction industry mostly permitting projects that were permitted or in the permit process, and then using that to sell to construction companies. That was in 2007 all the way to 2010. And we really just abandoned that project, and in the meantime, we had built construction management sort of platforms, the real basic one for myself. And then people started calling me for consulting, mostly private sector, and I just started doing it and that was kind of it. And I worked for an engineering firm part-time and they let me do side consulting as long as it's not in their markets. So that's kind of how it started, then it blew up to—I had like five employees at one point, it was really busy. And then private sector slowed back down. We've stabbed at a couple of government contracts. We took a joint venture with another company, which I'm a part owner of that. We tried to tackle some other government like, colleges and stuff like that. Not much success so far." [#10]
- The non-Hispanic white male representatives of an MBE-certified construction company elaborated, "he worked in the commercial sector in a very large company in the US as the VP of Operations, and he wanted a business to run with his sons while they were still in school. So, he was looking for some opportunities out here back in the States, and narrowed it down between a furniture dealer, a window company, and an automotive company, like brakes and oil changes and stuff. So, he bought a warehouse and they were a very small auction and furniture retailer, I mean, literally going and buying a desk and a chair and that was the model back then. And his son, who you met earlier, he's the Executive Vice President. He started the commercial furniture division back in 2006. And then around 2009—so I was hired with the company in 2007—around 2009, we got into the construction arena through the federal small business program 8(a), and that's where we separated the two companies into two different DBAs, with very different focuses in terms of the businesses that we were creating. But, you know, we had this idea that we were going to intertwine the two businesses, you know, down the road once we built a little bit of that muscle on the construction side. You know, we would have a go-to-market seamless transition that we could offer to clients, where it'd be under one umbrella: we could build it

and our sister company, would furnish, you know, the buildings. So that was the mindset back in 2009, and here we are 2019, heading into 2020, and actually realizing that dream, so that is kind of the brief history, if you will.” [#16]

- The non-Hispanic white male owner of an inspection services company explained, “it was already established when I got it. It was getting ready to close because they had nobody running it. I'm getting too old to do what I was doing.” [#17]
- The non-Hispanic white male owner of a professional services firm stated, "I had an idea and developed a software application that turned out to be pretty successful and started thinking about creative ways to get it out there to the world.” [#24]

**Types, locations, and sizes of contracts.** Interviewees discussed the range of sizes and types of contracts their firms pursue and the locations.

**Businesses reported working on contracts as small as several hundred dollars to contracts approaching one billion dollars.** [#2, #3, #5, #6, #8, #9, #10, #11, #15, #16, #20, #22, #24, #25, #27, #29, #30, #31, #32, #33, #34, #35, #36, #37] However, most firms reported an upper threshold for contracts at around \$2 million or less. For example:

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company commented, “anything from a little service, single repair all the way up. We just bid a nine million dollars, that’s why I was late. We just built a new apartment complex. It’s just under nine million.” [#2]
- The Asian-Pacific male owner of an DBE-certified civil engineering firm elaborated, “with the four, five-person company that we have, we gross a little bit over a million a year, so that's really good for this size of a firm. Mainly land development. A contract varies. It could be from \$10,000 to a \$250,000 contract, but it adds up along the way. So, we don't really look at the contract, we look at the opportunity to do different projects just to build the company resume. Everybody has an individual resume and experience, but as a new firm you have to develop our firm's resume.” [#3]
- The non-Hispanic white female co-owner of a construction firm stated, “our maintenance is smaller contracts, typically around the 150-dollar mark, which is because we go weekly. But then we also service estates, so those can be as high as 500 or 600 dollars a month. But the majority is 125, 130, and 150 is more common. And big contracts, just depends on what they want, because if they want literally a whole entire yard with mature plants and that kind of thing, that can be several thousands of dollars.” [#5]
- The non-Hispanic white male representative of a majority owned professional services company mentioned, “our range of cost of value fees over the last, say, three to five years has ranged from just a small couple thousand-dollar projects to I think our largest in the last three years is maybe 120,000 dollars.” [#6]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "they vary. I had two contracts and they were side by side

and that was a really big \$207,000 project. I've got some other projects that are 50,000 and 100,000 per year when you do the math. Because the majority of the staff that you need is overnight with the exception of some of the bigger construction staff when you need 24 hours. It can go up to over \$200,000 depending on the amount of services that are needed.” [#8]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "anywhere from a couple thousand dollars to ... Collectively, we worked on a project in 2018 and 2019 that we had four different task orders roughly, or four different packages that we work on. And so, all of it together was 115,000. So, if you combine them it's about 115,000. Other than that, we've had individual contracts around 70 to 80,000. But those are not average. That's up to that amount. It all just depends. Sometimes we do one appraisal, sometimes we do like right now we have 45 appraisals on one project.” [#9]
- The non-Hispanic white male owner of a construction management firm noted, “they're not very big. I mean, like probably, with my biggest client I probably did about a half a million dollars with them in a year. That was my biggest, but most of the time it's pretty small stuff and it's mostly as needed. Sometimes I get a client who pays me \$10,000 to do some work for him or her. So, we work on a fee schedule. So, they'll call us and say, here's a project to build. We negotiate out of per hour price for the crew who we're going to bring in, field staff, office staff, administrative staff. So, we have pricing for, it's a la carte, and they go, yeah, okay go. Don't dedicate more than this number of hours to this project over this period of time. So, it's not like a construction project like where's its build a Starbucks for X number of dollars. We're the consultants. So, we're like lawyers, we bill like whatever we do, so.” [#10]
- The Hispanic American male owner of an uncertified MBE civil engineering firm mentioned, “we're a small firm. If we get a million-dollar contract we're ... We're a micro company.” [#11]
- Commenting on the size of contracts they pursue, the Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company noted, “so we have 10 dump trucks, flat beds, equipment trailers, and we broker trucks. And the size contract, it's hard to tell at this point, but the initial one was for 500,000, and ever since it's been, once we exhaust that or meet the 500,000, then they renew it for another 500,000. So far, they've renewed it, I would say about 4 or 5 times.” [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company elaborated, “We'll do projects for 5 thousand dollar service orders, but they'll also work on 5 and a half million dollar large FF&E contracts with larger prime contractors, and our side will do smaller projects, in the hundred thousand dollar range that are tenant improvements, or minor site work upgrades, up to 20 million dollar design-builds or site infrastructure projects, for like the Army Corp of Engineers. So, our sweet spot, if you will, and our target range is anywhere in the near 3 million to 6 million dollars.” [#16]

- The non-Hispanic white male owner of a construction company mentioned, “anywhere from 15 to 250,000 is our range. We do 80% residential solar installation, we do probably 15% commercial solar installation, then 5% would be dedicated just to miscellaneous service calls and other electrical issues like upgrades, things like that.” [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “it’s a mix, some are small, like just a couple of thousand dollars here and there, some are big. Some we have like, on-call contracts, so they just call us when they need something. So, they can be really well used, but sometimes you stay on the on-call list and they never call you.” [#22]
- The non-Hispanic white male owner of a professional services firm stated, “anywhere from small, meaning \$15 hundred, to as high as a million, or maybe \$1.2 million. It depends on the number of computers the organization has that we’re selling to.” [#24]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, “the majority of our contracts are probably around 40,000, 50,000, although we do have contracts that go for a million. But those are far apart.” [#25]
- The non-Hispanic white male co-owner of a construction company stated, “well, they are about 10,000 to 1.5 million.” [#27]
- When asked about the largest contract that their company has pursued, the Hispanic male owner of an DBE- and DVBE-certified construction management company said, “probably a hundred thousand.” [#29]
- The female owner of a DBE- and WBE-certified professional services company stated, “we’re actually in a transition to retirement, so we are only—we’re no longer accepting projects unless they’re very small. Under 100,000.” [#30]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, “we can be bonded up to about a \$3 million per project situation, and we have a \$6 million overall bonding capacity. So, we manage our company within that. We’re most comfortable in working on projects ranging from a million to 1,200,000 because payrolls get extended to us because of the lack of prompt payment, so we’d have to be a little bit careful extending our cash flows. But we perform our services under a variety of payment opportunities for the client. We take Visa, MasterCard credit payments, we have 16 trucks that roll up, get paid at point of service, we perform the work under hourly rates. We also do unitize rates, we do contract rates, we do lump sum. So, we make ourselves available to our clientele. We have over 160 active customers on our roster. Each month we run about 88 to 100 different-- we work on 88 to 100 different opportunities for those clients.” [#31]
- The non-Hispanic white male representative of a WBE- and SBE-certified professional services firm stated, “it varies. I would have to look up what our biggest contract is and our smallest is probably around 10,000.” [#32]

- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "any type of contract from probably \$20,000 up to \$300,000." [#33]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "they vary substantially. I would say that, it would have to be kind of special circumstances for us to go for a contract under \$40,000. That would probably be the low-end, like I said, there's special circumstances where we'll do kind, as advertisement. We'll take a smaller contract or to help fellow biologists out, we'll take a smaller contract. We'll do annual contracts up to say \$600,000." [#34]
- A representative from a majority owned construction company stated, "anywhere from 10 thousand to 5 million. 7 million." [#35]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "minimum is about twenty-five hundred. The max can run up to forty or fifty thousand with processing and hassles with agencies. In the past bids, we've had hundred to \$200,000. But that's when I had staff to deal with that." [#36]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, "[we] bid on zero to probably 8 million and perform zero to our biggest one 4 million." [#37]

**Most firms reported working on contracts solely in California.** [#1, #2, #3, #5, #6, #7, #8, #9, #10, #11, #12, #13, #15, #17, #20, #22, #23, #25, #28, #29, #30, #31, #32, #33, #34, #35] Some firms worked only in San Diego, while others focused on southern California or did business state-wide.

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm noted, "all over southern California. Although my network ranges all over the country so I may soon be going beyond California." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company limited their contract zone to, "San Diego, Riverside, and San Bernardino counties." [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm commented, "I used to work at the City of San Diego, so we tend to stay within San Diego because that's our background, backyard. So, we know a lot of people, we have a lot of connections, so true to anything, it's who you know in life, sometimes it's not what you know. So, reputation-wise is really important to us, so we always want to do the right thing. So, when we work with the agency staff, they are always willing to help because they know we're not trying to pull a fast one on them." [#3]
- The non-Hispanic white female co-owner of a construction firm noted, "we have been known to travel the entire county. So that's about a 45-mile radius. However, our majority of work is done in the Poway, Rancho Bernardo, Scripps Ranch, 4s Ranch areas." [#5]



- The non-Hispanic white male representative of a majority owned professional services company commented, “our work is both local, right here in Carlsbad, as well as throughout the county. We also have projects we are doing up in Orange County and lower Southern LA County as well as out in the Coachella Valley-Palm Desert area.” [#6]
- The non-Hispanic white female representative of a majority owned construction firm noted, “we’ll do San Diego County, Riverside County, Orange County, and LA County, normally.” [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, “my rule of thumb is within a 50-mile range because I need to be able to respond if an employee doesn't show up. Unlike the bigger companies, sometimes they'll leave the site. Sometimes they'll leave and make the supervisor stand there. For me, if an employee doesn't show up—I just pray to God it doesn't happen at two sites at the same time.” [#8]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “within Southern California, however we will go to central and Northern California depending on the assignment. And typically for reviews.” [#9]
- The non-Hispanic white male owner of a construction management firm stated, “I try to stay around San Diego, but I've discussed going to San Francisco on a project. We do it, I'm not saying we wouldn't. We're chasing the dollar like everybody else. So, we'll go anywhere, I just haven't. My business has mostly been my reputation and that's San Diego for the last 15 or 20 years.” [#10]
- In regard to locations of contracts, the Hispanic American male owner of an uncertified MBE civil engineering firm stated, “the County, LA, Los Angeles. [We look] anywhere.” [#11]
- The Hispanic American male and non-Hispanic white female owners of a construction firm commented, “I'll go from La Mesa, Lemon Grove, Spring Valley, and then Santee, and sometimes Ramona, and Pine Valley—I'll go up to there, and East County.” [#12]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated his contracts are “mainly in the California area. So, all over California that needs my material, I would actually ship it to them. And we're trying to get our niche right now.” [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “the furthest that we’ve been willing to go is like basically the Riverside and Orange County area. No further.” [#15]
- When ask if their company brings their services to other locations, the non-Hispanic white male owner of an inspection services company said, “no, they all come here. [From] five, ten miles away.” [#17]

- The non-Hispanic white male owner of a construction company noted, “we go from the Mexican border to Temecula is our comfort range. We do go to LA when we have to, but rarely.” [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm explained, “we mostly stick to southern California, but we... I mean, we have done some jobs in central California. This is for survey, because mapping you can, if you have the data, you can map stuff from anywhere in the country. And with lidar we can do anywhere, but we’ve stuck to southern California just for logistics, because we have to send our crews out and... We don't win jobs that have too much drive-time because someone else nearby can. I think it's easier if you're local because you can go meet the client and things, so we bid on work in Texas but we never win because there's companies there that can do it, so why would they choose someone so far away?” [#22]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, “we are chasing work anywhere in California.” [#23]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, “we mostly stay with San Diego County.” [#25]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency noted, “my furthest client was Ventura County.” [#28]
- The Hispanic male owner of an DBE- and DVBE-certified construction management company mentioned, “we've gone all the way to Glendale and all the way to Los Angeles. We are established in La Mesa” [#29]
- The female owner of a DBE- and WBE-certified professional services company stated, “we work in San Diego County.” [#30]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, “from the Mexican border up to Santa Barbara.” [#31]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, “most of our work is centered in San Diego County. We recently was requested proposals to do work in Ventura County and Orange County. But we're prepared to, I mean, if the contracts get enough we'll go anywhere, we'll go out of the country if needed. But right now, we're starting out, we got to be a little bit more conservative because I got to be able to keep an eye and make site checks on the contracts we do.” [#34]
- A representative from a majority owned construction company stated, “we’ve mainly worked in San Diego County. A little bit in Fairview, a little bit in Riverside, a little bit in Orange. But mainly San Diego County.” [#35]

**Five firms reported working in the San Diego marketplace and with clients outside of California.** [#16, #24, #26, #36, #37] For example:

- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “side A has done work in Washington State, Washington DC, they’re nationwide, though I think the team is very open to going anywhere as long as it makes financial sense for the company. Side B is a little more focused on the Southwest region, here in California, Southern California specifically, I’d say within a 500-mile radius is our target. But we do have work up in Northern California, we’ve got some design-build fire-stations going on with Cal-Fire, and we’ve got work in the central coast right now. But 90% of our work is in Southern California.” [#16]
- The non-Hispanic white male owner of a professional services firm stated, “we work globally.” [#24]
- The Asian Pacific American male owner of a SBE- and DBE-certified construction company stated, “we work nationwide.” [#26]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “we’ve done work in San Francisco Bay and Sacramento, Phoenix,... San Luis, Arizona, the desert.” [#36]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, “oh, Arizona, California, I don’t think we had anything in Nevada, but we’ve been trying.” [#37]

**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 (28 of 32 who reported employment numbers) had between one and 50 employees. The study team reviewed official size standards for small businesses but decided on the below categories because they are more reflective of the small businesses we interviewed for this study.

**The majority of businesses (22 of 32) had 1-10 employees.** [#1, #3, #4, #5, #6, #9, #10, #11, #12, #13, #15, #17, #18, #20, #24, #25, #28, #29, #30, #33, #34, #36] For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “three employees including owners, and then we have several independent contractors.” [#9]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, “right now, we only have three. Myself and two contract employees. The two engineers that help me are part time. Again, they’re contract. Basically, full time is only me.” [#11]
- The Hispanic American male and non-Hispanic white female owners of a construction firm mentioned, “three right now. Sometimes, so I have family members that work for me when I need them. Let's say I take on a job and it just requires a lot of people, they just show up and help and we get it done. Three to six is our range.” [#12]

- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company explained, “Three. During our slow season, our drivers might fall down to 30 hours a week, but it’s still considered full time, yeah.” [#15]
- The non-Hispanic white male owner of a professional services firm stated, “we actually just use contractors, so it varies between two and four.” [#24]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, “we have eight employees. Including myself, only two full-time. The others are part time.” [#25]
- The Hispanic male owner of an DBE- and DVBE-certified construction management company commented, “I have temporary employees whenever we get a contract. But I would say two.” [#29]
- The female owner of a DBE- and WBE-certified professional services company stated, “as of today we have two employees.” [#30]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, “just one.” [#33]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, “I have four full-time employees including myself, and then two seasonal employees. So, a total of six right now.” [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I’m the only one here now. We used to have 50 employees but I cut it down now, So, just myself.” [#36]

**Six interviewees reported that their businesses had 11-25 employees.** [#7, #8, #23, #27, #32, #37] For example:

- The non-Hispanic white female representative of a majority owned construction firm explained, “it just depends on the time of the year. I’d say we have five full-time, and then we have seven part-time.” [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, “approximately 15 now, all part-time.” [#8]
- The non-Hispanic white male co-owner of a construction company said, “we are probably around 20 right now at this point. They are all full time. So, they get laid off.” [#27]

**Five business had 26-50 employees.** [#2, #22, #26, #31, #35] For example:

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “twenty-five to thirty, they come and go. Everyone’s full time It’s just a matter of the field guys. When we’re busier we ramp up from when we’re not as busy.” [#2]

- The Asian Pacific American male owner of a SBE- and DBE-certified construction company stated, "we have about fifteen full-time and maybe 20, 30 part-time." [#26]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "47, no part-time, it's all full-time employees. That includes our administrative team in the count. We run about 34 field employees at our union. We operate engineers and labor unions, and then we have 13 administrative salary employees or hourly employees." [#31]
- A representative from a majority owned construction company stated, "about 35." [#35]

**One interviewee indicated that their firm had more than 100 employees.** [#16] For example:

- The non-Hispanic white male representatives of an MBE-certified construction company commented, "between the two companies? About 105. But one side probably got about, I'd say 60 people on it, and then the other has the other 40-45." [#16]

**Growth of the firm.** Business owners and managers mentioned the growth of the firm over time. [#1, #2, #3, #4, #5, #6, #7, #8, #9, #10, #11, #12, #13, #15, #16, #17, #18, #20, #22, #24, #25, #26, #27, #29, #31, #33, #34, #37]

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm commented, "I am getting more contracts but again I only have had this business for 7 months. I would say my business is in line with other business. I was lucky to have a client in April. It is average and maybe above average than most businesses." [#1]
- In comparison to the growth of other firms, the non-Hispanic white female representative of a WBE- and SBE-certified construction company noted, "probably slower, smaller, but they don't want to over grow. The owner likes to pay everything every month even when it's not due. So, she doesn't do the 30, 60, 90 day. She just pays the bills, as soon as get them. So, and we don't use the line of credit, so they grow, we're growing slower so they can maintain the positive cashflow." [#2]
- The Asian-Pacific male owner of an DBE-certified civil engineering firm explained the growth of their firm, "it's not really growing because we started with three and then we picked up the fourth about five months into it because we knew we couldn't do it with three. We were doing, honestly, I don't know, 60, 70, 80 hours a week it seems like, so we knew we couldn't sustain that. So physically we couldn't have done that, so we brought in the fourth early on, and then the fifth comes and goes. Sometimes we have student interns in the summer, so we do try to give back to the system, and trying to help the kids, I call them the kids, interns and stuff like that, but it's hard to bring in full-time staff unless you have a bigger contract. When we started the business, we knew 2019 was going to be a trouble year in terms of everybody was projecting that it could slow down. We saw that at the beginning of the year for us, so we don't ... My wish list would be to grow the company to be about an eight to 10-person firm, but right now I think we're content with five because we don't really know what's going to be out there. And since we haven't had any success

with SANDAG or Caltrans or agency, then we're a little bit gun-shy, but if I had a constant contract with those agencies then most likely I would probably bring in two more people. The thing for us is we have low overhead as a small firm, versus a bigger firm where if they don't get a project or a project gets on hold then staff's job might be in jeopardy. We are, in theory, self-controlled. If it goes well, then we put in the hours, and then if it slows down, then we tend to not put in the hours and spend more time with the family because it's a balance for us. So, I think that's our advantage is we are not reactive to, if the job doesn't go through or something, we're not going to panic, whereas a bigger firm might have a little bit more sensitivity to those type of reaction, I guess." [#3]

- The non-Hispanic white male representative of a majority owned construction firm noted, "this year, we just ended our fiscal year on the 27<sup>th</sup> of October, so it was kind of the first year since I've been here, I'm just starting my seventh year, that was kind of like the first flat year, which means it mirrored our previous year. All years previously, I would say, since I started was about a 10-15% growth every year. I mean I would say it's, you know, definitely tied to the industry and the economy." [#4]
- The non-Hispanic white female co-owner of a construction firm commented, "well, it kind of ... it ebbs and flows, the business does, along with the economy." [#5]
- The non-Hispanic white male representative of a majority owned professional services company commented on the growth of their company, "we've gone through numerous ebbs and flows and dealing very reactionary to recessionary times and the development and construction business. I have gone from starting off as one, made our way up to about 12 employees. Hit a recession, went back down to one person again. Survived that, built back up to nine employees, hit another recession, went back down to one over a period of time. And the up and downs and the expansion from one to nine or from 12 back to down to one. Those don't happen overnight, but over a series of maybe a couple of years sometimes or more. And just five months ago, six months ago, we had five here, and I lost two people this last late spring, early summer because of slow down as well as projects that got put on hold. To other issues unpaying clients and such." [#6]
- The non-Hispanic white female representative of a majority owned construction firm mentioned, "it really depends on the year. There are years where we have taken on more, we tend to hire more people, and our workload can get very large. Other years, especially when we used to have a lot of rain, then we tend to come down. So, it kind of depends on the projects and the seasons..." In relation to other companies, they noted, "that is real hard to answer because it's going to depend on the type of work that they're going after. Such as, if they're doing prevailing wage, most prevailing wage jobs are on the larger scale. So, they are going to always be larger in that sense than we are because our primary is not the prevailing wage. It's like I said, once again, it's the commercial industry, but it's going to be the shopping centers, industrial parks, things like that, and not so much road projects. And that can really change it." [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "I'm probably slow because I don't really want to do bars

and clubs. And then I also am selective on the contracts that I will bid on, or even when I've been looking at some of these properties, I'm real selective because they don't want to pay for guard services. And for me, I'm not going to do something super low where the lower the bid the less the opportunity that you can pay a guard that will actually stay on site, that's the main thing. And my philosophy is I was a guard at one time unlike some of the CEOs that you meet from other companies, I actually was a guard. I started out as a guard, so I know what it feels like and what the expectations are on being paid. So, I try my best to accommodate them being paid, which sometimes costs me a little bit of my profit. Because if I don't get them and I don't pay them right, then I lose the project, period." [#8]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "we're a new firm, and so it could be expected to grow for at least... I would think the first three to five years, right? As you're building up clients and all of that. So, compared to other established firms in our industry, I'd say we're probably growing faster just because capturing some of that market, and we're new, and so we came from nothing to ... You know what I mean? And we're just building that up as opportunities come available, and as on-call contracts open up again, and we're able to get on those and get some of that work. But I think if we were more established, we would probably be fairly in line with the other firms." [#9]
- The non-Hispanic white male owner of a majority owned construction management firm stated, "I mean it was pretty small. Like I said, we started this technology company, and that just didn't take off. So, there was no growth. And then we took off and just in the last few years, things really grew to about, like I said, five employees and we were busy. And then about August of last year, a lot of the private sector has dried up as far as the development side. And then, so I've been back to just small things here and there, helping out with the hotel downtown right now, and then building some pump stations here. So, small stuff. Yeah, not like where before it was like get more employees, we need you to expand, blah, blah blah. Now it's like, sorry no need for you." [#10]
- The Hispanic American male owner of an uncertified MBE civil engineering firm noted, "being a micro space business, I mean, we struggle with everything. We try to stay in tune with technology. Well, some of the companies that I know are doing okay. It depends on how their arrangements are. Some of them are doing work for governmental projects. They are doing very well." [#11]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "stuff picks up certain times of the year. I think when there's a push in the construction industry, or there's things going on. As we get more people, things are needed. I would probably imagine that when the economy is doing well, that's when people are getting new appliances, and so that's... picking up a fridge here and there, or couches." [#12]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company commented, "the last year has been acquiring all the permitting and everything that I would need, so once we start rolling, I won't have any restrictions on not being able to meet whatever need because I don't have those documents, so it's just basically been

gathering all of the materials I need in order to do that. It's a seasonal type of work. So, during the colder months it gets slow. But the warmer months of course it speeds up because the material can't be applied when it is below 54 degrees." [#13]

- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company commented, "it definitely has grown, so we started with one truck and one driver, which was an owner-operator. And from there, we have slowly purchased two other dump trucks, a tractor trailer or a tractor should I say, and a flat bed, and then the equipment trailer, so... I would say it's faster simply because we have the contracts. Most people in our industry depend on brokers to give them work so they don't have their own contracts." [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company noted, "I think just for the company itself, we've grown tremendously, but in regards to the competition, we're still chasing, right? We're also growing. I mean, back in 2009, we were tracking 5 million dollars in total sales, I think, for the year, and last year we ended somewhere in the neighborhood of 52 million dollars as a company between the two divisions." [#16]
- The non-Hispanic white male owner of an inspection services company stated, "it stays pretty steady. I can't say that it's experienced much growth." [#17]
- The non-Hispanic white female owner of an uncertified WBE inspection firm commented, "it's dependent upon how the state changes the requirements for the test. This year, they dropped two years out of the program. It used to be, when we first started, every other year regardless of age. Then it went to four years, then it went to six years old before they came in for registration. January 1st of this year, they went to eight years, so that's two years out of what we had been testing, went away. So, it's dependent on how the state manipulates the program." [#18]
- The non-Hispanic white male owner of a construction company commented, "it's boring. My business model, definitely it's a comfort zone when I had about six to eight employees. When I get 10 or 12, then it's way too many man hours behind the desk for me to manage and quality control starts to drop, if you want to get too small then I can't pay myself. And so, definitely the size that I'm at is very comfortable. In speaking with other business owners that have gone larger, and then bring on more managers to oversee things then that's when things ... they can fall apart very easily. I guess we've downsized a little bit as we were much larger three years ago. That was the peak of the market. And so, we've scaled back slightly just to keep profitability higher, I guess." In regard to the competition they stated, "I think it's about the same. What I see with my big competitors is they tend to blow up, go bankrupt, and I end up fixing their problems. And so, I don't think it's a bad place to be." [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm mentioned, "it's grown a lot. I think when they started in 2013... I think they probably only had about five, six people. So, we've grown a lot, we've won some big contracts with



utility companies and employed more and more. I think we grew real fast, so I think probably above average, but then I think we've got to a point now where we've got the right number of people to manage the workload. I don't think we'll be having a growth spurt like that again." [#22]

- The non-Hispanic white male owner of a professional services firm stated, "our growth was monumental in the beginning, but since we've left Company X and we're marketing our product in a different way, it's taken a while for that method to take hold." [#24]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "we're probably on the small side. We probably could have gone bigger, but the previous owner liked to keep it small." [#25]
- The Asian Pacific American male owner of a SBE- and DBE-certified construction company stated, "we are above average. We are licensed in many categories, and we are not afraid to go nationwide." [#26]
- The non-Hispanic white male co-owner of a construction company stated, "it goes up and down." [#27]
- Commenting on the growth of their firm, the Hispanic male owner of an DBE- and DVBE-certified construction management company said, "some years are good, some years are not so good." [#29]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "we have been growing probably at a matching pace with the industry since the recession. The economic opportunities that are being presented to DBE SBE well-known businesses right now in the public works area are burgeoning because of the federal requirements that are tied to these projects. So, with that as the stimulus, a lot of the general contractors are starting to finally recognize that there's a coming of age and coming on board of the agencies and they're gonna have to find affiliated subcontracted partners. It's kind of been a forced arranged marriage, to be honest with you, but that has stimulated the opportunity for growth. We have an estimating team that is very actively going out and seeking the opportunity as well." [#31]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "I'd say that we grew, we've grown probably at the same rate as the industry in general until about a year ago, when I've made a concerted effort to downsize." [#33]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "from when I started two years ago our growth has been pretty good. Now I guess, something to consider is that when I'm environmental consulting, we're highly specialized in what we do so that both a benefit and a hazard for us because the problem with this is there's not nearly as many contracts available as in general environmental consulting." [#34]

- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, “it’s been growing and since we started, we’ve been doubling up. The last couple of years have leveled out. I think it’s pretty good being in the 8(a) program [ but] we’re probably average. Now, if we weren’t in the 8(a) program, we probably wouldn’t have grown faster. That was one of the reasons why we grew so fast, because of the 8(a).” [#37]

### C. Race/Ethnicity/Gender/Veteran Ownership and Certification Programs

Business owners and managers discussed their experiences with CUCP and other certification programs. This section captures their comments on the following topics:

- CUCP and other certification statuses (*page 29*);
- Advantages of CUCP certification (*page 33*);
- Disadvantages of CUCP certification (*page 36*);
- Experiences with the CUCP certification process (*page 37*);
- Recommendations for improving the certification process (*page 40*); and
- Comments on other certification types (*page 42*).

**CUCP and other certification statuses.** Business owners discussed their CUCP and certification status and shared their opinions about why they did or did not seek certification. For example:

**Twenty-three firms interviewed confirmed they were certified through CUCP or another certifying agency.** [#1, #2, #3, #8, #9, #13, #15, #16, #22, #23, #25, #26, #28, #29, #30, #31, #32, #33, #34, #37, PT#3, PT#9, WT#3] For example:

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company recalled, “I believe we’re WBE and SBE and HUBZone. I’m not sure [how long] on the WBE, SBE it’s been at least two because they’ve had it since I’ve started and HUBZone has only got this summer.” [#2]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, “I have the ACDBE Certification, the DVBE Certification, the DBE Certification, the SDVOB Certification and the SLBE Certification.” [#8]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “we have a micro small business designation through Department of General Services, DGS. And then, we actually recently applied for three other certifications. They’re not approved yet, but we applied for FDE through Metro, through the Los Angeles County Metropolitan Transportation Authority. We reapplied for our DBE, Disadvantaged Business Enterprise, through the state. We had applied for almost four years ago, and then it took them 15 months to get back to us, and we were denied at the time. It was really

technicalities on some of the corporate documents and things. Also, we weren't even doing business yet when we applied. They really want you to have three years' experience even though you don't have to. So, there were some things there that we just didn't know how things were going to play out, and they questioned it, I guess. So anyway, so we just reapplied through Caltrans for DBE, and then we also applied through the supplier clearing house for a woman business enterprise, and that one's good for utility companies." [#9]

- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company commented, "we're certified through Caltrans. They all probably happened around the same time, I would say probably 2016." [#15]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm elaborated on their certifications, "[we're] a disabled veteran business enterprise, that's by California DGS too. And then federally we are a service-disabled veteran-owned small business, so SDVOSB." [#22]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "we have an SBE certification and then we have an MBE certification and we are in the process of pursuing the DBE certification. We are certified to the CPUC [California Public Utilities Commission] as a minority business... the CUCP? Didn't even know that existed." [#23]
- The Asian Pacific American male owner of a SBE- and DBE-certified construction company stated, "we are a small business and a disadvantaged business enterprise." [#26]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency listed her certifications, "the City of LA, WBE, SANDAG/NCTD of LA, SBE, City of LA Micro-business, City of Long Beach, small business, the CUCP, and the federal small, and woman owned. In the state of California, small business. Everything was certified between July and August of 2017 and I sold my business in December of 2018." [#28]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company commented on his certification status saying, "I am certified. I have a small business and a DBE. And the SLBE from the City of San Diego, also. The small business and the DBE, I got almost right away. So, it's probably, I might say eight years and then the DVBE I just got last year and also the SLBE, I got probably two years ago." [#29]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "we have numerous. We are a DBE, a state-certified DBE. We are certified as a minority-owned business by the General Services Division. We are a woman-owned business. We are state-certified MBE. We are County Transportation Authority service from Metro as well as Orange County Transportation District certified woman-owned, minority-owned and Disadvantaged Business. We are a federal government small business certified and we maintain very active certification with specific agencies Port of Long Beach, Port of Los Angeles. San Diego has certified as well as a minority woman-owned business." [#31]

- The non-Hispanic white male representative of a WBE- and SBE-certified professional services firm stated, "I know it has women owned business, and also it's a small business." [#32]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "I only recently got certified as an SLBE [through the city of San Diego]. Let's see, this started, this September 25<sup>th</sup>, 2019. The DGS certification, that was July of 2018." [#34]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, "we have a DBE, an 8(a), a HUBZone, and ISBEE. I don't know if it's that [through CUCP] we only went through the [Cal]trans one. I think it's the same." [#37]
- A speaker at a public meeting stated, "I am a minority in a woman owned firm, small business and disadvantaged certified firm." [PT#3]

**Three business owners explained why their firm sought CUCP certification.** [#30, #31, #33]

- The female owner of a DBE- and WBE-certified professional services company stated, "most times women are under-represented in getting business and it's very difficult for them to compete. It's a way to be seen on a level playing field with other firms." [#30]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "it became apparent that that was the direction that Caltrans and some of the lead larger agencies were going to go. Back in the day, like I said, LA City, LA DWP, Metro, the public utilities, whether it be Edison, SoCalGas, they were seeking a CUCP certification to put you on to their list, that was approved. So that was the primary move in a direction that ownership went at the time." [#31]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "I am a minority business with the state and a small business with the state, and also SLBE with the City of San Diego. We became certified to get more public work." [#33]

**Fourteen business owners and managers explained why their firms had not pursued CUCP certification.** [#5, #6, #7, #11, #13, #15, #16, #18, #20, #24, #27, #34, #35, #36] For example:

- The non-Hispanic white female co-owner of a construction firm stated, "well, could be that we just are not aware of it, at least I'm not, and then we did at one time research becoming a woman-owned business, but that requires me as the woman of the business to be actually in the field, and I do not have the education to be in the field. I'm not a contractor myself, I could not give a quote for ... And you have to have that. You also have to have more than 50% ownership, and that's not how we were organized, so we do not try to pursue that. I was raising children and didn't have time to actually do what was required to qualify." [#5]
- When asked about certification, the non-Hispanic white male representative of a majority owned professional services company stated, "I didn't know about it." [#6]

- Regarding their certification, the non-Hispanic white female representative of a majority owned construction firm mentioned, “at this time, no. We've had it in the past, it just depends on what's going on at the time. If we're looking at the particular projects with that, yes. But like I said, most of our work comes from word of mouth.” [#7]
- Regarding their lapsed certification, the Hispanic American male owner of an uncertified MBE civil engineering firm noted, “I obtained the certification from the County years ago, 2002. We stopped because we really didn't get any work from that program. With the County, which was a SANDAG/NCTD City program, we didn't continue the certification.” [#11]
- Commenting on his lack of CUCP certification, the Black American male owner of an MBE- and SDVBE-certified construction supply company stated, “I will check into that. Again, I am trying to learn as much as I can about how to market myself. And any little tidbits like this that comes up, I try to get on it so I can do it.” [#13]
- Noting the lack of CUCP certification, the Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “the website was confusing, and I wasn't aware of it [CUCP].” [#15]
- When asked if they were also certified through CUCP, the non-Hispanic white male representatives of an MBE-certified construction and supply company said, “we are not, no. Probably because of the threshold, to be honest with you. They have a lot of the programs set limitations on the aggregate dollar amounts that you can claim before you're no longer a small business, I know like with DGS and other agencies we no longer qualify because we're over their threshold for the calendar year, yeah. Otherwise I'm sure it's something we'd probably look at.” [#16]
- The non-Hispanic white female owner of an uncertified WBE inspection firm noted, regarding her lack of certification, “no, I don't even know what that [CUCP] is.” [#18]
- The non-Hispanic white male owner of a construction company explained, “we've never bothered to certify. It's actually a really good question because we went through the airport authority. I'm trying to remember. I actually took a course, got certified, they gave me a \$50 million bond. But the individuals that I became really good friends with, who took the course also, you know minority women, they were all very nice. But when it came to actually doing business, then they realized that doing business with a white male might not be a benefit. And I probably should have gone for the Small Business cert at that point and said, "Well, hey, I'm a certified small business. Now I can compete on your level." It was just another hoop to jump through and I didn't know. I've got plenty of advantages being a white male. And so, I just didn't seek that out, I guess. I felt like the disadvantaged female-owned, minority-owned whatever businesses should get those contracts after getting to know them very well. And then part of it was I already am well established, I guess. But yes, I've always wanted to get into government contracts and things like that. And at the time, we just got busy and I could still seek a small business certification and probably do okay. But I don't

know if I would be on the same level as say, one of the main business or even the minority business when it comes to evaluating these contracts.” [#20]

- The non-Hispanic white male owner of a professional services firm stated, "I've never heard of that program. What's that called again? California what? Never heard of that." [#24]
- When asked about certification, the non-Hispanic white male co-owner of a construction company said, “no, [although] the female is 51%. The male is 49%. I do not know what that would do for us. Sounds like a racket somewhere to get money out of us. They are free? I do not know of any certification that would be free. They all want something. Not sure how it works and the general contractors I work for do not require any of that stuff. That is the reason my wife is the president. We did think about going that route during the recession, but we never did.” [#27]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, “I learned about these different certifications that some of the meetings I attend, so I don’t really know what all options there are for the certification but I don't think that I've been through anything like this from Caltrans. I’m just not familiar, I guess.” [#34]
- A representative from a majority owned construction company stated, “we’ve been small business before, but then it got too large, and then it’s come back down.” [#35]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “so much hassle. And I don’t need it.” [#36]

**Advantages of CUCP certification.** Interviewees discussed how CUCP certification is advantageous and has benefited their firms. Business owners and managers described the increased business opportunities brought by CUCP certification. [#1, #2, #3, #8, #9, #16, #25, #26, #27, #28, #29, #30, #31, #32, #33, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm commented, “it’s only a benefit when you are working with the public sector because some contracts require small businesses to be included. But there is no benefit for the private sector. They don’t care.” [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company noted, “on the military side, they do set asides all the time where you have to have a certain certification to bid it or a general contractor has to have a certain amount of participation from someone that has that. So, the woman-owned is useful for that. And then small business, theoretically somewhere people set things aside for small businesses, but they don't know that we actually really ever get anything on it.” [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, “a lot of times, you see a lot of the bigger projects, they slate a percentage of the project for a smaller firm DBE, so without having that certification you would never get a chance to work on a big project because there's no reason for a big firm to bring in another civil firm, because they do it all. The big firms, they do it all. They have a department to do drainage, civil, structural,

so there has to be a reason for the big firm to bring on a small firm. So, without going after those certifications, you have no chance. Not no chance, but there's no reason for them to bring you on. Like I said, the certification was there to open doors, but honestly it hasn't paid off yet." [#3]

- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "it's supposed to be an opportunity to bid on contracts and I can say yes, I've seen it. I have that cert and it helped me get a contract at the airport. It also helped me get a contract with another construction company doing some demo work and when they were doing a demolition project that was almost six months long. The benefits allow you to get the opportunity to get the contract, but you still have to bid for the contract and then there is a chance that you may compete with another security company. But again, it's one of those ... I think it's a preference on the actual prime on who they want to work with also." [#8]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "it makes the proposal process at certain agencies much, much easier by being certified, and provides opportunities for work that sometimes aren't there without it. It opens more doors, and then also it makes responding to RFPs and submitting a proposal much easier." [#9]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company commented, "I think California specifically being as progressive as we are, the state in general I think is very open-minded to helping minorities, to allowing for the opportunities that are afforded to minorities. I hate when I hear 'oh I don't have these opportunities because I'm a woman- or minority-business, I don't have these opportunities', that couldn't be farther from the truth. I mean we're like the poster child for the opportunities that California has provided to a minority-small business, Mexican American, family-owned business, but we utilize the tools that the federal government has provided to benefit the whole. Those agencies and the state of California have provided tools that we took advantage of and utilized to help grow our business for good, not just because we wanted to say 'oh poor us, here we are, just slouching and hoping that we get these opportunities and the phone's going to ring.' It takes effort, you've got to go out there and shake hands and meet with people and say yes to work that maybe you're uncomfortable with and prove yourself. I think that's what it's about, that's the beauty of these programs. I consider myself very lucky to be in this situation because of these programs, we have a building because of these programs, we have amazing people that work for the company because these programs allowed us to grow organically and build something for the future." [#16]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "almost all of our projects we get is because we are DBE, not so much the small or minority, but the disadvantaged business. That plays a lot of factor. And that's probably one reason why previous owner doesn't want to get too big." [#25]

- The Asian Pacific American male owner of a SBE- and DBE-certified construction company stated, "there are a lot of opportunities set aside for small business, and DGS certification, especially for example Caltrans, and a lot of the state agencies are now requiring that, and so there's an opportunity in that area." [#26]
- The non-Hispanic white male co-owner of a construction company noted potential advantages to certification, "we are thinking about doing something like that since we are going to build houses for all the homeless, which we better get on that. So, I am sure for a woman owned business, we might really get it if we get the homeless [project] and we probably really could get the job." [#27]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency explained why she pursued certification, "I got all the certifications in order to market my company to get myself all the potential credit. Like a possibly I helped other firms meet their target small business set-aside numbers. That was my approach for getting that certification. Small and woman-owned business. That's the reason I got the certification. I should say my previous employer required that I become a woman-owned business for anti-competition reason as well." [#28]
- The female owner of a DBE- and WBE-certified professional services company stated, "I have to say the very first job I had when they found out it was a woman-owned business, and this happened in the '80s. It is mostly primarily engineers who at that time were not known for hiring women in their own firms, would come and interview me because they couldn't quite believe that a woman was a consultant on projects. However, those people became some of our best customers over time when we've got projects with them." [#30]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "when our phone call goes in and our certifications are presented to the client, it gives them a chance to look at how they're gonna make that 13% to 17% to 23% goal if our numbers make sense to put into a line item on their bid. There are so many different opportunities for them to make the goal these days whether it's through a material vendor or dump, trucking company, a subcontractor. Again, it's been around and certified almost as long if not longer than most of these people because far earlier we've gone in the game, but we get our fair share. But it does-- it basically been certified probably represents 75% to 80% of the reason why we get our income. I think in the last two years, I can recall two different jobs that we got even though we weren't the lowest price because they needed a DBE qualifier." [#31]
- The non-Hispanic white male representative of a WBE- and SBE-certified professional services firm stated, "probably some increased interest from potential clients." [#32]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "I think the certification helped me in networking with larger firms. I got it to get more work with the city and state and the counties but it never panned out, but there were workshops that put the spot on us together with the larger primes and that was a good networking tool." [#33]



- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, “they’re set aside, they have set aside jobs that only the DBE can bid.” [#37]

**Disadvantages of CUCP and other certifications.** Interviewees discussed the downsides to CUCP and other certification types [#23, #25, #28, #29, #30, #31, #33]. For example:

- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "even the MBE program, it doesn't really work. It doesn't work because there is no mechanism to force a company to do an MBE. And to be honest with you, the good faith effort is bogus, It's laughable. It's useless because companies like us that can provide a service were overlooked. So, then we'd rather just participate in the marketplace and completely avoid the MBE. So, then we chase work and hustle it and we get the work. And you would think that it would be the other way around; that the MBE would help us get more work." [#23]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "the disadvantage is that if you grow too much, you can't get that certification anymore [DBE]." [#25]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated "it's hard to say if that the way and gaining that accreditation had any effect on me maintaining my small business or not because I had, because after work, after living in Carlsbad for working and living in Carlsbad that for a year and a half, I never did a single hour of work in San Diego SANDAG/NCTD. That says something." [#28]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated "I wouldn't say disadvantage other than spending-- some of them, took me more than a month, a couple of months to get. DBE took a long time to get because of the interviews and all. But I don't see any disadvantages other than that." [#29]
- The female owner of a DBE- and WBE-certified professional services company stated, " I think that sometimes people-- the firms tend to be looked at as always needing help. I think it puts them in a kind of position where they look like they might be inferior in some way. I think it's because it's a Disadvantaged Business Enterprise, but they're saying is that you need help, and if you need help, there must be something wrong with you." [#30]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "the problem has been that it seems like nobody ever grows out of the program. If you looked at all the people who are certified and you went back at 10 or 15 years from what I can gather, I spent 22 to 23 years in the public utility arena working for public utility contractors. Very few of those contractors are limited in growth opportunity because they're primarily all direct with the utility. They can go from \$60 million-- of \$20 million-- \$60 million to \$120 million a year in revenue because as long as they continue to support it, and they don't get penalized being a woman-owned or minority-owned business. But DBE has a requirement that you can't generate more than \$32 million over a

three-year period. So basically, the general contractors have so much trouble finding somebody to fill a spot. Let's say we outgrew that; they would have trouble finding somebody to backfill my number. We would also cut off our own opportunity to continue to generate that number. So, a lot of people who don't have a good marketing plan long-term hold back growth because they don't see where they're gonna be able to generate that kind of opportunity. The programs do have a limit though because the handicap is ownership is not allowed to get wealthy through the process of being successful in building the business because their personal wealth gets re-evaluated through cert reviews. And then it limits their ability to keep funding their growth because if they get too wealthy, they get decertified. So, it doesn't make any sense. You know, you have to have a certain amount of money to be in business, you have to have a certain amount of money to maintain your business, but if you get too much of it, you lose all that opportunity you worked for." [#31]

- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "there's not a lot of disadvantage, but to be honest with you, I don't think I've ever got any work out of the certification." [#33]

**Experiences with the CUCP certification process.** Businesses owners shared their experiences with the CUCP certification process. [#3, #8, #9, #10, #11, #13, #15, #25, #28, #29, #30, #31, #33, #37] For example:

- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "it took us about six months, we went through, then it's ongoing and depending on the duration, so usually you renew the certification either every year or every two years, so depending on what it is. Oh, yeah that process was, that was a tough process. So, as a majority owner, basically all the paperwork was under my name and all the background check was based on myself, individually, instead of the firm. So financial, all the background, certification, my PE, so I had to go through everything, so it was a tough process. I just want to give you an example. As I stated, before, I am Chinese, but when I came over to the United States in 1979, we were refugees basically. I was born in Vietnam, so we took a boat. We got smuggled on the boat, and the boat went to Hong Kong, and my aunt did the paperwork to bring us over to the United States. So, as a refugee, we didn't have any kind of paperwork, so my dad, when he came to the States, he had to apply and he couldn't prove we were his kids, my sister and I. So, he became a US citizen, we, my sister and I, became US citizens on our own. So, when I was doing all this paperwork, they were like, 'Uh, how do I know that you're Chinese, or, how do I know that you're Asian-Pacific?' So, I was dealing with the Caltrans lady that was doing the paperwork. I'm like, 'well, if you show up, I can speak Chinese to you, and you can see that I'm Chinese.' But that of course wasn't enough because she was looking for paperwork, so I had kind of bits and pieces. I had to find my grandma's death certificate, I had to figure out my dad's passport back in the day, and I basically pieced all this paperwork together just to prove to her that I was Chinese. And I was even willing to do a blood test, and I'm like, 'okay, you can do my DNA test and figure out where I'm coming from ...' You know? And then so basically, I asked her, I understand the process, and, is there a reason why the process is so strict? And then she said, Well, there's a lot of fraud and we need to make sure that you are not a puppet where behind the scenes it's owned by a non-Asian person and they're just putting you up as the front of the business. And so, I kind of

understood the whole process once she explained that to me. So, it was definitely a tough process. So, she did come to the office, did a face-to-face interview the whole works, and the whole process took, I want to say at least six to eight months. It was just a lot of back and forth and, prove this, provide this. It wasn't easy, but it was worthwhile. After going through the whole thing, you feel like you've accomplished something, so I wouldn't say it was a waste of time. I don't know, this might sound weird, but I was kind of proud that I was able to go through it and get that. Forms are forms. They have instruction, they guide you through it, so it's just a matter of putting the time into it and getting the right paperwork. And as soon as you go through the process the renewal process is easy. I would say it takes probably less than half a day to compile all the paperwork and send it back, assuming there's no hiccups, and usually that's how fast it takes." [#3]

- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "I didn't have a problem doing it, filling out the applications. It's really going to these events and trying to find out what entities actually will acknowledge those certs because not all the entities will acknowledge those certs." [#8]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "getting there is quite the process. It's very cumbersome, and ... I don't even know what the word to describe it is. Like we're 51% owned, and we always were, but I feel like you were having to jump through hoops just to kind of prove that. And so, they make it very difficult to qualify, I guess. Which I understand. They want to make sure that each firm that is applying is legit. Falls into one of the categories to qualify them as a DBE. So, it's difficult. I mean the amount of documentation and the things required in the application is extensive. None of it's really a problem, but they just question things that ... I don't know how to describe it. It's like here we are a business. It's clearly 51% woman owned. You know what I mean? I do majority of the work and all that. And so, I think there's just things that you have people evaluating this that don't have a clue about business I think, or really how they work, and they're just looking at numbers, or looking at documents, and kind of maybe not seeing the bigger picture." [#9]
- The non-Hispanic white male owner of a construction management firm stated, "I know it's difficult, not miserable. I just know that it's time consuming." [#10]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "from what I remember, it was just a lot of documents. It's was easy. And a lot of big questionnaire, I forget." [#11]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "it was fast. I expected a lot more difficult, but it wasn't. A lot of people helped me. One person in particular was Cheryl Brown. She was with the Veterans Outreach Center. She helped me to acquire a lot of the certificates and stuff that I have." [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "we recently started looking at CUCP, but the website was confusing" [#15]

- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "that's a long time ago. Back in the 1990, they were just starting. It was pretty hard. There were a lot of paperwork involved, it was tough. And then originally actually, Caltrans was supposed to take care of that, and then they didn't want to spend the money hiring people to do that. And then we got shifted to L.A. Metro. Despite the fact that we don't do any project in L.A., our certifying agency is L.A. Metro. Caltrans on the city level doesn't want to deal with it. But keeping in mind, this was 29 years ago." [#25]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "it was laborious. It's not difficult. It just took time and a lot of paperwork. The reason I knew how to do it was I took a small business class to learn how to do it. That was more difficult than the state and the federal. I would say. It was more difficult. More time consuming and more paperwork, for sure." [#28]
- The Hispanic American male owner of a DBE- and DVBE-certified construction management company stated, "it wasn't easy, but it wasn't-- definitely anybody can do it, you just going to have the time. If you only had two choices I would go with, easy. CUCP's DBE certification process was harder though than other agencies." [#29]
- The female owner of a DBE- and WBE-certified professional services company stated, " It's gotten a lot better. I have colleagues that are pursuing a DBE and I know that it's always that's a lot of paperwork for them. But I'm seeing more and more my colleagues get that certification, which is excellent. Compared to other certifications, CUCP's always been kind of a touchstone, so if you were-- not a touchstone, but it's like a basis. If you were going after other WBE, like the Clearing House or maybe with other agencies, maybe cities, municipalities, generally if you have that certification it was a little easier to get the other agencies certification. Not always, but sometimes." [#30]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "we go to recertification every couple of years and most of our certs, so it's always a challenge because we have to provide a whole series of documentation to everybody and a lot of times, we've been in a long time so it's not as challenging, but if you're new into this game, getting to the front door is one thing. Getting qualified and certified is a very challenging thing, though, because of the documentation and the evidence you have to have. I think the process itself is not any more cumbersome or difficult than other agencies. I think that it's just low in the design itself, the program itself." [#31]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "the beginning was very difficult. I think it's a little harder to get than others, but that's about it. Recertifications are pretty straightforward though." [#33]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, "it's somewhat difficult. It's about average, kind of like how they all are." [#37]

**Recommendations for improving the certification process.** Interviewees recommended several improvements to the certification process. [#1, #2, #3, #5, #9, #12, #15, #28] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I think making it online will help many people. This way if you need to turn in a document you don't have to mail it in like CUCPs process and then wait for it go through. Make it online vs mailing. Also help people find free advisors, like at SBDC, maybe post more information on how to get free help. There are people out there who charge for their help and people should not have to pay when you can get free help." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "I don't know, one that's widespread. Who's actually doing the certification or if there are other agencies doing the same thing and who they've applied to. Like I know some of them are only local, like San Diego has a specific one that only see the accounts in San Diego, et cetera. We just learned that. So, I don't know. Maybe there's a more widespread certification that is accepted more places." [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "I think the paperwork's out there. I think one thing would be if there's kind of, CUCP are kind of global, so as long as a lot of the agencies that are smaller agencies would accept that, then maybe you could exclude going through the local agency's process maybe, to save time. But I think, yeah, I think it's required. You have to go through it. whichever agency is the strictest, then their paperwork should satisfy all the local agencies, in my opinion, because you went through the gamut of proving everything already so you shouldn't have to do it again with a local agency." [#3]
- The non-Hispanic white female co-owner of a construction firm stated, "I think there's a good reason there's some restrictions and that they're kept strong, because I have an understanding from the time that we were trying to do that that there's some fraudulent ways to qualify. 'Yeah, I own 49%, or even 50/50,' but what do you actually do? How do you really know what's going out in the field? My husband could tell me, but you're supposed to have on site experience. You are supposed to be calling the shots. I think that's actually honest and right. I think that process is okay, because I think it leaves out a lot of people who are just trying to manipulate the system and get benefits or breaks that they're not qualified for, just because some woman has her business run out of her home, but she's not on site. She's not actually digging trenches, she's not actually telling a crew that this is how the irrigation has to run through the property, she's not going out there saying, 'Hey, this leak looks like it's coming from here. Let's do a pressure valve check.' You know? I know the words, but I don't know the business. I can't do it. I mean, I've gone out with him and watched him, but nothing the same. And if there's any woman who's doing that and trying to pass off that she knows what she's doing, she better be able to show that she does. She better have some kind of educational certificate, some continued education, that she's actually the one out there getting her hands dirty. Is she actually drawing up the blueprints for an addition to a house? Is she on there with a paddle smoothing out and finishing the

concrete? Is she setting the forms? Is she actually a woman-owned business, when she should actually just be an employee? She would be the employer. And from what I understand, there's been a lot, a lot of fraudulent representation. So, I think that's fine, and when I was researching that to see if we qualified and that was the number one thing that hit. It's like, I'm not in the field. I can't just show up and say I'm in the field. Being in the field means actually doing exactly what you're doing, you know. If I was working alongside with you and had learned all that with you and sat for the state board with you and I was also a contractor myself, then there'd be no issue, because I'd have the proof of that I do that, and I'd have the references and all that." [#5]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "CPUC is the agency and it's their program, but then they have other agencies that are the ones that can process the application. So, one is Caltrans, one is Metro, LA Metro, and then there are several others. So, through Caltrans, you have to submit everything through the mail. Through Metro, they have a streamlined process and they have a ... It's the same application, and for the most part the same documents are required, but everything they have is online. So, it's very clear as to what you need and what you need to upload, and you just upload it all. It was much more streamlined. And so, the reason I know about both is when I applied in 2016 through Caltrans, I mailed in everything. I told you we were denied, and then we had to reapply. So, when I reapplied, this just happened a few weeks ago, I reapplied through Metro. At the time, I did not know I couldn't reapply through Metro. I have to go back through Caltrans since we originally had submitted there, but I didn't know that. So, I reapplied through Metro, and it was just a much easier process. And in fact, within the same day that I submitted my application, I got the information back stating that I had to go through Caltrans. So at least that application was in. Somebody looked at it enough in one day to be able to say, 'yeah, this is what you need to do.' So, what they did is when I submitted to Metro, I submitted for my DBE, or I'm sorry, yeah, the DBE, and then Metro's SBE. So, they said, 'We will accept your SBE. Just fill out one more form.' And, "But sorry, you can't submit through Caltrans." And I was able to talk with somebody on the phone, and it was just much more communication there. And things I believe may have changed at Caltrans since then, but like I said, it took them 15 months to tell us no, which I thought was absolutely absurd. Metro will process normal applications within 90 days, and if you are going out for an RFP that they have out at that time, they will expedite your application in 30 to 45 days. Where Caltrans does not provide any expediting at all. And at least in my experience, they do not adhere to the 90-day turnaround for applications. So, I've heard that that has gotten better... So, I guess my experience is that the different agencies, the different certifying agencies that can certify for CPUC are handling things differently, and they're not the same, and the efficiency of the different agencies is not the same." [#9]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "It'd be nice to know how to go about getting the certificate. Definitely more outreach. This is the most outreach we've had." [#12]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "I wasn't aware of CUCP. I learned about it through the Mid-Coast Project.

There was a golf tournament, and the people we were paired up with, they actually asked us if we were registered with CUCP. I guess I wish it were maybe better advertised, or, you know, like more information about it basically, the marketing. I've taken classes through PTAC or the small business development center, and they didn't say a word about it" [#15]

- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "I would say being assigned to a person to help chaperone you through the process would have been helpful. Maybe even like a video workshop, you know? Some kind of interactive training would have been helpful." [#28]

**Comments on other certification types.** Interviewees shared several comments about other certification programs. [#1, #2, #6, #11, #13, #23, #24, #26] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I had a great experience. I was lucky enough to work with LA metro for the certification program at a center, SBDC, that helped you apply for certification. They guided me through the entire process, and it was all online for LA metro, so it was not too hard. Many people complain of the process being very difficult. Again, I went through LA metro not CUCPS. It was an all online process for LA metro which made it faster. Also, SBDC helped me a lot with the application. For City of San Diego, I was trying to get a certificate as a small local business. But I have to be in business for a year before I can even apply for that which is ridiculous, because they're promoting small businesses and things like that. I didn't have that requirement for DBE or WBE. I don't know why the City has a 12-month period." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "I know our HUBZone was a pain in the butt, but again, I think that's only federal, so it could be because it's federal." [#2]
- The non-Hispanic white male representative of a majority owned professional services company stated, "I've tried some of those as well and those are just equally as difficult. And they've now turned those into you have to be of a certain disadvantaged aspect. I've always, definitely, I'm a small business. But yet small business certifications don't really seem to mean that much. And I've tried, even two years ago we tried to do that, and I couldn't. In going through that, to be honest, based upon what you know. We could not qualify. It is not very inviting to someone like me unless you know that you have some certain disadvantage. It depends upon what you're trying to get out of it. If the intent is to attract certain types of people, then the problem is that by its title, disadvantaged business, disadvantages is a descriptive that different people can have different interpretations of that. And so, yes, are we not given this same level of equal opportunity for something? And from that standpoint, being small and without one of those other particular labels ... it was, yeah. It didn't seem to be easy for us to understand how this could be targeted to help someone like us." [#6]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "you know I started doing this certifying with the City of San Diego and ended up taking it half ways. Because I realized it was a lot longer, a lot more tedious. But I may just go ahead

and do that if truly there is a way to get minorities and micro businesses involved. I don't have it certified, yeah. Again, I started the certification process with the City of San Diego and found it a little long, tedious and dropped it." [#11]

- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "it [certification through LA Metro] was intense. I thought it was very helpful. What I did was – I called a young lady, I forget how I found out about her, but they set me up with LA Metro, and then they had someone come out to my place where I do business, and they inspected the area, wanted to make sure I wasn't being backed by some huge company to kind of piggy-back off of me, in order to win a contract. So, I thought that was good. But I haven't received any business from them yet. I liked it because they were very helpful. They came through, and the gentleman sat down with me, and he asked me questions, a lot of the stuff that I didn't know the answer to. He asked me questions about, 'what is your projected sales?' and all of that, and I couldn't answer that because I never done it before. But he was saying 'okay, you probably want to do this way, or you probably want to do it that way.' I just thought that was very helpful. And the person I talked to, which was the corporate person that I called in Los Angeles, she was very helpful, as well. She said, 'okay, I am going to send out so-and-so, and he is going to come out on this day and meet with you.' And then she said, "well, you probably want to change this on your application, change that on your application. Verify this, verify that." They were really helpful. I was really impressed with LA Metro." [#13]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "the DBE has a mandatory requirement on it. I even heard this from other SBE minority companies. They are like, 'Dude, the SBE is worthless, the MBE is worthless. But if you can get the DBE, the DBE will really help you grow.' And I even have primes tell me 'The SBE is garbage, the MBE is garbage.' And I'll say, 'What do you mean?' I had a good friend from a big company that was one of the owners tell me, 'this is garbage. If you get the DBE, we can give you a lot of work because it's mandatory.' And I was told that when I was at my prior company. Because we started looking into that. So now that I know what I know, the SBE is worthless, the MBE is worthless. The DBE, there is an actual requirement on the contract. So, the DBE, they will tell you there's 10%, 5% requirements. So, the DBE is an enforceable, mandatory requirement to the GC. And this is why the MBE and SBE don't work because there is no enforceable requirement. They have to meet the DBE requirements. So, a company sent me an e-mail asking if I wanted to bid on some fabrication stuff. But they wanted the bond. And going through it, I found out about the bond like two days before the bid was due and I was like, there's no way I'm going to be able to get a bond in two days, so I forsook it. But because they had to by law meet the DBE, they are sending e-mails to companies like me. You see the difference?" [#23]
- The non-Hispanic white male owner of a professional services firm stated, "I asked the PTAC and they said yeah, because we applied for SAM government ... to get on the SAM government list and we had to certify ourselves as a small business. I assumed since we're on then we're certified." [#24]



- The Asian Pacific American male owner of an SBE- and DBE-certified construction company stated, "initially it's difficult. Annual renewal now, they've streamlined it where it's easier now. State agencies are now starting to standardize throughout the different agencies. Federal is completely different and it's a whole different ballgame, and so you have to separate state versus federal, and so you can't mix them together, so they're two different certifications." [#26]

## D. Experiences in the Private Sector and Public Sector

Business owners and managers discussed their experiences with the pursuit of public and private sector work. Section D presents their comments on the following topics:

- Trends toward or away from private sector work (*page 44*);
- Mixture of public and private sector work (*page 46*);
- Experiences getting work in the public and private sectors (*page 50*);
- Differences between public and private sector work (*page 54*); and
- Profitability (*page 58*).

**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. [#1, #3, #6, #8, #11, #15, #16, #20, #22, #25, #37, AV#37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "that's tough to answer for my business as I just started it. However, public sector doesn't really hire individual companies they hire teams which a company may be a part of. So, I definitely do more private work typically. it mostly changes based on the economy. Right now, there's not a lot of work on transit, SD is not the greatest marketplace for the transportation industry. So right now, a lot of people are looking to LA for work. When there's no contracts in the local public sector then I am mostly private. More work in the private sector than there is in the public sector. The changes, like I said, was basically a shift. Because a few years ago, there was a lot of money in the public sector for transportation projects. And because of the reduction in funding, that shift is now towards the private sector, with private development, commercial, industrial and housing and schools and everything else that's come up." [#1]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "it's not a trend, it's a balance. You have to get a balance. My goal would be, the private sector work is what started the business, so if I can get a 75/25 breakdown, 25 in public works, eventually that would be great to offset any type of economic downturn, if you will. So, we just want to balance, so we've been working towards a balanced, two sides of the house type of deal since day one" [#3]

- The non-Hispanic white male representative of a majority owned professional services company stated, “in 2005, I want to say somewhere about there I made an aggressive move to do municipal city parks. And we were at the time a little ahead of the curve compared to other firms similar to ours in size and scale and location. And we had a very good run for about five years. And then coming out of the 2008, 2009, 2010 everything kind of shut down because we had a terrible recession at that point and time. And then we've continued to try to do that. However, there's less and less of those types of projects that come out. Along with the fact that the large firms that when I first was doing that, I was not competing against all the large firms because they were doing big master plan communities, and they were not aware of these smaller park projects. Well, they're small project to them, but a big project to us because of the difference in size and scale between a 30 to 50-person office and a three to eight-person office, there's a huge difference. And, so I was competing in essence, in a small pond, and then they got involved with it, which made the pond even, well, quite different. And they were the big fish in that big pond. I mean, in that small pond, and then they just ate us up. And so, we lost a lot of that work because we couldn't compete against the big firms.” [#6]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "I'm trending away from public work right now, but I'm not going to quit because I feel as a business owner, not personally, I feel as a business owner that if I walk away from certain projects like this, then that's their excuse to say that we can't hang. So I'm hanging with a couple of small threads in my hand, but I don't want to quit because I don't want them to be the ones that say, 'Oh he couldn't hang,' instead of me quitting. Because then I can justify that, 'Okay, you know why I quit, or you know why I couldn't hang? Because you guys took too long to start the project. You guys took too long to pay me when the project started going. And then you caused me problems.'" [#8]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, “when I was on my own, 2007, I went from having a lot of private work, to having nothing. Had no other choice but to switch sectors.” [#11]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “for us, being that we are DBE, we tend to stick to the public sector, being that there are requirements, and, you know, we've learned that side of bidding.” [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “in 2008 or 9 when we went into the government sales, it was mainly because the Recession, and I guess turned out to find out there's a lot of opportunities in the government to do business and we continued to pursue and grow.” [#16]
- The non-Hispanic white male owner of a construction company stated, “there is a trend towards private sector work for white males.” [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “private sector, well we do most of our work with independently owned utilities, investor owned utilities. And we won some big projects with them, so now they

know us and it's easier to win repeat work. Other construction companies, because of the line of business we're in, we win work with them. Private construction companies. I think just because we're affiliated with some of these big utility companies like San Diego Gas and Electric or whatever, yeah, it's just easier to win work with them. We're in their system, they know us. Public sector seems to be more difficult to get into, especially because we don't have that much experience in that area." [#22]

- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "even during a recession the city and the county, the agencies cannot stop work." [#25]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, "we get a two-week pay with the federal government." [#37]
- The non-Hispanic white owner of a professional services company stated, "it's difficult to break into government work. We primarily do private sector." [AV#37]

**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.

**Five business owners or managers explained that their firms only engaged in private sector work.** [#10, #11, #20, #27, #36] For example:

- The non-Hispanic white male owner of a construction management firm stated, "right now, it was all private. Or has been for a long time. I work in the public sector, but not under my companies. We'd like to work in the public sector under our companies." [#10]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "private sector, yes. 100% right now." [#11]
- The non-Hispanic white male owner of a construction company stated, "we haven't done any public work. I'd love to get into public sector work, but the time involved is expensive and there's just too much competition, I guess." [#20]
- The non-Hispanic white male co-owner of a construction company stated, "zero from the public. 100% from the private. The problem with the stuff on government things like that is you can get in trouble so quick and you don't even know you're in trouble, so..." [#27]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "zero from the public sector now. Hundred percent from the private sector. Yeah, the public sector can destroy you. You don't follow the bid procedure checklist they wanted. Which I'm done doing with my job as a consultant. I mean you have to have another person who is involved with bringing contracts and that kind of stuff. , I don't want to do it with those people anymore." [#36]

**Three business owners or managers explained that their firms only engaged in public sector work.** [#16, #25, #34] For example:

- The non-Hispanic white male representative of an MBE-certified construction and supply company stated, “it is 100% either federally funded, state funded, or city/municipality funded” [#16]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, “our business is 100% public work. The public sector is more stable.” [#25]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, “the companies or are the few partners have been like the Navy, the marines. So, I guess all is public. Typically, this, our work is usually mandated by the ESA or something.” [#34]

**For ten firms, the largest proportion of their work was in the private sector.** [#1, #3, #4, #5, #7, #8, #11, #12, #22, #23] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “in general, 70% of my business is private and 30% comes from public sector work.” [#1]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, “majority is the private sector right now. I would say at least 95%. So sometimes you get a project here and there that is public.” [#3]
- The non-Hispanic white male representative of a majority owned construction firm stated, “there’s certainly significantly more in private than public, statistically speaking, I would just be speculating, but if I had a guess, I would say we probably do 10% in the public and 90% in private.” [#4]
- The non-Hispanic white female co-owner of a construction firm stated, “most of our contracts are private.” [#5]
- The non-Hispanic white female representative of a majority owned construction firm stated, “we probably actually do most years about 80% private, and then 20% with the other.” [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, “majority of my work is coming from the private sector because I work with a property management company that’s been really flexible with me and I have an advantage because the other two bigger companies that they work with, they don’t respond as fast as I do. So, I normally end up getting their first priority on a lot of their projects because the bigger companies don’t respond to them.” [#8]

- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "I'm doing strictly the private development, and that's what has kept our office open, is our private development contracts. We had a government contract that had just ended in June, and the contract required my presence. But, again, that ended in June. It was 100% private work through about 2009, when private work and private development went down to zero. So, people in my field were starting to look in the public sector to get work." [#11]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "more private. I call it, the County, they're good but I'd rather work with private people because I don't have to deal with the hoarding part of the difficulties." [#12]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "I guess I would say we're at probably 90% private, or maybe even higher than that. And 10%." [#22]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "a lot of the work that the company is doing with this division is from private companies. I think right now we only have maybe 3% coming from the public sector. We want to increase that." [#23]

**For eleven other firms, the largest proportion of their work was in the public sector. They described multiple reasons for engaging in more public sector work.** [#6, #9, #15, #16, #26, #28, #29, #31, #32, #35, #37] For example:

- The non-Hispanic white male representative of a majority owned professional services company stated, "the majority of our work, I would say especially for the last 10 years, maybe even longer, has been municipal work. Whether it be for a local city or primarily they're mostly municipal city projects or then with the architect who does a lot of school projects, other institutional work. And what I mean by that, when I say most of, that would be based upon the value of the projects. We can have one city street project that we might be involved with that its value could be equivalent to 10 private projects. So, it depends upon how you want to classify. If it's based upon the number of projects versus the value of the projects, then the municipal work is the dominant." [#6]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "about 95% public, and maybe 5% private. Just that that's what we specialize in as right of way work. So, the projects that we work on are typically public projects." [#9]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "I would say 95% comes from, I guess, the public sector, which would be Caltrans and SANDAG, yeah." [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "our side we're about 70% (public) also federally funded government work, but 30% private." [#16]

- The Asian Pacific American male owner of a SBE- and DBE-certified construction company stated, "less than 5% is private. Our emphasis has always been public, because we don't need to advertise, because the federal government advertises for their services. We're just looking, so it's an easier opportunity for us to find work in the public sector. Private sector, you have to actually advertise yourself, and so we've shifted ourselves to the public sector." [#26]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "I would say 90% came from public sector." [#28]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "it's probably more like 90/10 right now because the opportunities are so great in public works right now. Especially, and you'll see that happen in most signatory contractors that are union contractors because, with the 2028 games ahead, everybody is backing up seven to 10 years to get all of the infrastructure projects built. And then three to four years before 2028, you're gonna see a lot of moves toward the private side of it because then the facilities are gonna have to get built up. So, this is the stimulation that's going on right now. If you read the details on the websites of Metro Caltrans on and on, they are all trying to get transportation corridors expanded and widened and built out and to move the visiting public around during that period of time." [#31]
- The non-Hispanic white male representative of a WBE- and SBE-certified professional services firm stated, "probably 80% public, 20% private. It varies year by year though." [#32]
- A representative from a majority owned construction company stated, "I would say 90% is public. There's occasional small things here and there, like some churches and a few other small things like that for private. We don't do any residential, so...commercial." [#35]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, "the public sector including the federal market, I would say 90%. Just because the 8(a) we mainly do military work." [#37]

**Five other firms reported a relatively equal division of work between the public and private sectors while acknowledging year-to-year variability due to changes in the marketplace and economy.** [#2, #13, #24, #30, #33] For example:

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "it's actually probably pretty even. It's probably fifty-fifty." [#2]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "the bulk of it will come from the private sector, which is the big strippers. The percentage for Caltrans and other public sectors? Probably 50%." [#13]
- The non-Hispanic white male owner of a professional services firm stated, "public private split is 50/50. We're starting to lean more toward the private sector because of the frustrations we've had in the public sector." [#24]

- The female owner of a DBE- and WBE-certified professional services company stated, " It's probably 50/50 at this point. I've always done primarily public works projects and then my partner and the other person to manage this project has been private development." [#30]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "I would say about 50/50. It depends on the economy." [#33]

**Experiences getting work in the public and private sectors.** Business owners and managers commented on what it's like to seek work with public and private sector clients in the San Diego area.

**Twelve business owners expressed that it is easier to get work in the private sector.** [#1, #2, #3, #7, #8, #9, #10, #22, #29, #30, #32, #36]. For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "private sector has less red tape and processes There's also less requirements for small business and this and that. It doesn't really matter for me to be a bit small business or not in the private sector. It's more about relationships but it's easier to get selected. Competition is still there, but if you have the relationships, is easier and faster to get the work." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "private is a lot more relationship based. You just kind of, have to know the right people in the right places." [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "private sector is easier, it's based on our reputation. So, we've been doing a good job so usually a project comes to us, we don't have to look for a project." [#3]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "private's easier because you still have the bid and then when you look at the whole shopping list there was a \$4.6 million project that I tried to bid on and I went and downloaded all 25 companies that were on that list and sent an individual e-mail to each one of those companies. "Hi, my name is John Smith Book. And there's a bid book which we are signed up on their sites, they will send you out all the notifications that come into them. And so it would be nice, that same thing, to be able to sign up with their site, and I'm sure they probably do, and I just don't know what their sites are, to get those invites, 'Hey, this is our website, please come look at our projects coming up.' That, a little bit more, would be nicer because, otherwise most of the time, you either really get to know somebody or really get to know how they process their bid requests. SANDAG, that was one of the easiest ones to get paid with. I was really surprised. That point of contact is the main thing. If you can find that person, then usually the projects go fairly easy. Like on the last project we worked on, we were a sub, and we were 4<sup>th</sup> in line. So, we had to go through all these people, and then the prime, and at first it was really hard. But somehow, I found this one person. And she was wonderful. Because she said, 'Oh, okay,' she goes, 'Yeah, I know who that is, no problem. Let me get ahold of them. And I'll have them call you and have them get the paper.' And it's like, why can't we always find that, have that one

wonderful contact person that can help get you in the right place or make that connection because that's really the key. If you can get somebody like that, then the projects go so much smoother and easier." [#7]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "they have an on-call like appraisal bench, so that comes out, I'm not sure, I don't remember if it's every two, three years, or five years, something like that. So, they give the opportunity to appraisal firms to get on-call contracts. They usually select like three or five firms and then there's not guaranteed any work. But then when task orders come out, then those selected firms would bid against each other for the work typically. I understand how it works and how they put out their RFP's... their proposal process was pretty extensive. Very, very detailed, time-consuming, and some of the experience requirements might've been a little excessive. So, I think it might be on one of the harder ones." [#9]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "we have not worked with NCTD or SANDAG, and I think it's just not being familiar with their bid process, really. I mean, the fault probably lies with us, we should have looked into it more. And I'm not familiar with their DVBE credits, like, what they need, whether they even recognize DVBE. I have been to their booth at a number of different events, and they've been at one recently in Balboa Park and I got information then." [#22]
- The female owner of a DBE- and WBE-certified professional services company stated, "to do work with SANDAG and with Caltrans if you're a single person firm or even a very small firm, it's so much paperwork associated with that. I never did pursue it after that." [#30]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "most people work[ing] in the private sector, the only [thing] they want once in a while is a Certificate of Insurance. To do the public sector, you have to do all this minority, diversity stuff that doesn't relate to anything that's relevant, all political stuff I that don't care to deal with." [#36]

**Six business owners discussed getting work in the public sector.** [#5, #10, #16, #34, #35, #37].

For example:

- The non-Hispanic white female co-owner of a construction firm stated, "There's more paperwork involved with the public sector because just what's required. It's more formal, I suppose is a good way to put it." [#5]
- The non-Hispanic white male owner of a construction management firm stated, "bidding of public works contract, like to build a road or a bridge or a pump station is work, but it's easy. Like you fill out a form, you put your numbers down, you apply your bond, you sign all the addendums and you're out the door. RFPs are tough because there's no number at the bottom. So, it's all about presentation and getting the right team. And there's no way to know how you'll be judged. So, like I had done a ton of work at UCSD and we applied for it. We put in an RFP there, and I got some of the head staff people over there to put down for my recommendations and stuff. And we weren't shortlisted. So, it's a lot of work and it's



really hard to know if there's a payoff at the end, and to even know why it didn't pay off. I mean, it's one thing if your bid is too high, you go yeah, my bid was higher than everybody else. But with the RFPs thing we put in there a ton more work. I mean like a public sector construction bid; you just read the plans, you do the takeoffs, you do the things. It's kind of mechanical, at least. With the RFPs, there's just no way to know where you land, or what you did right, who you missed. Is somebody butthurt at you over at that agency because they don't like you, which happens all the time. And the other thing is with consulting price is not supposed to matter. So, and I kind of understand that, but at some point, the rates these guys charge just because they have a stack of really good resumes or their company has been around for a long time, is almost cheating in itself as well. We'll come in and say \$150 an hour for our staff. Bigger companies that have huge reputations and big stacks of resumes to throw at it, there'll be like \$250. Well, the agencies, technically when you're choosing RFPs, you're not supposed to look at price. That's supposed to be a negotiated thing later. It's supposed to be dealt with after a shortlist has already been developed. Basically those of us who are trying to come in at bargain pricing to get the job, to build our resume, we still get left out because the price isn't considered. And that's good and bad, but a little frustrating because when you're small, you have to find some edge. Usually pricing is your edge. Like, so if price doesn't matter, the way that little companies get in is by joint venturing" [#10]

- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "with referrals in the public sector, not to directly award, but 'hey we have this opportunity, do you want to provide a proposal?' and that's opened up even more doors and more doors, so our performance definitely has a lot to do with that." [#16]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, " , most of this has come from either us networking, directly reaching out, targeting specific companies or management, supervisory level biologist and attending like networking events or conferences and stuff, I would say that, since I guess we've only been in business for just over two years, where we've done pretty good at obtaining work, but yeah, again, I guess that's all relative." [#34]
- A representative from a majority owned construction company stated, "we are in some of the trade journals. Besides that, we took mainly do our bidding with the county and SANDAG, Caltrans, NTF. We go through a bidding process, we get mainly the JOC jobs, Job Order Contract, that's what JOC stands for. And they're usually substantial jobs, over a year's period of time, they're maybe like, 1.2 million or something. And then each JOC has smaller JOCs in them. We do more in the public works, just because those are bigger entities." [#35]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, "I would say it's easier in the public because of our 8(a) they're satisfied. We only have competition against other 8(a) firms." [#37]

**Four business owners shared recommendations as to how the San Diego Association of Governments, North County Transit District, or other public agencies could improve their contract notification or bid process. [#1, #3, #6, #31]. For example:**

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “for SANDAG and many of these agencies, it takes six months to two years sometimes to get a task order or get on a contract or something like that. So, it's challenging. Especially for a small business because you get on a team, but you may not see anything. Even if you're selected, you may not see any work out of it for another six months, so you have to wait. City of San Diego is notorious also for that. They just take forever and take months and months to select you and issue a contract. And it is just a lot of effort goes into those kinds of processes. Well, I think a lot of times it comes down to kind of the contracts departments being the bottleneck and not having enough people to process everything. Or, the City, maybe staff don't have the authority to issue contracts without going to the council, for example. So that takes time. Sometimes that adds on a couple of months. Negotiations take time, if they're pushing the consultants down on fees and escalation and things like that going back and forth. There's a lot of things in the process. And then, like City of San Diego, if you ask for a proposal, you put in a proposal, let's say 10 firms decided to put in a proposal. They don't know short lists, sometimes they interview all 10 firms. And that's a lot for one project if they do that. So that's, again, a lot of effort putting into something that they could have done with maybe shortlisting to five firms. They just sometimes don't, they don't go through that process. It's more work for the private sector, to comply with all of the... And that's just one client. If you have five different agencies, you're doing this for the amount of time you are spending on writing proposals, doing interviews, and then following up on paperwork and things like that, it's too much for a small business. I don't have the solutions, but there definitely can be streamlines.” [#1]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, “you get the notification, so I think everybody would see it. It's just a matter of going through and being able to get picked for it. So SANDAG has a system where they have already on-call consultant that they already picked, right? So, a lot of times the project gets set up for those on-call. So they have a group of people like myself who are on the Bench, but a lot of the times the on-call team already has a team, so there's no reason for them to go pick somebody off the Bench unless the Bench has something that the team doesn't already have. So, it's hard to get into the on-call team, and then even harder to get picked from the Bench because everybody has their own team already and they already won the on-call. So SANDAG goes through the on-call first, and then if the on-call people can't do it, in theory, then they go to the street, but they haven't gone to the street already because they got all these on-call teams that they picked already. So, they send out an RFQ and say, Hey, we're going to pick three firms to be our on-call engineer consultant team. So, of course, there are probably 10, 15, 20 firms that applied, seven get selected on a shortlist, and then maybe from seven they pick the three. And for the next three to five years, nobody gets picked again because those teams are set.” [#3]
- The non-Hispanic white male representative of a majority owned professional services company stated, “in the past, there were some things that we had some direct contact with

an NCTD employee, but yet minor in nature. One situation was designing a bus stop, as part of the transit system. Another had to do with when we were doing some subconsultant work, associated with sections of the trails adjacent to both the coaster, and the sprinter. When, to my knowledge, I've never gone after any NCTD or SANDAG project specifically, there's a reason why I also haven't. Is because they are so heavily influenced by these certifications that don't apply to what otherwise... Historically, I've always just considered myself in the check the box that said white. I think the little bit that I would say I could have an opinion on would be that when SANDAG or NCTD are involved with projects, if it's dealing with that the primary client is a different municipality, it all comes down to what power struggles there are with the local municipality compared to SANDAG or NCTD. If there's tension in that relationship, then being part of the design team where we can get mixed signals. And different sense of priorities. And that goes back to what I've said before, communication is so critical. So if we're working, if our primary client is a municipality, a city, and yet one of the other, these two agencies are involved, but they're not the prime client, you can have tension between them because they're fighting over whether it be turf wars, or what have you." [#6]

- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "we all need to grade ourselves as to what we can do the next time to win a job. Having a liaison that we can contact and who can pull data for us and help us come up with those answers that we ought to better market ourselves or approach the opportunity the next time, so that we can win it instead of finishing second, third, fourth, or whatever. Leveling the playing field, it seems like once you win and you know how to win, you get a little bit again and that's okay. But if the industry as a whole is going to expand and improve, there can't be 10 DBEs who get all the work and the other 200 are struggling to make ends meet. Because eventually, if those 10 are really successful, they're going to grow on to the program and then what happens to the other 200 if they're not prepped to take over? Okay. So, there has to be a process to monitor and help facilitate the growth and success of each of them that really choose to make the effort. One of the agencies right now, a metro is trying to start a mentoring program for successful DBE to quote those who are struggling to find the same level of success. So, maybe that's a concept that San Diego also needs to assess." [#31]

**Differences between public and private sector work.** Business owners and managers commented on key differences between public and private sector work.

**Nineteen business owners and managers highlighted key differences between public and private sector work.** [#1, #2, #3, #4, #5, #6, #7, #10, #11, #13, #15, #16, #18, #23, #25, #28, #29, #36, #37] Their comments included:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "rules, regulations, billing, and requirements are very different for each sector." [#1]
- The non-Hispanic White female representative of a WBE-certified construction company stated, "prevailing wages is a huge one since we're a nonunion. So, the prevailing wages, the

guys make a lot more money. And then, on the public stuff, there's also the apprenticeship, ratios. You have to have a certain amount of apprentices to journeyman, foreman, purple guys and blue guys. It's more of a hustle if you're not used to it. And then the certified payroll. You're also to do payroll completely different. So, somewhat private's easier, but also goes for cheaper, but relationships can go further or public is pretty cut and dry a little bit, if you qualify." [#2]

- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "I'll start off with employee first. So, as an employee on the private sector, in theory, you have to do a good job, and if you don't do a good job, technically, you can lose your job. Whereas if you're a city staff, once you get into the system it's hard for you to lose your job. So, I think public agency staff tends to not have that type of pressure, so they tend to be, I guess, I don't know, lazier I guess, if that's ... But on the private side you have to put in your 40, 45, 50 hours just to make sure that a project's running well and it's profitable, or else your job could be in jeopardy. So, as a business, on the private sector, it helps us out because we're overachievers. We work day and night. The client likes that. At 6:00, in the afternoon on Friday, they can still call us, and we'll pick up the phone, whereas other firms, bigger firms, your staff might be gone at noon. So, we are not a better civil engineering firm, but we are better in providing customer service, that's what sets us apart from other businesses." [#3]
- The non-Hispanic white male representative of a majority owned construction firm stated, "it depends on how you define the differences. Generally speaking, public work is prevailing wage type projects, private's not. There's usually a prevailing government wage, so instead of paying our typically hourly wage, which say is approximately \$17-\$19 an hour, the prevailing wage is, you know, between \$56 and \$58 an hour, and then there's like pay roll reporting that comes along with it. So, a lot more work involved on the public prevailing wage projects. Well, the work itself is the same, as I mentioned with prevailing wage, there's just things like, you have to have like sign-in sheets and sign in and out for documenting your time on-site because with public work they want to verify that everybody's being paid accordingly per the contract. So, you're always having to do those things, it's just an extra step, and oftentimes with public work you have to sit through some safety orientations, that can be time (consuming) like 1 or 2 hours. I think I would say sometimes contractually, there's a lot more. Private work, oftentimes, we'll just sign our lease agreements, public's got all kinds of things to go over. The general passes it down to the subs, so there's just a little bit more contractually, but I don't think there's any other challenges." [#4]
- The non-Hispanic white female co-owner of a construction firm stated, "It's easier to get work in the private sector because you're not competing with other bidders for public work. And it's also desirable. Public work requires, it's usually quite a long period of time as opposed to private sector, we just get them in a couple weeks. I know that the few times he's worked for the City of San Diego and also for Encinitas, it was months, measured more in months than in days. So that means he's taken away from the kind of troubleshooting and taking care of our regular customers, so private sector has been easier." [#5]

- The non-Hispanic white male representative of a majority owned professional services company stated, “they differ in two different respects. Often in the private sector, the client has a personal and maybe even emotional tie and connection to the project and the finish design. Whereas in the public sector, you're working with project managers that may not be an end-user. And that's a big difference in how you have to run and manage and design projects. How you go through and get from a design standpoint because design is so subjective. Those that are going to be intimately involved and actually project themselves in your design such as in the private sector they are going to be more interested and want to know more about your design process. Whereas in the public sector it's more about just getting it done. The other side of it is from a contractual standpoint. The public sector contracts are much more detailed, much more legal with a lot more scrutiny of all of the liability aspects. And so, you have to be on top of those issues more so in public sector work as compared to private. Making sure that you've done all of the proper things and followed a process that makes sure that you have dotted all the I's and crossed all the T's along the way. What we have to do is more so in a public sector work, we have to have what I call defensible design. We need to be able to defend every decision and every choice and every suggestion that we offer. It all depends upon if you have developed the tools to continue working in that environment. If you're working in the private sector like I said, you might have to do more hand holding with your client and if you've developed the kinds of tools that you can efficiently then share with them, then that works well. Same thing, there's a different set of tools that the public sector needs and if you have developed those in an efficient manner that you can continue to draw from the previous and use that. You're going to do fine within whichever of those sectors you're pursuing. But it's hard to, in a small environment to be good at both or I should say to be great at both.” [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, “definitely in the private sector, there is less paperwork. And it's easier to get paid.” [#7]
- The non-Hispanic white male owner of a construction management firm stated, “we'd love to get more government work because it's more consistent than private sector.” [#10]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, “it is different. The public work sector is basically managing design, supervising the budgets, supervising the design efforts, more managerial. And the private sector is both the managing and being involved in the design. The public bidding process is a little more tedious, a little more demanding, again, not only from all the insurance requirements, the historical experience requirements. In the private sector, all the work that I get is by referrals, and existing customers. So, they don't ask me to update my resume, they just give me the work.” [#11]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, “I think that public is more friendlier, more easier to talk to, more open to trying to help me. A lot of public entities, they don't say that they just don't have the time to kind of help you approach your goal because usually what I do is when I call, because I am new, I let them know that I'm new and I'm trying to get into the business, and I just find that

the public sector is more open to hear what I have to say and suggest different avenues to go down." [#13]

- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "not too much. I guess I could say with the public sector, because it's government, there's a little more organization. I guess for us, it is, because we're better established in the public sector. But I guess if we would've gone the private sector route, maybe we would've been better established. Because in the private sector people have their chosen trucking companies that they like to work with, and they stick to them." [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "it's a very different business model going after and working in the private sector, I mean, you're working with people that are either financed directly with the bank or individuals that are financing a project, and a lot of times they don't ask you to bond, and the sub-contractor pull is very different as well because they don't pay their guys prevailing wage rates, so they're able to undercut their competition if they choose to do so. So in terms of disparity in the bidding and on an apples-to-apples playing field, it doesn't allow for that because you have contractors that can just cut you at the knees if they want the work, and in the public sector, you have guidelines, you have rules, you have by-laws, that keep everything on apples-to-apples, you know. I think that working with the government can be a little bit more clear and easier to work with and easier to compete, there's rules that you need to follow, typically, that are checked. But in the private sector, it really becomes chasing relationships." [#16]
- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, "no. They all have their individual ways of paying, which is fine. But that's no different than one of the dealerships in the Auto Park or whatever, that I bill them at the end of the month, that kind of thing. There's no difference in the way I interact with them. Because the test procedure itself is the same. If it's a government agency, they don't have to pay the \$8.25 for the certificate because they're exempt from that, because you're taking it from one pocket and (putting) in another. Other than that, the test procedure is the same." [#18]
- The Hispanic American representative of an MBE-, SBE-, and DBE-certified construction company stated, "the public seems to be more complicated. More complicated and the specs can be more out there, sometimes ridiculous than private sector. Because, see, the private sector is based on the market, on revenue, and the public sector is not. They have a fund. So, a lot of times I look at the specifications from different cities and the engineer will specify something completely different than the other cities for the same product. Even though that this product works, the engineer doesn't like it. He doesn't care for, he doesn't like it or he's pompous or arrogant, 'No I am this engineer, and this is what I want. Don't question me.' But in the private sector, it's based on production, it's based on quality. If I shut this down and I get this part from you, will it work? Absolutely. Then let's do it. Because at the end of the day in the public sector, it's based on, I've got to charge the client... I've got to sell milk and for every gallon that I sell I make a little bit of money. And these guys don't have, say, a million or \$10 million bucket where like the cities do. The cities will have a bucket of money so the urgency to produce or the urgency to provide is not really there. So that's the big

difference between the private sector and the public sector. Now you have some cities that are very good, the engineers that understand construction. And a lot of these guys don't know construction as well. They've been city engineers for 35 years and they only see construction once in a while. They don't see what we see. So that is the big difference that we see. It's someone behind a desk as opposed to someone who is actually printing plans, fabricating the stuff, doing the work. So, there's a disconnect sometimes. And this can produce excess of complications and so forth. So, there is a difference between the public and private. And also, in the private sector, once you develop a relationship with the private industry, they always go to you. And it's a little bit different from the public. You have to bid. And if you bid low, you get the job, otherwise you may not get it. It's a little different game.” [#23]

- The Asian Pacific American owner of an MBE-, SBE- and DBE-certified professional services company stated, "you always get paid in public work, that's all I can think of. And, well, there are other things. In the private sector, money is always a concern. But in the public sector, yes, money is a concern also, but the quality of the product is always foremost.” [#25]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, “I would say generally the rates are good in the public sector. So, the rates are, I think overall better especially in Southern California. There's more trust and dependency with the client-- with the public sector client than the private. And it's a personal preference. I enjoy working in the space where you have to balance all of the public interest with the need to be environmentally compliant.” [#28]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, “there's a big difference. In the private sector, I don't do an inspection for them. Those are usually the cities that do that. So, yeah, big difference.” [#29]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “the public sector has an image, in the graphics and the way they want to present their documentation so it's a different image goal. Not just the project. It's the way they look when they're doing the project. That's my perception.” [#36]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, “you spend more time doing paperwork than getting the job done. While private, you just go out and do the work. I don't know if it's more competitive on the private side because they don't have all the paperwork with all the crazy rules versus the public side has. Before you get out of your truck and put your boot on the ground, you got to send them a plan, how you're going to step on the ground.” [#37]

**Profitability.** Business owners and managers shared their thoughts on and experiences with the profitability of public and private sector work.

**Seven business owners perceived public sector work as more profitable.** [#10, #11, #13, #15, #26, #35, #37] For example:

- The non-Hispanic white male owner of a construction management firm stated, “I’d say actually you make less on the private sector to be honest. Because the government kind of has some, like I said, the price doesn’t matter. So, if you do get in, you make good money. It’s like 2.3 multipliers, and some of that is even specified in the contract, what the multiplier must be. But private sector, yeah, you don’t make quite as much, because it’s just more competitive. A guy calls up the three buddies that he knows and goes, who’s going to give me the best price to do this work? You got to beat your two buddies. Where government, like I said, that part is left until after the negotiations are done. You pick somebody, then they open that third arm or that last envelope and go, okay, your prices are this, that’s out of line with the market. Or you know, that’s in line with market. Well there’s no downward pressure. It’s always just slight upward pressure every year. So yeah, I would rather have government work more consistent, more money.” [#10]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, “typically, with the public sector, the public is bound by either the state rates or the federal rates, depending on the type of funding. And those are well compensated. Most of the lucrative work is through the public sector.” [#11]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, “I think public would be a lot greater than private. Well because it’s a bid process. If your bid is the higher bid, or if your bid is the winning bid, it may be more lucrative. If I do a certain job in the private sector, I know that I can only charge this amount or that amount.” [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “private sector I would say they’re on a tighter budget, and they like to, I guess, always ask for a lower quote than the going rate. They always try to negotiate one way or another. Public sector typically pays fairly, for the most part we stick to market rates, and you know, whatever the rate is.” [#15]
- The Asian Pacific American owner of a SBE- and DBE-certified construction company stated, “actually profitability is more so in the public sector than the private sector. With public sector sometimes there’s a lot of give and take in terms of how much money is afforded, and so it’s better for us to approach the public sector.” [#26]
- A representative from a majority owned construction company stated, “public sectors are the larger jobs, and would be more profitable. The smaller ones are just hit and miss, here and there.” [#35]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, “[in the private sector] you are not as guaranteed your pay as you are with working for the government.” [#37]

**Five other business owners and managers perceived private sector work as more profitable.** [#1, #2, #3, #16, #22] For example:



- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “usually with the requirements that the public sector puts on individuals or on companies, they negotiate profit, usually the negotiated profit is less. Then sometimes they don't allow for the escalations, or they limit the escalation even though people have to pay their employees. And the rates... sometimes public sector caps the rates and private sector does not do that. So, basically the multiplier for working in the private sector is higher than the multiplier we use in the public sector.” [#1]
- The non-Hispanic White female representative of a WBE-certified construction company stated, “the private is relationship based. So some people don't care about low price, they'll give it to the better contractor, as long as it's within the budget. Whereas public works always goes for a little bit. So, whoever's the cheapest gets the public works, just funny. Yes and no. Some of the public works, you can really get a lot of change orders and change orders make more money and that's why so many people chase them. So if you have the right office team, you can make a lot of money on the public work stuff, but you have to just really be on top of it and know what change orders to go after and in the long run they get screwed. Yeah.” [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, “I think public sector contract limits your profitability, so that goes into your overhead rate, right? So, as a... just to get into that a little bit, so as a new firm, as a small firm, a lot of times we don't have all accounting and all that stuff set. We have basic accounting, we don't have accounting that SANDAG or Caltrans would typically see. So, for example, for this on-call for Inland Rail Trail, I had to go in as a, use the Safe Harbor rate. So, the Safe Harbor rate is 2.1, and then they give you a little bit of profit. So, I don't know what the math comes out to be, like 2.16 or whatever. So that limits your profitability, versus if on the private sector, if Pardee wants to pay us \$100,000 to do this task, and let's say it only took us \$75,000 because we're efficient, then we would profit on the \$25,000. So, there's limitless profit on the private side versus the public side, but on the private side I think there's more risk, in theory. If you screw up something, then you have that back charge, whereas on the public side, while working with TY Lin and stuff, when you screw up something you may or may not have to pay for the mistake. Because the agency, sometimes they don't tend to go after the design team as much, whereas the private side, it's going to cost somebody. So, let's say we made a mistake and we built an inlet wrong somewhere and it cost \$5,000 to demo it and put it back, well, the client's going to say, ‘Well, it's your mistake, you pay for the \$5,000.’ Because why would they want to eat that? So, it's a risk-reward, more risk, more reward, on the private side. Public side, a little bit less risk, but the profit, I think it's capped. Even escalation of year one versus year five, I think there's only a 3% escalation each year, so ... Whereas on the private side I can give my staff a raise, a cost of living raise of 5%, and I would pass that 5% along to the client. Whereas on the public side, if I give the same staff 5%, I would only get 3% back because it's a cap escalation. So, the firm eats the 2%.” [#3]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “it (public) can because there's certain contracts sometimes we have to go through, certain government pre-established contracts, and they already have pre-negotiated with the manufacturers that we work with, with the pricing, and they've already

pre-negotiated our commissions, and so on many occasions there may be less profit, but still enough to continue doing business with them." [#16]

- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "public sector normally, not always, but often just goes with the lowest bidder. So, we on some jobs have been outbid by like, a million dollars, and we can't understand how somebody else can perform the work for such a low price. We're like, "How?" It's just impossible. So yeah, we can't work that out." [#22]

**Five business owners did not think profitability differed between sectors.** [#4, #6, #7, #18, #28] For example:

- The non-Hispanic white male representative of a majority owned construction firm stated, "no, not really, because if there's additional cost for prevailing wage, we offset our price accordingly. So, it's not necessarily that we make any more or less for private or public work, really. For us specifically, our profitability is not any different between private and public. We try to get both equally, without bias, really." [#4]
- The non-Hispanic white male representative of a majority owned professional services company stated, "I wish I could say that it is in total. What I will say though, is what is consistent is that they are both unpredictable. Because at any one time you can think that you have a smooth-running municipal or public sector project and it could all of a sudden just be put on hold. And in doing so it may take longer to get paid because they put the project on hold and yet you've got this time into it, and they are putting everything on hold. The same thing happens in the private sector, also. Or they will say, 'well we really don't have... You went and did that work I did want you to do that, but sorry I don't have the money.' Or they give you less or you know, 50 cents on the dollar or what have you." [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, "sometimes it can, and what happens in that is, and it can happen both sides because sometimes there are things we are not aware of, or whoever's creating the project is not aware of at the time, when you start it. So, like there's jobs that you'll bid to go in and do, one day or two days straight out, everything has to be done. Well, then you get on site and you find out something isn't correct or wasn't done or there was something that had to be changed in that process. And so, then it changes how we have to do our work. In the public industry there's more people involved, more industries in the project, and depending on the project. So, I do think that's where that can happen, and the same thing, in order to get an approval for something that has changed, it takes more work because you're having to explain it to the superintendent on site. Then, they've got to agree or disagree with that. And then, even if they agree, now they have to go get the approval. They have to get all the parties together. And go through it and explain it, and sometimes they want to see what's going on to understand it, but so it just kind of depends. And then it has to go to the person who's in charge of the project to get the approval, and then it has to come back down. And so, when you get things like that sometimes, it slows down the process, and you have to stop. And there's nothing wrong with that. If you get the problem corrected and make that way when you go forward, it's right to begin with. But it can slow down the process, it can

change your profitability a little bit. Where in the private industry, if you find something like that, there's less hands to go through." [#7]

- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, "it's pretty much the same. The only difference is in the purchase of the certificate because we have to purchase them from the state before we can issue them, in blocks of 50 with that. Government entities, they don't use those so there's no outcome." [#18]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "for my size company, it was very similar. So the profitability was similar." [#28]

## E. Doing Business as a Prime Contractor or as a Subcontractor

Part E summarizes business owners' and managers' comments related to the:

- Mix of prime contract and subcontract work (*page 62*);
- Prime contractors' decisions to subcontract work (*page 66*);
- Prime contractors' preferences for working with certain subcontractors over others (*page 71*);
- Subcontractors' experiences with and methods for obtaining work from prime contractors (*page 72*); and
- Subcontractors preferences to work with certain prime contractors (*page 80*).

**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.

**Many firms (n=10) reported that they primarily work as subcontractors but on occasion have served as prime contractors.** [#1, #2, #11, #15, #23, #25, #27, #29, #34, #36] Most of these firms serve mainly as subcontractors due to the nature of their industry, the workload associated with working as a prime, the benefits of subcontracting, or their specialized expertise.

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I have subcontracts with prime companies. I am on retainer with CEOs and give advice to boards when needed." [#1]
- The non-Hispanic White female representative of a WBE-certified construction company stated, "we're not really prime contractors. I guess on the service stuff we're technically prime because it's direct to whoever the owner is. So, the majority is really as a sub." [#2]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "I'm a sub, yeah. Which was the case at the City of South Del Mar and other work that I've done in the public sector." [#11]

- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "we're always a subcontractor being that we are not a licensed contractor." [#15]
- The Hispanic American representative of an MBE-, SBE-, and DBE-certified construction company stated, "we don't have a license, which would allow us to be a prime, but we are able to participate in the market as a sub. Maybe down the line we might consider becoming a prime for small jobs, but as of now, that's not something that we want to do. Because, for example, to be a prime, there's a lot of knowledge that you need. There's a lot of knowledge that you need to know about the entire job. And as subs, we specialize in a certain area of the project. So, we are really good at piping and miscellaneous steel, we can do that. And for us to become a general, we would have to have knowledge in small structures, we would have to have knowledge in how to cut the pavement. And then as we grow, we can hire individuals with that knowledge. But right now, as we go are growing, it's beneficial for us just to be a sub." [#23]
- The Asian Pacific American owner of an MBE-, SBE- and DBE-certified professional services company stated, "for most of our projects we are a subcontractor, or a subconsultant with a single contract. Just because our specialty is pretty narrow, geotechnical. We only address that one aspect of the project, and the project is just more than geotechnical. There's unit structural, units civil and all that." [#25]
- The non-Hispanic white male co-owner of a construction company stated, "yes. Because of our specialty." [#27]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "because of the size of the company." [#29]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "everything has been subcontracting. I only have one prime contract. I like being a prime, but basically, the one that I'm a prime for, it's a specific control contract, so I don't have any subs. So basically, it's one contract. I go directly and handle everything. I don't have to go through kind of a chain of command. I can, pretty much, directly contact. So, in that way, it's easier for me. If there's an issue, there are less people involved. I guess the prime is better. However, if it's a big level Caltrans contract or something, I don't know. It could be different. So, it might be good to have a big consulting firm, kind of the go in between in case there are any issues because they've got more experience with that. So, I don't know yet. For certain entities that we work for, essentially you have to be a member of basically it's the cooperative ecosystem unit. And in order to get certified for this, essentially, we wouldn't qualify for it. Generally, it's universities and nonprofit organizations and stuff like that and the feds are the only ones who qualify for basically this organization. In some of these contracts and like the army corps NAVFAC contracts, the only way to bid on these contracts is to be a member of this unit. I need a nonprofit organization to go through. Now, it can be a straight pass-through contract like one of the ones I have now to where there's no involvement with them other than the fact that they're a gateway

for us to do the contract. But they also take a percentage of the contract. So, anyway, in certain cases, like being a sub is the only way we can actually get on a contract.” [#34]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, “generally as a sub-contractor. Because of the bonding requirements for big projects. That was scary. I don't want to do that... [but] we're not really a sub-contractor. Although an engineer hires us to do something so I guess in that way we are sub-contractors. But the client faces us directly. The engineers just coordinate our work.” [#36]

**Nine firms reported that they usually or always work as prime contractors or prime consultants.** [#1, #5, #7, #11, #16, #20, #26, #35, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “so far everything I've been doing is as a prime, and that would be most of my work when I work with small companies or with any company.” [#1]
- The non-Hispanic white female co-owner of a construction firm stated, “he's basically a prime contractor but we have been a sub. For a company that has been contracted by the City of San Diego. It would be like ... I'd have to say 98% prime. It's way up there, because the subcontractor work comes only if there's been a flood or fire on city property.” [#5]
- The non-Hispanic white female representative of a majority owned construction firm stated, “most of the time we are the prime on the job. Probably about 80% of the time, we're the prime.” [#7]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, “I'm the prime contractor on the private work.” [#11]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “On one side, we're 95% of the time a prime. I think it had to do with the focus on growth, right, a strategic focus on the construction side. I mean, obviously, when we were getting into the industry, we were very open to being a sub-contractor because we were building up that back-log and the repertoire. And you know, the agencies that we wanted to get into saw that we were actually performing that kind of work, you don't just get handed work, you have to physically do the work and show them that you were successful at performing the work and coming under budget and meeting timelines for your schedules. And so yeah, for us, it was really a focus on how do we become a good prime contractor, and, you know, understand the small business aspects of construction and how to really navigate within the federal arena. And then you know, the program teaches you how to become a better contractor, hiring the right people, and investing in equipment and tools and getting ready for the open market because it's not forever, it's a small window of time that, you know, the government allows you to utilize these tools to become a better contractor after you graduate from the program.” [#16]
- The non-Hispanic white male owner of a construction company stated, “5% is sub and 95% is prime.” [#20]

- The Asian Pacific American owner of an SBE- and DBE-certified construction company stated, "we mostly do prime contractor work. Because we have the certifications and also the licenses, we can bid directly. When I don't have the certification and the licenses in a particular area that I'm interested in and there is a requirement for that, then I approach a prime or a prime approaches me to be a subcontractor to do that work." [#26]
- A representative from a majority owned construction company stated, "most of our public works jobs, we are the prime. We only do sub work maybe 10-15% of the time. We tend to be, with the larger contracts, more of a construction manager. Our section of work like the asphalt paving, but we all have some subcontractors to do electrical or... That sort of thing, some things like that." [#35]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, "I would say 80% prime, 20% sub. We've gotten more military work which is prime contracting." [#37]

**Seven firms that the study team interviewed reported that they work as both prime contractors and as subcontractors, depending on the nature of the project.** [#3, #4, #6, #16, #22, #28, #29] For example:

- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "usually prime and subcontractor deals more with the public works side. So, for example, on the private side, if we worked with Pardee Homes or something, they wouldn't call us the prime, they would just say, 'Oh, here's a civil company, here's an architect, here's a landscape architect.' So, we would each independently contract with the developer. Whereas on the public side, you would have a leader, which is the prime. The prime babysits all the subs, right? So that's the difference. We haven't been able to be a prime on the public works side. So, if SANDAG had a smaller contract, like \$5,000 or less, then we could be a prime and we could babysit all the subs and stuff like that. But if the contract is so big, we're not going to even be able to be the prime. We would always be a sub by default." [#3]
- The non-Hispanic white male representative of a majority owned construction firm stated, "Our permanent fence branch has been a prime. Rental fence never the prime. But yeah, our permanent fence has. For my rental fence, 100% of the time we're subcontractors. It's because we're considered a non-construction-site service, it's more of like a security fence type product, so it's not something where we would manage any true construction. The branch that we're located at, because we have half the building for permanent, half is rental, which I'm manager for the rental side. So, there's another branch manager just for permanent, so they do subcontract for installation of their product, the permanent fence side. But me, specifically for the rent-a-fence division, we don't subcontract anywhere." [#4]
- The non-Hispanic white male representative of a majority owned professional services company stated, "yes. Many times we've primed and subbed. Although it will depend upon what kind of a project we're speaking of, as I mentioned earlier, in the mid-2000s, we

started doing larger public parks. I'd probably say it's weighted towards a sub and say 65/35." [#6]

- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "I think at this point on the other side of our business, we may be 50/50 because of our specialties division that we work with large contractors." [#16]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "both. We probably subcontract more. We have one large prime contract, but I don't really know. In terms of money? Our large prime contract is worth a lot, but I would say we only have about five prime contracts and the rest we sub." [#22]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "I had both prime and sub-contract. At the beginning, I was a sub and by the time that I sold my company, about 70% was as a prime." [#28]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "I mostly do subcontractor work because of the size of the company." [#29]

**Four firms explained that they do not carry out project-based work as subcontractors or prime contractors.** [#10, #13, #17, #18] For example:

- The non-Hispanic white male owner of a construction management firm stated, "that's the thing, like, not for the government because we're kind of new, but on private, see we're owner's representatives. We're not primes or subs. Yeah, we're a third category. We're construction managers. So, like typically you'd say like, say somebody who owns hotels. They're good at operating hotels, not necessarily good at building hotels. So, they'll hire us to build their hotel and then they can start operating it, because they only build maybe one or two hotels a year. You don't need a full-time staff of guys like us." [#10]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "no, I supply materials." [#13]
- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, "only ever had my own services I provide." [#18]

**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 CUCP-certified subcontractors.

**Thirteen firms that serve as prime contractors explained why they do or do not hire subcontractors.** [#1, #3, #5, #7, #10, #11, #15, #16, #17, #20, #22, #34, #36] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I have not had the reason to do that yet, but that would

be a possibility because either there might be something that I can't handle within my field of expertise, or if I get busier, and I need someone to help me, I have actually talked to other firms, other individual consultants, to have arrangements to be able to do that. Well, like I said, let's say, if one of my clients needed more in depth, financial consulting to set up their business, I can help them with budget management, but if there's a lot more detailed financial type of a role, then I would bring on someone with more of a financial background, like accounting background and things like that as a subconsultant to help the company under my contract." [#1]

- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "when we get a contract from the developer sometimes, you have subs that are, they're experienced in drainage, storm water. Sometimes you get subs that, survey sub, mapping sub. So, a lot of times the developer would ask us, 'Hey, can you manage these subs for us and manage their contracts?' So, their contract would be embedded below us. But as a prime, if the subcontractors make a mistake and they don't have enough insurance, in theory, you are responsible for their work, so there's a disadvantage of being a prime. So that kind of leads back to the previous question, how come you can't be a prime? Because liability is also important." [#3]
- The non-Hispanic white female co-owner of a construction firm stated, "we do have subcontractors as well, that would be for tree trimming or concrete curb cutting, that kind of thing. Not very often. Again, that really depends on what kind of work is wanted by the client, but we do hire a tree service contractor for trimming branches that are off the ground and to remove trees. We also have contracted cement workers for concrete finishing or for drain drilling that has to go through the curb, that kind of thing." [#5]
- The non-Hispanic white female representative of a majority owned construction firm stated, "like railing, for an example, it's when we put in the handicap ramps or some of them has to have railing, we don't do the railing. So then yes, we will set out the railing part of that, but we make sure that it meets the specs that we require to do that job. And so, there are few things like that we will do." [#7]
- The non-Hispanic white male owner of a construction management firm stated, "in fact, most of my employees, they weren't really employees. They were all subcontractors. They were guys who I would hire that did the same thing I do or some variation." [#10]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "if it's a specialized field, like sales reports, electrical, that sort of thing. Yeah, we would subcontract. Yeah, surveying, aerial surveys. So, there's specific sections that we would subcontract." [#11]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "because they tend to be a little more difficult personality-wise. In addition, the subs that we will not work with, one of them in particular actually committed fraud against us. And the second one refused to provide us with the W9. Basically, when we obtained the Mid-Coast contract, I actually went and sought out a lot of Hispanic truckers,



and I basically gave them my card, and I told them we were going to be starting a new project, and that I wanted to talk to them a little further and more in depth about the project. And so, when they called me, or I would call them, I told them about becoming DBE certified, and I helped them get in contact with the SBDC so they can become DBE certified. And I basically sent them all up there to Cheryl Brown, and she helped them get DBE certified. So, since then I've developed relationships with a lot of them." [#15]

- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "a lot of it is a directive within the request or proposals that the agencies submit for bid. They tell you, you know, 'hey these are our small business goals, we've got minority, or we've got women-owned that you need to hit a percentage, we've got veteran-owned that you need to hit a percentage, we've got minority business and you have a percentage,' so a lot of the times they tell you the percentages, and so obviously we're mandated in order to be able to bid on the project to hit those goals. we typically will sub out installs, that's pretty much it. There is a difference, I think, and it's not because we want to go with a non-small-business, it's because they've got their stuff together, they've got 60 years of experience in doing this specific trade. And a lot of times, it's a specialized trade, you've got companies that only focus on high-voltage electrical and they happen to be a large business, but it's because that's what they've done for 60 years, and they're the masters at it." [#16]
- The non-Hispanic white male owner of an inspection services company stated, "sometimes when we have to. If I were to go on vacation, we'd hire a subcontractor to come in and fill my spot. Interview them just like if we were hiring an employee—they have to be state licensed and have certain score requirements met before they can come on board." [#17]
- The non-Hispanic white male owner of a construction company stated, "one of my employees, I helped him get his own electrical license and so now technically he's a sub." [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "we can't do certain tasks like, I don't know, if you're interested in knowing the exact tasks, but we can't do large-scale aerial survey because we don't have a plane or a helicopter. We don't have the technology to do something called potholing, which is when you use really high-pressure water to drill through the ground so you can get to pipes and things underground without digging up the road. We can't do utility location. So we have two or three different subs for those services, if we need them we just ask those people to team with us." [#22]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "I don't foresee us ever subbing any work out. Not the type of work that we do because of the liability involved." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "We have a husband and wife team that are excellent biologists and they do all the zoology work if that's needed. More on things to stay uncertain. Protocol licenses to do endangered

species surveys and we use that for those things. It's a personal relationship with trust."  
[#36]

**Fourteen firms that the study team interviewed discussed their work with CUCP-certified subcontractors and explained why they do or do not hire CUCP-certified firms.** [#1, #2, #5, #6, #7, #10, #11, #16, #20, #22, #25, #26, #35, #37] Their comments included:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "since I'm a small business myself, I don't necessarily make that a criteria because if I'm working for a public sector and I bring a sub on board, they automatically roll under me and I'm already a DBE. So that's not a requirement for me. If I wasn't a DBE, that would be a different situation or a small business, that'll be different. I can tell you when I worked for large companies and I had to bring people like that on board. Again, we typically went with firms that we had relationships with, because some of the firms that were certified didn't necessarily have the experience. So, it made it more difficult for the prime to hand hold and work with the sub to make sure they follow the procedures. So again, it would have been really important to have prior relationships and prior work experience with that company to pick them as a sub." [#1]
- The non-Hispanic white female representative of a WBE-certified construction company stated, "especially if it's on the public stuff where there's a set aside where we have to hit a certain percent. A lot of times it will be disabled that or disadvantaged. So, we have to, but we always send it to the same group of people, but we more focus on them if there's a set aside. There's literally no difference [between certified and uncertified subs]. They tend to get more work on the public sector because there's so few people with some of the certifications that you have to use them or like control subcontractors. There are only one or two firms in San Diego that are disadvantaged. So, you have to use them. So, in some of the public stuff, they get used more so they're little ... it's good and bad. There's more spread out, but they're more familiar with certain campuses, like on the schools, for example." [#2]
- The non-Hispanic white female co-owner of a construction firm stated, "not consciously, I wouldn't say. Although interestingly enough, both of those contractors that I just mentioned are Hispanic." [#5]
- The non-Hispanic white male representative of a majority owned professional services company stated, "not really, and that may be why we're still small, because I don't push that. I look for people based upon... and companies, for what I know that they can offer to the design, and to the team, not from a standpoint of checking the box because they meet some labeling criteria. For me, I guess I'm old school, in that it's based upon your abilities to do good work, not based upon what hat you wear, or what handshake you know, for the fraternity that you're trying to get into, or what have you" [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, "certified subs compared to the non-certified subs? No difference." [#7]

- The non-Hispanic white male owner of a construction management firm stated, “I don't want to be rude or inappropriate in any way, but usually any company that gets like... Not all of them. Most of the disabled vet companies are hard core great at what they do, because they're vets. These guys are ex-military, they know what they're doing. But a lot of them that are like woman- or minority-owned, sometimes it's dad's company, and he gives it to his daughter to run. And so, it's really just run by another white guy. You know what I mean?” [#10]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, “typically, no. Unless the scope of work from the prime contractor specifically asked for something. But at this point, there's been no need for it.” [#11]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “there is a difference, I think, and it's not because we want to go with a non-small-business, it's because they've got their stuff together, they've got 60 years of experience in doing this specific trade. And a lot of times, it's a specialized trade, you've got companies that only focus on high-voltage electrical and they happen to be a large business, but it's because that's what they've done for 60 years, and they're the masters at it. I mean, the 3 subs that we work with are small-businesses, are minority-owned, one of them is women-owned. So, I don't know if we've looked for it, but it's fallen like that and it's worked out excellently, so we've been lucky to run into them.” [#16]
- The non-Hispanic white male owner of a construction company stated, “I don't [look for certified subs]. I just go based on referrals. So, when I pick up the phone then I have well established main contractors that I key off of. And anytime I need something complex done like all the work here, it's all done by, I say, ‘Hey, I need this task.’ And then I call one of the contractors that I respect, and they say, we'll call this guy or call this person, this woman, whoever it is. It doesn't matter who it is. I've never known if somebody has that cert or not because it's not one of my questions I would ask. Well, I wouldn't say because you have that certification that I'm not going to hire you. Absolutely not. I would absolutely hire anybody who can do the work. Race, ethnicity, age and gender, it doesn't matter. If you can do the job, then I want you.” [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “I mean, it's always good to have more diverse companies on your team. And some of it, it really depends on what the proposal said, but it seems that the subs we use are all diverse anyway. So, we are already a DVBE, a disabled veteran owned business. And it really depends what the RFP says, so if we are going to bid on a job and it says, ‘You must have 10% woman-owned business,’ then we would use one of our subsets of woman-owned business. But the two subs we mostly use are both woman-owned and minority- I think, so we usually can make that criteria. Is there ever a difference? Not that I know of.” [#22]
- The Asian Pacific American owner of an MBE-, SBE- and DBE-certified professional services company stated, “we've had certified subs. Some used to be certified and they aren't anymore. Like I said, one of them grew too big. We didn't choose them for their certs, they just happened to have certifications.” [#25]

- The Asian Pacific American owner of an SBE- and DBE-certified construction company stated, "to find certified subs the most obvious place really is to go online, Google DVBEs or MBEs, and sometimes you can also search on DIR. Are you familiar with DIR? DIR is Director of Industrial Relations. Sometimes you can go in and search, but there are some places that are state websites that you can search. DGS website will help you also identify some of these organizations. Non-certified subs are more plentiful in terms of selection than the other ones such as WBE, DVBE. All those categories, the one that the state is actively pushing almost on all contracts now that I see, that I go into, for example CHB is one, another one would be DMV, in the state are all now requiring in some fashion DVBE, minimum of 3% to 5%. And again, it's very, very difficult to comply with that, and it's almost like it's mandatory now that I've seen some that have just said, 'DVBE is optional and it will give you an incentive,' which is good for us and we can select. Otherwise, if they make it mandatory, then it becomes challenging. It's also difficult to find them for one, to match the qualification and then the location. Qualification locations are important, so it's difficult to find somebody qualified and have a proper license for that particular area. That becomes a challenge for me. And then of course, the field is very narrow in selecting those also. There aren't that many available. And if there are, it's some kind of ... For example, if I'm in the area of landscaping, I'm looking for a DVBE landscaper, there may not be any in that area, so now I have to find a DVBE somewhat related to landscaping, maybe such as management. They might do something like management assistant or something." [#26]
- A representative from a majority owned construction company stated, "we have a list of subcontractors and all the stuff, DBEs and all those qualifications. So we would request those people to send us bids. Normally the private sector doesn't have those requirements. If our subcontractors has one of those qualifications, that's a bonus. Usually, it's not required. It's not something that benefits anyone. From my point of view, I don't have much of a difference between them. They still have to get the required paperwork." [#35]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, "as much as we can. Most of our preferred subs are already. There's some that are good and some that aren't on both sides, you know?" [#37]

**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, #25, #26, #35, #37] For example:

- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "either through e-mail or somebody would send me the RFQ where they would ask us, 'hey, are you guys going to prime this job? We want to be your sub.' So those are the two main things." [#3]
- The Asian Pacific American owner of an MBE-, SBE- and DBE-certified professional services company stated, "we choose our subs through, I hate to say it, but good old boy system."

We've just worked with them for so long. Our projects require a certain amount of insurance. The airport requires a \$5 million insurance, the railroad requires a lot more. And there aren't that many drillers that carry that much insurance. In fact, in San Diego County, there's only one. So unlike the bigger company, like Kleinfelder, for example, Kleinfelder can carry the driller under their insurance. With us, we can't do that, so the driller has to actually be able to stand on their own legs. That limits us to one driller. We don't have a lot of choices. And then some of them are a specialty also. We do geophysics and all that, and there aren't that many geophysical companies around either. We've fallen into the same trap like the City used to do. You get so comfortable. It's hard to start with different companies, people you don't know." [#25]

- The Asian Pacific American owner of an SBE- and DBE-certified construction company stated, "first and foremost, they need to have the appropriate licenses, and then they need to have the experience, and those are the two main areas that I look for, licenses and experience." [#26]
- A representative from a majority owned construction company stated, "we accept bids and [inaudible] for the public sector jobs from a list that we have of subcontractors. And for a private job that we're doing, usually, of a smaller thing and we would just call them and say 'Hey, we need this.' We would call our favorite sub in that category." [#35]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, "through competitive bidding." [#37]

**Firms who work as prime contractors explained that they do not want to work with subcontractors who are unreliable and consistently under-perform.** [#28] For example:

- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "we select our subs through personal relationships. There are subs I will not work with just from bad experiences." [#28]

**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.

**Three subcontractors mentioned the helpful role San Diego's programs play in finding work.** [#3, #10, #15] For example:

- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "we sign up for all the SANDAG on-call and stuff like that, so a lot of the time you would get notification through e-mail that there's a new project and stuff like that. So, I would look through it and I'd make ... I would filter through it, and if it makes sense then I would take it to the partners, if it doesn't make sense then pretty much it dies after I read it." [#3]
- The non-Hispanic white male owner of a construction management firm stated, "we watch all the proposal (sites) like PlanetBids and eBidboard and we look at all the proposals that

are out there, and pick and choose on what we might bid, as far as government stuff. In private sector like I said, it's just people know me and call me." [#10]

- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "basically, we look through the Caltrans website, and see what's within our district, and we submit bids. First, we opt-in, and then we look to see what prime contractors are needing help, and we fax or e-mail a bid sheet. In addition to that, we also have established relationships with several primes who then seek us out. I would say that the one that we did work with, it was more of like, we're already DBE. They initially had us as a trucking company, and then they would use their own trucks, of course, before using ours. So, they didn't need, I guess, the credit as much, so... Yeah. I think, had they not been certified, they would've probably provided us with more work regardless of their own trucks because they would've needed the credit. I go to the meet-the-buyer events. I mean, definitely introduce ourselves and, you know, hand our card out, let them know what we do. On most websites, like Caltrans, for instance, there's a section of the website where they post that they need help. When it comes to like the different cities, I guess, they post who goes to the mandatory meetings. So, I look through the list of people who signed in, basically, and I reach out to them to see if they'll be bidding. With the City of San Diego, there's, all the, I forgot what they call them, is it stakeholders, or plan holders? They're listed. They're not necessarily bidding, but they're listed. Obviously, they have an interest, so then we reach out to them. Yeah, the different government websites, from the cities to Caltrans, PTAC, the business center, they sometimes post. I guess I reach out to them, and they have posts on their website. And then the meet-the-buyer events and mandatory meetings. Like, for certain projects, Caltrans will have mandatory meetings, or the city or the school district. The school district conducts walk-throughs." [#15]

**Eight subcontractors reported that they are often contacted directly by primes because of their specialization, their CUCP certification, or because of they are known in the industry.** [#5, #22, #25, #26, #27, #29, #34, #36] For example:

- The non-Hispanic white female co-owner of a construction firm stated, "the growth has been actually quite good as far as getting the word out. It's been mostly word of mouth. And people enjoy my husband's personality and the work that we do, and so they tell their friends and their neighbors, and so we have grown kind of organically, no pun intended. Well, we have done some advertising, but not a whole lot. We have the name of our business on the trucks, and people see our phone number and a lot of times they'll look up our license like, 'Oh yeah, you're legit.' Just like, 'Well, you're not just really a gardener.' So no, we're not gardeners. I mean, we are landscape gardeners." [#5]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "we team with other large general contractors and we provide the survey or the mapping portion, and then actually build the thing or... So, a lot of our work, people just request our survey services, and then we subcontract to them. Yeah, and some people subcontract us because they need their DVBE credit, so they want to have us on their team and they put our name on the proposal, but then they never give you the work. Mostly people contact us. But if we find a large contract with the GIS or survey or LIDAR scope, we

can find out who the primes are and contact them, too. So, it's both. Mostly, they contact us, though. Usually, when someone has an RFP and they're writing their proposal as prime they already know who they're going to use anyway. So, it's mostly a waste of our time to contact them, but we try. We attend a lot of meet the prime events. Again, we do the e-mail, too. We try and create contact lists of different categories and e-mail them. Mostly with this kind of thing it's all relationship building, just meeting people and saying like, 'This is what we do, can we be on your team?' Yeah, and networking. That works the best. Like, us just sending a cold-call e-mail, you get very little response, but you do get one or two out of 500. So large contracts for example, I met a guy the other day that works for the Navy and he sent me a list of primes that are working on the large contracts that might need survey or mapping work. You can also look, if you are bidding on something, you can look on PlanetBids. Are you familiar with that? And it tells you which primes are going to submit a bid so you can contact them that way. Yeah, PlanetBids, other portals like that. Sometimes the primes e-mail us, because you know when you get onto somebody's contact list and they just say, 'We're bidding on this job, can you help us?' But some companies now, for some reason, do an invite-only bid. So they decide, like, that, 'We want these eight companies to bid,' and they only send it to them. And then we can never work out why we weren't on the invite. Who knows how or why they do that, but it's strange. Yeah, like, Metropolitan Water District do not advertise their bid proposals. They invite only. So, it's strange." [#22]

- The Asian Pacific American owner of an MBE-, SBE- and DBE-certified professional services company stated, "these days, mostly the primes call us. They ask, 'do you want us to be on this, on our team for this project?' They don't have certifications, and that's why they're looking for us. That's why the DBE certification is so valuable for them, because they have to meet their quota. We still go to association meetings, and then we still go to all the City of San Diego Caltrans events. Not so much to find work, but just to meet people, talk to people, shake hands, exchange business card, and remind some of the older people that we're still around." [#25]
- The Asian Pacific American owner of an SBE- and DBE-certified construction company stated, "it's really challenging and difficult unless you have a networking system in place already and they know that I have a certain license, then they'll contact me. Other than that, for me to advertise as a subcontractor who is available, it's very, very challenging, because there's no system in place for us to do that." [#26]
- The non-Hispanic white male co-owner of a construction company stated, "I am asked to bid on the project from the prime contractors. The way it works for me is they e-mail. They ask me to bid on her job. I get asked probably five or six jobs a day." [#27]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "I do a little bit of business development, attending seminars, meeting with some of the prime contractors. Other agencies: SANDAG, Caltrans, North County Veterans Association, it depends. I also belong to PICAC and they send a lot of those seminars or events." [#29]

- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "I'll have a consulting firm contact me because they find a contract that has control and so generally that's how it goes. Or we meet people at a meeting or conference-style event, and then we exchange information, and then they contact us, and we'll generally do conference calls or whatever. Then we'll eventually submit a proposal." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I get calls one or two a week to do projects. And this is me, so I'm very busy. I was on some [call and he said] 'Why don't you bid on this?'" [#36]

**Several interviewees said that they get much of their work through prior relationships with or past work performed for primes.** [#2, #3, #4, #6, #7, #16, #20, #28, #34] They emphasized the important role building positive professional relationships plays in securing work. For example:

- The non-Hispanic white female representative of a WBE-certified construction company stated, "either low price or relationship. Relationship goes pretty far even than the low price because not all general contractors will take a low bid from someone they don't know. Because it's scary to take a low bid from someone you don't know, especially in a public works project where there's so much on the line. So probably relationships is the most. A lot of the public sector work, you have to be registered with the agency or with the school district. So it's sort of, I don't know justifies or, you've already kind of jumped through the hoops and have been pre-approved and I don't know. They've already checked you out. So if the agency or the school district have approved it, then you can already just like pass the bar. But for most of them, it kind of just goes back to relationship. On the public stuff there's job lock signing. So before a job bids they'll have everybody who wants to come see to the side of the building. Come see and walk around and basically just make sure you have all of the bid documents. Usually a general contractor. One will invite you or if it's a building, like sometimes we get them before the service contract on the building and the facilities guys will give us a heads up so we can go find them that way, Find out new general contractors was that way and send in the bid, but it's not necessarily like, not a lot of dog and pony show, I think. Job locks, job lock lists for the public stuff or going to the job lock. And then the private stuff, either the vendor network or if they have a job lock." [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "you get onto a project when the prime gives you a chance to be on the project. So, like I said before, a lot of times it's networking, it's working with that same firm on another job and then you do well, and their staff vouched for you and then you get a future project with them as a sub. And that's a real example that we're living through. So, we bid on this park project, they awarded us the park project, and then we worked with the prime. And the project was going well, so that had another project that they were chasing, so the project manager kind of vouched for us, gave us a good word, so we were able to be on their team going after the project. So that's two projects. So that turned into two potentially real projects, but if we did not get exposure to that prime, we most likely would not even get on any of their projects. We do all the time. We send them our marketing package, resumes, and SOQ, but once we send it and we don't hear back or nothing comes out of it, then it's pretty much dead. We don't do it on a yearly basis, we would pick TY Lin or WSP or whoever, so once we send it



and we don't get anything then that pretty much dies. I don't go back and keep asking, based on prior experience and interaction. So, they have to know us, right? They have to know me or my staff or somebody. So, if they don't know you, then you're walking through the door, how do they even vouch that you're going to do good work, right? So, a lot of times it's a former employer, that's the first step, so ... Former employer, acquaintances, former bosses, and then the next level would be people that you worked with on jobs before. Like I said, landscape architect or the architect. So, a lot of times they would bring us on, or we would bring them on because they do a good job, so at that time it's kind of like helping each other survive." [#3]

- The non-Hispanic white male representative of a majority owned construction firm stated, "sometimes like there'll be somebody who gets the general, and they'll ask one of their subcontractors to be responsible for the temporary fence, and they'll be like 'why me?' you know. And there'll be like a grading contractor, and they'll be like 'hey, it appears I got the temp fence in my bid package, can you provide us with your temporary fence in this case?' how they come to you typically. Just because of how long we've been in this market, you know, we're pretty familiar with the ones that have been around, and then if there's newer ones, we seek to try to provide bids for anybody bidding, you know, those type of projects. For me specifically, I mean, we try to get it to them before, but it doesn't necessarily mean that after they get the contract, you know, sometimes they use a plug number for the rental fence part, you know, they'll say 'hey I'm just going to put 5 dollars a lineal foot towards the cost' and then if they get the job, then they call and say 'hey look I got this new job, it starts in a couple of weeks, maybe we can do a job walk,' or 'here's the footage, can you bid me for this footage?' Right, right, we try to reach out, most of the companies, that are, you know, bidding these works have been around, and, you know, we like it when they reach out to us with their bidding work, we prefer they reach out to us because they know us. Yeah, it's more of a conversation, like 'oh hey, I'm bidding this job, I see they're going to need this or that, can you get me a number?' We also try to reciprocate and look for work that people are bidding and ask them. You know, anybody that requests plans or shows up for any kind of preconstruction meetings, you can see who's interested in bidding a job, and we try to find out who's interested in bidding work, and we can call them, and they'll say 'nah, I'm not going to bid it' or 'yeah, I'm absolutely going to bid that, yeah I'd like it if you give me a number,' so, you know, we try to work it both ways." [#4]
- The non-Hispanic white male representative of a majority owned professional services company stated, "we had such a good relationship, and we teamed up with some engineers. And I believe it was because of our reputation we got those other projects, but we were a sub in those situations. I'd say establishing the relationship with the firms that you start off with. It's all about relationship building and developing their trust. I have a good, great, relationship with a large civil engineering firm that we started on a project, and we came together not by anyone's specific choosing, but as a result of the success with that. They have since asked me to team up with them on numerous projects, since, and to continue to provide the landscape architectural services for them, with the work that they do." [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, "a company will be on a project, and they'll need something, and they'll know the

owner, and they will call him and say, 'We would like you to come out and help us on this.' And we will try, because same thing, that's a relationship that we want to keep. By word of mouth and they see projects that we've done, and that's how we usually get contacted." [#7]

- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "one is qualifying with all the requirements that the primes have. Sometimes being a small business is a big one, and just being competitive. And also, I think throughout the last few years we've developed some really good relationships with large primes, so we've become their preferred vendor just by executing well, you know. Bid lists. I mean they have events that we attend. We'll sponsor, you know, golf tournaments, just depending on whatever they're doing because they do a lot of that in order to raise funds for wounded veteran programs, and all that kinds of stuff. So we'll take those opportunities to show up, set up, tent, and just sort of talking to people, shake some hands, knock on doors sometimes. Just BidMail is one of the ones. Basically, you sign up and list the scope of works that you can take on and you'll get invitations. That, and some are through relationships that we've grown, you know, they know that we do this, they'll give us a call and say hey, just like Keith will give a call to other subs that he knows that know how to do the work. They know that we know how to do the work, so they'll give us a call and say, 'we need you guys to bid this, bid that,' so definitely relationships." [#16]
- The non-Hispanic white male owner of a construction company stated, "it's always somebody that we have a relationship with already. They'll call us and say, we have a difficult challenge come up, and 'bid for us' and then we'll say, 'okay, we'll come take care of that.' It's usually on the smaller scale, anywhere from \$500 to \$5,000 is typically those tasks. But it's because somebody that we've been working with already says, 'Come do this for us, we trust you, we like your work,' blah, blah, blah, and just knock it out and take it off of our plate. Something like that, so it's small. It's pretty much referral based. It's people that we've established relationships with already. I was looking at a lot of larger projects through the County and SANDAG and all that stuff. Just the process of getting into those is just lengthy and it's way too much money. Then if we invest all the money that it takes to get those, then we basically can't make payroll sometimes. It's crazy. It's just word of mouth." [#20]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "pre-existing relationships or I marketed directly. My success is by my reputation and professional relationships and it's just a lot of getting to know the client. You have to build up their comfort in you as a small business." [#28]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "one of our smaller contracts, I knew a federal level representative that needed work done. She reached out to me directly, because I've known her the past few years, and she knows the kind of work we do." [#34]

**Some business owners reported that they actively research upcoming projects and market to prime contractors.** [#1, #5, #23, #29, #34, #35, #37] Those businesses reported that they research upcoming projects and sometimes identify prime contractors using online and other

resources. Some firms then contact the prime contractor directly to discuss their services. For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "in this particular case, I met with the owners of the firm, and we talked about opportunities to work together. And they asked me what I did, and I went over all the different things then. I also mentioned that I do, reports and quality control and all of a sudden, they chimed up and said, 'We have a report we need to finish, would you be able to work on it?' So I said, 'Send it to me, let me look.' And we negotiated and I'm signing the contract basically to edit a report for that. But it was because of the relationship again, because I had lunch with them. We wanted to talk about what we could do together. And they are small businesses as well. They are woman-owned businesses as well. So we're working together now. So depending on the programs and the kind of projects that they're going after, I just meet with them and talk about the type of services I can provide that may be helpful to them. And, I'm not targeting specific projects at this point. But I'm just giving them info... Because I'm new, a new firm. I'm just giving them information about what I can do, give them a business card, refer them to my website. So just in case they can think of something they can come up and let me know. So that's the problem. Is how do I find the firms that do my kind of work as a prime so I can get on their teams? So that's the difficulty, the challenge I have. I think primes pick their subs based on who they know, and trust and whether they're responsive. So it's tough to bring on a new firm without knowing what their work ethics are, what their expertise or if they're really good at what they do, are they responsive. So it's tougher to get in the door. Once you have a foot in the door and you've done a good job, the primes would love to get you back. But that first instance when they're going to be on your team, that's the hardest part to overcome. That's the big hurdle. Well, I think a lot of times people get to know each other based on attending meetings, going to organizational functions, they start building rapport when they sit next to each other and talk and maybe follow up. It's a process. It doesn't happen overnight, and it doesn't happen in one meeting. That's why the small businesses have to be out there all the time. To be in these events and to create that connection and make sure they can follow up and many times people are not, they're too busy. They're not, available to have lunch with you. When I was a prime, I always made time. If somebody approached me and said, 'Hey, we want to come sit with you for 30 minutes and talk.' Come on in. Because I knew it was not easy to do that. I knew it was always hard for small businesses to do that. So I always made time. But many people don't do that, and that's when you get to know a person. If you took that speed dating or whatever, and then took maybe as a small firm, you found five connections. You really have to follow up on those connections and say, 'Hey, I met you at the speed dating, can I have 30 minutes with you to come and see you and give you my information. Get to know each other.' So then the other person has to accept. Then you sit and have the 30 minutes, that's when maybe there is a lasting impression about, 'Oh, yeah, this person came in, saw me, now maybe I can think about it.' And I follow up, our thing is going, bring in projects or opportunities or leads in advance of the RFP meeting, that's what it takes for a sub to get on a team, if they're new. I always told my subs, 'If you bring me an opportunity that I may not know about, and to let me know, then you're definitely on my team, because you're the one who brought it to me.' So it takes a lot of

effort for the sub to really get noticed. Because competition is high, you don't have a relationship yet, you got to do something different to become someone that they can go to, or get a foot in the door or something like that. So, that's where things fail. That's why people fail. They don't follow through with a lot of these things." [#1]

- The non-Hispanic white female co-owner of a construction firm stated, "[the owner] will call. If he hears something happening, he will call that company, call the owner of that company like, 'Hey, do you need my work on this one? Because if you do, I need to allot some time for it.' And sometimes yes and sometimes no, just depending on if it actually qualifies as city work." [#5]
- The Hispanic American representative of an MBE-, SBE-, and DBE-certified construction company stated, "we don't need to market because we are actually chasing advertising of jobs. For example, Long Beach will put a job, so then I will take that job and then Long Beach will have a list of contractors that will bring the work. And what I do is then reach out to those individuals and say, we are bidding those jobs, we have a proposal. What I do is just submit our portion that we do to the prime and then if the prime likes our numbers, he will give us the work. So, then we become a sub for the prime. We prepare very professional proposals. I have seen some of the proposals given by fabrication companies and they are very hard to read, and they are very vague and plain. So, from my other company what we used to do is, the client would send us plans and say, 'Hey, I need shoring for this section of the building.' So, what we would do is go through the plans and in the program, we would actually highlight the scope of our responsibility of the project. And then we would give the proposal and it would be an attachment to the proposal and an actual exhibit in color saying, 'this is our scope, this is...'. So, it was very professionally put together. Whatever we can do to attract a client, we have to do. So, we would have conversations that our proposals have to be well-written, we list out all the materials that we would use, all the specifications, everything on there. All of our exclusions, it's in writing, and then we provide a detailed drawing. We actually highlight all the pipe and then we make our exhibit an attachment to the proposal. And then that way when they get... I even heard feedback that, 'we know exactly what you are going to provide from these plans, that your proposals were amazing.' And I followed by saying, 'Hey, we do that because we want you to know that if we give you this level of detail at the proposal stage, we will give you the same level of detail during the fabrication of our products for you.' So, we have to use whatever resource we can to win the client." [#23]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "primes usually don't advertise either so you got to go-- if a contract comes out from say, SANDAG, if you don't know the primes or if you don't know that there's an on-call contract coming up then you're out of the loop. So, you need to be informed on when a contract is coming up so that you can go chase, market yourself to those primes that you think might be bidding as primes. And sometimes it's a hit and miss unless you catch 100% of the primes bidding, which you don't know who is bidding. As a sub, you'll never get the work. If you miss it, then somebody else got it, you don't. for the larger contract, let's say for City or SANDAG or Caltrans, you just talk to the guys to the Primes that the larger Prime that you think might be going after that contract and you try to

get on their team. But, for this City, it's different because it's hard to identify who's going after that contract. If you're not in the loop, if you don't have friends in the City, you don't know who's going after the contract. The Prime sometimes if we have a good relationship with the primes, the primes approach you and say, 'Hey, you know this conference is gonna be coming up and let's say December.'" [#29]

- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "I will directly reach out. If I say I'm searching for contracts online on different, I guess, procurement websites, I'll find the contract; I'll see who's involved with it. Generally, I can find out with either they give me the information, or I do some quick research. I can generally seek out the person that would be in charge of hiring me and reach out to them directly and say, 'Hey, I saw this contract coming up. There is an element of control, and here's our information in case you want to potentially partner with us.'" [#34]
- A representative from a majority owned construction company stated, "we find out about the jobs through different trade resources, bid boards, e-mail invitations, and we can go into a project website and request to be a bid holder... A plan holder. And when we get all the access to all the plans, and specs, then we can make a bid-offer of that." [#35]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, "I'll usually get a bid invite, just by building relationships and kind of I'll look at what jobs FedBizOpps has from the government and usually I can tell who's going after what or what type of job it is." [#37]

**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.

**Seventeen business owners and managers indicated that they prefer to work with prime contractors who are good business partners.** [#1, #2, #3, #4, #5, #6, #7, #15, #16, #20, #22, #23, #27, #28, #29, #34. #37] Examples of their comments included:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I've been in the business for a long time, I have a lot of good relationships. And those would be my first go-to people instead of going to someone brand new. If I were to do something technical, my problem again is, I don't have a lot of relationship with primes that are doing what I'm doing. So that's the hard part, is trying to find some relationships there in that area." [#1]
- The non-Hispanic white female representative of a WBE-certified construction company stated, "primes we like are better to work with, friendlier, they actually pay on time. They give you feedback. Primes we don't work with, because they don't pay on time, they don't provide feedback, they're harder to deal with on site, paperwork." [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "my only two cents to that is if the prime has a bad reputation or not responsible for stuff, then I would

not get our company involved with that. Because if I see that it's going to get messy, then I would not step into it because they're a bad prime. I don't know if that makes sense." [#3]

- The non-Hispanic white male representative of a majority owned construction firm stated, "I think it's pretty common for any company to try to have one preferred prime. Typically, they prefer one company for their construction fence. They generally will choose, you know, if they're happy with one, you know, it's just you build relationships within the industry. So, it's like, if you can build a relationship, they'll generally keep using you. Every once in a while, you lose a customer you've had for a while, but you've probably gained, you know, another customer that was using somebody else, there tends to be a cycle within the industry. We definitely have some primes that we enjoy working with. For the ones that I've been working with for several years, you kind of develop almost family relationships, you know, where you've got all these experiences with them, and you get their challenges, like, you know, them needing you, and you have no time to get there, but somehow you manage to try to help them, and you pull it off. So, it's just having those relationships which makes it enjoyable. You know, and there's some people that I've been working with for a while, you know, you don't get the same value as somebody else, you know, you've been having the same company where sometimes you got that one guy that's a pain to work with, and then you've got, you know, most of the other guys are really cool to work with. It's nice working with the ones that pay their bills on time because we have some companies that have trouble doing so, or they require change orders to their contracts. They ask you to do work, you do it, but they won't pay you unless you get them to get you a change order, but you can't get them to give you a change order, so you can't even... And then, so sometimes, getting them to actually give you the change order versus you doing the work when they need it. So, as it happens, you try to be customer service-related, and you be like 'okay I'll be there tomorrow, do the work, but I need you to send the change order, you know, as soon as possible.' Well, next thing you know, they've called you out there 5 times, and you're still waiting for change orders for the first one. And then some companies have what they call pay apps, so you can't even send in the invoice because nobody will pay. You have to enter your invoices in a pay app system, and if it doesn't equal the amount allocated or less than, then you can't even submit. So, you can do all this other work, but you can't even ask for payment because you don't have the value corrected." [#4]
- The non-Hispanic white female co-owner of a construction firm stated, "that is a very good question. With the one that I've mentioned, the company has chosen us specifically to be the only landscape contractor that they work with, and so that's been a long-term relationship. And then I am not sure how he has found the other ones and what he did with them, other than they do good work. Reliable work." [#5]
- The non-Hispanic white male representative of a majority owned professional services company stated, "first and foremost is good communication. And, to a certain extent, honesty. I don't mean that people are necessarily as compared, being dishonest, but I find that sometimes they're asking things of you when they're not being honest as to what, and why, they want something. To be proactive is the other aspect. Being proactive is critical, in anticipating what might lie ahead, and making sure that you're prepared to deal with it, when it does raise its ugly head. When you work with others that understand, and agree

that those are important factors, I think that's key to a great relationship. When they're not truthful about their expectations, for what they want from you, and what your role is, and for those that... They are individuals, and therefore then, company philosophies of all stripes, and some of those in particular, be it architects or engineers, do not want, or do not perceive, the field of landscape architecture as being that important, or that necessary. Not that I'm seeking for them to look at us as equals, but they should have equal level of respect for what it is that we do. I have worked with numerous individuals, and companies, that it's apparent that they're only selecting, or are working with landscape architects, because they have to, or feel they have to. As compared to the perception that we bring something to the table, and those are the individuals and firms that I will avoid." [#6]

- The non-Hispanic white female representative of a majority owned construction firm stated, "it can be several things. For an example, we were on one project, and this has been a long time ago. We went in, we graded everything. We had it prepped. Underground people came in, who were supposed to have already been there and done their work, apparently had a problem and had to come back out. And they had to dig up parts of what we had already graded. And then the contractor was mad at us because we had to go back and regrade it. And he couldn't understand why. So that created problems all the way down the line because we had to go, 'well, we came out, it was done. There's underground guys back out here who have dug up what we've already graded. So now we cannot lay asphalt until we come back in and regrade again.' So, you do run into that, and we'll call it the order of things to be done, the process of it being done sometimes can create issues. Then there is, on the same project, they couldn't figure out... it was supposed to balance. There wasn't supposed to be any export or any import in dirt, and we had to bring in a lot of dirt, they couldn't figure out why we had to bring in dirt. Well, they found out later, this project, the plans that they were given by the City were incorrect, because there had been a railroad track in that, now is what they had been removing to turn this into a walking path or an area so that people could use, the dirt was contaminated. And that dirt had to be removed, but it never got updated in the plans. So that same thing, that put a stop to everything, because now nobody could do what they were supposed to because we're bringing in dirt trying to balance this out. And they're like, 'There's not supposed to be any dirt.' And they had to go back to the City, and it took months to get it figured out." [#7]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "there's two, they're out of Orange County, but ever since the first time we worked with them, I guess they really liked the way we worked, and they continue to reach out, whether we actually bid with them on a project or not, they just use us. There are primes that we won't work with. Mainly, I mean, and they are a large prime, but they have a really bad reputation where their employees on the ground, whether it's foremen or equipment operators, they're rude, they're disrespectful, and they, for some reason, tend to not care about your equipment. So, when you have a truck and say, they're dropping boulders into it, they're not careful about dropping them. They will pick them up and just drop them. I mean, that can be super dangerous, and not only that, but they will overload you. And if you tell them, 'I'm at capacity,' they've been known to get upset about it, even

though you're the one responsible, and that's your driver's license on the line, they get upset and they're very verbal about it." [#15]

- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "big ones, the ones getting the contracts. There's definitely some that we've had negative experiences with. There's no doubt about that, happens all the time. So, yes, there are maybe a few that we would not bid to. Bad past experiences, bad project management that makes us maybe look bad. We may not be able to collect our payments on time, and that hurts the company because we know that there's people that are expecting their check every week. And also, the company needs to stand up, stay standing up. So definitely we don't want to take any step that is too high of a risk for us." [#16]
- The non-Hispanic white male owner of a construction company stated, "we've established relationships. And there's definitely primes that I do like working with just because the communication is more transparent. Yeah, that's a big thing that if you communicate well with somebody, then expectations are set very clearly and then you can accomplish them. But when the people that are aloof, this may or may not be included, this may or may not be part of the final package, that kind of thing. That's when everything goes up for them. And they're very clear. Because when preparing for a job, you either have everything you need to get the person there with the materials or you don't. And when the person is there, working, and then they're like, well, this is in addition, then the whole process starts over where you go back, you prepare, you load everything up, and then you get back to the job site, which is doubling the amount of time at work. There are primes we won't work with, yeah, there's people that are paid slow. There's people that have not communicated well, there's people that have had shortcomings on their end, and then they'll say, well, this guy held me back, this other guy. They'll blame a third party and say, well, they held up the job instead of me when actually, it was them. So absolutely." [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "we have some vendors that ask us for proposals all the time. Like, pricing jobs. And they never use us, so that's annoying because they must just want our numbers for their proposal and then they go use someone else. So there's certain people we have a no-go list, some general contractors, because we've done so many bids for them and they've never... They win the work but they still don't use us we like to work with the utilities, because we know their work and we've got good relationships with them already. We're trying to branch out, though, we need to diversify. Yeah, and we know them and we have the experience necessary. It's hard sometimes to go to another large industry when you've got no experience, they always want to know, 'What have you done in this area or that?' So you're unlikely to win the work." [#22]
- The Hispanic American representative of an MBE-, SBE-, and DBE-certified construction company stated, "we won't work with some primes, due to them not paying us or just being difficult to work with or asking us to do stuff that was not in our contract." [#23]
- The non-Hispanic white male co-owner of a construction company stated, "I prefer primes 'cause they pay their bills. The ones I don't like don't pay their bills." [#27]



- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, “there are people that I prefer to work with because I have experienced working with them and the nature of how we do business is compatible.” [#28]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, “there are primes that I have a really good, strong relationship with, yeah.” [#29]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, “their reach is a lot farther than mine, and they have more opportunities to find these contracts that I might not necessarily be able to find. So, in general, it's good to have them, I guess, take, kind of, the offensive move and contact me versus me having to reach out to them because they already know what kind of work we do. And there's been instances where there are a few cases where getting paid [by other primes] was a very big problem.” [#34]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, “some of the big boys are a pain but some are good to work with, and then on the DBE, SBE, some are good to work with or some are a pain, you know? Some primes will beat up their subs and some will take care of them. Some are notorious for making money off their subcontractors.” [#37]

**Seven firms that the study team interviewed discussed their work with CUCP-certified prime contractors, and explained why they do or do not seek out CUCP certified primes.** [#3, #4, #15, #22, #23, #29, #34]

- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, “I think the smaller firms, they're more vested, so they tend to work harder and more responsive. Whereas maybe the bigger firms, staff firms, inundated with more projects and they have more pressure and they don't have time for you, maybe” [#3]
- The non-Hispanic white male representative of a majority owned construction firm stated, “there's a few companies that we've always had great experiences with those companies. There are several companies that we have great relationships with that fall under those categories, you know, happy to do business with them. I would say that it would probably be a little easier to work with the smaller companies. It's easier in the way of, it seems like compared to, like some of the large companies, they have their own agreements, they won't sign ours. Like, a smaller company is happy to sign our lease agreements, just a rental agreement, just sign, it's just a basic rental agreement. Whereas most of the larger sized companies, they have their own agreements, they're like 'hey you're going to do business with us, you're going to sign our agreement.' And so they give us these huge contracts, and again we're talking about rental fence, so to receive these contracts that are generally for constructive subcontractors, you know, people that are plumbers, electricians, carpenters, companies that they're subbing out to, you know, those contracts would apply to them necessarily. To something so minor, simple, as temporary fence, to have to go through these hundred-page documents can be, you know, ridiculous. So, it seems like with the smaller

and minority-owned companies, that they're more willing to sign our simple rental agreement, to us it makes it much easier to do business." [#4]

- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "I would say that the one that we did work with, it was more of like, we're already DBE. They initially had us as a trucking company, and then they would use their own trucks, of course, before using ours. So, they didn't need, I guess, the credit as much, so... It was less work handed to you. Yeah. I think, had they not been certified, they would've probably provided us with more work regardless of their own trucks because they would've needed the credit." [#15]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "yeah, I suppose maybe the work ethic of the people you're working with might be different. But just because they are more for disabled veteran or whatever, but I don't think in terms of the actual work that's to be done there's a difference." [#22]
- The Hispanic American representative of an MBE-, SBE-, and DBE-certified construction company stated, "we don't contract with certified primes because there are none. These are specialized markets and there haven't been any minority-owned companies that I know that even do that." [#23]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "you know the primes usually don't have those certifications because they're large companies." [#29]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "we've worked with a DBE, or VE veteran-owned small business [as our prime]. It was a very simple contract and it was a very small contract. The work wasn't too involved. So, it was a very simple process, I guess. This particular job was a lot less involved than most of our contracts are." [#34]

**One subcontractor also offered their perspective on hiring second-tier subs.** [#23] For example:

- The Hispanic American representative of an MBE-, SBE-, and DBE-certified construction company stated, "[we contract second-tier subs] based on the product that they can provide. So sometimes I'll need a piece of pipe bent that we can't do and there is a company in Bakersfield that does that all the time. So, I will just sub that portion out to them. There was a company that has a laser that cuts stainless steel and they were able to cut the forms we needed and shape them, and they were going to be around \$20,000 cheaper than we were going to do it in-house. So, we subbed it out to them. We gave them the work. They did it and sent it back to us." [#23]

## **F. Doing Business with Public Agencies**

Interviewees discussed their experiences attempting to get work and working for public agencies. Section F presents their comments on the following topics:

- General experiences working with public agencies in the San Diego area (*page 86*);
- Barriers and challenges to working with public agencies in the San Diego area (*page 92*);
- The factors that public agencies use to award contracts (*page 97*); and
- The SANDAG/NCTD's bidding and contracting processes (*page 99*).

### **General experiences working with public agencies in the San Diego area.**

Interviewees spoke about their experiences with public agencies in the San Diego area.

**Thirteen business owners had experience working with or attempting to get work with public agencies in the San Diego area and in other places.** [#2, #6, #7, #10, #11, #13, #15, #20, #22, #25, #35, #36, #37]. Their comments included:

- The non-Hispanic white female representative of a WBE-certified construction company stated, "we've worked with different varying school districts, varying actual cities, like City of Vista, City of Santee. I think we've chased some in EL Cajon, most of them as subs. Some of the school districts deal multi-primer where every discipline is their own quote-unquote contractor, direct to a school district, but there's always a construction manager overseeing it. You're technically a prime then, but you're just responsible for your own cleanup and dumpsters and stuff. That's really the only difference although there are some school districts you just avoid. I don't think [we've worked with SANDAG or NCTD before]. I don't think that we've ever as a company done anything or even seen bid invites. I kind of skimmed my e-mail real fast to see if we've gotten anything. And I don't think we're on the radar." [#2]
- The non-Hispanic white male representative of a majority owned professional services company stated, "In some instances, you can tell when an agency is just going through the motions of an RFP, when they have someone that they would like to work on the project. I have no problem with that, but why not just be honest about it?" [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, "for the CALTRANS project, it had to do with the intersections and some curbs and gutters, and we were a sub on that. And their bidding process, once again, it's a little different than SANDAG. So then, it's one more thing I had to stop and read up on and learn. It was easy, once I got ahold of somebody that could tell me where to get the information. And so it just kind of depends on that because that's where I find my hardest thing is trying to find a person or contact that you can actually call and go, "We've been awarded this project, we're not familiar with how your process goes. I'd like to speak to somebody and find out how and where I can get the information from and to make sure I'm getting the right information." CALTRANS is like most of the others, they have all their paperwork that has to be done correctly and has to make it all the way up the chain. But once they have it, they usually will pay within their 30 days. So, it really goes back to having that same point of contact. Because if you have that person, she sees something, or he sees something, they're going to call you and say, "Aye! We caught this, you need to look at it, because it doesn't seem right." And so, it really helps us, especially because we don't do as many jobs

as somebody else helping to make sure, if there is something they see, they're letting us know ahead of time and we're at that point. So, it's not going all the way up the chain and not, "Oh, no, kick it out, go all the way back down." So that point of contact is huge for us. I find CALTRANS a little harder to do. I think because everybody has their own site. So, unless you're, like I said, if we get invited it makes it really easy, but if you're out trying to look specifically for those jobs, everybody has their own sites. So, then you have to find the sites and then you have to find out what contractors they are looking for and what qualifications. And I understand why they do that, but it would be nice if there was... One master site, so that you could see everything that was coming up. It would be nice if all these entities could get on one program. Well, it can be a barrier, and it also makes it, you know, "Oh yeah, that project was this, I have to go into this program to do that. And this one goes to this project." So, if they could come up with one system that we could all use, it would be nice. I find the school systems to be a little harder. Because there is a lot of paperwork that's got to go in with that. And they are trying to get it where it's all online and yes, most of the time that is easier. But you're looking at stacks of paperwork. Yes, big. And so even though you send it in, you have to keep all of that. So you have to make sure you keep it in order, and make sure you got your copies lined up, so that it matches because if one piece of paper's out of line, and you have to start looking for it, it's a nightmare. You don't get paid to do all of that work. So, you either have to build that into your bid or be prepared that you're going to have some expenses that are not going to be reimbursed. But now that could be, depends on how you look at that, whether that's good or bad because if you're going to do multiple projects with them, or plan on doing it, then you can recruit that down the line. But if it's a one-time project, you do lose a little bit. It also just seems like school districts just seem to have so many entities on a project. And you can have multiple superintendents, you can have multiple projects go on at the same time. And you wouldn't think some of them would have anything to do with another part of something, but sometimes it does. It's like we're out there doing the parking lot. But there was also somebody putting up the new signs for the marquee and all that. Well that was actually tied in with the asphalt work contract, and I'm still like going, "Why?" So, we couldn't get paid until the guy got all the signage in, and the signs working and all of that. They're harder to work with and it's harder to get paid. Because what happens is, they won't pay until, they submit it and, "Okay. Oh, okay. You want to process billing. Okay, what has been done?" Okay, well, we've done this, but this hasn't been done and this hasn't been done and this hasn't been done. So even though we may be done, the rest of it isn't done. So, then you only can get a percentage of that money. If there would be a way that they could, regardless of it's on one contract or not, be able to break it down somehow so that you can keep, I guess I don't know how to describe it. Because like as we come in, we did the parking lot, but he couldn't come in and do what he needed to do until we were out of his way. So, then he comes in, and then he has to get his stuff. And then there's electrical people, so even though we may not have anything to do with this error, but because it was tied with the parking lot, we have to wait until they get done, and they process all their paperwork. Meanwhile yes, and then the following month, then you can submit again and then it's the same thing. Well then, how much now is the project done, where the first time it may have been 30%. Now it may be 50%" [#7]

- The non-Hispanic white male owner of a construction management firm stated, "We started to put together a proposal on Encino wastewater just recently, but there was a couple of competitors in there that had done recent things for member agencies very recently, so we just opted out of that one. We knew that we wouldn't win... They were fine to put the RFP in. It was kind of similar to anybody else. It was a pretty simple RFP. I will say they didn't tell us that we didn't get the job for like four or five months. I'd have to go back to see when we put that in, but I don't want to say it was spring and summer when we put that in, and we just got the e-mail like two weeks ago that we didn't get it. I don't know. We kept calling. We called every two weeks religiously, and they wouldn't answer calls, or they didn't answer back. My understanding was that it just took them that long to go through the process. They were just slow and that's, you know, some agencies are slow. Low priority compared to something else. Or as they were preparing. So, they would go, okay, we're going to go renovate these science labs over here. And we would come in and go, here's your space, these are the things you want to accomplish, these are your budgets, this is your cost. We would arrange the design teams, the architects, the engineers. You really took over the entire program, and then at some point you handed it off to the construction division and they would start constructing. So, you might analyze projects that never get done. They might say, well you don't like this building anymore. And we'll put the program management on it, and they'll go oh, yeah, it costs more to do anything than just to leave it the way it is. It's not beneficial. So, we'll just leave that building for now. And then some will look at, and go yeah, we want to tear this apart and put new science labs in here, new classrooms or whatever." [#10]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "for the school district. The prime was awarded the contract. They did place my staff that was going to work through me, but they did not participate with me, which is questionable. My firm was part of the team. My team had two engineers. They had needed 10 people, so I was proposing to have two engineers as part of the 10, the rest was theirs. they brought one of them, and without compensating my firm. Compensating or participating my firm. So, I was totally incorrect. And they're still working." [#11]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "when I go to these events and I work with VBAC, which is the Veteran's Outreach Center. When I work with them, they have professionals there that say, if you're trying to get to a certain industry, they give you these hits. So, you can maybe contact this person or that person or that person. So, when they suggested I do it with Caltrans, I reached out to Caltrans and they said, "hey, by the way, we have an event that's coming up.' I go to the event and then I would just give them my spiel for what I do and how I do it. Then they would suggest that I talk to a certain prime about my practice. And that's what I have been doing over the last year. Just reaching out to client contractors, giving a portfolio on who does what, and how long we've been in business and stuff of that nature." [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "we are on the Mid-Coast Project. Yes, we have several other Caltrans projects... Well, City of San Diego, Santee, National City, Chula Vista, and we're currently working with Fallbrook. Caltrans work is fairly easy. There's also, I have a contact there as

well, that, whenever I have any questions about labor compliance, I just call her, or she directs me to the right person, and I guess it makes the process a little smoother.” [#15]

- The non-Hispanic white male owner of a construction company stated, "Lakeside School District, we wanted to do some solar projects with them. We understood that they had a large project ready to go, and that contractor decided to take on more profitable jobs other places. And so, in fact, we really tried. We even had some carports that were scheduled to be demoed. And I reached out to them saying, these are going to be demoed. Should we move them from where they're located to one of the schools, and we can do it very economically? We really tried. But there's definitely a political process that has to be met. And the few people that I talked to over there, they said, you really needed to start this a year ago, if you want to do it today. And you need to go through the process and all the meetings and all the whatever. So, a spontaneous thing where we can move carports from here to there, which is something I could design, permit, engineer and have installed in maybe 30, 40 days. That might stretch out to a year, a year and a half process and then we've got a store inventory, we've got to sit on the inventory, and it complicates the whole deal. So yes, we've tried. When we started the evaluation process and the bidding process, and we realized that it was going to be far too large for our corporation. Electrically, we could have figured it out. We could do eight pieces out of 10, basically. And we just let it go." [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "these agencies have... they're in PlanetBids, so we get automated alerts. I mean, they're all the same, really. They send out the RFP and you just have to write your proposal to what they ask for. They have a program, I think it's called the SCOOP program, and it's about being a small business. You did have to fill in the SCOOP documentation, but that was as part of the proposal, so it wasn't a prequalification. If you've got a SB certificate, then they're happy for you to be a part of it. It wasn't very hard. Some of the larger, like, LA County is hard too. And there's a lot of prequalifications, like, for a LA Metro job we're doing right now. Like, a lot of paperwork you have to fill in and all of that," [#22]
- The Asian Pacific American owner of an MBE-, SBE- and DBE-certified professional services company stated, "finding work in the City of San Diego was easy. For San Diego County, I would say probably harder compared to the City of San Diego, but part of it is probably our fault. We don't chase County of San Diego projects as hard. It was easy to work with them once you build a reputation also. Like I said, the hardest part was getting the first job to prove yourself. We always get paid, for the most part, I think it's been averaging 60 days, probably. There are some that it goes to 90 days." [#25]
- A representative from a majority owned construction company stated, "SANDAG, County of San Diego, San Diego International County Airport, Caltrans, NTF, San Diego City Schools, other small districts... We've done many schools. Southwestern College district... It can be anywhere from creating a parking lot, doing roadways, we've done some TI work for the county, we've... offices, counter-tops, and desks remodeled restrooms. A lot of that work we did as prime. It's in the job contract." [#35]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, “we have. Water districts, utility companies, government. I don't do it since the last ten years [because] a lot of times those kinds of agencies because I was a city counselor or a director on NTDB, I had a conflict so I have to stay away from those things.” [#36]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, “we kind of stay away from it, especially the school districts. They're too much of a pain, I know the school district has project labor agreements for non-unions, so.” [#37]

**Eight business owners described their experiences working with or attempting to get work with the San Diego Association of Governments (SANDAG) or NCTD specifically.** [#1, #4, #7, #16, #28, #34, #35, WT#1] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “Well, I am on SANDAG bench. And I'm also on one of the teams for the planning contract that they have. I've seen several announcements from Port of San Diego, City of San Diego, San Diego Airport, but I haven't found the right one for me to be part of a team. Again, a lot of them are more technical. So, they don't necessarily have, I guess, type of projects that I can work on or I want to work on, so it's a little bit more difficult for me.” [#1]
- The non-Hispanic white male representative of a majority owned construction firm stated, “We worked with NCTD both directly and as a subcontractor. Lots of City and County of San Diego, SANDAG, I mean, not directly, yeah. there's been some companies that have done some, you know, highway work or something, you know, and they've called us out to just do some, you know, minor construction fence kind of for containment of their site material or something like that, so not as much SANDAG work as I would like, you know what I mean. One was when they were building, you know, the Trump wall thing down at the border, so that was kind of like an emergency thing. I don't know why it happened so quickly, but there was concerns of, you know, not just the media, but picketers. They reached out to several fence companies to see if they had the capability of providing the services that they need, and so we're one of the few companies that qualified for the volume of material and the workforce to produce as much in as little time as needed, which we stepped up to the plate, and we 100% backed up what we said, which was really nice I wouldn't say it's difficult to find those opportunities, they're pretty, I'm going to use the word vocal, about their opportunities, there's always sites and requests to bid, they're not hard to find.” [#4]
- The non-Hispanic white female representative of a majority owned construction firm stated, “SANDAG was really easy to work with, I was really impressed. The only thing we had to go do was I had to send all the guys down for class and they had to have their IDs made and all the background checks and stuff. The first part is a little more, I don't want to say difficult, more things to do. More laborious to get prepared to do, but once you get through that, the rest of it goes really easy.” [#7]

- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "we tried to get into some Caltrans or SANDAG projects as a prime, no fault to Caltrans or to SANDAG, we just didn't have the right number. We look forward to bidding on more opportunities as long as they make sense and they're within our wheelhouse and skillset as far as capabilities. We've had no problems bidding to agencies here in San Diego County. It's all the same, they're all the same because they all post on the same websites for the most part, they're not hard to find. I don't want to say they're hard because you know going into it that these are the requirements, you got to put in the effort, you got to put in the time, you got to read every document. It's hard if you want to make it sound like it's hard, but I don't consider them hard, I consider them to meet the requirements of the contract. It is what it is, I know it's not a yes or no answer, it is what it is, just do it. They were good, I think the problems that we had were our own doing. Working with the agencies was fine. We're definitely going to bid with them again, I can tell you that. We had little hiccups on some items of work that we mis-scoped, but that was not anyone else's doing except our own." [#16]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "for SANDAG and NCTD I never got the opportunity to quote. I would go and try and get the work and nobody asked for a quote from me. It was easy to find out about the opportunity but it was difficult to get the opportunity." [#28]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "the first six months was very difficult [for the SANDAG project], because the way we have to invoice, or the way we invoiced on and with previous entities was a lot different than how Caltrans, how we have to do invoicing with Caltrans. Even though the invoicing, the budgeting we proposed got accepted, we ran into problems, I guess, the first small portion of the contract. But once we figured that out and adjusted how we invoiced to them, it's gotten really easy. I mean, it's really straightforward now. And we got set up with a net 30, with the subcontractors that were applying. So that's what's saved us, is us, being able to get paid monthly, versus some of our other contracts, where it might be nine months before we get paid. I would say it's easy, for the work that we're doing with them. And out of all the contracts that I'm associated with now, it's easier to get paid through them [SANDAG]." [#34]
- A representative from a majority owned construction company stated, "it was about the same. I believe there was a pre-qualification that we had to fill out and then we were bidding on the projects. Just like we do for everybody else. We've done that, we've done different JOC contracts with them, JOC jobs with multiple jobs underneath it. We've never had any problems. In fact, we just finished two the other day." [#35]
- The Hispanic American representative of an MBE- and DBE-certified professional services firm stated, "we are on SANDAG's Bench for Marketing and Communications, as a prime firm. However, we haven't won an actual contract for work yet. It seems SANDAG has (so far) given the work to large firms and not small businesses." [#WT1]



## **Barriers and challenges to working with public agencies in the San Diego area.**

Interviewees spoke about the challenges they face when working with public agencies in the San Diego area.

### **Twelve business owners highlighted the complexity and difficulty of the public sector bidding process, and the length and large size of projects as challenges, especially for small disadvantaged firms. [#1, #2, #3, #4, #6, #15, #20, #22, #25, #26, #28, AV# 1]**

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “they would have to go to the agency, bring me on as a sub, it has to get approved. It’s very cumbersome to add new subs. A lot of times, Caltrans doesn’t even allow it. Yeah, if you’re selected by Caltrans for a project, you cannot bring on any new subs after you’ve started. SANDAG allows additional subs. But I think the paperwork is very cumbersome. And it takes forever to add people. What a lot of times people do, is they put them on the list on their org-chart anyway, just in case. And then that way, if they ever need them, they could use them. But you never know, depending on what kind of... Especially if it’s an on-call contract, you may get different assignments that you never thought about you were going to have. So, if you had say, Caltrans contract, and you got this assignment, if you’re not allowed to bring a sub on board then somehow you have to get it done yourself, so they’re very inflexible, they’re not flexible. They don’t have flexibility. But it’s not like that in the private sector. You just go and hire somebody.” [#1]
- The non-Hispanic white female representative of a WBE-certified construction company stated, “some school districts you just avoid because of requirements, PLA, PSA, project labor agreements. So, it’s a step beyond the usual public works. So instead of just apprenticeship ratio, they want someone from a rich neighborhood and a poor neighborhood and a black guy and a white guy and a purple guy and a girl. And every level of journey who has been in apprentice is not just journeyman apprentice.” [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, “we want to work with public agencies, but we don’t have the opportunity to submit to even an on-call because, like I said, they’re always looking for a bigger firm that does it all, and we’re not there. So, the attempt is, a lot of times an RFQ comes through, I go through the RFQ, and then we’ll see. A lot of times it stops there because they would ask for firm prior experience, and we just started the business, so we don’t have any prior experience. So, I think that’s kind of the main thing, is prior experience, and then being able to manage the sub, the team. So, a lot of times you read it and it’s dead. So, once I read it, it’s dead and I can’t prime it, then I would say, ‘Okay, can I be a sub?’ So, I would look through it and say, ‘What are they looking for?’ So, if they were looking for a prime that is a landscape prime or a planning prime, then I would say, ‘Well, yeah, I can be a civil sub. Right?’ But if they’re looking for a civil prime, I’m dead in the water again because I can’t prime it. So, from there as a sub I would kind of go through all the people I know, ask them via e-mail, ‘Are you guys going after this? Can we be your sub as a civil?’ And then, yes, no. If it’s yes, then I would do all the paperwork, send it to them. If they said, ‘Ah, we already have it, or, our in-house is going to do it,’ then that’s where it dies. Yeah, so a lot of times you would see the City of San Diego, you would see the San Diego Association of Governments. The last one, National City, and

then you have your SANDAG, and then the Caltrans projects comes, but those projects are just way too big.” [#3]

- The non-Hispanic white male representative of a majority owned construction firm stated, “because of their requirements, we are only allowed to deliver the product. Which means those guys have to install and remove, which has been a challenge. It’s been difficult for them because of that, very difficult. So, there is a challenge for us working with those projects as a non-constructive site service. You wouldn’t think we’d be restricted from completing our work on something so minor. Even when I’ve put my guys through the certification to work near railroads, it still doesn’t qualify them to do the work as a sub for the prime. Yeah, they had bid forms that had to be filled out, there was a process. You know, personal opinion, I guess it’s a public agency, for us it’s just kind of, you know, we’re such a simple site service that you know, it’s a lot of work to do for a minor skill, but we play along. It’s a little bit more than standard business. But not overly, enough to take the fun out of it. But a lot of the San Diego Unified, they have a lot of work that’s done through proposition funding, and those are the ones that are extremely difficult for us to work with because there’s things about the proposition money and requirements for the type of labor. And there’s not enough clarification on non-constructive site service. There’s not enough language to specify that something like temporary fence would have an exclusion. I mean, I would say it should state 'agree to prevailing wage requirements,' that we always do, we always pay our guys prevailing wage. But that fact that we’re non-signatory to any union, we won’t sign a PSA or a PLA agreement, which means these are the kind of job sites specifically, and there’s so many of them, where we just have to drop off the material. Again, does not work well with the prime, does not work well for us, really, I mean because here we are, have all the equipment, have all the experience, it’s minimal amount of work, and our contractor has to turn around and find somebody else to install it, who doesn’t have the tools, does not have the experience. To me, it’s a waste of everybody’s energy, completely. I mean the only ones that benefit are the labor union guys, which really hurts taxpayers’ funding, because you’re going to pay these guys a bunch of money, and it’s going to take them four times longer to do the work, not having the right tools on something so simple as non-constructive site service. We’re not building anything. It’s one of the largest school districts, and because they get so much funding from propositions, it’s hard for the prime to understand the rules. That temporary fence is a non-constructive site service, and, as much as I agree that they should have a requirement to meet prevailing wage requirements, I don’t think it’s fair that we have to be forbidden from doing labor on site because we’re not signatory to a labor union because there isn’t one for our type of site service. And I just don’t think that the language is proper enough to allow the prime contractors to understand, they don’t know. So then, what do they have to do? They have to yield to the default. It’s gray. So, because it’s so undefined, it creates difficulty for us to deal direct. So, you got to get somebody who doesn’t install our product attempting to install, and that doesn’t benefit anybody because it’s not done as securely or safely.” [#4]
- The non-Hispanic white male representative of a majority owned professional services company stated, “not specific barriers, only general. And that is that because they’re trying to do a lot of CYA, at least this is my perception, the agencies require a lot of administrative

hoops to jump through. And that goes back to my earlier comment, which is, is the community getting the most and best for their money? And oftentimes what they've done is they've created a terrible waste of money and expense. The administrative costs I think on projects over the years have escalated in their dominance of what has to be included. Because it's a bunch of BS paperwork that has to be done and there's a cost to that. And I think that is a sad injustice. And if the general public fully understood that, I would like to believe that they would be outraged at how much waste of public money there is towards the administrative and overhead aspects of all these projects. The public is looking for things to get, to see product, to see something be built or completed. But yet there is a sad amount that is spent on, as I say, paperwork, because somebody's needing to go through, and you know? And I understand, and I'm not saying that there shouldn't be any, but I think it's terribly inefficient, and it's a gross disproportionate amount given how much these contracts are. And design architecture engineering firms that are the prime on a lot of these projects, they bill a huge amount now compared to years past for all of the overhead." [#6]

- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "for a small business, there are a lot of requirements, meaning there's a lot of systems in place. There is a verification system. So, you have to verify that you were paid in a timely manner, and then on top of that, the prime, I don't know if it's a requirement of SANDAG, but the prime also has a requirement where every month, I have to submit the checks that are received, the check number, the date, and then give them the check numbers and the dates that I mailed out checks to my subs. So, there's a lot of checks and balances, and then they turn around and confirm with the subcontractors, so there's a lot of submitting redundant work, I would say. Instead of there being one system in place. I understand there has to be checks and balances, I get that, but for a small business of just one, it's a little more difficult, it takes up a lot of time. I literally have to go check, and when you're running 30 trucks in a day, not only do you have to bill for 30 trucks, either weekly or daily, but then you have to, every check that you're going to write to that individual, you have to go enter it into a system and submit it monthly, basically. And then turn around and still verify that you were paid correctly. And if your subcontractors are not responding to the link that they're being sent to verify that they were paid on time, then you have to get on them. And like I said, when you're running 30 trucks a day, that's 30 different people you have to reach out to. It could be several days because you're trying to get ahold of people, either e-mail, phone calls. Sometimes you have to teach them how to do it, because they don't know how to work the system, a lot of them don't. So, one of the systems that they're all connected, basically, in one way or another. So, one thing I have an issue with is that the prime sends us a check, I don't know, say on a Friday. They cut the check a day or two before that, they put it in the mail on a Friday, we receive it on Monday or Tuesday because it comes from Los Angeles, and we have to pay within 7 days to the subcontractors. So, in these systems, the day they're writing down is the day it was sent. So, they'll ask them a question saying 'Company A trucking was paid on,' they'll use the Friday date where it was mailed, and then they'll ask, 'were you paid in a timely manner?' and in parentheses it says '(within 7 days).' They're using the day it was mailed. Right, and there's a weekend in between. So, I feel that that is unfair, I guess. They haven't been very strict about it, but it's not a good look to your primes, you know, when they're telling me, 'well, you were paid on

Friday, why didn't we receive our check until...' It's a paper check, and it's a paper check that I write and still have to mail out myself, and then sometimes my subs, I guess that's my fault, I preprint them because I know money's coming, so I'm ready to mail it out, trying to stay ahead, and the preprint day's like, you know, they think, 'oh you've been holding on to our money.' Yeah, but it's not that, it's just that we have to wait for the money to actually be mailed, and then still get here from Los Angeles, and then send it out. That has been an issue in and of itself because I don't think Caltrans tracks the money as strictly as SANDAG does. I guess I could always confirm it with Caltrans, but according to the prime, they're not paid until segments of the work are completed. So, say the segment's still going 2 months later, and we have a 30-day term period, you know, payment term, it's been 2 months, 3 months and we're still not seeing any money. So then, my subcontractors are asking, 'where's our payment?' You know? So, I don't know that that is true or not, I've never confirmed it, I just took their word for it, but I wish, I guess, Caltrans was a little more diligent, you know, with making sure payments are sent out." They continued, "I think one suggestion, and I don't know if it goes with that question, but on the one project, the MCTC project, there was multiple brokers, so multiple trucking agencies. And, I mean, I was told that SANDAG cannot tell them how to do their work, or how to utilize their trucking agencies or their trucking firms, but it was definitely very unfairly distributed. We're all DBE certified, and, while I had my DBE trucks sitting, there was non-DBE trucks out there through the other agency. It wasn't fairly distributed, yeah. Or one of the other, like I said. Well, first of all, because I lost all the guys that I turned into DBEs because I didn't have work for them, they went to work for the other guys. So, they were given a lot more work than we were. But my problem was, you have a DBE requirement on the contract, you're giving them more work than you're giving us. My DBE certified trucks are sitting, while non-DBEs are out there working." [#15]

- The non-Hispanic white male owner of a construction company stated, "the Airport Authority ended up just being overwhelming, and the Lakeside School District, it just seemed like a lot more meetings than we were ready to take on. Just unable to figure out how to navigate the process. Private sector is easy. You deal with one person. They say yes or no, and then you got a green light, or you got a red light. With the public, it's you're dealing with multiple people, it maybe boards, it may be a closed bid. They want everything in a certain format. It's much harder to navigate. That is definitely a barrier. Because I didn't have the certifications it wasn't worth bidding. Because why bid if somebody can bid 10% above me and still get the work whereas a lot of work is bid with I'd say, 5% to 10% profit margin. And therefore, if you lose that then you end up working and losing money, essentially paying for going to work." [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "so we've submitted bids to them, but we didn't win because we don't have experience in airports or water. Actually, the Water Authority were really good and they contacted me for a debrief. And really the moral of the story is we didn't have experience with them. So, we're thinking, 'Well, how can we get experience with you if...' So, we probably have to somehow be a sub to somebody on one of those contracts. I'm not really sure how we'll do that. The Water Authority was a bit harder, because PlanetBids

automatically notifies you. And most probably their one does, too. But it was just... It wasn't harder it was just different to what I'm used to. Most of the public agencies around here use PlanetBids. I had to submit [that proposal] by hand, in paper and the other ones you can submit through PlanetBids. So, it's easier to submit electronically." [#22]

- The Asian Pacific American owner of an MBE-, SBE- and DBE-certified professional services company stated, "getting paid was the hardest probably through the San Diego County Airport Authority. They do make you go through hoops. They want your time sheets, copies of time sheets and everything else. They are the only agencies I've ever worked with that ask for copies of your time sheets to be attached to your invoice. I've never had anybody else ask for that much. They count those hours and a 20 cents discrepancy they catch you, and then they say, you got to account for this 20 cents discrepancy. I told them, why don't you just pick it up from the next invoice? But when I'm doing SANDAG work with the City of San Diego right away, then it becomes complicated. You don't get the same privileges that they give you when you're doing your own project, because SANDAG pretty much always crosses somebody else's municipality because SANDAG is a joint agency, right? So, you don't have your own right away. You're always working within somebody else's right of way. Every time I do a SANDAG project it's a headache." [#25]
- The Asian Pacific American owner of an SBE- and DBE-certified construction company stated, "SANDAG... the bidding system is in place, it's just not business-friendly. So, because of that, I just usually don't even approach them. It's not friendly. I even registered with SANDAG, but for some reason it doesn't come to fruition. The other thing is the difficulty with NCTD and, for example, MTS, and maybe even SANDAG, is that qualifications are requirements in terms of insurance, extremely high. And then they require some additional insurance requirements that other agencies don't require, so specialized ones, and that's another one. Thirdly, probably the most difficult challenge to work on any role. Or railroad issues, you have to be railroad trained, certified, and so that becomes... And then that's an annual one also, and so every year they're sending crews out there to retrain. And so that just adds an extra burden on contractors, because we have to go through the training process every year, whereas other agencies maybe do one-time training and you're done. just today we were shut down by NCTD, because the crew that was out there didn't have the railroad training, and now we've got to send them out, so all work is stopped, so send them to training, and just one layer of challenge that we have to deal with. I mean, obviously it's a safety issue, so I can understand NCTD's point of view, that you have to have it, but I think somehow I think it would make it a little bit more friendlier in terms of us to be able to get them, maybe an online training. We have to physically be there. A lot of them are going online training now, almost -- even university is going online, whereas now we have to be physically there, spend extra amount of hours just so it becomes an annual training. A lot of the training are refresher training, so know that if you've done it, it's a refresher. If NCTD did refresher trainings for those that were already trained, again, it would smooth things out a lot. The last thing is getting paid. Public agencies, their paperwork requirements are more I guess elaborate and stringent than private sectors, such as certified payroll or reports, monthly reports, so you have to send in with your invoice month report backup documentations to get paid." [#26]

- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, “the port was very difficult. The number one reason, the contract language makes it very difficult to get insured and the way that they implement their projects to the competitive process, that is very difficult to break into. So other ports, for example, I can go in and get a contract for a small dollar amount and be able to get business started with the ports. San Diego does not allow that. So, there was no... it’s like all or nothing. So, you have to provide major services, or you don’t provide any services at all. Did you understand what I’m getting at? Is that with other cities and municipalities, I would have the ability to go in there and provide one area of service but then competitive process that this-- they kept that port of San Diego applied, it was not conducive to a small business being able to go in there and work directly with the port. So, the only way a small business can work for the port is to go find a large business that they’re willing to team with. The City was similar, the City was much more complex and much more political and it was not the same situation. Just to give you an example, the only entrance that I would’ve been able to get into the City is if I went to go work for their legal department because their legal department had more flexibility in bringing in and outside experts. And it’s just a lot of opportunities through the legal department for what I do. So, one of the big hindrances to doing business with the City of San Diego was the difficulty in being qualified as a local small business. They have an SLDE program that is very advantageous for small business and they have very high set aside on their contracts. So that should be advantageous. However, it’s very difficult for me as a scientist to demonstrate my business was a viable business. The requirements to demonstrate that your business was viable, was very cumbersome and took at least 16 months of being in business before they could demonstrate that you are a viable business. And this is the reason that I even participated in this survey was because I feel like there’s, there’s a big disadvantage here for small businesses to work with the City. I have a Ph.D., I have a Doctorate in Science but it was not acknowledged as a demonstration of being an expert where if I had a degree in Engineering, then it was much easier to demonstrate your qualification as a local small business and that is really unfair. That is the main reason I thought about doing this survey was the way things are in San Diego, there was nothing going on to really do to encourage me or to help me get working for anybody in San Diego. So that’s after a year and a half. I still never had any San Diego work. Now if I stayed in my own business for a couple more years, I’m sure something would have broken open, but because the growth was all happening in LA, it was just pulling me more and more and more away from San Diego. The Port encourages all in local. I think they do encourage small local business. The problem was-- is that you could only do that when you are a very well-established business that was much bigger. It wouldn’t absorb the newer business and it wouldn’t absorb a really micro business.” [#28]
- The Non-Hispanic white owner of a professional services company stated, “it is difficult to get work with the City especially as a prime consultant. Not too many jobs for land surveyors. It’s difficult as a small firm. SANDAG and other government agencies tend to look to larger firms. We apply for many of these projects and it’s very difficult to get in the door because SANDAG and NCTD give the contracts to larger firms.” [AV#1]

**The factors public agencies use to award contracts.** Five interviewees commented on the factors that public agencies use to award contracts [#1, #7, #10, #20, #22] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “it depends on if the agency comes up with something really strange, but most of them are pretty reasonable for the selection process. As long as they don't ask for price, because, with professional work, there's a law about not asking for proposals, or not selecting based on proposal cost, or based on project or fee or your consulting cost. Some agencies try to do that. They ask for rates sometimes and they could pick competitively based on rates, go with somebody lower. They're not supposed to do that. It's supposed to be qualification based. Some of it is behind the doors. Some of the cities, smaller cities try to get away with that. They even ask for cost proposals and they say they won't open them. But again, that's a lot of effort for people to put those cost proposals together, when you don't even know exactly what the project scope is. But you have to put it together. And they say they'll never open your envelope. You don't know if they do or not. Or they ask for, they don't ask for hours, but they ask for rates or they asked for hours, but they don't ask for rates. Even that is tough, because sometimes people are comparing apples and oranges when it comes to selecting the firm. It depends on all the assumptions that were made. The scope that they said they were going to do, but that could get in the way of agencies picking the cheapest, or the lowest number of hours or something like that. Sometimes people do that, some agencies do that. There's a whole QBS rules and requirements that the qualification-based selection is supposed to be. But sometimes that does not happen. Well, I think it just depends on if somebody complains, and who's going to complain? We're trying to get work from that agency. We're not going to rock the boat.” [#1]
- The non-Hispanic white female representative of a majority owned construction firm stated, “I'm sure there are things in those that factor into whether you want to or not. And, but that could be any factors. It could be the material factor, it could be a special material, it could be a special machine that they want to be used in that project. So, it may not necessarily be in the paperwork or the people, but there are factors that can go into that that can... Can be a barrier. Be a big barrier.” [#7]
- The non-Hispanic white male owner of a construction management firm stated, “obviously with RFPs it's really hard because we don't know why we didn't get the job. If it's a public bid, you just look to go oh, my number is not as low as somebody else's. But with RFPs- There's a scoring system, there'll be like a hundred points and it's based on resumes and past experience and dah, dah, dah, dah -- it's like all these different things. And then what they do is, they'll take like five copies, and they'll give it to five different people within the agency, and sometimes even outside the agency. Everybody scores it, they aggregate your scores and that's where you are. So why did I get a nine from somebody on this, and a six from somebody on that? And it usually comes down to if somebody doesn't like you, because they're the ones passing that out, right. They're like, score these guys like shit, they're not supposed to do that. But we know that's what happens.” [#10]
- The non-Hispanic white male owner of a construction company stated, “because I don't have a certification as a small business means that other people can bid a lot more than me. That's huge.” [#20]

- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “often, I think more so in the public sector, or especially federal, before the bid even comes out they already know who they’re going to choose. So it’s mostly about relationship building, meeting the procurement people at these different events.” [#22]

**The SANDAG/NCTD bidding and contracting processes.** Interviewees shared a number of comments about the SANDAG/NCTD’s contracting and bidding processes.

**Five business owners viewed the San Diego Association of Governments as more approachable and focused on small business development than other public agencies.** [#4, #7, #10, #15, #29] Their comments included:

- The non-Hispanic white male representative of a majority owned construction firm stated, “for NCTD, when I worked directly with them for their own facility needs, it wasn’t very difficult. They put the bid out to a few different companies, and I won the contract. But, as I mentioned already, working underneath a prime with certain requirements becomes difficult for us because of the labor restrictions.” [#4]
- The non-Hispanic white female representative of a majority owned construction firm stated, “it was easier. The prequalifications, so you had to get that packet together, I actually thought that was a good idea. Because like the class was to make sure they knew what the safety regulations and things that went on for them, as well as the trolley. Because the trolley lights were involved in things, and we would have to move off the tracks when the trolley was coming and things, and so it was a good thing because you never know what people will remember or forget over time. So, to me it was a good thing to have them go to the class. And I can understand why they needed their IDs and things so that they knew who they were supposed to be there and all that. So that it made sense to what they were asking for. I thought it was great, because once you went through that class and all that tests and all that, then you were able to work on a project for like the next two years. So, it wasn’t just for that project, but they gave you a timeframe. And then after that, you can go back and renew all of that with them again, and then you’re good for the next two years. And so, it makes it easier. The same thing to bid the projects, because you’ve already been through all their programs and you already have all the stuff they require. So, it makes it easier. Some of them, SANDAG don’t do it, there’s still some of them that do. It would be nice, and I don’t think there is an easy way to do it. It would be nice if there would be an easier way, probably for both sides, to be able to see what work is coming up and get notified, like for an example, Blue Book. And there’s a bid book which we are signed up on their sites, they will send you out all the notifications that come into them. And so it would be nice, that same thing, to be able to sign up with their site, and I’m sure they probably do, and I just don’t know what their sites are, to get those invites, ‘Hey, this is our website, please come look at our projects coming up.’ That, a little bit more, would be nicer because, otherwise most of the time, you either really get to know somebody or really get to know how they process their bid requests. SANDAG, that was one of the easiest ones to get paid with. I was really surprised. That point of contact is the main thing. If you can find that person, then usually the projects go fairly easy. Like on the last project we worked on, we were a sub, and we were 4th in line. So, we had to go through all these people, and then the prime, and



at first it was really hard. But somehow, I found this one person. And she was wonderful. Because she said, 'Oh, okay,' she goes, 'Yeah, I know who that is, no problem. Let me get ahold of them. And I'll have them call you and have them get the paper.' And it's like, why can't we always find that, have that one wonderful contact person that can help get you in the right place or make that connection because that's really the key. If you can get somebody like that, then the projects go so much smoother and easier." [#7]

- The non-Hispanic white male owner of a construction management firm stated, "pretty much all your major state-run agencies bid about the exact same, as far as putting together a construction bid. Caltrans, North County, SANDAG they're all pretty similar. Read the specs, fill up the form. SANDAG can be a little difficult, but they're fine. I mean, the ones that are hardest are anything with the trains obviously, North County transit districts. Anytime you're working around railroad tracks, and anytime you're working near the freeways, because there's Caltrans work that's not on the freeway and there's Caltrans work that's on the freeway. Like on the freeway is a whole different thing. Like we did a bunch out by Heber and El Centro and work out there. Caltrans is out there. No problem. Easy peasy. You want to do something out here on I-5 it's a whole different thing. It's just different. So, I wouldn't say it's agency, it's like it's location or project to project depending on the project. I mean everything go on PlanetBid and everything goes out in the DJC and all that stuff. I guess as long as you know what you're doing, it's pretty easy." [#10]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "it has been fairly easy, they've definitely been available, even, you know, just to speak to whenever we've had issues." [#15]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "SANDAG and Caltrans have the same requirements. So it's not any harder or any easier than the other agencies. They got to submit your paperwork to the prime. The prime asks you for specific types of paperwork that the agency wants and you submit that paperwork to them. But it's not hard because all of that is electronic files that you should-- everything's here on your computer and you just send it to them and everything's okay. But working on projects between agencies, yeah, that's a big difference, because it doesn't depend on the agency. Ultimately, it depends on whoever the project manager for that agency is, and sometimes those persons can be easy if they have a lot of experience, or sometimes it's hard if the project manager doesn't have a lot of experience and they try to impress somebody. So, they are tougher, you know, they want things their way. So it just depends and it's up on whoever the person is, and you know sometimes they're good, sometimes they're not so good. During the paperwork phase of it, then it's about the same as the other agency or the city. They all have pretty much the same requirement." [#29]

**Two business owner discussed difficulties in learning about the SANDAG/NCTD's and agency contract opportunities.** [#22, #34]. For example:

- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "we have not worked with NCTD or SANDAG, and I think it's just not being

familiar with their bid process, really. I mean, the fault probably lies with us, we should have looked into it more. And I'm not familiar with their DVBE credits, like, what they need, whether they even recognize DVBE. So, I have been to their booth at a number of different events, and they've been at one recently in Balboa Park and I got information then." [#22]

- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "I'm not really as familiar as I need to be as far as, I guess, the whole process is, basically for me reaching out about contracts. I mean, if I'm looking at the, say, Cali Furniture website. It's hard for me to just type in keywords to have a contract pull up. Because like I said, there might be out of every 50 contracts, there might be one that applies to me. Whereas on these other procurement websites I can, it's easier for me to type in keywords to take me right to a contract that has an element of control. So, for me, my standpoint, I try to filter through the best I can of the contracts and find them. But generally, they're so elaborate that the main contract would be construction. And within this, there might be 70 or a hundred task orders. So, finding the one, and I guess they're [SANDAG and Caltrans contracts] so complex as opposed to the general contracts by like the states. Say, like, Army Corps NAVFAC or state parks or something." [#34]

**Three business owners shared recommendations as to how the San Diego Association of Governments or other public agencies could improve their contract notification or bid process.** [#1, #3, #6]. For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "for SANDAG and many of these agencies, it takes six months to two years sometimes to get a task order or get on a contract or something like that. So, it's challenging. Especially for a small business because you get on a team, but you may not see anything. Even if you're selected, you may not see any work out of it for another six months, so you have to wait. City of San Diego is notorious also for that They just take forever. Take months and months to select you and issue a contract. And just a lot of effort goes into those kinds of processes. Well, I think a lot of times it comes down to kind of the contracts departments being the bottleneck and not having enough people to process everything. Or, the City, maybe staff don't have the authority to issue contracts without going to the council, for example. So that takes time. Sometimes that adds on a couple of months. Negotiations take time, if they're pushing the consultants down on fees and escalation and things like that going back and forth. So there's a lot of things in the process. And then, like City of San Diego, if you ask for a proposal, you put in a proposal, let's say ten firms decided to put in a proposal. They don't know short this, sometimes they interview all ten firms. And that's a lot for one project if they do that. So that's, again, a lot of effort putting into something that they could have done with maybe shortlisting to five firms. They just sometimes don't, they don't go through that process. So, it's more work for the private sector, to comply with all of the... And that's just one client. So, if you have five different agencies, you're doing this for the amount of time you spend on writing proposals, doing interviews, and then following up on paperwork and things like that, it's too much for a small business. I don't have the solutions, but there're definitely can be streamlines." [#1]

- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, “you get the notification, so I think everybody would see it. It’s just a matter of going through and being able to get picked for it. So SANDAG has a system where they have already on-call consultant that they already picked, right? So, a lot of times the project gets set up for those on-call. So they have a group of people like myself who are on the Bench, but a lot of the times the on-call team already has a team, so there’s no reason for them to go pick somebody off the Bench unless the Bench has something that the team doesn’t already have. So, it’s hard to get into the on-call team, and then even harder to get picked from the Bench because everybody has their own team already and they already won the on-call. So SANDAG goes through the on-call first, and then if the on-call people can’t do it, in theory, then they go to the street, but they haven’t gone to the street already because they got all these on-call teams that they picked already. So, they send out an RFQ and say, ‘Hey, we’re going to pick three firms to be our on-call engineer consultant team.’ So, of course, there are probably 10, 15, 20 firms that’s applied, seven get selected on a shortlist, and then maybe from seven they pick the three. And for the next three to five years, nobody gets picked again because those teams have been picked.” [#3]
  
- The non-Hispanic white male representative of a majority owned professional services company stated, “In the past we had some direct contact with an NCTD employee, but yet minor in nature. One situation was designing a bus stop, as part of the transit system. Some other had to do with when we were doing some subconsultant work, associated with sections of the trails adjacent to both the coaster, and the sprinter. When I said, to my knowledge, I’ve never gone after any NCTD or SANDAG project specifically, there’s a reason why I also haven’t. It is because they are so heavily influenced by these certifications that don’t apply to what otherwise... Historically, I’ve always just considered myself in the check the box that said white. I think the little bit that I would say I could have an opinion on would be that when SANDAG or NCTD are involved with projects, if it’s dealing with that the primary client is a different municipality, it all comes down to what power struggles there are with the local municipality compared to SANDAG or NCTD. If there’s tension in that relationship, then being part of the design team where we can get mixed signals. And different sense of priorities. And that goes back to what I’ve said before, communication is so critical. So if we’re working, if our primary client is a municipality, a city, and yet one of the other, these two agencies are involved, but they’re not the prime client, you can have tension between them because they’re fighting over, whether it be turf wars, or what have you.” [#6]

## G. Marketplace Conditions

Part G summarizes business owners and managers’ perceptions of the San Diego marketplace. It focuses on the following three topics:

- Current marketplace conditions (*page 102*); and
- Keys to business success (*page 108*).

**Current marketplace conditions.** Interviewees offered a variety of thoughts about current marketplace conditions across the public and private sectors, and what it takes to be a

competitive business. They also commented on changes in the San Diego marketplace that they have observed over time.

**Eleven interviewees described the current marketplace as increasingly competitive.** [#5, #6, #25, AV#1, AV#2, AV#3, AV#4, AV#5, AV#7, AV#8, AV#9] For example:

- The non-Hispanic white female co-owner of a construction firm stated, “it’s somewhat competitive, although we had been able to sustain our standard of living with just my husband working outside the home. So, there’s definitely room for us to be able to offer our landscaping services and grow, obviously. So, I say there’s good opportunity here. Yes, because with an almost decade long drought, there was a lot of switch in the marketplace from sprinkler irrigation to drip irrigation or to drought resistant type of landscape, so that kept us busy. Even though the change in the weather could’ve spelled disaster for our particular industry, it did not. That helped that the state offered water abatement and rebates and that kind of thing, so we did a lot of work during those years with people cashing in on that, getting money from the state, federal, whatever. Yeah. Like vouchers or whatever it was that they gave out for that. If you qualified, they got it. We did ... Oh gosh, in the first few years of that, we did 60 of those in the first three or four years. So that was actually a boon for us, not a downturn. And it could’ve been, it probably was for a lot of other people. Somehow, we made it through the '07, '08 recession. And I think, again, that’s because our company caters to the more affluent who have more of a cushion financially, so ... So definitely what’s going on economically in the area does affect us.” [#5]
- The non-Hispanic white male representative of a majority owned professional services company stated, “the current market is always being questioned. At any given time when you think it’s good, there is others that are telling you that they’re concerned that another recession is just around the corner. Unfortunately, that has happened to us here, in especially Southern California, where everything is exaggerated as far as it’s hypersensitive. Either when times are good, everything is just going like gangbusters and crazy as can be. And it’s either really great and going, everything’s going to be perceived as being great and better tomorrow. Or it is on its way down. For some reason we can’t find any long-sustained kind of even plateau. And that’s what’s frustrating for me. I think, we’re better off right now today than we were two years ago. But I don’t know if it’s just how sustainable it really is. I think that there’s too much in this industry and in this region that we’re a throwaway society. And any one of us as designers and consultants, we’re expendable. And that part of me might be kind of the pessimist side of it. But I think to a certain extent that’s a lot of what happens here. The competitiveness is so unfortunately aggressive.” [#6]
- The owner of a woman owned professional services company stated, “competition is steep here.” [AV#1]
- The Non-Hispanic white owner of a majority owned professional services firm from the availability survey stated, “work is very specialized, not many contracts available.” [AV#2]
- A representative from a majority owned professional services firm stated, “expansion is difficult in San Diego, mainly for smaller companies.” [AV#3]

- The Asian Pacific owner of a professional services company stated, “it's hard to break through barriers with large companies.” [AV#4]
- The Non-Hispanic white owner of a professional services firm stated, “it's a highly competitive and saturated environment. Sometimes agencies don't have a lot of inclination to move the chess pieces around.” [AV#5]
- The Hispanic owner of a construction company stated, “starting the work is difficult and fluctuates, its competitive.” [AV#7]
- A representative from a majority owned goods and services company stated, “it's a difficult market to be in, it's saturated in some areas. Plenty of opportunity but we've got some effective competition that we have to work with.” [AV#8]
- A representative from a majority owned goods and services company stated, “it seems to be expanding. Several locations opened in the last few years. A lot of competition.” [AV#9]

**Six business owners described a slowdown in the market.** [#4, #12, #17, #18, #34, AV#6] For example:

- The non-Hispanic white male representative of a majority owned construction firm stated, “it's all tied to the economy. Just this last year, we 've kind of flattened out in the last 12 months, compared to the previous 12 months, and so it might lead one to believe that there might be a certain level of decline in the near future.” [#4]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, “if I have the advertisement, yeah, there's enough work around. You know, I feel like East SANDAG/NCTD is unique in that because people settle here and don't exactly move out a lot, except for maybe military families. But we have a lot of competition actually out there. There's a lot of guys that jumped on to this, that are doing it now, and it makes it... The work isn't flowing in like it used to be. They have more options, so that's where my bids have always been real good. I'm fair, and so that's why I get most of the work. Now, this last two months, I'm just... It's terrible. I've got to do everything I can. I call on my contractor friends to get referrals to do whatever.” [#12]
- The non-Hispanic white male owner of an inspection services company stated, “I would say they're down. Not as many vehicles coming in as there has been in the past years. It's either because people are buying newer vehicles, replacing their old vehicles with new vehicles. That's my guess. A lot more newer vehicles on their own.” [#17]
- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, “my whole industry is based on when a vehicle was originally sold, and how many were actually sold. When we've seen a downturn in the economy, people did not buy cars. So, with a lesser market then there are less cars coming into the market on a yearly basis, as they age. 2009, 2010 and 2011, they didn't sell as many cars as they had previously because money wasn't as easy to get. Because, this is a requirement for registration every other year once the vehicle is eight years old. Now January 1st, the 2012-year models will come into the

program again. They were in until the change last year, but now they'll come in again. And January renewals are already in the mail, because I saw one yesterday that is due the middle of January." [#18]

- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "I would say that it seems that obtaining funding, I guess, is getting more difficult for certain entities. The people that would hire us, there's less funding available, overall." [#34]
- The Non-Hispanic white owner of a construction company stated, "slow; we are housing based, we subcontract, and the cost of housing has driven the cost on construction down because it costs so much to build. Make it easier for homeowners to get permits and gouging it would be easier. Red tape." [AV#6]

**Seven interviewees observed that marketplace conditions are generally improving, especially for small and disadvantaged businesses.** [#3, #7, #13, #15, #20, #31, #33] For example:

- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "I think everybody's busy. I think it's going well for everybody, but we don't know when the market's going to turn, so I think everybody's just working hard just to earn as much as they can, I think, and save for a rainy day. Well, the public sector is based on funding, right? So, if they get government funding for a project then of course those public jobs are going to go. Where on the private side, at the end of the day, it's based on, for us, for land development, it's based on, are there buyers? Are there home buyers? And then if so, they're just going to build the homes. And if there's no buyers and everybody's afraid that they're going to lose their job and stuff, then the market's going to slow down. So, it's definitely driven by the economy. Changes? I think changes, the only ... I'm not sure if this is a completely true statement or not, but I think with all the crazy tariffs and this that's going on, I think it has an impact on overall construction costs. So, we do see a combination of everybody's being busy and the tariff. I think the construction cost has gone up. A lot of times we would do a job and we'd think, yeah, the job costs this much, and by the time you go to bed it could be 20, 30% higher. Then all of a sudden there's not enough funding, and they would tell us, 'Hey, can you reduce the cost of the project by removing certain things from a project? So that's the change.'" [#3]
- The non-Hispanic white female representative of a majority owned construction firm stated, "we're fruitful. I look at how many has come in, in the last 10 years, and there's been a lot. Well, I'm going to have to say yes. Because your public, for the most part, is going to be prevailing wage. So, there's usually better wages, more benefits than those than you will find probably in the private sector. Up until last year, since we had the recession, people were not spending money unless it was absolutely necessary. Which, of course, on the same thing, they weren't doing new projects, only certain ones got through. And now they're trying to play that catch up and trying to get all these projects done that they weren't able to in the past. And so, now there's a lot more work out there for people, there's more people coming into the industry, and it's great. But at the same time, it can affect those companies depending on what side they're on. Like us, we're non-union. We pay definitely better than

minimum wage. But prevailing wage definitely has its perks because they have the retirement plans and they have the sick leave, and just more benefits to it than some other smaller entities can offer.” [#7]

- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, “I think the conditions are good. I just think I have to first get my name out there and create some sales opportunities. I think there is more demand now. I think if we get even more towards infrastructure change, it’s going to be even more so in demand.” [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “they have been fairly fruitful this year. We definitely have a season so, right after the holidays, like end of November, December, January, February, is our slower season. Usually it’s because of rain. But in years past, it has been fairly slow during that time, and I would say like in March it picks back up. And then, depending on where your project is, if there’s some sort of protected animal, your project will come to a halt.” [#15]
- The non-Hispanic white male owner of a construction company stated, “the utility, they make it very advantageous to have solar power, which we provide. And that we pay the highest rates in the nation, so it makes it pretty easy. They keep increasing rates, which is increasing market size. It’s doing well, yeah. All the big companies tend to go big and then go bankrupt. That’s what we see actually. It’s actually how it’s always been. People come in with a big name, put up billboards, go bankrupt. I think ... Actually, no. I have no idea. It just seems to be a trend. I think they just get too aggressive, too greedy. They come in from other markets and they think they can use some of the same skills that they use in the other markets for this business and it falls. It just fails.” [#20]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, “with the 2028 games coming up, it’s good. It’s probably been 15% to 20% growth of opportunity and with that, because of a lack of workforce and low unemployment, pricing has also gone up about 15% to 20% over the last 24 months.” [#31]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, “private sector is going gangbusters right now, I’m turning down work in the private sector right now. Public sector has been pretty steady.” [#33]

**Business owners and managers offered mixed sentiments about whether there was greater business opportunity in the public or the private sector.** [#1, #2, #11, #16, #24, #27, #28]. Most business owners felt the private sector held more promise than the public sector. Their comments included:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “for the San Diego market, my business or my industry is transportation. It’s been difficult for many consultants in this market because of the funding that’s available for transportation projects. So many consultants are looking north to L.A. to try to work with L.A. Metro and agencies up there. So, the private sector actually is doing

better in this market right now, because of the development. Private development has grown in the last few years. So, there's, I think, more opportunities in the private sector than public sector with the number of consulting firms that are out there. They're having I think, more luck and more opportunity in the private sector right now." [#1]

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "construction's been moving really slow for both, for public and private, which is surprising. Normally, private work moves really fast. It's all been kind of, just construction is really busy and really slow at the same time. It's kind of a weird balance. We're bidding a lot; we're seeing a lot and the actual construction itself is not moving as quickly. It's kind of just one of the waves. It comes and goes. It does these things -- either move really fast or really slow and we're just on a slow wave right now. A busy slow wave business." [#2]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "there's a lot of activity now on the private sector, but I hope it never gets to the way it was before. Before 2007 and there was a lot of land speculation and a lot of development." [#11]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "the public sector is much more visible. I think because there's more fairness to it because it's required for the marketplace to be fair and to be inclusive of MBEs and women-owned businesses. The private sector is not required but I have seen some of my clients who do make a good-faith effort to be inclusive. For example, there is one client I have that have about 20 medical clinics in San Diego, and they do look for the certifications in order to include minority businesses and do that. And I think it's becoming much more..., and it's probably not the right word, popular. In that regards there is much more demand in the private than before, but, at least for what we do, the public sector is still the strongest one for us, but we are trying to open up more to the private." [#16]
- The non-Hispanic white male owner of a professional services firm stated, "the marketplace is reasonably good. The opportunity that we are seeking is alive in every municipality in San Diego. The problem is to get someone to listen, someone with authority who cares about the things that our product delivers to listen. To sum it up, people in municipalities really don't care about ... I should say, don't want to make too much fuss about helping the city that they work for. They're more interested in making sure that they don't step on toes and it's been told to me that it's because of their pensions. They don't want to affect their pensions after working there for so long. But technology has enabled us to make this opportunity far more viable to a lot more companies and public agencies. The last three or four years, coming up on four years, the economic conditions have been stellar so that has been in our favor as well." [#24]
- The non-Hispanic white male co-owner of a construction company stated, "I am probably declining right now. We are going to be at decline until the beginning of the year. I think there's more public now than there was before, you know? More public work coming up than there was. There's lots of work everywhere actually." [#27]



- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, “I feel like there's a lot of opportunities in the public sector. Transportation is huge right now. Absolutely enormous.” [#28]

**Keys to business success.** Business owners and managers also discussed what it takes to be competitive in the San Diego marketplace, in their respective industries, and in general. [#1, #2, #3, #4, #5, #6, #7, #9, #11, #12, #13, #15, #16, #17, #18, #22, #23, #25, #26, #27, #28, #29, #30, #32, #33, #34, #36]

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “my relationships in the industry has helped me. Unlike most new businesses, my reputation is already established, and I am very active on LinkedIn. I get thousands of views on the things that I post on LinkedIn. You have to brand very aggressively because there's a lot of competition. You have to develop and maintain your relationships. Because this business is all about relationships. You have to do good work, good quality work in order to get repeat clients. So, you have to really keep your clients happy. Being present in the right forums, whether you do LinkedIn, or you do your website and you put blogs in, or you are out there in different events, attend events, networking, it's presence -- that simple. You got to be out there, so people realize that you're still in the business or out of sight, out of mind in this business. And one on one meetings and relationships, those are all something you have to work on and for a small business, that's pretty difficult because you have to do everything. You have to deliver the work, you have to brand yourself, you have to maintain your business, there's a lot of things and you have to work on projects. So there is a lot of things you have to do. Attend SANDAG. SANDAG and Caltrans and a lot of other agencies have their outreach events, you have to be there to have an opportunity to talk to the primes and agency people. So, there's a lot of different functions that you can attend and be part of. As far as your billing rates, what you charge, sometimes that impacts people's decision to hire you. It's difficult because you really have to know what the industry is charging and all that as well to be able to be competitive. But you can negotiate as a small business, you can negotiate rates in different ways, to maybe lower your price or something like that. If that's something you want to do to get into business. I don't recommend it, because to me, you're not really doing yourself any favors, but sometimes competition requires that. Sometimes some small businesses, underbid you by going lower or something like that in billing rates and all of that. So, it makes a difference, and people select them sometimes.” [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “low margins, strong office team, good relationships.” [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, “pricing. Doing a good job and pricing. Your fee can't be high. You have to be competitive and you have to do a good job.” [#3]
- The non-Hispanic white male representative of a majority owned construction firm stated, “you've got to know yourself, and your strengths and weaknesses, and try to focus your energy to the customers that you can benefit the best.” [#4]

- The non-Hispanic white female co-owner of a construction firm stated, “I think that that's maybe due to adaptability, ability to do that, or because their companies were so big, they had to let go of people because there wasn't enough work. And we don't have very many people to start with, so that was never really an issue. I think it is across the board the same as all of what's going on in southern California, is that there's a lot of startups and then within a year or two, boom, they go bust. Why? I don't know. Some of it's just oversaturation, I think. Some of it is poor planning, obviously. Some of it is, who knows. Part of the franchisee of a nationwide chain, it just didn't work in our particular locale. I don't know. But I think that's par for the course in Poway as it is in San Diego, or anywhere, Orange County say, and that's kind of unfortunate. I think there's a lot of ambition. I mean, the economy's really good for that right now that they can get the money to do that and kind of maybe see a dream started, but I think sometimes they forget there's a whole lot of hustle and work that you have to put in. You have to be a person of character, you have to have integrity, you have to have a good business sense. If you yourself don't, you have to have someone in your team that does. And we've never had that problem because we've stayed small mom & pop attitude, and we also encourage other small businesses.” [#5]
- The non-Hispanic white male representative of a majority owned professional services company stated, “there's the ideology side of my thoughts towards that, versus what I perceive as what it is. I think the perception of what it takes and that is that you have to... It's a lot of, I want to say to a certain extent, kiss ass.” [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, “have an owner like we do. It really is. It's having somebody who really has an interest in what they're doing. There are people out there that are doing it just because it's a job. Our owner takes pride in that. He likes being able to have somebody and walk up and say, ‘We did this parking lot two years ago,’ or ‘Yes, go look at this parking lot that we did six months ago and take a look at it. And if you like what we did over there, give me a call.’ And so, there's a different perspective on that.” [#7]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “you just need the experience, you need the experience in doing the public agency work and right away work. That's it. First and foremost, it's the amount of experience you have, the number of years of experience in general in appraising and in the right of way world. And then being able to deliver a good product and being able to handle a certain volume because there's a lot of single appraisers out there. So, they don't take typically take on more than a few parcels at a time. So, having several appraisers that you can rely on to get the work done helps.” [#9]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, “you have to be competitive and you have to have the team, the background. And again, from my perspective, being a small minority participant with a plan. It's the prime that makes the difference. The prime contractor.” [#11]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, “I think people talking good about you and being fair. I always give a discount for the

teachers, the military, the seniors. Like yesterday, my job, I took off a hundred for each load for them off the normal rate. So, they get that. Then, some people tell me that a lot of the hauling guys who are out there, they're charging a lot more, which I think is not fair because some people might not have the options of... Whoever's putting their advertisement, that's who they're going to see. They're not getting a fair go at it actually. I mean, you got all the advertisement with Got Junk, literally you've got to push advertisement and I could be as busy as I want, I guess. If I expanded in certain things, for sure we could be crazy busy.”  
[#12]

- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, “produce a good product. And stand by your product and follow through.”  
[#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “one: customer service. Good customer service. Two: competitive rates. You talk to other truckers to see what other people are paying. Three: making your name known. Attending events. I think that’s the biggest thing is attending events. And making phone calls, they will remember your name, I mean, when I was going for the Mid-Coast Project, they would see me coming and they would just smile, they knew exactly who I was. One time, my husband was like, ‘you’re a stalker,’ and I was like ‘no, I’m a professional stalker’ Right. I go to the Black and Hispanic Chamber of Commerce events. So actually, at a networking event for the Black Chamber of Commerce, I actually met an individual who is basically in charge of small business development at SDG&E. So, you know, it’s like you never know who you’re going to meet.” [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “we’ve performed very well for our government contracts. I think that has a lot to do with our qualities/DNA are non-negotiable, attitude, we put all these efforts into training people, making sure what we teach them here goes out there. And I think that has had a great impact into repetitive business. Sometimes I know we’ve gotten contracts where I know we're not the lowest, but we may be technically more acceptable because we pay attention to the details, and sometimes they want to work with us, sometimes you start building that network of trust as well. So, I think that we’ve gained the trust of the public sector enough that they keep opening up opportunities for us in order to get more work, and we’ve been successful at it, not all of them but we have. Try to keep the customer experience, we try to be a wow company, we deliver wow projects, where the client comes in at the end and no matter what the hurdles are, at the end, the client is happy. I think that is quality team players, to be able to have people that will deliver quality, that will estimate with quality, technically capable. being able to operate out of a warehouse is one thing that gives us a lot of advantage to be able to consolidate materials in one location and to have our own fleet of trucks to deliver. So the fact that we made money but we invested it back into fleet, into equipment and things like that, that also now makes us much more competitive when we’re going to get projects because we know we have the resources on hand, that we’re able to self-perform work, that is a huge advantage because when you sub, there’s always that added cost. But the ability to self-perform a good portion of our work, I think that gives us a huge advantage, also.” [#16]

- The non-Hispanic white male owner of an inspection services company stated, “convenience in pricing, and location, and competitive pricing.” [#17]
- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, “I think, over the years, I've learned you have to treat people fairly, not gouge them. And you have to have the customer concerns as your focus, so to speak. So not just interested in what I'm doing, but what their needs are and whether it's worthwhile.” [#18]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “for us, that's why we offer those three services under one roof. So that's our differentiator, really. It's like a one-stop-shop for geospatial stuff. And you have to be diverse. We also have our DVBE, so that gives us more opportunity. But often the DVBE percentage on projects is low, it's usually around 3%. So, I think local government and private agencies, you know, to give us more chance or give us more opportunity on the contract could make the percentages higher for... It's usually like, 20% for small business and then only three for disabled veteran. So, we get onto projects, but we only have a tiny portion of the work.” [#22]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "in order for a company to grow nowadays, one of the reasons that, if you stay local and you just service the local economy, you are not going to really grow beyond what the local economy can give you. So, one factor in growth is you have to expand out of your market. You have to expand, and you have to provide those services. Not just in Bakersfield. Because Bakersfield can only produce so much money a year. For what we do. And then you have four or five other companies going after that dollar or that dollar value.” [#23]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "I think a lot of it has to do with integrity. Never take anything that's beyond your capability, and just be honest with the agencies what your limit is. And the last thing you want to do is take on something that you can't handle and end up messing up the project. Because all the agencies they've gone out of their way to give people a chance.” [#25]
- The Asian Pacific American male owner of an SBE- and DBE-certified construction company stated, "to be competitive I would say that you need to streamline your organization, sometimes use subcontractors appropriately, and I think also to just be aware of the marketplace and the market conditions out there. Only hiring when there is a particular contract available instead of having staff available so that it's contract-driven rather than just general. If the subs have equipment that you don't have, so instead of me going and buying the equipment, I could go ahead and use a sub that already has the equipment.” [#26]
- The non-Hispanic white male co-owner of a construction company stated, “get a low bid. You got to have the capital to do it, you know. You know in the old days; they took the guy

that was in the middle. Not anymore. They did get low bidder no matter what. So, it's a low bid. Low bid wins the job." [#27]

- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "you know the people that are good at doing this, they know the patterns, they know when opportunities are going to come up, and they are preparing ahead of time before the opportunities are preparing for them. Relationships, client relationships, and cost competitiveness." [#28]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "it's just a matter of getting in the team, getting lucky enough to get on a team that you know gets the contract. Not every team gets a contract and if you're not in the team that got it then you're out for the next five years. You need to know your spec or for the agency that you're working and then you need to have a relationship, a good, established relationship with the primes." [#29]
- The female owner of a DBE- and WBE-certified professional services company stated, "probably experience. Having the appropriate tools and knowing how to use them." [#30]
- The non-Hispanic white male representative of a WBE- and SBE-certified professional services firm stated, "you need to have the right staff. The staff with the right experience and background." [#32]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "I think in public sector I think it's experience and recommendations. And private I think it's recommendations and cost." [#33]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "we don't really have that many competitors. Essentially, we only have two competitors and that's the Feds and that's my old company. Now, we're more expensive than both of these, so that's one disadvantage we have; however, the people, the personnel that we hired to conduct this business, they're basically come with a lot more certifications, we do more certifications, we do more training, we don't hire technician level. We got to offer different product than our competitors, otherwise why would they go with a business that's two years old versus a business that's 80 years and 40 years old. I would say our success, I guess, is on our ability to network and our ability to provide higher quality work than what a land manager's gotten in the past." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "you have to know what symbiotic resources are that you're dealing with in the region. A person from Kansas can be here would have no idea what's going on. So you go to the plants and animals. You have [to know] systems so that you can put that in a format to those can use it. You have to have graphics background. So you create their graphics and interpret what you're seeing on the ground into a form people can understand. And you have to have a knowledge of the legal requirements of accounting facts and all these kinds of conditions that you have to satisfy. And report to keep those certifications in place." [#36]

## H. Barriers or Discrimination Based on Race/Ethnicity/Gender/Disability or Veteran status

Business owners and managers discussed a variety of barriers to business development and any experiences with discrimination. Section H presents their comments and highlight the most frequently mentioned barriers and challenges first:

- Obtaining financing (*page 113*);
- Bonding (*page 117*);
- Insurance requirements and obtaining insurance (*page 118*);
- Equipment (*page 121*);
- Personnel and labor (*page 121*);
- Working with unions, being a union or non-union employer (*page 124*);
- Obtaining inventory or other materials and supplies (*page 128*);
- Prequalification requirements (*page 129*);
- Experience and expertise (*page 130*);
- Licenses and permits (*page 132*);
- Learning about work or marketing (*page 134*);
- Any unnecessarily restrictive contract specifications (*page 137*);
- Bid processes and criteria (*page 141*);
- Bid shopping or bid manipulation (*page 143*);
- Treatment by prime or customers during performance of the work (*page 145*);
- Approval of the work by the prime or customer (*page 147*);
- Delayed payment, lack of payment, or other payment issues (*page 149*); and
- Other comments about marketplace barriers and discrimination (*page 153*).

**Obtaining financing.** Interviewees discussed their perspectives on securing financing. Some firms reported that obtaining financing had been a challenge but did not offer specifics. Many firms described how securing capital had been a challenge for their businesses. Examples of their comments are included below. [#1, #2, #3, #8, #9, #12, #13, #15, #20, #26, #31, #34, #37, AV#26, AV#27]

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “I’m not aware of that because I did not go through that process. But I know through SPDC that there was a lot of opportunities for financing through different financial institutions that you could work with.” [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “retention. Public works has a, it used to be 10%, it’s now 5% retention, so they hold 5% of your contract value till the job’s closed out. So that can be a pain in the ass. If you have an equipment price of a quarter million dollars, they’re going to hold 5% of that, then they’re just holding your money for free, but you’re still expected to pay your subs and your vendors their full amount as soon as their bill is due.” [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, “there’s no bias. A lot of times a firm needs to go through two years of business before a bank would give you any kind of loan, so everybody goes through that. I don’t think there’s any barriers. The first two years, we basically front our own money because we know that we can’t get loans and stuff, but that happens to everybody, I think.” [#3]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, “when I started dealing with funding companies, and this is all true fact, once I got the company going and I was working on getting funding services because I can’t afford payroll, I met about three or four different funding companies through Accion. Accion is another business that’s here in San Diego that helps small businesses and I still think they’re kind of rigged and I hate to say it like this because you’re going to have to prove to me you had a minority-owned black-owned business that they actually loaned money to. Because all their TV commercials don’t have any black-owned businesses. I get all these different companies calling me. My phone still rings now for funding service. This particular company calls me and says, ‘Hey, fill out the application, blah, blah, blah.’ I fill out the application. Two days later, this guy calls me back. ‘Why you didn’t tell us you’ve been arrested?’ I said, ‘Excuse me.’ ‘Hello? Here, we’re looking at your information. It shows you’ve been arrested.’ I said, ‘So what’s the guy’s name?’ ‘John D. Smith.’ I said, ‘But you got my name wrong. My name is John C. Smith, John Charles Smith.’ He goes, ‘Oh.’ I said, ‘You know what man?’ I says, ‘You have a nice day.’ He said, ‘Excuse me?’ I said, ‘Yeah, I don’t need your services.’ So, then his boss calls me back, ‘Hey, how can we make this work?’ I said, ‘You know what? I’m going to send you something first and then you call me back.’ I take a picture of my military ID card. I take a picture of my driver’s license and take a picture of my DD-214, I take a picture of my concealed carry permit that I had by the Sheriff’s department and I e-mail all that to that guy. 10 minutes later after he reads and looks at all those things the guy calls me back, ‘Mr. Smith, I’m so sorry.’ I said, ‘No, I do not want to do business with you again. Don’t call me ever again. Delete all those documents I just sent you because I’ll never do business with you.’ ‘Well, how can we make this work?’ ‘You messed up when your guy called me on the phone with his loudmouth going how come you went to jail?’ I say, ‘He didn’t even ask me in a professional manner.’ I said, ‘Now, let me tell you how I am. I intentionally on Facebook looked up every John Smith there and the one you are talking about lives in Sacramento and he’s a Blood.’ The guy goes, ‘How do you know that?’ I said, ‘Didn’t I tell you I own a security company? Didn’t I tell you I

intentionally looked on Facebook and looked up every John Smith, that's there is on Facebook and made friends with them?' And that John Smith is a Blood that lives in Sacramento and you can look on his Facebook page and he's got the grill, the gold teeth, and the hair and wore red. I even talked to him before on Facebook just to say, 'Hey man, we got the same name.' It was blatant. So now let's talk about my identity being stolen. I've got invoices clearly and my tax returns show how much money the company... we're making. And to this day, I've been in five businesses to this day and I still can't get a simple \$10,000 or \$5,000 line of credit. I've even tried to take \$5,000 and go to the bank and get a secure credit card for \$5,000 for my company -- to this day I still can't do it. That's the truth. And I'm 50 years old and I've had friends that I've known loan me money and just tell me, don't worry about paying them back. Because they see how hard I struggle to try to keep this company and I had this one contract before my friend loaned me \$7,000 and said, 'Don't worry about paying me back.' My other friend that I knew from high school gave me \$2,000 to buy uniforms and told me, 'Don't worry about paying it back.' Because I couldn't get a funding company to loan me money. Now I'm working with a funding company I've been with, but these guys they're good but since they don't report anything to the credit agencies, I still can't get a separate credit card for the company. Still can't. It's not just my credit. The reason why I say that because I've been with Navy Federal for 24 years and I've gone in and had two different increases on their personal credit card. But then when I've gone to other entities and tried to get lines of credit, I would say, it's off my credit. Yes. But then when you turn around and show them tax returns or show them receipts and show them the money going into the bank. For some of the places I've gone to and dealt with the funding companies, yes. But then again, you don't know who's looking at my application. I don't know, you don't know who's really looking at my application or are they just doing number crunching and going, 'No, we're not going to give this guy a line of credit. So, there's too many, but sometimes I feel like there is, because then when I look at other entities and other businesses that are doing more shady and more crazier stuff than me just trying to survive. Why is it so hard I've been in business for five years and my credit score is 620, 630 and it's dropped down lower. I was able to do other things, but you can't give me a line of credit for the company. You can't give me a simple \$5,000 line of credit for the company?' [#8]

- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "I need financial advice from somebody you can trust, who's got my best interest." [#12]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "I have to get the revenue to build my product. That is a problem. I have good credit, but my wife on the other hand, has gotten behind on a student loan. So, I went to try and apply for an SBA loan and, although I meet all the criteria, when they pulled the credit report, they saw that my wife had gotten behind on a student loan. So that automatically kicked me out. And because of that, I just haven't been able to get past that. Until she can pay that loan off, I'm just kind of stuck." [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "I would say, with financing, being that we're a small business, it's not race,



but just that you're a small business, you know, they will really not look at you. And, that I'm aware of, there's not many financial institutions that will lend to you. Not based on race but based on size. And if there are, I guess those type of loans are not really advertised or out there." [#15]

- The non-Hispanic white male owner of a construction company stated, "I think it's a barrier for everybody. I don't think it's gender specific. It's a huge problem especially for small companies. Small companies you have to have very careful books. Under the current criteria you have to show reasonable increase in business every year, you have to show increase in paying taxes every year. And so, this is a building type of process where you show these things one year and then the next year, and then you build upon that for the following year. And then four or five years later, then they finally give you a loan. And so, without that type of track record, the bookkeeping, everything, forget about trying to get a loan. It just doesn't happen even for vehicles and basic things. Being a white male, I don't think it does affect me. I wouldn't know if I came in with that same portfolio of successful, established years of business that if somebody would say he's Hispanic or African American or something. I don't know." [#20]
- The Asian Pacific American male owner of an SBE- and DBE-certified construction company stated, "because financing is usually done through banks, and banks have their own certain standards that they have, and it becomes very difficult. There are private agencies that provide financing, but the interest rate is so high that it's almost not productive enough." [#26]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "huge barrier. It's based upon us being the type of firm we are as a small business and the fact that we cannot get cash back into our company quickly, so we have to fund the projects and the cost for such a long period of time. It's a growth-limiting issue." [#31]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "I was struggling very much to get financing, and it's not discrimination. I think that it's hard for any business, no matter who it is, to get funding or business loans when you have no equity, and you haven't been in business for a while." [#34]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, "I know that is sometimes a problem because of certified payroll." [#37]
- The Black American owner of a construction company stated, "main challenge has been not able to obtain financing through the traditional banking system, has put us in a position to go with independent lenders with high interest rates." [AV#26]
- The non-Hispanic white owner of a DBE-certified construction company stated, "it's rough going up against companies that have a lot of money. Were a DBE. Going after bigger projects without backers – it is pretty rough." [AV#27]

**Bonding.** Public agencies in San Diego typically require firms working as prime contractors on construction projects to provide bid, payment, and performance bonds. Securing bonding was difficult for some businesses and other interviewees discussed their perspectives on bonding. [#2, #7, #8, #20, #23, #26, #36, WT#4]

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "we don't have any issues with it. And I don't think there's discrimination, if you can't get a bond, then you have financial problems and I haven't worked anywhere with that. So, I can't really, I don't want to break on that one." [#2]
- The non-Hispanic white female representative of a majority owned construction firm stated, "on some of these projects, like airports and things, you have to have a bond. And these bonds are sometimes very large. And so, if you're required to get them on your own, sometimes you can't really put that funding up front to get those bonds. Now some projects, and I would hope that they've gotten more this way, the City or whoever's backing that project will cover that portion for you up front. And it's kind of like you pay into that program. Anyway, they've got a beautiful auditorium and things down there, and they were trying to do more work with it. And we were very interested in it, and they needed a bond, and then I started questioning them about the bond, and they put me in contact with somebody, and they said, 'because you're considered small business in this, we'll be able to help you get the bonding for this.' Oh, that's fantastic. Right. And so that is huge. So, I would hope there's more programs out there for things like that. But yeah, it's putting these bonds up because some of the bonds aren't bad, but some of them are... Very high. Very high." [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "the problem is I don't have the lump sum of money that's needed to do the bonding. So now the bonding cripples me from bidding on this contract versus if I bid on the contract, I'd still have an opportunity to bid on it but now I have to do the math. I've got to find out the most comparable rate and make that comparable rate also match with the bonding for that particular project, which could either blow me out in the water because now the bid is too high because they wanted the lowest bid possible. But for me, I can't bid \$21 when I know that my bond is going to cost me \$80,000 on a \$750,000 project. I just think there's a flaw because I've yet to be able to get bonded and every time I've tried it, they look at my credit score and then I get booted off." [#8]
- The non-Hispanic white male owner of a construction company stated, "Pretty much when I got my bond, they didn't even ... I talked to them on the phone, and then I filled out a piece of paper, so I just can't see that being a barrier." [#20]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "let's say you have to submit a proposal with a bond. I mean it's work. If you look at my bid, if you like it and then force me to go get a bid. Don't do it up front. And then they will tell you, we will give the bid bonds back to everybody who didn't get the job. So why did you ask 85 people to give you a bid bond? All that does is you're wasting the time of the bid bond company because he just gave out... You just wasted his time. So why not say, hey, if you are the lowest bidder and we give you the contract you

have to submit it within 10 days. Then that's reasonable. Otherwise we are just barking up trees that aren't wanting to hear it. A lot of wasted time is involved." [#23]

- The Asian Pacific American male owner of an SBE- and DBE-certified construction company stated, "it's almost impossible for them to be able to get bonding right off the bat. Now, when you say bonding, there's two kinds of bonding. One is the state-required bonding contractors, which is I think \$12,000 or \$15,000. That's easy to get, you pay a small fee, but I'm talking about any projects that's required by a state agency since we want bonding. Small startup companies, it's almost not even in the picture. They can't get bonding. As my business sales increased, because they look at that, and so they were able to give me bonding which increased over the years, and so it's just a matter of growth. And for startups, when they don't have sales to back them up, can't do the job." [#26]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I think it's backed on their experience in the market. If you're trying to get a bond and your brand new which the bonding company got to have some credibility with the person they're dealing. You've got to start them all. Get some financial background and get a bank history and show that you got some savings on the bank, you know how to deal with money. Then the bonding company will talk to you." [#36]
- Written testimony from a local trade association stated, "bonding is a barrier to keep African Americans from bidding on public works contracts." [WT#4]

**Insurance requirements and obtaining insurance.** Business owners and managers discussed their perspectives on insurance. [#1, #3, #7, #8, #9, #11, #12, #13, #20, #22, #23, #24, #25, #26, #27, #28, #33, #37]

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I did have to get insurance and I basically searched around. I didn't have any problem getting a competitive rate for liability insurance." [#1]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "nope, insurance was relatively easy." [#3]
- The non-Hispanic white female representative of a majority owned construction firm stated, "we have turned down a couple of jobs because they've required such a large amount of insurance. We cover, we have the standard industries, what they think should be, and we have an umbrella policy to go with that. But even with that, there you're looking at, that's the three-million-dollar policies, and there are companies wanting five and six million dollars. So, and what is in this industry, jumping that two million could be somewhere between \$7,000 and \$15,000 to do one project. So that can, depending on the project, you have to decide is it worth doing that project in order to get the insurance for it or is that something then you let go." [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, " My agent was trying to get some insurance quotes, he put it out to all the different little things. I get a phone call from somebody, 'Hey Mr. Blue, do

you guys do security for bars? I'm like, 'No, not really, but I don't turn away the opportunity to make money in business. So, what are you trying to do? Maybe I have a friend or somebody else who could probably help you, too.' 'Okay, no problem. Thank you very much.' Click. 10 minutes later my agent calls me and goes, 'Hey man, they canceled your policy.' I'm like, 'What the hell are you talking about?' 'Yeah, they canceled your policy.' 'For what?' I said, 'Mike, I had some guy call me on the phone asking me if I do bars?' And I said, 'I don't do bars, but I won't turn down away business.' And I said, 'I really don't do them, but I don't turn away business. So, what kind of services do you need, or I can refer you to somebody? And then he hung up the phone with me and I call that guy back and that guy avoided me -- the whole time. And then I ended up talking to his supervisor.' I said, 'This was unfair practice in what you guys just did.' All this time I'm thinking this guy is actually someone soliciting, looking for services. What he did was act like he was the owner of a bar to see if I provide services after he looked at my profile. And those aren't covered under my insurance. It was garbage. And I called them, I ended up talking to the person that was over him because I'm a retired vet. I said that was unprofessional. I said because the guy called me asking me, do I provide these services? And I said I don't walk away from money but if I can't do it somebody else could do it." [#8]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I haven't had a problem. However, the minimum insurance requirements for a lot of these public agency projects are pretty high. They're higher than what you would typically have if you were just a general appraisal firm. So, you have to be able to afford those premiums that are higher. Sometimes their requirements are like really ridiculous and super high and then you'd have to ask for exceptions in the contract. Because they'll put in like \$5 million minimum for insurance plan, with appraisers that's unheard of. We don't ever need that much. It's something where they would require an engineering firm or some other firm to have that, but then they just have that in our contract. So, then we have to point it out and request an exception. And so far, I've always been granted an exception when it's something that high." [#9]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "you are required to have gigantic insurance requirements. So, it's very difficult to break in. It was for me, to break into the public sector. It was very difficult." [#11]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "I've needed it in the past for the construction end of things for certain work for the City or to do something like that, they want you to, even to put in a bid, you got to have insurance. That was a long time ago though, and I did have the insurance back then to do that." [#12]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "not an issue." [#13]
- The non-Hispanic white male owner of a construction company stated, "all the insurance work and things like that, I just fill out paper and send it in. They don't see me; I don't even talk to them." [#20]

- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “there’s no barriers. We have an insurance broker and she helps us, it’s fine.” [#22]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, “that’s not an issue no more because you can get a lot of stuff online. And nowadays people don’t care if you’re black or Hispanic. If you can pay it and it’s reasonable, let’s do business. Back in the day, if you would go to the old State Farm and there was an old white guy, very racist, no, I’m not going to give you no work. I’ve had that happen to me when I was young and entering the marketplace. But nowadays it’s so diverse that people don’t even look at that. I can get a quote online and they don’t care if I’m Hispanic. They don’t even know what I am. They just want to know that I can pay the bill and meet the requirements and, boom, they’ll give you the stuff. So that’s the era that we are in, that it’s more colorblind. It’s not as it was before because of the Internet. The Internet has removed a lot of barriers that were there before.” [#23]
- The non-Hispanic white male owner of a professional services firm stated, “yes. Especially when dealing with municipalities. Insurance considerations are huge, and, this is a complaint, municipalities make you get this type of insurance and make you sign contracts that say you won’t sue the City. It’s a big barrier to doing business, because it’s rigged in their favor.” [#24]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, “one thing I can say about the insurance is the amount of insurance. SANDAG insurance requirement is pretty high. I don’t remember what it is. And every time we have to ask for a special dispensation just because we have \$2,000,000, \$4,000,000 for our general liability bond, and then we have professional liability is \$2,000,00. And I forgot what SANDAG is, but it’s higher than that.” [#25]
- The Asian Pacific American male owner of an SBE- and DBE-certified construction company stated, “it’s all fee-driven. You pay the fee you can get the insurance. However, there are some industries that it’s very challenging. For example, tree trimming is extremely challenging insurance. Most private insurance companies will not deal with you, and I think there’s two that I know, roofing and tree trimming. And so, we are almost required to go with state fund, because then only because the public agency that will insure us in the tree.” [#26]
- The non-Hispanic white male co-owner of a construction company stated, “they don’t care. As long as you got money, they’ll sign you up.” [#27]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, “no discrimination but the amount of insurance, I mean, it’s ridiculous for some of my projects that were like a \$30,000 project, I had to have \$5 million of insurance. I had to say as a small business, I was paying about \$6,000 a year in insurance.” [#28]

- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "when I was just starting out, public sector required a certain minimum level of errors and omissions and when you're small you need to do small work, it doesn't justify getting that stuff and it was expensive, so it took a while. Once I got a few years under my belt and bigger projects it made sense to get the larger insurance." [#33]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, "for someone's starting up, yes, that could be [a barrier]." [#37]

**Equipment.** Business owners and managers discussed their experiences and challenges obtaining the necessary equipment for their firms. [#7, #8, #12, #20, #30, #33]

- The non-Hispanic white female representative of a majority owned construction firm stated "whenever the Resource Board and all of that came in and started changing the requirements for the smog, at that point, yeah, it really did hurt because, even now there is equipment that we own that we cannot use. So, we then either have to rent or go buy... and there's a couple of different..., and they call them tiers. And certain projects require you have a tier 1 or you have a tier 3 to do that project. So then, you can look at it as an added expense, if you don't have that particular equipment, or that tier of equipment." [#7]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "that is a barrier. I think it goes with the financing and the money and getting a low rate, something that's not crazy high. To be able to have some help, it would be nice to know... There are so many advertisers out there calling me all the time, 'You want money? You want...' I don't know who to trust." [#12]
- The non-Hispanic white male owner of a construction company stated "I guess we bought trucks. You have to do that in person, but I just can't see it being a barrier as long as you've got the credit rating. The sleazy salespeople, they just want paper, so I don't think they would care who I was. Yeah. Female, black, Hispanic, I don't think they would care. They just want their money. They want their commission." [#20]
- The female owner of a DBE- and WBE-certified professional services company stated, "I believe that it's a barrier for some people, but it's colorblind. I think if you're a single practitioner, you are looking at maybe having to pay for the AutoCAD for \$1,200 maybe. The MicroStation for \$1,200, that's a lot of money for a sole proprietor." [#30]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "I think so, you have to have certain software to perform the services and the cities require certain version and type of software to work with them, so yes, you need to have that, yes." [#33]

**Personnel and labor.** Business owners and managers discussed how personnel and labor can be a barrier to business development [#1, #2, #3, #7, #8, #9, #10, #12, #20, #23, #25, #26, #27, #31, #33, #34, AV#33, AV#34, AV#35, AV#36]. For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “I think personnel is the biggest issue right now with availability of resources. Talent. Well, first of all, because San Diego market is not as strong, a lot of talent has either moved away, or they're looking to L.A. for opportunities. L.A. is very busy, so they're looking for hiring people. All these companies, agencies are trying to hire people and there's just not enough people to go around. In the private sector for local companies that do private sector work, they're having a hard time finding people as well. Engineers, surveyors, any kind of more, not entry level, but more experienced personnel, more senior level project manager level has been difficult. Part of it I think as people move away, San Diego is not very cheap to live in. So, a lot of talent moves away, it makes it more difficult and bringing someone from outside other States, that is also expensive because people expect higher salaries and cost of living increases and things like that. So, in San Diego it has been difficult to find talent all the time, experienced talent all the time.” [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “I mean, theoretically, it could be but, I don't know, San Diego is a particularly small, kind of like a slow busy. We're really small, huge community and the construction community here is just insane. You need guys, you can just make a call and suddenly have six guys sitting there wanting to work. So, I guess if you don't have someone that knows anybody only, yeah, but not really.” [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, “we tend to be a little bit more selective on who we pick.” [#3]
- The non-Hispanic white female representative of a majority owned construction firm stated, “for us it is because we are a small company. And for some of these jobs, it takes more people than we have.” [#7]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “finding good appraisers is difficult and appraisers that have experience in right-away. It has nothing to do the gender just the nature of appraisal work and the ups and downs of it and the ebb and flow of the work. It's hard to find good appraisers to use.” [#9]
- The non-Hispanic white male owner of a construction management firm stated, “The market is really tough for hiring, because so many people got out during the economic downturn. Anybody who is 55, 60 years old who could retire did, why work for slave wages for the next 10 years or who knows how long. So those guys all retired. And then during that 10-year period, no young people came in because construction was a terrible industry. There was no money, it wasn't a growth industry, blah, blah, blah. So, people my age who are in their 30s in the beginning of that now in their 40s, there's a huge swap. Now there's some younger people coming in, but not as much. It's still considered a bad industry to be in. So, hiring anybody is impossible. I drove people out of retirement that's what I had to do. I brought my 70-year-old dad out of retirement to work for me at one point. That's how desperate I was. Because he was a superintendent at a construction company when I was a project manager and an estimator there. And I had to bring him out of retirement. I brought

him down from Oregon away from my mom, I put him up in my spare bedroom and made him work for me for like six months. That's how desperate we were to find people. Government sector seems to be good, private sector has really dropped off quite a bit." [#10]

- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "I think my biggest thing has been the lack of work, enough to feed everybody like that. If it was flowing, I think building a business where the employees, everybody could be working regularly. Yeah, working regularly, but be in code with whatever that looks like. Everybody's getting their W-2s and all that, having your work comp. All that stuff that goes with it. I think having that and having that flow of money to be able to just do everything would be nice to do that. I think that would be great to be able to manage all that. That would be wonderful." [#12]
- The non-Hispanic white male owner of a construction company stated, "I don't think people mind working for smaller companies. I don't think people mind working for other people. I just want people who work, who accomplish the task. Finding people who will show up consistently actually is a huge barrier. Yeah, it's a challenge." [#20]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "we've had requests, but we didn't chase them because we didn't have the manpower to estimate the job." [#23]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "there's too much work, not enough qualified people that we can hire. We've been wanting to hire people, we just can't. There's nobody unemployed right now. It is horrible. It just seems like since 2014, things just been crazy." [#25]
- The Asian Pacific American male owner of an SBE- and DBE-certified construction company stated, "in terms of if they require, especially DVBE or a WBE requirement becomes a challenge for us, because now we're trying to find a qualified DVBE that has the proper equipment as well as... Okay, then it becomes a whole different ballgame." [#26]
- The non-Hispanic white male co-owner of a construction company stated, "personnel labor? No. No. There's no discrimination with that. With us being woman-owned? Nobody cares. No." [#27]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "with public sector work, we're being told we also have to hire people from a certain zip code or certain neighborhood of the impacted zone of that project. And the problem is where a lot of this work is going on. There's probably a 1% to 1.2% availability of workforce to hire." [#31]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "I think personnel is important in public sector and private sector to a bit but yes, I mean, in the public sector they want to see lot of experience and school all the staff



and things like that. So again, when you're starting up and you're on your own it's hard to compete if you're a small one-man firm or two-man firm, and you don't have a lot of experience that you can point to in your portfolio. And that's for anyone; it's not a minority issue, it's just a startup firm, it's just really hard to get the errors and omissions insurance. It is hard to build up a portfolio that you can point to and it's hard to compete if it's just you or two or three people. Not discrimination based at all, in fact, I think if it's race or ethnicity is a bonus. Because I remember when I was a partner at larger firms and we went for big public works, I mean, we really sought out minorities to... because we got points for it, it's really clear on the checklist and the point system they were going to judge on RFPs and also the interviews." [#33]

- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "not as long as they're US citizens. I keep saying US citizens because I deal with firearms, and I can't have anyone that isn't a US citizen working for me." [#34]
- The Hispanic owner of a construction company stated, "we need talent. We need new people." [AV#33]
- The Non-Hispanic white owner of a construction firm stated, "lack of qualified labor force." [AV#34]
- The non-Hispanic white owner of a construction firm stated, "it's difficult to grow because of labor." [AV#35]
- The Non-Hispanic white owner of a construction company stated, "biggest problem is manpower." [AV#36]

**Working with unions, being a union or non-union employer.** Business owners and managers described their challenges with unions, being a union or non-union employer [#1, #2, #4, #6, #7, #8, #10, #15, #22, #23, #25, #26, #31, #36, #37, AV#23, AV#24, AV#25, PT#3, PT#9, WT#4]. Their comments are as follows:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I don't have experience with that. I know some other firms have that type of difficulty because, if they're not like surveyors or other things, if they're non-union, there's some restrictions and obstacles for that, but I don't have that experience. The pay and what they can, basically, who they can bring on board. And if the public agency requires union workers and they don't have that within their firms, they can't pursue that opportunity." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "there's just certain outfits that don't necessarily like unions, but I guess being nonunion then we're all so isolated because we don't want to deal with the PLA PSA school districts like San Diego Unified. We will not go to work there. You just can't work there with the project labor. It's set for you without being a union." [#2]

- The non-Hispanic white male representative of a majority owned construction firm stated, "I'd say our biggest difficulty is that there's certain public projects that require that you sign a PLA or a PSA agreement, which typically says you're signatory to a union. But we're a non-union company, so those end up being like an obstacle for us directly, just because we're really a non-construction site service, my side is the rental fence. So, when you do things for, you know, minimal site work, like temporary fence, usually you set it up, you rent it, and then you go pick it up when you're done. So, it certainly creates the obstacle because there's not a union rental fence company. So, often times, we'll have to deliver a product and find a union company to set it up, and it's kind of ridiculous in my opinion. Just drop it off, and then they'll have to hire somebody out of, you know, the carpenters union and pay those guys, you know, 60 bucks plus, ends up costing them about 100 bucks an hour to have a couple of guys set up some pretty simple product. But then there's times where you have to have special equipment for our types of pounders or rock drills and stuff that we have that they don't necessarily have. You know, sometimes primes will, if they're union companies, it's just because we're this weird niche as a temp fence company, it's not like they can find a temp fence company that's union because it's a non-constructive sites service. So, the problem is that they have challenges using us because of their contracts. Right, so it's very disturbing, they have the bid, and it hurts them so much because like, I'm going to be there for a day, you know, for the beginning, and they're going to call me when the job's done. Now, they might have to call me once or twice in between because somebody on a forklift ran into the fence or somebody in a semi-truck took out a corner of the fence, but it's so minimal amount of work. Or 'hey I need you to move the fence over 100 feet' or minor stuff. But to have those contracts come in where they can't use me, or I have to deliver, there is a hardship that I think is not accurate, you know. There should be a correction made somewhere that says non-construction site services, like port-a-potty's, for example, what are you going to do? Get a union guy out there? You going to give them all the tools and send somebody out to pump the crap out of the port-a-potty's? No! There is no union port-a-potty company, you know. Non-construction site services, like our company, fall into like, storage containers get dropped off, or trash, you know, disposable, port-a-potty's, you have temporary power that kind of falls in with non-construction. Just like temporary construction, but then you get these union guys that say, 'oh no, that's labor on the site, nope that needs to be done by a union guy.' It's like, c'mon, really, guy? C'mon, we're not carpenters, we're non-constructive to the site, get your head out of your ass because to seriously make us drop off our panels is the biggest headache for the prime. It's a total headache, it's ridiculous. Yeah, but not having to do with race or ethnicity or anything like that." [#4]
- The non-Hispanic white male representative of a majority owned professional services company stated, "I'm part of what DIR talks about ... there's a big emphasis about prevailing wage. And prevailing wage is based upon union type of businesses that have union employees, and landscape architecture is typically not. And the only area that I'm familiar with and understanding of related might be with engineering firms that have their own in-house surveying crew, and because some surveying companies deal with union employees. But most architects and engineers, straight architects and engineers, don't. But I think the industry has clouded that a little bit, and I was very, very frustrated in trying to go through

and being involved with getting a DIR number. And yet, you can't find anything within their system that deals with the specifics of our industry where we are designers. We're not part of the people that are actually building, which might be contractors that are union employees. And so, there's, I think, a failure to appropriately recognize the differences." [#6]

- The non-Hispanic white female representative of a majority owned construction firm stated, "we're non-union. We pay definitely better than minimum wage. But prevailing wage definitely has its perks because they have the retirement plans and they have the sick leave, and just more benefits to it than some other smaller entities can offer. There is, just like some projects, they require you to be union. And so, then we cannot participate in those because we're non-union." [#7]
- The non-Hispanic white male owner of a construction management firm stated, "it's miserable. They've got the same kind of attitude of being part of any of the specialized classes where they just don't work very hard generally. They're owed a job. If you're trying to bid union work and you're not in union, like you get a lot of shit. You won't get the contract; they'll use your numbers to shop somebody else out. If you're sometimes on adjacent projects, they'll throw shit at you. I mean, I've seen some pretty ugly stuff. Like literally dead rats thrown on our job site, because we were adjacent to a union project." [#10]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "sometimes it's required that you are union. But I know, like, our local teamster union had left San Diego, and they wanted us to join the Riverside County one. And it's like, well what are they going to do for me, you know? It's like, they're so far away. So, we withdrew from the union, and there's certain jobs that require it." [#15]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "because we're a small company and we're just not signatory to a union, so that can stop us winning work, when we have to be signatory to the union." [#22]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "as long as we don't set foot on the job site, we are okay. Because everything that we do is off-site. So, if we do step foot on the job, we have to pay our people prevailing wage or provide a union-contracted employee. But as long as we don't do that, we don't have to meet that requirement." [#23]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "engineers do not belong to a union, but our field technicians do on some jobs. They join the union at least for the duration of the job. Which is a barrier, because they have to join it temporarily." [#25]
- The Asian Pacific American male owner of an SBE- and DBE-certified construction company stated, "I am working on a contract right now that will require me to be part of the union for the particular job, and I understand I have to fill out the paperwork. It looks like I just have

to pay a fee for every employee that I hire, and so not knowing that because the contract is a good contract, I've signed up but I don't know my personal knowledge and how it works with unions. For example, give you a specific, Pacific Gas and Electric workers are required to be part of the union, so now as a corporation, I have to now sign up for that work for any employee that works on PG&E to be signed up with union, so that's a challenge right there." [#26]

- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "we're a union employer. It depends on how you approach them. They are your labor house; they can't get to the labor. So, it's really interesting right now. The unions - I was nervous about working without, as we are with them because they know they can't fill the orders with qualified personnel and the skills that we need. So, we give them a little flack because of that on a regular basis and they take it right now because they have to. It is a huge financial barrier, because I have to pay the guy a rate, not based upon his skill set, based upon his category. It is supposedly not. I can't give him a pay scale based on merit, I use pay scale based on some negotiated contract two years ago between the ATC and the Union." [#31]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "That's horrible. That's horrible. Just the unions in their project agreements whether [they have] PLAs. Project labor agreements. Some of these unions are a lot more Caucasian than minorities or women. Yes. Male Caucasians. Just because that's where those groups are. As I said, most of these unions that I've seen are trying to bring in diversity." [#36]
- The owner of a woman-owned construction company stated, "only place we have trouble landing work is with Caltrans. Union will not let us work for them." [AV#23]
- The Native American owner of a construction firm stated, "the taxes and PLA are horrible." [AV#24]
- The non-Hispanic white owner of a professional services firm stated, "it's difficult to compete with larger unionized entities." [AV#25]
- From a public meeting held in San Diego a respondent stated, "I am a minority in a woman owned firm, we're small business and disadvantaged. Usually when describing that people would not assume that I'm union, it doesn't go hand in hand. If the transportation officials that are running SANDAG would just open their eyes to see that in using the delivery method of providing the professional services through your contractor that are signatory, you tend to not have the participation by DBEs and the MBE/WBEs that you're talking about, so they've had a few projects, the Mid-Coast Transportation Corridor where they had a memorandum of understanding with the Building Trades Council to be inclusive of everyone. I would think going forward, since we're all throwing money in that pot, that I also would like to participate in those projects. I'd like you to take back home to them, there's a lot of people that don't fall in the class of being unionized firm that are also the people you're looking for, like small business, and you have to find a way to match them up. We'll play by the rules, we'll pay them what they want for the benefit program, but they

have to allow us to play the game, otherwise we can't be there, and that's not a decision that can be fully made by SANDAG. It has to be a cooperative effort. We just want the abilities to make that choice to participate, but if it never exists, we can never even come around to having a vote." [PT#3]

- Additional comments from a respondent at the public meeting, "without PLAs that allow for non-union or non-signatory firms to bid for projects there is a significant exclusion of small and disadvantaged businesses. The only PLA or memorandum that I've seen with SANDAG is on the Mid Coast Transportation Corridor. In LA, however, Metropolitan Transit Authority has PLAs for all industries and could be a good model for SANDAG to implement because they consistently have high rates up to 30% of participation from small businesses." [PT#9]
- Written testimony from a local trade association stated, "union and non-union (open shop programs) should be on the same page in helping all citizens' gain and learn a skill in their sponsored apprenticeship trades. Apprenticeships should all be exempt from PLA's on the bases of discrimination, which are state and federal approved and meets the requirement of equal opportunity. Open shop and Union apprenticeships are established, not only to hire and train unskilled workers at a discount to the employers, as opposed to all journeymen skilled workers (at a prevailing or Davis Bacon higher pay rate), but to help hire underutilized African American, women and other excluded groups, to meet equal opportunity hiring and training needs. The problem is that most owners though may not be racist as business owners, but they overlook the rights of having a diverse workforce and some ignore the need for diversity all together. The fact of this lack of oversight on the part of the City of San Diego and other public agencies which is not being done, make them a party to discrimination, through passive participation or indirectly, by non-enforcement of EEO laws to its private contractors and their sub-contractors, which ends up as total exclusion of African Americans, women and other groups. The Davis Bacon law was developed in New York City in 1939 to prevent African Americans the opportunity; the City of San Diego has suppressed equality in construction contracts to save white construction contractors. The City uses prevailing wages requirements on all public works projects vs. federal term, known as Davis-Bacon wages of federal projects which was originally used to keep out unskilled and skilled African Americans, women and other excluded groups. By directing interested parties to contact this union where the Unions ask for joining fees (\$300 - \$600 dollars) and require paying union dues, until everyone in the line in front of you gets a job first, and whereas Union members let their friends in the line ahead of African Americans, which is someone of their own race. As in the case with another individual who was told to join the union so he could work for Swinerton Builders and that he would have a job within a week or so, he never did and had to go to Los Angeles, California to work." [WT#4]

**Obtaining inventory or other materials and supplies.** Business owners and managers expressed challenges with obtaining inventory or other materials and supplies. [#8, #13] For example:

- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, “the material that I’m selling, I’m actually selling someone else’s material now. But I have to buy the material, add my mark up on it, and then sell it to the primes. The primes though are basically saying, why should I do that when I could go directly to the supplier to get it. So that’s why it’s kind of slow, so what I am trying to do is expedite my process so I can actually supply them with the materials. And I don’t have the middleman and I can compete with some of the other companies.” [#13]

**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. Multiple business owners and managers discussed the challenges associated with pre-qualification [#1, #2, #8, #9, #16, #20, #31, #33]. Their comments included:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “it’s not an obstacle, it’s just cumbersome. A lot of times, some of these agencies require prequalification but then nothing happens. Like the City of San Diego has this whole prequalification process every two years. You get on a list for the chance of getting called on a project, which you still have to go and interview for and most of the time, you don’t get any calls. But you still put the effort to put the prequalification package together. I mean, you do it every two years. So, you update, but the amount of information they asked for, it’s just extra work that you may not to do. And they have like 20 different categories. If you’re a firm that can do five of them, then there’s five qualification packages you have to do. As a large firm, I know we used to do like 10 of them or something like that, and that was a lot of effort. And then nothing would happen. Because they only use that for smaller projects. And then for a larger project, over a million dollars, you still had to do a whole qualification process. But if you go after a project that’s over a million dollars, you’re going to have to put a separate package for that. But this other list was for smaller projects below a certain threshold. And the City may never get one of those projects. So, you just put in all that information for two years, and then every two years, you have to go back and repeat it for the chance of getting something. And a lot of times people just didn’t get anything.” [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “they’re useful and they’re good, but sometimes they’re reasoning behind the limits of the set, are just ridiculous. It’s also harder for newer companies or newer firms to start pre-qualifying. They want things like, certified financial statements, which littler companies, don’t have. I think we’re only two years in and some of them want five years or more. And so, unless you’re going to go pay the CPA to go ahead and stamp them, then you’ll have to wait three more years to prequalify for them. It’s extreme but again, it’s financial security for everyone.” [#2]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, “Man, I get it you need to have a certain amount of time in service, but then the other part is some of the little nick picking requirements that they have and then details of it and intermixed. You just wonder how, okay, how does this thing work?” [#8]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "sometimes agencies will have something like minimum 10 years as a firm, like forget the fact that you have over 10 years of experience as an appraiser, but they want the firm to be together for 10 years. So, we actually were denied a contract two years ago for that reason. Still we don't have 10 years as a firm together, but we were able to get a contract this go around when they put it out again. I guess decided that we were still in business and they made an exception. I'm not really sure. I didn't question it. But again, it was a requirement and we still decided to submit a proposal for the RFP because we're very close in location to that agency, and the closest appraisal firm to that agency in location. And we know the market area and all of that. So again, I'm guessing that's why we were awarded a contract this time." [#9]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "that goes back down to you either meet the requirements or you don't, and you're just wasting your time by not doing your research beforehand." [#16]
- The non-Hispanic white male owner of a construction company stated, "I don't know. If you have to do five things before you can even bid, then there's a less of a chance that I'm going to bid because I have one certification, which is C10 licensed electrical contractor." [#20]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "you don't know what the goal is on the pre-qual sometimes. They don't advertise why it's important to pre-qual. Are they looking for financial wherewithal? Are they looking for a skill set wherewithal? What are they seeking with the outcome? They're just gathering data but where's that data going? What are they going to do with it?" [#31]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "I think it's a good idea because it takes a lot of time and money because pre-qualification packages are usually a lot less involved, so if you're going to pursue it you might as well put in a little bit of the effort and see if you're really going to make the cut as opposed to wasting your time, and probably everyone and their brother thinks their qualifying so it saves a lot of time for the district or the entity to review these things quickly and make the cut." [#33]

**Experience and expertise.** Interviewees noted that experience and expertise can present a barrier for small disadvantaged businesses. [#1, #3, #7, #11, #20, #22, #30, #36, AV#21, WT#1] For Example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "with the public sector, they're looking for background and experience doing that similar type of work. So, if I'm just coming in as a new business, I'm not going to be able to go after a project because I don't have history of having done that type of work. Even though I've done that kind of work in a bigger company, but I don't think they recognize that. Building up that portfolio to get to the point of going prime for a public sector, it's going to take me a long time to get there. If subs have never worked for SANDAG, the prime firms will have a harder time picking them, because they have to train them all

over again. So, they stick with the people they know typically. And it makes it harder for new small firms even like me to come on board.” [#1]

- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, “when you start a company, you don't have company experience. Right? So, it's almost like you have to be in business for a couple of years just to get company experience, and if you can't land jobs, how do you have company experience and a resume to even apply for a project? You're dead in the water, so you can only do it as a sub. So that's a big barrier. I don't know how they can waive prior experience. Maybe they should evaluate individual experience or company experience, so maybe give that option. Because everybody has personal experience, right? Because everybody has 20 - 30 years of experience. So instead of have company experience, maybe it should be individually experience.” [#3]
- The non-Hispanic white female representative of a majority owned construction firm stated, “yes. Always getting somebody that is experienced in this field can be hard because if you're good, you're working all the time. And trying to break people in sometimes can be hard. Because it takes time and experience. And the person, too, has to have that dedication to really want to learn. So, when you look at bringing in somebody new to a non-union, to a union base, sometimes that union may take on some newer people and be able to train them faster. I think that's because they have more personnel that can do the training. Where when you're a smaller company, not everybody's going to be able to teach. So then it takes that one person or those two people that really know that part to teach that person those special skills, before they can go to the next person and get the next set of skills.” [#7]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, “you have to provide proof of experience in that local field, or whatever. So, it's very difficult to break in. It was (difficult) for me, to break into the public sector. It was very difficult. But, nevertheless, one of the sacrifices is that all of these public agencies want to see five years of experience, and it's very difficult for a firm that's been doing strictly private work to come up with five years of experience unless someone gives you an opportunity, like a prime contractor.” [#11]
- The non-Hispanic white male owner of a construction company stated, “experience definitely matters, yeah. You have to have certain criteria to bid on certain jobs.” [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “I think for us, because we're a small company, and we have a lot of experience in the utilities sector, but we don't have that much outside, it's difficult to break into new industries like we said, water, airport. They tell us, ‘Sorry, you've got no experience.’ But we don't know how we can get the experience.” [#22]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “it's a barrier. That's why a lot of these people have to start with a company and get their experience as an employee. That's one take-off I'd had three individuals of my company that I trained and they took off and started their own companies. Then, I've had people who came into the company totally qualified because that's why I had them working here, and



they went to work for another company with their own qualifications. They work as employees not as corporate, not as owners. Two of them took off and start their own businesses. One stayed and one's very successful." [#36]

- The Non-Hispanic white owner of a professional services company stated, "obtaining work through City/SANDAG/NCTD agencies is very challenging for a small business. Can't get the necessary experience." [AV#21]
- The Hispanic American representative of an MBE- and DBE-certified professional services firm stated, "some public agencies say that they really want to work with small businesses. When they issue an RFP, they may request a minimum of 5 years of experience in that task area. We have hired staff that has that minimum experience and more, but the public agency says the firm itself must have the years of experience, not the staff. It would be nice if the staff experience was taken into consideration. Otherwise, how is our firm supposed to get that experience and get our foot in the door? If staff have that experience, it is the same difference." [#WT1]

**Licenses and permits.** Certain licenses, permits, and certifications are required for both public and private sector projects. The study team discussed whether licenses, permits and certifications presented barriers to doing business. [#1, #7, #8, #10, #12, #13, AV#28]

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "licenses, I don't think they're difficult to get. For City of San Diego, I was trying to get a certificate as a small local business. But I have to be in business for a year before I can even apply for that which is ridiculous, because they're promoting small businesses and things like that. I didn't have that requirement for DBE or WBE. I don't know why the City has such a long, 12-month period." [#1]
- The non-Hispanic white female representative of a majority owned construction firm stated, "every city has their own permit and licensing facilities. So, you have to call every time you want to work in that city. You have to call the city and get ahold of the licensing and the permit people to find out what their qualifications are and regulations are, so that you can submit the paperwork into them, to get your permit or your license to work in that city. And then depending on the project, will depend on what other permits and licensing that you have to get and what you have to go through to get it." [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "I get it if you got too much business on your plate, but then like my attorney wants to send them a nasty letter, but I can't point the finger at them because it's not their fault that it has taken too long for the process to be done for the badging for the people, but so what do you do? You can't send a nasty letter to them when technically it is not their fault, but then you lose money, you waste money on the County and City because of the background check process. So, there has to be a better way of streamlining background checks when you're actually hiring employees to actually work. Because now you're just wasting money and then that employee walks away because now 60 days has gone by and their background check hasn't cleared. And when they walk away,

you just wasted 30 bucks doing a background check on somebody that thought they were going to end up with a job, whether it's part-time or full-time. If I compare the badging and background process that I went through at the San Diego airport and then I compare the badging and background check compared with the County of San Diego, it's two different entities and you would figure the airport because of the FAA stuff would take longer. But the County takes longer than the airport.” [#8]

- The non-Hispanic white male owner of a construction management firm stated, “getting your contractor license in California is a bitch. That's why I became a consultant. I went to go get my license, they turned me down. Like I have 20 years of experience. I know more than 90% of the people out there. ...if you didn't fill out the form correctly. So, they like give you like this much room for experience. First of all, California contractors' licenses, you have to be a journeyman for four years in order to get a license. That's stupid. I've been a project manager and an estimator for 20 something years. I know more than a journeyman about how to run a company and how to do the estimate, how to build the job. I hire a guy with a hammer who's a journeyman to go out and do the hammering. I even know how to do that part, but I'm managing it. You want more people like me and less guys like that. So yeah, and I had all the journeyman experience, because I actually did grow up through the ranks. But for whatever reason, they just didn't think I had sufficient experience, which I thought was crazy. I built the MVP terminal in Pendleton where the president flies into; it's got the presidential podium with the seal on it and the whole nine yards. I'm like, so I've built some pretty cool projects. I mean tons and tons of stuff and I didn't get my California contractor's license, so I thought that was insane. They didn't even let me sit for the test. They denied me my applications. I said, [expletive] that, I'll consult.” [#10]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, “it was a barrier once. I learned it the hard way. I got a call, I went up and looked at, I think it was the City. They had some burnt homes up there, and so I went up there to look at junk removal, but it was grand scale of demolition and stuff. But I don't have the contractor's license, but the guys I know, they would take on that big job and then I could work with them and do that. But, doing that and then never getting back with a bid, because I asked the guys back then, they were all busy at that time. A lot of work was going on, so nobody wanted to take on the job. Then, I get a call from the City saying that I didn't give them a bid, but had I bid, I'd have been in a lot of trouble because it was a sting and you needed demolition license. That's where I learned about you need construction cleanup license or demolition license. In my mind, I'm thinking contractors... because anything like that, I already know I can't do that, it's too grand. But they don't know that, so they were doing a sting. I didn't even do a proposal or anything, I couldn't get the guys, the contractors to come in, but it just didn't work. So, that was a problem, and then getting the construction license, I need to pay money, but that cost \$700 and something dollars, \$1000 dollars. But then, I owe a fine to the City because they fined me for that sting. Obtaining those licenses, it seems like it's financially, right now, hard. I think it's a barrier and a burden. Not very clear at all. We had to look up, for instance if it's over 10,000 pounds in the truck, that's when you needed the CA number. But you don't know that. That's probably why he had never been pulled over before. It was just that load was just so massive.” [#12]

- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, “I don't know if this would be... but the California State Licensing Board. I come in, of course, with 20 years of experience, I took a test to become a contractor with them maybe five years ago. I passed part of the test, but I didn't pass the other part. So, I found out at a later date, I thought you could only take the test once and once you took it, that's it. So, I didn't pursue it. My wife was reading the information, she said well there's no limit on how many times you can take it. This was four years later. So, what I did was reach out to and said hey, I would like to take the test again, I paid my money and everything to take the test again. They set me up with a test because I had taken it before, now I am definitely qualified, right? But by this time, my consecutive years had lapsed. So, you have to have 4 consecutive years in the industry in order to take the test. So, what I did, first they put me in the system, but when I called, because I was anxious to take the test, I called the young lady, and I think I was just over-anxious, because when I did call her, it must have sent out some type of red flag. So, she did start going over my application, in my opinion, with a magnifying glass. She put me in the system because the other lady called me and said, ‘okay, we want to schedule a day for you to take the test.’ A couple of days later, she sent me something saying, ‘oh, I am so sorry, but we won't be able to let you take the test because you have a lapse in your time.’ I sent a letter to Gavin Newsom, I sent a letter to Kamala Harris, I sent them to all of the representatives and everything, ‘this doesn't make sense. I have been doing this for 20 years. Definitely have the experience. I have taken the test before. Now you are telling me, I can't take the test.’ Newsom got back with me and said, ‘hey, this is the California State Licensing Board, we don't have jurisdiction there’ but whatever. I was very disappointed because it just really tied my hands, but maybe that is just a personal complaint from me. It didn't make sense to me. It does limit my ability because now I can't bid on the contracts as a C32 contractor. So now, I have to be a sub instead of a prime because I can't bid. I can't even get in that arena. So, it strictly just ties me down to just being a supplier bolt to a contractor. It just personally affects my business. I personally feel like it was bullcrap, myself.” [#13]
- A respondent from the availability survey stated, “too many license pawnshops.” [AV#28]

**Learning about work or marketing.** Business owners and managers discussed how learning about work is a challenge [#1, #3, #6, #7, #8, #9, #12, #13, #22, #24, #25, #26, #29, #33, #34, #36]. For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “I think there's some challenges for some people that don't have the expertise. I'm a 35-year veteran of the industry. So, it's much easier for me to do that. But there are a lot of small businesses that get out there with little experience, and that's what I'm trying to do, is help them but they can't afford to pay me. So, I think that's where, there's a high percentage of small businesses that go out of business within the first year or up to five years because of that, because they don't make sales, especially in professional consulting industry. If they don't know how to market themselves, they just won't thrive, and the business won't survive. The fact that they don't have a knowledge of how to sell... A lot of businesses know how to provide the services they provide, whether it's writing a report or designing something or whatever, selling widgets, but they know how to

make it, how to deliver it, but they don't know what it takes to manage a business. They don't know what it takes to sell their products. They don't have the experience in marketing, branding, developing the business and things like that. It's about background. They don't teach that in schools. They don't teach you how to sell your business or how to basically develop business. A lot of these people that start their businesses are experts in their field but may not have ever had opportunity to do business development. Without that, it's tougher to... They struggle, they struggle to figure out how to get there. They don't have the relationships, so they got to go build relationships, then they got to maintain the relationships, then they got to get the projects from those relationships. It takes time. It's a struggle. Having a network within your industry is the biggest hurdle. And some people don't know even how to go about developing their network." [#1]

- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "no barriers, but it's, like anything new, trial and error. You improve along the way. And then there are certain things that we had never done before that we have to do after our jobs, accounting, marketing, stuff like that." [#3]
- The non-Hispanic white male representative of a majority owned professional services company stated, "most all municipalities, you can go to their website, and I have had front office staff that it's been their responsibility to scour those every now and again well, with whatever level of frequency, as well as I will also. Then, there's a certain amount of word of mouth, that happens. Now, recently I started using a source that sends me e-mail information, on a daily basis, for public projects that are being notified throughout whatever my requested area is for. Right now, it's San Diego County, and some bit of Orange County, and as I mentioned, the areas where we are familiar with, out in the Coachella Valley as well." [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, "sometimes it can be hard, like I said, because we don't always get notified of what's coming up and what's not. And I'm not going to say it's all their fault, but sometimes it's hard to find out where they're listing their work at and what has to be done to get on their bid list." [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "I'm too small and I'm not putting myself down; meaning I'm too small. For me, it's a challenge to sit here and pay somebody \$5000 to build my website when I'm just going to have to learn how to do it myself. It's a little bit of a challenge to pay somebody to do marketing when I've tried it once or twice and lost money. Because here I am paying somebody 14, 15 bucks an hour that supposed to be doing door-to-door sales for me and they're not doing it. So, it's a bigger challenge because you have to find somebody who's really dedicated, either you want to help me, or you don't want to help me. And I don't have 40 hours a week to toss away to give you and you're not performing any services for me." [#8]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I guess a little bit, learning about work, it's like you have to, I think it would be

very hard just to come into this business. I was fortunate when I was with my prior firm that I was able to be involved with the different associations and that's how I got my name out there and met a lot of people and developed relationships. Otherwise, I think it would be somewhat difficult to market to some of these agencies. How do you get in front of the people that are decision makers and develop those relationships with them? It also depends on the client and the agency, some people if you know them, then they'll be sure to e-mail you when something comes out. But if it's typically a bigger agency, then the only way that they spread the word about their RFPs that are out is that you've had to been registered on their website or some website that they've contracted through like PlanetBidss. So literally I printed out a list of all the counties and all the cities in California for the most part, in Southern California, and we had to go through and go to each one of our websites or try to track down how you get on their list to be notified. So yeah, it's time consuming and you have to go, 'Oh, I didn't think of that city.' You know what I mean? You're like, where do I want to do work? It's time consuming." [#9]

- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "the toughest thing is knowing which site to focus energy on. When we run referrals or recommendations, do we send them the link to the Yelp, do we send them the link to the Facebook? Google? Where do we want even just recommendations at? Which site? It changes, I feel like, every year, so that's tough to stay on top of that. I'm not trained in that; he's not trained in that. I suppose we could think about hiring someone, but then there's that cost again, so, definitely complicated." [#12]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "that's one of my weakest points, is marketing. I've been basically doing it myself because I basically have an engineering background, so I do most of the building and making stuff. So, the marketing, I'm kind of gravitating towards that, but as of now, we don't do much marketing other than phone calls. Because of the industry that I'm in, all of my focus over the last 20 years, has been manufacturing, building, setting up, stuff of that nature. Now I'm in this for myself, I'm finding that I have to market the material as well. So, I don't have any expertise along that line. I have to give something to some firm to show me more about marketing. I just mainly been relying on the BVOC off of the VA." [#13]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "I don't know if you're familiar with the organization PTAC, and I'm not sure if that is a government or a local government agency. But they put on a lot of workshops of things about how to win business. It stands for Procurement Technical Assistance Center." [#22]
- The non-Hispanic white male owner of a professional services firm stated, "I didn't know much about social media marketing and stuff like that, so I had to learn it and start doing it." [#24]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "the City of San Diego for example, we signed on to them and then they send us a notice about projects. For the most part, the larger company has a market

company that chase after these projects, so they're usually ahead of us. The bigger company have entire departments just to marketing and look for that opportunity, we don't." [#25]

- The Asian Pacific American male owner of an SBE- and DBE-certified construction company stated, "I've noticed that almost all public agencies are using private bid solicitation companies to advertise their bid, okay? As an example, County of San Diego uses BuyNet. City of San Diego uses PlanetBids. SANDAG, I don't know where they're at. I just don't know, okay? So, if they were in PlanetBids, I consider the SANDAG is by itself, I think. I'm not sure. And so, if they could all somehow, and I don't think it's ever going to be able to merge into one, it'd be great. Now, actually public sectors have done that. eProcure, California is one website which is state-owned that advertises all their bids, which is great. So, I know that if I want any state bids, I can directly go to that. But then there are some other issues like when ... But however, as I mentioned, San Diego and others use PlanetBids, and so we still have to check those out, including eProcure." [#26]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "yes, probably. The only barrier that I see is the, you know, not being able to find out when a contract is in the mix to come out at the same time as a lot of those primes. Those primes they find out months and months ahead of any other sub would know. I don't know if it's because their business development or because they already have personnel working in those offices that they hear about or you know, they have more insight than us small companies would have. And so, therefore, they're privy to that kind of information where nobody else is, not the ones subs are talking about." [#29]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "I think it's helped me, I think being a minority was very helpful because it opened up some networking opportunities to be a sub to the larger firms who were seeking out minorities to put on their teams." [#33]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "marketing is a little bit tricky, we can't really put up billboards or put up flyers and stuff like that. Essentially, the general public is..or private entities, typically aren't going to be the ones that give us work, it's going to be state level and federal entities. So, so far our approach to marketing is going to meetings. Basically, meetings where we know that - other meetings and conferences where we know other biologists and basically the people we want to work with or for are going to attend and then we go after, then just going, we have capability statements and we do a lot of networking, essentially." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "it's because of their social and economic situation. They got to worry about a job. They don't have time to go watch bids. But if they did and they knew the bids, they could get a job. That's just not the way it is because of their social background, their cultural background." [#36]

**Any unnecessarily restrictive contract specifications.** The study team asked business owners and managers if contract specifications presented a barrier to bidding, particularly on

public sector contracts. Multiple interviewees commented on personal experiences with barriers related to bidding on public sector contracts [#1, #2, #3, #4, #8, #9, #11, #16, #20, #22 #24, #26, #28, AV#38, AV#39]. Their comments included:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “that’s a big challenge. Many agencies just over the years, their bureaucracy grows more and more and more and they require forms and this and that, that really has not necessarily have anything to do with delivering the work, but it’s more on the legal procedures and everything else. But it’s tough on small businesses. I know when I was with my former company and, for example, we did submit with L.A. Metro. L.A. Metro has so many ridiculous number of forms to fill out and submit. And if you had a large team and you had, 15 subconsultants, everyone had to go through that. And it’s just a lot of effort, for something that you’re not even sure you’re going to get. So, yeah. Requirements just get more, I don’t know, increase over the years. And it would be nice if they’re simplified. Then that’s why it takes so long to even get on a contract. For SANDAG and many of these agencies, it takes six months to two years sometimes to get a task order or get on a contract or something like that. So, it’s challenging.” [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “the PLA PSA, that’s kind of a prequal requirement, yeah. The Project Labor Agreement, Project Stabilization Agreement.” [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, “I just want to touch on contracts, so master agreements. So a lot of times as a small firm it’s a take it or leave it situation with the client, developer, so if you want the project you got to obey by their rules, and if you don’t want it then you walk away. So, as a new business, a lot of times we have to take that if we want the project. But four years later, if I read the contract, if I don’t like it, I would not sign it. So that’s the difference between year one and year four.” [#3]
- The non-Hispanic white male representative of a majority owned construction firm stated, “a lot of the San Diego Unified, they have a lot of work that’s done through proposition funding, and those are the ones that are extremely difficult for us to work with because there’s things about the proposition money that have requirements for the type of labor. And there’s not enough clarification on non-construction site service. There’s not enough language to specify that something like temporary fence would have an exclusion. I mean, I would say it should state ‘agree to prevailing wage requirements,’ that we always do, we always pay our guys prevailing wage. But that fact that we’re non-signatory to any union, we won’t sign a PSA or a PLA agreement, which means these are the kind of job sites specifically, and there’s so many of them, where we just have to drop off the material. Again, does not work well with the prime, does not work well for us, really, I mean because here we are, have all the equipment, have all the experience, it’s minimal amount of work, and our contractor has to turn around and find somebody else to install it, who doesn’t have the tools, does not have the experience. To me, it’s a waste of everybody’s energy completely. I mean the only ones that benefit are the labor union guys, which really hurts taxpayers’ funding, because you’re going to pay these guys a bunch of money, and it’s going to take

them four times longer to do the work, not having the right tools on something so simple as non-construction site service. We're not building anything. And I just don't think that the language is proper enough to allow the prime contractors to understand, they don't know. So then, what do they have to do? They have to yield to the default. It's gray. So, because it's so undefined, it creates difficulty for us to deal direct. So, you got to get somebody who doesn't install our product attempting to install, and that doesn't benefit anybody because it's not done as securely or safely. So, like, gender, no, none of it really relates." [#4]

- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "with the City and County and state stuff, you have to keep an eye on the bid and then if you don't keep an eye on the bids, you'll see an e-mail pop in your mailbox and then it's gone in five days and then the bid's done. You have these quick turnaround bids that are ... Here's my conspiracy, why is this quick turnaround bid giving you only 15 days to turn it in, so that means either you already are going to keep the incumbent on there or you want bids to be turned in so that it looks perfectly legal that you're allowing people to bid on the contract in a timely manner. Case in point, I got a bid that showed up in my mailbox on Monday, which was the 17th and it's due by the 30th that I got to turn it in and there's 44 pages that I have to finish reading through. I don't know if it's the contract itself or the time to get through it." [#8]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "honestly, the DBE thing, to some extent is, dare I say it like reverse discrimination. I realize it's not the agency themselves that make this decision, they have these goals because they have federal funding, so they have DBE goals, but literally it makes it so extremely difficult sometimes to get a contract. And there's so few appraisal DBE firms that they can't just accept those that are DBE, they won't have enough people to do the work. It's like with OCTA we were denied a contract. I had a DBE sub on our team, but she didn't have the right NCAIS code. And she was somebody that could provide a commercially useful function for us to do work for OCTA. She was a professional proofreader and she could do editing and typing and things like that. So, somebody we actually could use in our reports and we need a commitment to her as a DBE firm, but it didn't meet the right code. So, we were automatically disqualified from the proposal process. So the fact that we do this type of work, that we have a good reputation for the type of work that we do and could be, I think a valuable asset to OCTA on their contracts and actually had OCTA staff that wanted us on the contract, we literally were disqualified." [#9]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "from the public sector, yeah, they're pretty complete. I think those processes are in place to participate everyone." [#11]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "I would say this isn't necessarily discrimination, I'd say sometimes agencies will write their requirements for past performance. As far as relative past performance, the project that's bidding, sometimes they'll curtail these projects in a manner where they already know that they have a select few contractors they want only bidding on this work. But I don't fault them in it because they've probably also had reasons for doing it



where they've selected a contractor that absolutely performed awful. I can't blame them for writing in a manner that may sound or come off as discriminatory, but it's not. I just think they're protecting their interest in the taxpayer, so I can understand why. But I can understand why other people would be like 'well that's not fair, that's being discriminatory.' But, is it? I don't know." [#16]

- The non-Hispanic white male owner of a construction company stated, "I think they're all a pain, so I don't think it's discriminatory at all. It is absolutely a barrier for anybody getting into it. Just fact of the matter. Everybody has their own set of criteria that they want you to get into. And dealing with people, you can explain things. Dealing with putting things in a box, saying this is this, this is this and then breaking open my bid and saying, well, this is included, this is not." [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "again, the only thing I can say about that is the experience part." [#22]
- The non-Hispanic white male owner of a professional services firm stated, "that's a problem in the public sector. There's very strict contract rules and they much favor the City. They won't give you the business unless you adhere to their contract rules." [#24]
- The Asian Pacific American male owner of an SBE- and DBE-certified construction company stated, "that's a very big challenge, and sometimes it'll happen. Here is one example. It's a public agency, state agency that is prequalifying vendors to be able to be on the qualified bid list. One of the requirements is that you have to have experience dealing with a public agency in that field. That just puts almost everybody that never had that option in that field out in the cold. And so only those that are already in the system have done are allowed. There's one, in fact, just happened to me where state agencies requiring that, that I have to have at least one or an experience dealing with the public for that particular area even though I can't bid on it. Had they said private is also okay, private experience, it's fine, but more they wanted public agency experience. That just I think is discrimination right there, because they're now basically pre-identified in the companies to do the work. They can sometimes also exclude, I think discriminate, by putting in language that makes it difficult for us." [#26]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "there's a lot of contracts that are very difficult for a small business to take on the liability in San Diego, San Diego Port is a good example of the contract languages. It can be onerous and very expensive for insurance. And hiring a lawyer to help with the contract negotiations because that's what you have to do. And for small businesses that could be really impactful. That small, small business, not a race, not ethnicity. Small business has a disadvantage when it comes to dealing with the contract. you have to do a certain amount of business in order to handle the costs associated with doing business and that this is the municipalities have a very difficult contracting language personally. Actually, for small business and territory." [#28]

- The non-Hispanic white owner of a construction company stated, “the skilled and trained workforce contracts are not easily compliable.” [AV#38]
- The representative of a majority owned goods and services company stated, “have tried to submit bids but restrictions on competitive incentives.” [AV#39]

**Bid processes and criteria.** Interviewees shared comments about the bidding process for agency work; business owners or managers highlighted its challenges [#7, #8, #9, #12, #13, #15, #17, #20, #22, #28, #29, #36, PT#9]. For example:

- The non-Hispanic white female representative of a majority owned construction firm stated, “the bidding process, depending on who you’re bidding with, they can be easy or difficult because if that bid requires certain qualifications, the prime’s got to do their qualification, and then they got to look for those subs that meet those qualifications, and then those subs have to turn in all their qualifications to submit to the prime. So, the prime can submit them in with their paperwork when they bid the job. And so, if there is something that doesn’t look correct, whether it is or not, then you could be kicked out for that bid and never even get the chance. I understand there’s some good and there’s some bad with that, because they want to make sure whoever they bring into this is going to be able to do the job. But then again, too, there is so much paperwork involved, that you decide, is it really worth doing or not doing?” [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, “they never want to see who’s what and where. So you never know that you could probably have a solid bidding but you’ll never really know the truth if the person that’s in there looking at the bids isn’t friends with somebody from one of the other companies. Because you hear the stories all the time. ‘All good, Betty’s at this company or Johnny’s at this company,’ but you’ll never know the truth. They ain’t never know how many times somebody went out to eat lunch with that particular company or the current company that was on-site. What Christmas gifts for the holiday parties had been left so that they can maintain their business.” [#8]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “the bidding process for public projects can be very, very extensive and time consuming. The proposals that need to be put together. I wish there was more, I mean this will never happen because they’re all separate agencies, but it’d be nice if there was a little bit more of a similar format, you know what I mean? So, you could take the same proposal and use it with some tweaks over and over, you know?” [#9]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, “I think, not for doing proposals. I’ve practiced, so I got good at them. Now, that part I at least know.” [#12]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, “it’s basically a self-taught thing. I’m dealing with some of the people I knew in the industry before. A lot of them are retired now and I asked them, ‘hey, how do

you bid with Caltrans? Where can I get this knowledge from?' So, a lot of the stuff, I am just learning as I go. Through my network mainly, yeah." [#13]

- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "I had to learn the bidding process, so I guess for somebody else that's starting up at this point. I can't say that any of these are an issue. But for small businesses that are just starting, you're completely clueless, so I guess there isn't any... I just jumped in. Yeah basically, and then learned how to format our bidding sheet. And later on, I met with SBDC and showed them what I had, and they suggested that I add basically almost like a resume, sort of, but listing all the projects we've been on, you know, the equipment we have." [#15]
- The non-Hispanic white male owner of an inspection services company stated, "I thought it was fair. Primarily what they're looking for is pricing, you know, lowest pricing, lowest bids, and getting it done on schedule." [#17]
- The non-Hispanic white male owner of a construction company stated, "it's just because every different agency wants it in a different type of format and package. Does being able to produce a variety of bids show you're working as a small business?" [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "I don't think there's any barriers." [#22]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "no race, ethnicity or gender discrimination on that." [#28]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "I don't know about the bidding process as a sub. If you're not on the team, you're out. That's basically, the bidding process is done by the primes." [#29]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I've seen some on both sides of the border and it's interesting in Mexico. You're in some big room when they open the bids in front of everybody. It's kind of whoa. In the US, it's a little private. You have to guess on what's the best price that you can give them and hope that you don't leave too much on the table. You compete with other people. They may have an advantage... That's business. You can do it cheaper. At the age of this, you're going to leave the amount on the table because it's their table." [#36]
- From a public meeting held in San Diego stated, "we're a startup company and I'll give you one example that often times the time limit is usually like four weeks or something like that to respond to an RFP and that can be challenging, especially if you're a small firm that doesn't have the staff to do it. As you know, we wear a lot of hats, right, and so we're burning the midnight oil with proposals and things. The time limit and the resources, that's a big deal especially when... if you're a big firm and you've got a staff of people, you can respond to these things easily. Even just having a little bit more time, things of that nature

that it's just not really hard to connect the dots that, hey, the smaller firms may not have the resources to respond to something like this." [PT#9]

**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. Business owners and managers described their experiences with bid shopping and bid manipulation in the San Diego marketplace [#1, #2, #3, #6, #7, #9, #10, #12, #15, #20, #22, #27, #29, #31, #36]. For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "this is sort of like that, because I'm a consultant, and I provide professional services. If they were looking for a bid, then that would be totally the wrong thing to do. Because again, with QBS, they should really select based on qualifications not how much they're going to pay me to do the job. So, some of the smaller agencies or cities try to do that." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "that's just relationships. I don't think there's any discrimination specifically in that. Kind of just construction is what happens. If you have zero relationships at all, but then you would have to be so new to the industry and have no one." [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "a lot of times we would bid for a project, but the client tends to get three bids, five bids, and then they pick the low bid, so we have to deal with playing that game. So, by doing that, we waste a lot of marketing time, even though we didn't really have a chance to win it. It's just going through the process for nothing I feel like, sometimes. Or sometimes I think the client uses the bids to lower the incumbent's original bid, I think." [#3]
- The non-Hispanic white male representative of a majority owned professional services company stated, "we were uniquely qualified, way beyond I know anybody else that was, and those that that did get eventually selected, it was purely just because of cost. Because I've always tried to be up front. I don't like having to ask a client for a change order, and for additional fees. I'm going to tell you how much it's going to cost, and in many instances they are presented with alternative versions of reality, by other people, that will convince them that it won't cost that much, but yet they're going to end up paying for it, and reach or exceed that cost, because of additional change orders, and extra services that they say that they now have to charge for I mean, just yesterday I was asked to put together a proposal for a project. And the engineer sent me a plan for it. And so, I worked up the proposal, and then I looked at it and I thought, you know what? I wouldn't be surprised if this is going to be a competitive thing. So, I started cutting it And I cut quite a bit out of it, and I cut probably 20% out of what I felt it was. Then instead of sending it to him, I sent him a text and said, 'I've got it to this, do you think this is...' Because he didn't say that there was a budget that I needed to be at, but I assumed that there probably was. And I gave him a number in a text, and he said, well, I've got a bid that is 20% lower than that. Well, it would

have been nice had he just simply said, hey, I've got a bid on this project, and I'd like you to propose on it, but you need to beat this number. Why not just be honest with me?" [#6]

- The non-Hispanic white female representative of a majority owned construction firm stated, "bid shopping, that can be hard because you're really trying to think about whoever came up with that scope of work, what they were thinking at the time. Because there's different methods in doing things. So, the idea is okay, for example, like with asphalt, you can completely remove it, put a new parking lot down, you can grind it, and then overlay it. There are all kinds of things you can do. So, the idea is, what was the person that created this set of plans in this bid, what were they thinking at the time? Are they thinking, okay, it says, 'asphalt, remove asphalt, replace asphalt,' but are they removing it to natural or are they just taking the top two inches? And sometimes you're having to read between the lines on what they're doing." [#7]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I think that's a problem. If they're doing it right and they're looking at, first and foremost, the most qualified firms or something, and then who is the lowest among them, then I think that that's probably reasonable. They're in a position where they have to be careful with the public funds that they're spending, so I understand that. But sometimes it's straight up lowest bid and I think that's detrimental to the project and ultimately to the taxpayers and everybody, because at the end of the day, that's not usually the best way to get work done. Your work comes back with problems and other things further along the way." [#9]
- The non-Hispanic white male owner of a construction management firm stated, "[bid shopping] used to be a problem, but now with the listed subs and everything like that, that can stop being a problem in the 1990s and 2000s. And, bid manipulation, that's always a problem. People misbalancing their bids. That's probably the biggest one. Engineer makes a mistake on their takeoff when they're putting together the unit prices. Or going in knowing there's a mistake on the plan somewhere that they're going to get a big change order. Or knowing that they are up against a soft agency that will roll over on change orders constantly. So, they'll bid it low as a shitty contractor, and then they'll come over and just change order the heck out of an owner, and they've got an owner that's got deep pockets and doesn't care." [#10]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "sometimes. I mean, that's where I think us coming in a little lower has helped." [#12]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "yeah, the bid manipulation, I've heard people have ins with other people on the inside, or as subcontractors. I've heard of people where they cancelled a contract and go with somebody else because it was lower. And they're not necessarily DBE certified, so they don't have that protection. But it's about money I guess, and the bottom dollar. They do take their contract away and give it to somebody else or cancel their contract." [#15]

- The non-Hispanic white male owner of a construction company stated, "every agency should bid shop. You should all have to compete against each other. That's not a problem. I don't mind being competitive." [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "lots of large companies do it. They know what product they want, or they know who they want to use, so they write the RFP to suit that company so they'll definitely win." [#22]
- The non-Hispanic white male co-owner of a construction company stated, "they do that no matter if you're a man or a woman. So, I'd say no discrimination." [#27]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "once you're in the team you negotiate your price with the prime—once you're in the team, they don't change. They don't kick you out of the team because of your pricing." [#29]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "that can become a problem in the industry overall. With the general contractor, you have to be careful how soon you will be giving your price." [#31]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I see it all the time in the private sector. In fact, I have some clients. I don't use them very often. They'll say, "Oh, so and so, so they can do a percent of it." I said, "You shouldn't tell me that. That's not your right to do." It's somebody I really know. Thank you. Bye. I don't let my competition get used like that. I don't want them to use me like that either." [#36]

**Treatment by prime or customers during performance of the work.** Business owners and managers described their experiences with treatment by prime contractors or customers during performance of the work was often a challenge [#7, #8, #15, #22, #23, WT#2].

- The non-Hispanic white female representative of a majority owned construction firm stated "yeah, but it was kind of funny at the same time. We were on one of the shipyards. We were doing their parking lot, and this gentleman, he was some type of superintendent for that company, comes up to me and says, 'Well, you guys are not in compliance, and you're not this and that and the other thing..' And I turn around and I looked at him and I said, 'Well, excuse me, I don't think we are out of compliance and two, go talk to that gentleman right over there. He's the one that's running this project.' And he looked at me, and he would not go talk to him. So, because he thought I was running it, he started to question everything." [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "I had a particular contract where I was a sub with a company and the two sites that I had, the one site, the owner of the property was real flexible and worked with me. Now the other property, they actually had a property manager and it was a government or government entity. And it was a real challenge because I'm the sub and the prime who's responsible for the equipment, but constantly this individual kept

blaming my company for the golf cart having a flat tire, for the guards not having the adequate equipment for the golf cart. If looked at the baseline of the contract, the prime was responsible for maintaining the golf cart, but every time he turned around, I'm the one going to change the flat tire on the golf cart. I'm the one who had to go get the lights for the golf cart. Another instance, I was driving from San Luis Obispo to San Diego and an employee that was from the previous company when I assumed the contract, sexually harassed one of the client employees and that turned into a mess. And while I was in transit coming from there, I removed the guy off the property within an hour. While another lady who's like the secretary was complaining to make a noise and the prime account manager goes, 'Lady, what are you talking about? This guy removed the guy while in transit from San Luis Obispo to San Diego and put another employee on the property within an hour to two hours. What's your problem?' And the guy didn't have to defend me, which was the prime, but he did because he saw that as they were trying to find a reason to boot me off the contract when within the ample amount of time, given that I was five hours away from San Diego on the phone, I got the guy written up and removed off the property within two hours." [#8]

- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated "in trucking, if you have a dumpsite to take the dirt that they have to remove, basically, they always say, 'if you have the dump site, you have the work,' because they tend to, you know, favor you more. So basically, when we were first brought on, they told us, 'find the dump site and you'll have more work.' The other sub already had dump sites; they were giving them a ton of work. We found a few dump sites, and they gave us such a hard time. They had to come out, look at the place. They wanted the guy who owned the land to give it to them for free, yeah, to let them dump there for free. They just gave us a harder time, and we know this for a fact, than they did with the other guy. And the other guy was just sending to different locations, and they weren't having to visit all those locations, like they were with us. So, we were discouraged, and essentially, we ended up just giving up because of that, but yeah, that on the side of the prime." [#15]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated "sometimes you have clients who expect a lot or expect you to do extra work for free. I think this must happen everywhere, like, all over the world. You complete the scope and then, 'Oh, but you haven't done this or that.' And then you look at the documentation and it's not in the scope." [#22]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "I'll give you an example. We did a job; we did our first job first of the year and we did the piping and it had to be coated and the coating was coming from LA. The coater wrapped the pipe in cardboard box to protect it because the coating, if a rock chips it on the freeway you have to recoat it. So, if it's going to be coming from LA to Bakersfield so it was covered up. We got the pipe in the field and the contractor called me back and said, 'Hey, can you come pick up the trash?' At first, I was like, 'We will pick up our boxes, I mean the pallets but that's about it.' Then he called back and sent pictures and said, 'Hey, I want you to come pick up the trash.' And then the owner got a hold of it and was like, 'No, dude, that's way too much. They've got to pick up their own trash. We are not a garbage

company.' So, stuff like that... And then he was like, 'Oh don't worry about it, I'll pick it up.' Stuff like that that they would try to take advantage of me. Just because we are a minority company doesn't mean we are dumb. Yeah, we want the company, but we'll go beyond the work, but we are not going to go there and pick up the trash. And for him to ask, at first, we were like, 'Dude, I don't know if we want to work with this guy again. He's taking advantage of us.' But in the end, he was okay with it and we got it resolved. But also, I think there's a pushback, just because we are minorities doesn't mean that you are going to ask us to mop the floor for you in your house. And that is the idea. And we're like, 'No, we are sorry, we are not going to do that, that's on you.' And he was like, 'Okay.' But from that you learn. So, on our quotes now we are going to put that every time we submit pipe and it's coated, it is the responsibility of the contractor to throw away the wrapping on that. Because once you deliver it it's on them. It's like if Sears delivers you a washer and dryer and they are just going to deliver you the washer and dryer, they give it to you in a cardboard box. And then you are supposed to take it apart and install it. You don't come and tell Sears, 'Hey, come back and pick up my trash.' You don't do that. You don't buy anything from Walmart or whatever, take it apart and call Walmart say, 'Can you come pick up the cardboard box?' That's crazy." [#23]

- The representative of a WBE- and DBE-certified construction company stated "why do all the labor compliance contracts go to the same person/large firms. As a small business owner, approaching large firms for work is like playing hide and seek. For example, SANDAG awards all Labor Compliance to a firm. Firm's manager or VP says at an outreach, 'I need help, I'll contact you.' After several calls and e-mails, I realize my request is treated as a joke. There is no intention of subbing out to me/my firm. During a networking event, I learn from another labor compliance consultant that she attained work from this firm. Well, I have many years working on SANDAG projects and know my trade very well. The only difference is I am a minority woman. Very unfair. Contracts must be awarded fairly." [#WT2]

**Approval of the work by the prime or customer.** Business owners and managers described their experiences getting approvals of the work by the prime contractor or the customer [#1, #2, #3, #4, #5, #10, #11, #13, #15, #17, #18, #20, #22, #24, #27].

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I mean, depends on if the small business has done good work or not. Sometimes the small business is brought on board just for the sake of meeting the requirements, but they don't have the experience to do their work. So, there's a lot more work for the prime to train them and make sure they understand to do it per the agency requirements, and things like that. So, I've seen that happen. But if the sub has experienced and does good work, typically the prime accepts it unless there was something wrong with not following instructions or something like that." [#1]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "no barriers, no." [#3]



- The non-Hispanic white female co-owner of a construction firm stated, "you always have your difficult, challenging people, but no. There's not a barrier." [#5]
- The non-Hispanic white male owner of a construction management firm stated, "never really had a problem with that personally." [#10]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "typically it's not that that's the issue. It's the quality of the work." [#11]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "there hasn't been any complaints." [#13]
- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, "only a couple times. And fortunately, my son was next door working and he heard this gentleman threatening to sue me because he missed his appointment the day before and thought he should be number one, and he had a problem. Rather than test him and fail him, I just told him he had to go get it taken care of. Then he started with the foul mouth and my son was next door, and he told him that he could please leave and not to ever come back. In probably not so pleasant terms." [#18]
- The non-Hispanic white male owner of a construction company stated, "if you have credibility with the customer ... One of our assets is we're usually a referral-based company. And so, it's usually a given that we're going to do good work, we're going to warranty the work, we're going to do all those kinds of things. And so, if something is questionable, and the customer already knows that we're going to warranty it, we're going to stand by and we're going to whatever, then they may assume that it's good. But if they see what we're doing, and then they assume that it's bad, then we have to answer all these questions to educate the customer and let them know that this is how we do it. This is how we do it every single time. These are the products we use, and this is why we use them. Then it just elongates the project, which then decreases profits. When we're working with a client that we don't have any credibility, out of the blue, it's definitely more expensive to work with that new client as opposed to working with somebody that we received as a strong referral. I think appearance wise I think that would be a huge barrier to a smaller ... It is a huge barrier to a smaller or an established company, or something who doesn't look as good without as many logos and everything else. For sure. You look smaller and therefore the default would be to question everything that they're doing as opposed to a larger company. If they do something funky, which they do a lot, then people just assume they'll be here tomorrow and take care of it. As opposed to a smaller company, they want to make sure that everything is perfect the very first time. Things that probably would never fail in a million years, they're going to question those even though it might be standard practice for larger companies." [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "we usually, you know, before we sign a contract with a company, we will write an approval procedure." [#22]

- The non-Hispanic white male owner of a professional services firm stated, "in the public sector, employees will not approve something that's clearly done, and only to suit their purposes. So yes, that is a barrier." [#24]

**Delayed payment, lack of payment, or other payment issues.** 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, #9, #10, #18, #20, #22, #24, #26, #28, #29, #30, #31, #33, AV#15, AV#16, AV#17].

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "that's a big issue. The reason is that there's usually a provision that the prime will not pay the sub until they get paid. And if for some reason, their payment is delayed because they didn't do good work, for a small business, is very difficult because you have to wait, and a small business cannot afford to wait. And primes don't like to pay the subs in advance because they don't know if the sub's work is accepted by the agency or not. So that's a big dilemma. And as working for a prime firm, I can totally understand why you wouldn't want, then why they wouldn't want to pay the sub. Which means the agency really needs to be diligent in processing payments and accepting whatever to make it easier on the small businesses." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "I don't think it's anything specific. It's just general. Maybe just kind of the retention thing, but that's about it." [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "a lot of times it's when they get paid, then you get paid, so you would have to wait your turn. So, I guess the faster they get their paperwork in order, the faster we get paid. We price that in, in terms of that we know when we're getting the money, so we don't wait for it." [#3]
- The non-Hispanic white male representative of a majority owned construction firm stated, "it's nice working with the ones that pay their bills on time because we have some companies that have trouble doing so, or they require change orders to their contracts. They ask you to do work, you do it, but they won't pay you unless you get them to get you a change order, but you can't get them to give you a change order, It's kind of just adding to the existing contract. So, the first one will be change order 1, and then he needs the fence moved, and I'm going to say 'well that's a thousand dollars because I'm going to spend four hours there, 250 bucks an hour, just to throw something out, so I need a thousand dollars.' Okay, well, let me send you a change order, you know. And then, so sometimes, getting them to actually give you the change order versus you doing the work when they need it. So, as it happens, you try to be customer service-related, and you be like 'okay I'll be there tomorrow, do the work, but I need you to send the change order, you know, as soon as possible.' Well, next thing you know, they've called you out there 5 times, and you're still waiting for change orders for the first one. And then some companies have what they call pay apps, so you can't even send in the invoice because nobody will pay. You have to enter your invoices in a pay app system, and if it doesn't equal the amount allocated or less than, then you can't even submit. So, you can do all this other work, but you can't even ask for

payment because you don't have the value corrected. And so talk about some challenges, my head hurts every day when I have to answer to my contract lady, and these customers are asking for more work, and I'm like 'I haven't been paid for 6 months on stuff and this is the seventh, eighth time they've asked for more work, and yet they haven't even corrected their system to allow me to receive payment.' You hit one of my biggest pains." [#4]

- The non-Hispanic white male representative of a majority owned professional services company stated, "sure. But to say discrimination? I don't know that it was discriminatory in nature other than when it's mostly as a dispute as to whether or not it was agreed to services or outside of the original scope." [#6]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "I got more successes getting paid working with the property management companies than I've had with the City and County type projects, where it takes too long to be paid and by that time the source or resources or funds that I need to borrow to make the pay check, it takes forever. Payment is bad, payment is bad, and I'll say it a million times over, payment is bad. You've got whoever the person that's in the accounting office that's either lazy, don't care or there's poor communication skills. When you say you don't understand something or how do we make this right? And then if it's too late, then oops it's after the first of the month or the fifth of the month you passed your deadline, you got to wait till next month to re-submit these. Which I think is junk. They need to either fix the system they have, make sure the accounting people are communicating. I would even make the accounting person that's responsible for that contract, have a meeting with the prime and the sub who are doing the bookkeeping so that we can make sure that the invoices are done the right way instead of me submitting them and then you go, 'Oh, they're done wrong. Sorry, you got to wait for your next month's time to invoice them.' We have to fix that broken poor communication link or being paid and making sure that you get paid in a timely manner because that catch clause that if City goes bankrupt, you're out of luck, no money. Well, if the City goes bankrupt and can't pay your vendor for services now that vendor gets sued, the Labor Board, which is the state, takes that company out of business because you defaulted on the money, which leaves us hanging. Now you want us to go buy a bond, which leaves us hanging too, but yet you're the City, County and state are free and clear of the small business that's trying to make a living, that's trying to provide for the economy, that's trying to provide for people that live in the economy to grow. You're telling them, 'If we go bankrupt, you're out of luck. I'm sorry. Have a good day?' And that is why small businesses now get sued by the Labor Board and then you're screwed." [#8]
- The non-Hispanic white male owner of a construction management firm stated, "I never had problems getting paid and they're pretty prompt pay. As long as you kept your stuff together and you get with your inspector, and you get your numbers go okay, we finish from there to there and just be fair. I never had a problem, except I will say that I've been ancillary to projects working as a consultant for the City, on projects that were getting Caltrans reimbursements. And that was very difficult because they didn't outline the requirements for the reimbursement prior to... So, the City of Carlsbad was building a bridge in downtown Carlsbad. Caltrans was going to pay for part of it, because they get win-over. It was somehow Caltrans related. And the City was supposed to track certain things in

order to get paid. So, like they had to track every single concrete ticket, put it in a special binder folder type thing. And then when they turned in to get reimbursed, they'd have to prove the right concrete was used on every batch. Now a lot of times us consultants are spread thin, I'm on three jobs right now. So, I'm driving around. I don't watch every ticket come in. So, I'll make sure the first ticket comes in right. So usually if the first ticket comes in right, you're fine. They're not going to screw up in the middle of the day. You check a couple of tickets to make sure, and you just see consistently they're coming in right. It's very rare that the wrong truck will come in, or a wrong batch will come in if you've started the day right. I've never actually had it happen in 20 something years. But anyways, so the City didn't track those tickets closely enough and fix some of those kinds of things. And Caltrans withheld money from the agency until... I don't even know how it actually ended up resolving because I only kind of came in at the end to sort of help out a little bit. But I will say that is a problem, Caltrans reimbursement relationship with agencies probably could be improved. At least the communication. Like if we're going to give you money back, here's our list of rules. And I don't know where that ball got dropped, but I can say that, that's been an experience I've been a part of. Primes can be slow, but California's law requires pay within nine days of when primes get paid. So, I mean it is kind of what it is, unless it's disputed funds." [#10]

- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, "I've had that twice in the last 20 years. I think that's probably not too bad, and that was my fault. I should've never let them take the vehicle without making payment for the work." [#18]
- The non-Hispanic white male owner of a construction company stated, "that can crush a small business instantly, almost. Because a lot of times we'll do my accounts receivable, we do a million bucks a year. Approximately a million to 2 million a year is what we do. And right now, my accounts receivable is \$50,000 to \$60,000, and if that blows up by \$100,000 project not paying on time, that can be devastating. Because then what do you do?" [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "we have slow payments sometimes, and you have to chase them. I don't know that much because our accounting lady downstairs deals with it. But I know she sometimes struggles to get people to pay on time." [#22]
- The non-Hispanic white male owner of a professional services firm stated, "that is a huge barrier; it's a huge problem. It took me six months to get paid by the City." [#24]
- The Asian Pacific American male owner of an SBE- and DBE-certified construction company stated, "there's one prime that does not pay me on time, actually pays me every three months because of their financial situation, because the prime is waiting to get paid before they pay us. And so sometimes the turnaround time is three months, and we're okay with that, because financially we have the working capital to be able to hold off. I mean, it's a very small amount." [#26]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "no biases if that what you're asking about, there was no bias in payment."

But I found that because I was a small business, the municipalities that I worked with worked really hard to pay me as fast as they could because they knew I was a small business. So, I felt like it was an advantage. People were more sensitive to making sure I got paid on time.” [#28]

- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "first paycheck usually takes anywhere from 60 to 90 days. Because they don't pay the subs directly, they pay the prime and then the prime takes their time to pay the subs. Well, you know as a sub we're not privy to that type of information. So, I don't know when the prime gets paid and I don't know how long it takes the prime to pay the sub. You need to be aware of that and make allowances for that money not coming in when you wanted, it comes in when it comes in. Nothing you can do about it.” [#29]
- The female owner of a DBE- and WBE-certified professional services company stated, "there are ways of where you kind of go to the top if you need; if you're having issues with getting paid. I mean, quite frankly, it's not true of every prime consultant that you work with. Sometimes it might take you up to a year to get that. I think that sometimes the agencies just need to keep double-checking, even on a monthly basis that the subs are being paid. I think it's now monitored more often than it was then, it would become more routine and people would realize that they need to do it. That they need to get their sub-consulting team. It's like anything, once you get the ball rolling with a type of process that they know that that might happen, then it gets easier for these people to operate in an effective way, obtaining their sub-consulting. To be fair, a lot of times agencies aren't paying the prime sometimes.” [#30]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "one problem that the program has is the fact that it lacks escrow account requirements to the general contractor or the agency administering the contract, which means that my pay application has to go to the GC as a vendor, as this material supplier, as this the dump guy or truck or anybody who works for the GC which gets awarded the contract. He gets our money first and then he pays us as his requirement. There are rules that say you have to pay in seven days of receiving the money, but they never do. So, our average pay is between 75 and 90 days. So, all the subcontractors, 90% of the subcontractors in Southern California, or vendors are funding 100% of the public works projects. Okay? Because of the fact that there is no accountability and no oversight on the agencies on the general contractors, and there's no consequence if they don't pay you. There should be or our money should get put into an escrow account and their margin on top of us gets released to them when we get our payments released. I have one client who claims their crew with me, yet on my year, they owe me \$399,000. Okay? And I'm trying to get them to pay and they have not paid me my September, or October, or November, yet they received their money for contracts. It's a Caltrans project for the Sweet Water Beach on the other side here in San Diego. All morning long I've been going around the project manager because he wasn't aware. And after he submits the payoff the contract people at corporate are not submitting, and they get their money, they're not paying us. We could call our DBE representative, but again, that is the issue and then you take that scenario and you multiply it through Metro, LA County Metro, San Diego County Transportation Authority,

Riverside County Transportation Authority, Orange County Transportation Authority, on and on and on. That's the story of every DBE out there. I can give you a list of owners to call. And we all sing the blues and have the coffee every morning. We go around and round and it's just the bunch of-- it is the chronic problem with the industry and the reason why they're having trouble finding any economic boom time in public works, companies who want to jump in and participate. Because the story is getting out there now that, well, the opportunities are there and the volume is there, profits are not because you have to have all the cash to maintain yourself for 60 to 90 days and you do benefit payments, your payroll, your own AP vendors. Okay. Because you're not gonna take your cash in time. The utility industry is not plagued with this. Want to know why? The agencies don't do what's monthly pay, what's weekly pay. In the utility industry, they pay you weekly. But in the public work industry, you get paid once a month. If they changed the way they paid, that would be great too, because instead of being only once a month or pay per month, if they pay bi-weekly or even weekly, okay? Then cash would flow to the system a lot better, everybody would be a lot happier. That's why the utility industry never has a problem, okay? So and then I was there for- like I said, 22 years and we never had cashflow issues whether I worked for a big guy or a small guy, never." [#31]

- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "well the public sector is very consistent, the private sector, I'd say probably 10 to 20% of the time, they're very slow on paying or sometimes they don't pay." [#33]
- The owner of a minority owned construction firm stated, "if they would pay a little faster." [AV#15]
- The Black American owner of a construction company stated, "mainly funding, in the construction industry it takes 30-45 days to pay, so while waiting for invoices to be paid, we are having to sometimes look for funding which is not readily available for companies like us." [AV#16]
- The Black American owner of a goods and services firm stated, "just the money. Starting a business is difficult, especially with getting paid. You wait 60 days to get paid." [AV#17]

**Other comments about marketplace barriers and discrimination.** Some interviewees described other challenges in the marketplace and offered additional insights. [#2, #3, #5, #11, #16, #20, #22, #29, #31, AV#36, PT#5]

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "I think it really comes down to who you know. If you have a crazy person moving to San Diego to start a construction company, maybe who have zero knowledge of anybody in SoCal, but then you're deciding to move to San Diego from somewhere for some reason. Then you probably have the money to fund it anyway." [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "the only barrier, I would say, is being a small firm. I think that's a barrier in itself. Not having the resources, hard to compete with the big boys. That comes with being a small business." [#3]

- The non-Hispanic white female co-owner of a construction firm stated, “for us personally, there's not been really any barriers. It was not difficult to incorporate, it's not been difficult to get work, it's not been difficult to keep clients, and you know, there's always attrition. There's people that, the expectation is higher than what can be delivered, but I wouldn't call those barriers.” [#5]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, “I really have not seen, in the public sector, discrimination. So, it's the other way around. It's trying to participate minorities. Stimulate the participation of minorities.” [#11]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “I don't think we've ever had a situation, not that I can remember that involved or affected us directly involving discrimination, I couldn't think of a complaint to be honest. I think we've just been very lucky to have a solid team that realizes that, not only for a minority or a woman owned business, any business when you start, most of them -- you have to get out there and use the tools and resources that are there. And like you said, California provides so many opportunities and they do it all the time, they have events in Balboa, events over here, and SANDAG's there, they're all there, and you can approach and talk to them and they'll share the 'hey this is where you sign up, this is where we'll send you the information,' so it's there. For me, I think the frustrating part, not to go on a tangent, but I think some people think 'oh these agencies are just putting it on for show to check the box, right? I mean they want to be present but they don't really care about small business,' I think that's a horrible way of looking at opportunities that agencies put out, whether it be SANDAG or City of San Diego or City of California or if it's a federal opportunity. You get what you put into it, it's a free country to do as you will, and you can be as successful as you want to be, and that's the beautiful thing with these programs. You can be certified and never get a contract. And some people really think that they're going to get certified and the phone's going to start ringing. 85% of the small businesses that graduate from the 8(a) program fail, that's a fact. But I can't tell you why. I don't have an answer. And I don't have an answer other than we put in the work to make this business successful, there's no magic potion, right?” [#16]
- The non-Hispanic white male owner of a construction company stated, “I mean the time that it takes to put together a proposal to get to a public entity, which is maybe 50 to half a million dollar project, which we would absolutely love to do, my materials can slash away 10% to 15% in that time easily, and that's up or down. Getting through the meetings ... yeah, just meeting with everybody who I would have to, multiple sidewalks, getting access to the sites, getting all these other things that you have to do. Even just getting the meeting with the maintenance people, access people, all the steps that are involved, that just goes way long. Who knows those people? Who actually has their numbers? Who can set up the meeting? Who can say you need to set up that meeting? Who can give that permission? Who has the key to actually say you have to take a phone call from this guy and set up a meeting? It just elongates. Whereas a business owner, you meet with them face to face, you have an understanding face to face. They have the person who has access and the keys and everything on their phone and everything just happens. As opposed to going through a public process.” [#20]

- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “the only one is that strange thing where they invite people to bid, they don't let everyone bid. I don't know why.” [#22]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, “the percentage that is allotted for the small business, disabled business, and the veteran businesses. Some agencies have higher percentages than other ones. The county versus the city or the county versus SANDAG or SANDAG versus Caltrans. Everybody has their own percentages that they want to see.” [#29]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "I think the only other thing is when we need to solicit a phone call to an agency, there seems to be no desire on the agency side to have the tough conversation, okay? Everybody wants to save dollars, taboo items that you don't speak about. Payment is the white elephant in the room, okay? Then finding the qualified employee is the next white elephant in the room. And there is nobody of courage on the agency side who is willing to take the bony part of it and talk to the general contractors about this or speak directly to the unions about this. And that is becoming a broader industry issue because of the very low unemployment. And so and because of the fact that these projects that they're putting out, these are mega projects now. They're a billion-dollar, 600 million dollars, 500 million-dollar jobs and there is cash tightening up at a variety of levels. And so, like I said, that's creating before a billion-dollar job was 10 hundred million-dollar contracts. Now it's a joint venture between 6 general contractors spearheading the billion-dollar job. And they just made it 10 times harder to work because first off you got the joint venture, people arguing with each other and then you got a number of contractors that we take to be 10, 100 million dollar jobs are now working underneath the umbrella of 6 general contractors working on a billion-dollar job. So now you have to be looking for their issue. So, they're not getting smarter by how they're administering their projects. They're getting actually goofier.” [#31]
- A respondent from the availability survey stated, “it's tough to find warehouse real estate here.” [AV#36]
- From a public meeting held in San Diego stated, “we have a local office, but our headquarters is not here in San Diego. So even though I'm here, my office is here, we don't have our headquarters here. So, some of the programs that incentivize having a local headquarters here would not apply for us.” [PT#5]

### **I. Additional information Regarding Whether Any Race/Ethnicity/Gender/Disability or Veteran-Owned Discrimination Affects Business Opportunities.**

Business owners and managers discussed any experiences they have with discrimination in the local marketplace, and how this behavior affects minority-, woman-, disability-, or veteran-owned firms:

- Price discrimination (*page 156*);



- Denial of the opportunity to bid (*page 156*);
- Stereotypical attitudes (*page 157*);
- Other predatory business practices (*page 157*);
- Unfair denials of contracts and unfair termination of a contract (*page 158*);
- Double standards (*page 159*);
- Discrimination in payments (*page 161*);
- Unfavorable work environment for minorities or women (*page 161*);
- The 'Good Ole' Boy Network' or other closed networks (*page 162*);
- Resistance to use of MBE/WBE/DBE/VBE/DOBEs by government, prime or subcontractors (*page 166*);
- MBE/WBE/DBE/SBE/VBE/DOBEs fronts or fraud (*page 167*);
- False reporting of MBE/WBE/DBE/SBE/VBE/DOBEs participation (*page 169*); and
- Any other related forms of discrimination against minorities or women (*page 172*).

**Price discrimination.** One business owner discussed how price discrimination affects small disadvantaged businesses with obtaining financing, bonding, materials and supplies. [AV#31]

- The Hispanic owner of a construction firm stated, "in the hauling industry when it comes to getting work the industry uses brokers, to assign or hire independent truckers to do the work. In most cases, they want an owner/operator. When you are smaller, they don't hire you because of the prevailing wage." [AV#31]

**Denial of the opportunity to bid.** Business owners and managers expressed their experiences with any denials of the opportunity to bid on projects. [#2, #6, #7, #15, #22, #27, AV#18] For example:

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "it would just be on public stuff if we weren't prequalified to be on that school district or in that specific agency." [#2]
- The non-Hispanic white male representative of a majority owned professional services company stated, "yes, because I wasn't one of the alphabet soup kind of labels." [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, "actually what's interesting, most of the work that we do, most of our property managers are women. And even a couple of the companies are owned by women that we work for. So, no discrimination." [#7]

- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "there's definitely prime contractors that I would say sort of look to work with more white-owned, as far as subcontractors go. They don't outright deny anyone, it's just noticed." [#15]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "yeah, invitation only bids. But we don't experience people saying, 'Oh no, you're a disabled vet, we don't want to work with you,' or anything like that." [#22]
- The non-Hispanic white male co-owner of a construction company stated, "yeah. Normally, because they have enough people. They do not need more bidders, so..." [#27]
- The non-Hispanic white owner of a professional services company stated, "I have been refused subcontracting work because I was too small of a company." [AV#18]

**Stereotypical attitudes.** Interviewees reported stereotypes that negatively affected small disadvantaged businesses. [#1, #2, #18, #23, #31, #34] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I don't see that as much anymore. I think everybody's pretty much professional in that area. I don't know about the contracting side, but on the professional services, I think. I haven't run across that." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "that's construction, so yeah, probably. Not specifically for us, but I'm sure someone somewhere has." [#2]
- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, "in the beginning, because I've been doing it so long, and I still get it occasionally when people call on the phone or they walk in and I'm the only one here; it's like, "You're going to do the work?" But my former boss liked it, and he'd say, "Oh, no. She's good at it." I was one of his best students and I had the time to study and make things happen. I didn't have a job. I had kids but I didn't have a job. My husband was, for the most part, overseas so I had the time to sit and study and night. The kids in the class, they were more interested in doing other things. I wanted to be able to take care of myself and then ultimately, it led me to where I am because I keep up on that stuff. I get a lot of strange looks for first time people, but so much of my referrals are word of mouth so they're already prepared for the fact that I'm a woman." [#18]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "this is the problem. Our owner started from nothing. And he's grown this company from nothing. He's a very intelligent man. I think the perception out there is that a lot of minority companies are small, they haven't grown. And that can be true. But there are also minority companies like us. Minorities are very educated, they are very hungry, they are very into entrepreneurship. We've grown companies from other sectors. We move on. If they found people like us that we are going to give a good service,

we are going to give a good product, we are highly educated, we have master's degrees and we can do the work. But we don't come in contact because the perception is there. If we continue doing this and we get work, we may get a phone call one of these days that somebody wants to buy us because we are taking revenue from that company. And that's just a normal thing. But most of the guys in the industry now are younger. They are in the 30s and 40s and their attitude is more, hey, we are all brothers, we are all Americans, let's work together. And the old school generation has a different flavor. Once in a while you come across that. But I think today everyone else is pretty cool about it. I don't think they really worry about that anymore. Because we are here. We are not going to go away. So, let's work together and get stuff done and move on." [#23]

- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "because there are a lot of rules governing that right now in the industry that have become widely accepted as being the way forward. So, they're very careful about that because, with the other thing that's helping this is within the general contractors, various genders or races have advanced to the organizations and the management especially in Southern California. So, it may not be in other parts of the country. But here in Southern California, you see a lot of different people holding a lot of different positions these days that like versus 30 years going in the construction. The industry has been very successful at working under that umbrella." [#31]

**Other Predatory Business Practices.** Business owners described predatory business practices they have seen in the market. [#2, #10, #12, #15, #18] For example:

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "that one's almost a reverse. Some of the companies that have that minority will raise their price because they know they're the only ones that can do it. Like site control contractors. So, it's almost a reverse. It's not then being discriminated against them, discriminating against others or abusing their status." [#2]
- The non-Hispanic white male owner of a construction management firm stated, "yeah like unions guys. Union guys are union guys, it is what it is. But not from any agencies. I think the agencies are really, they're very consistent. I mean, we have bidding practices and we have rules, and that's what it is. I mean, like I said, RFPs are a big cloud, so we don't know. But standard construction bidding, I think the agencies do a pretty good job." [#10]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "I don't know how we disappeared on the Google search, but I mean it's weird. We were up there for so long and strong, and then it's just gone. I'm like, what is going on?" [#12]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "I wouldn't say so, other than, I guess, you could say people, like other competitors that are also in trucking, doing small side favors just so they can get the preferred treatment, I guess, or they can get more work." [#15]

- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, "I know there are people that advertise a lot, and you'll see this on the internet, that they'll do a cheap price. The customer gets there, they open the hood and the guy says, 'Oh, well I'm sorry. That doesn't work on this car because it has six cylinders and this only has four cylinders.' There's no difference in the test. Plug into the connector, computer reads it the same on any vehicle, whether it's little, tiny, 2000 and newer, whether it's a four cylinder or a V-10, or diesel It's all the same test and yet, there's one shop in particular, they're charging \$80 just for the test, but they advertise \$30, \$40. They draw them in, and the consumer doesn't know that the test is exactly the same. It's a computer that plugs in to the vehicle port. Yeah, sometimes it's a little more difficult to get on a ladder, but not for a big tall guy. It's only my personal limitations. Somebody who's six-foot-tall can open the hood and see everything he needs to see. So why do they charge twice as much when the computer's doing the same thing? That's my big beef with them." [#18]

**Unfair denials of contracts and unfair termination of a contract.** Business owners and managers were asked if their firms had ever experienced unfair termination of a contract or denied the opportunity to work on a contract. Sixteen firms stated that they had no experience with unfair termination or denials of contracts [#1, #2, #3, #4, #7, #10, #11, #12, #13, #15, #16, #17, #20, #22, #27, #30]. One firm described their experience with an unfair denial and termination of a contract [#8].

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I don't think that's happened. I've not seen that. Not based on race or gender or anything. Usually, it is more performance than race or gender." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "maybe, but I mean it is pretty black and white, most of them are low priced and you kind of can't argue with that." [#2]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "I had a young lady and her dad come up here and when the dad saw me come in he walked out. I've been on the contract, got awarded the contract, went to the site and one of the employees saw me and she walked out." [#8]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "I can't say unfair denial of contract awards, but definitely, like the example I said before, you know, I mentioned before where we were all on the project, and the work wasn't distributed evenly." [#15]
- The non-Hispanic white male owner of a construction company stated, "I don't know of any, no." [#20]

**Double Standards.** Interviewees discussed whether there were double standards for small disadvantaged firms. [#2, #6, #7, #15, #18, #20, #22, #28, AV#19] For example:

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “not that I've personally experienced, so I don't know. I mean, there's the controls contractors and they have installed two in San Diego that have whichever certification it is. So, I mean they might be overworked and it's because of that, but it's not a discrimination. It's almost forcing them to take on more work. I don't know the right word for it.” [#2]
- The non-Hispanic white male representative of a majority owned professional services company stated, “there's always a certain amount of that, but it's not worth trying to elevate any of that to conversation, at least for me.” [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, “the prime might think it's great or the customer, but somebody else may not. But, I don't really consider that a bad thing. I consider that a good thing because then hopefully, if there is something, we've corrected it so that it won't be a problem in the future.” [#7]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “I have known of another woman-owned business where someone actually told my husband directly, women don't belong here. They were given a harder time.” [#15]
- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, “by the public, a lot of people are amazed that I am able to do what I do. If it's lifting, or there's a way. I'll get help but, for the most part, the idea is mine. There are a lot of guys that think that women can't do stuff like this, but they've been told so they're here anyway. I specifically have a lot of female customers because they prefer to deal with another female than deal with a man who's going to lie to them about it and take their money, just because their ignorance. Not that they're dumb, but they don't understand.” [#18]
- The non-Hispanic white male owner of a construction company stated, “I'd say any small company, any unknown, anybody without logos and shirts and all that stuff that they would all be discriminated against equally whatever they are minority-owned or woman-owned or anything.” [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “we haven't experienced it but I've seen it happen before, where scope of work is not clear and then nobody knows what you're supposed to be doing and the prime expects more of you or you expect more of your sub. So, the moral is to just tie everything down before you even start. In terms of receiving work, it's almost the opposite. We just get small amounts of work because they only have to give us like, 3%. So, one technical writing job I did, it's like a 40-page firm document. And they're like, ‘Oh, your part will just be two pages. So that's all you're getting.’ I'm like, ‘Thanks.’” [#22]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, “there are hurdles that are much more difficult for a small business to overcome than a large business. In other words, holding large and small businesses to the same exact term when it's more difficult for a small business to absorb that extra cost, that

extra effort. So that it's not discrimination, it's the lack of finding enough of creating opportunities, I guess." [#28]

- The Black American owner of a construction company stated, "when people work for black Americans there is a higher standard set by the employers." [AV#19]

**Discrimination in payments.** Slow payment or non-payment by the customer or prime contractor were often mentioned by interviewees as barriers to success in both public and private sector work. Examples of such comments include the following: [#7, #15, #22, #34] For example:

- The non-Hispanic white female representative of a majority owned construction firm stated, "slow payment, I do believe that does happen, and part of it was because that was the same project I was talking about where they had removed the dirt. Well, we weren't getting paid because we were in the midst of the argument, to who's right, who's wrong? The plan says this. And so yeah, it put a halt on everything until that got sorted out." [#7]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "I can't say that there has been, but I don't know if it's also because I know the law, you know, and I use it to my advantage, I guess. I will push, and I will make phone calls, and people know it, so I don't know if that's why." [#15]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "I don't think we've ever had a non-payment, but they're just slow sometimes. But that's not based on discrimination." [#22]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "I think the fact is that if I was more of a larger firm, I guess, prime and larger, I think the payment would have been probably quicker than what it is." [#34]

**Unfavorable work environment for minorities or women.** Business owners and managers commented about their experiences working in unfavorable environments. [#2, #15, #31, WT#4] For example:

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "not that I know of. I mean, I've been in construction since I was 19, so yeah. And I used to be really cute and skinny with big boobs, two babies ago. So yeah, I mean, you send the cute one to go beg for jobs. They're probably offensive to some, but I also grew up in a construction house with two brothers, so it wasn't necessarily offensive to me. But someone, somewhere, had their feelings hurt." [#2]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "one is where one of my female truck drivers, who is an owner-operator and DBE certified, one guys went up to her truck and first he started with 'oh, you have beautiful eyes' because she has green eyes, she just said 'thank you,' didn't think anything of it. But then it went from 'you have beautiful eyes' to 'I love your lips', and she felt uncomfortable. And when I reported it to his higher-up, his higher-up called him, he denied

it, and his higher-up said, 'well I've never had any trouble with him, I believe what he says, and this is a predominantly male industry.' Yeah. 'And if she doesn't like it, well, I'm sorry.' And so, my response then was, 'well, when you see yourself with a lawsuit, don't say I didn't warn you' because it's you know? It's something that could amount to more than just you and I talking, you know, or me reporting it to you, and you're basically looking the other way. And not only that, there was a witness, which was one of my truck drivers. Yeah. I don't think he's had much to say other than 'I believe what he said.'" [#15]

- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "I think there is still, in the field in certain types of construction there is still gonna be that. I think that the only way that's gonna get overcome is by-- a good friend of mine just became the president of a non-union cable TV contractor and she is probably as progressive and vicious a person, a human being, let alone man or woman that I have ever met. But yes, that's what it takes, alright? So, you know, if you're gonna go into boxing, you'd better be tough. If you're gonna go into construction, you'd better be tough. So yes, it's just you gotta know how the game is played and you gotta be able to read the audience and you gotta know how to maneuver the system. But she won't back down from anybody, she doesn't let herself get talked down from anybody. I think the industry is learning how to breed that type of future person in leadership which is important." [#31]
- Written testimony from a local trade association stated, "African Americans in the City of San Diego have experience some of the worse treatment and continued racial insults. I have documented these behaviors and witnessed prejudice toward African Americans, with statements like "they don't want to work," coming from a contractor's foremen and his workers at a job shutdown (picket) on Redwood and 54th Street in 2011, and where we presented the video to the City Attorney at that time. There are other reports where swastikas and "I hate [racial expletive]" are written in job site bathrooms, where African Americans have to work in a hateful environment. Union labor leaders have made the claim that 60% of African Americans are all in jail, which is why they are not in construction and are for the most part excluded by unions. The harsh treatment African Americans receive is dehumanizing, as in many cases where boy [racial expletive] and other dehumanizing statements are made. As in the case of Ortiz Construction company for the most part only have one African American, who feel that he has to amuse his employers by referring to himself as [racial expletive] "I's yo best [racial expletive]" and stated that he has been there over 10 years. There are cases, with an AGC apprentices who reported to their committee that he was told to walk behind the truck, where the Latinos road and he had to walk, bringing the AGC apprenticeship committee members to near tears, as he told his story and how he needed his job to provide for his family. Another man was near to tears when spoke of his experience as being sexually harassed by a white male foreman, who told Mr... what he was going to do to his [racial expletive] ass, while making sexually explicit images." [WT#4]

**The '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. [#1, #2, #3, #5, #7, #9, #10, #11, #12, #15, #16, #18, #20, #22, #23, #24, #30, #31, #33, #34, #36]

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "that happens sometimes in the selection process. Some of these companies, if they're not forced to hire a small business or a minority business, they may never open those opportunities because they like to, with the bias that they have, they like to hire people that look like them." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "yeah, 100%. It's not about gender, it's just, the good old boy network is the good old boy network. It's alive and doing really well. It's thriving." [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "I think it's the same as the big firms horse-trading with each other. They each bring themselves on other jobs, so it's ... I guess the easiest way to look at it is to review all the SANDAG or whoever's contracts to see who are all the same players. If you get the same people all the time, and those are the people that are always going to be working on SANDAG jobs." [#3]
- The non-Hispanic white female co-owner of a construction firm stated, "I have heard of it, and sometimes I get a look, but it's not pervasive I wouldn't say. Like when I show up to pick up something or to take care of something, it's like, 'oh, you're a woman in the landscaping business.' It's like, 'yeah, and I got to deliver this wrap to the boss,' you know?" [#5]
- The non-Hispanic white female representative of a majority owned construction firm stated, "I think people have grown past a lot of that. But again, finding that one person that can give you the right information, some people may call that the Ole' Boy scenario. To me, it's not that, it is trying to help people be able to get through the process easier and understand it better and having that one-person contact helps." [#7]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I do think there are places where they've used these several appraisers forever and it's just the nature of our business, most appraisers are men, older men. Appraisers are an aging industry I guess, and so I think there are agencies that just use certain appraisers for a lot for so long. I don't think they're necessarily being discriminatory, but yeah, it's kind of like the good old boys' club. It's like, I've been doing this forever with you. You know what I mean? Let's just keep that going. We don't want to let anybody else in. So, I think there might be some of that." [#9]
- The non-Hispanic white male owner of a construction management firm stated, "in the public sector no, there is no good old boy, we have standards. I mean, with the exception of like I said, RFPs are a big cloud... There's reason that AECOM is the size they are. It's not just the reputation. Because it's [RPF review] a judgment. They read the resumes and they say, well we think these people's aggregate 10 resumes are a five, and somebody else will go, I think they are a six, somebody else goes I'll give them a one. Because I want my guys to get it, so I'm going to give these guys a low score. Somebody else might go, these guys really seem like they got some good experience give them a nine. Well, so there's a lot too that like



we know who we want. It's a long running. In RFPs we all know, agencies kind of get to pick who they want to some degree." [#10]

- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "it's not minority-based, but it's the good old boys, the big prime contractors." [#11]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "I don't think so. We were very welcomed at the Chamber of Commerce." [#12]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "I would say, definitely, on one particular project. But I would say it was the Good Ole' Boy system, and whatever favors, they do I would say they take away work and gave it to the others. And I know this for a fact because at one point we were asked if we could provide an external service by someone within, and we were looking around trying to help them, and, during that time, the amount of work we had increased. And when, I guess they asked the other company if they could do it, because we were taking too long or we couldn't find the price that they were looking for, and the work was taken away at that point. And I later heard it myself that the other company had taken care of it. We say that there's a Good Ole' Boy system in place. Yeah, there's a group of, in our industry, of truckers from East County, I'm sure you know, is majority, I would say, white, and they all stick together, they tend to only give each other work unless they really need you." [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "I hate that terminology, I mean you can say there's a good ole' boy network, but again, much in line with the agencies, there is a good ole' boy network in the fact that these agencies are like, 'yeah we have our preferred contractors because they've performed time and time again, and every time we go out of our comfort zone and try to open up an opportunity for a new contractor without having our pre-selection mandatory check the boxes' they end up getting burned. So I can understand why, whether it's an agency or us as a general contractor or any other contractor, may have their quote-unquote good ole' boys they want to go back to because in the past they've probably had a bad experience that probably lost them a lot of money, so I get it." [#16]
- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, "I've seen some of that. I was like, 'Fine. Go there. I don't care.' There is still a lot of it around, especially in some of the smaller areas. Well, this guy says, 'Oh, you've got to go see my friend, Joe. He'll take care of it.' Especially in our business, there's been some fraudulent stuff. They were done illegally and that's definitely... You have to know somebody, and it's x amount of dollars to do whatever. But the state is working on enforcing all of that kind of stuff. And the fines are pretty hefty for doing illegal stuff, or if they're doing other stuff that can be considered elder abuse or something, taking advantage of older people. Then, if there's enough documentation, there have been people that have gone to prison for it." [#18]
- The non-Hispanic white male owner of a construction company stated, "there are a lot of closed networks. I want to say good ol' boy network but it's because they are well

established. the major builders around here they get to know the mayor, they meet the city council all the time, they see councilors telling them their concerns and then new rules that are coming and then major builders are to comply with them before anybody has a chance to know that conversation took place. The labor builders are influencing their city councils also. Maybe vice versa they'll be saying, well, we want this if you want this. And those deals are being made. We don't have that relationship; we don't get that. And so, there's definitely a 'Good Ole' Boy's' network. And then I don't think it happens as people think it does. It's that we have that association, those years of background together that you build over time. Yeah, city councils, knowing the Mayor, being in with those major building meetings when land is rezoned, all those things. Those guys, if they have an in then they're not getting out. And to break into that even whether I'm a white male or anybody breaking into that is ... I don't know how to do that." [#20]

- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "I mean like I said, relationship building is really where it's at. People can put out an RFP and say, you know, 'It's fair, we're going to get all our bids in.' Mostly, not all the time, but mostly the incumbent wins again. Or they know who they want. Not all the time, but sometimes." [#22]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "you know what I found? It is a problem in the beginning, but once you get in with them, you are good. Because, see, at the end of the day, like also I'm 45 years old so I present myself in a very professional manner, we know what we're doing and at the end of the day, I have a conversation with these guys and we do good work, we are professional if you have seen our shop and 'we just want to be able to participate in the market and do a good job for you guys.' And once they understand that, they are okay. At the end of the day, if we provide a good service and they know that they can count on me, they will give us work. I'll give you an example. The last company I was at, both of my friends came from India on a master's program. So, they got educated in India on a bachelor's program and then under visa program they came in and did their masters. So, their intention was always to start a business. Just to get to the US, do the masters and then start a company. Now this was five years ago. So, eight years ago they came into the US with nothing, but enough money to finish their master's program. Now they are owners of one of the fastest structural engineering companies in America and they are millionaires. So that's the idea that we are sensing because if that discrimination was really existing, nobody would do business with these Indian men. One of the guys can barely communicate. Yeah, he's a millionaire because he provides a good service. And that's one of the beauties about America, that in a capitalist economy, it's not really ... See, back in the day because everybody had dominated the white industry. But now the diversity comes in and now the idea of a dude, I don't care if he's Mexican, black or white, if he gives me what I need I'm going to do business with him. So that's the new era that's taking over America. A good example is them. They came here seven years ago and now they are millionaires. Because they provide a service to industries and they provided a service to a lot of these old-school white companies that didn't care that we were Indians or minorities as long as they provided structural engineering and it was good and, boom, you've got the business." [#23]

- The non-Hispanic white male owner of a professional services firm stated, "I think senior management in IT in municipalities have a relationship with larger vendors and they rely on them to pretty much run their companies in exchange for lucrative contracts." [#24]
- The female owner of a DBE- and WBE-certified professional services company stated, "I don't know if it's the good-old-boy, but I know that was happening since a lot of times, teams get established and they know that once they have a good team together that they are able to make more money, and I think that is what-- as they bring in somebody new there's going to be a learning curve. You might have a team that includes minorities, some women, and it's really hard for other minorities or women on firms to go after the same projects. It's a fact that they have to establish in a team relationship and it's hard to get by that." [#30]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "that is gonna be there until for probably another 15 years. But I guarantee 15 years from now, it's gonna be a conversation like they've used to talk about black and white TV now. In Southern California, it's gonna be something that existed but no longer exists. Don't forget these programs are only 15 to 20 years old at best. But construction has been around since men. WBE/MBE started in the 80s in the utility industry, right? So they've only been around 40 years, alright? And women in engineering and mathematics and science and construction degrees and so forth and business degrees, that's only been around for probably 15 to 20 years in a high number, over 8 to 10 percent. So that's the issue. It takes a few generations for that to work its way through. But, give it another 15 years. By 2035, all of these conversations we're having about these issues aren't even gonna be issues." [#31]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "I think that's gone by the wayside, maybe 20 years ago there may be a little of it but not now, especially in the public sector." [#33]

**Resistance to use of MBE/WBE/DBE/VBE/DOBEs by government, prime or subcontractors.** Interviewees shared their thoughts on government, prime or subcontractors showing resistance to using a certified firm. [#4, #9, #20, #22, #26, #33, WT#4]

- The non-Hispanic white male representative of a majority owned construction firm stated, "no. They always get first take. I mean, right? If anything, it's the other way around, you know." [#4]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I mean it's the opposite I think, because so many of them are required to if they have funding that requires them." [#9]
- The non-Hispanic white male owner of a construction company stated, "I think it's the opposite. I think government wants to use those entities. Yeah, I think it's the opposite. I think, as a white male, I've had an advantage for many years and still do. And I think the opposite is happening in that if I put in my bid today against those entities, I would expect

to lose, providing the exact same service, the exact same quality, warranty everything. If we did apples to apples, I think they would definitely kick me aside.” [#20]

- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “no, I would probably say it's the opposite, people want to get you involved, mostly because they have to. But I hear, you know, it makes for a diverse team.” [#22]
- The Asian Pacific American male owner of an SBE- and DBE-certified construction company stated, “I've seen opposite actually, the government desire to use SBEs, MBEs and WBEs.” [#26]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, “not at all. I think the public sector they encourage you to, if you are a prime, as to hire as many minorities, a diversity of minorities, it's to their advantage. So, I think it's an advantage as opposed to a disadvantage to be a minority in the public sector.” [#33]
- Written testimony from a local trade association stated, “City of San Diego Capital Improvement Projects Reported in September 22, 2011 that out of \$143,884.496 African American(s) received \$40,000 dollars in construction contracts. City of San Diego 2013 workforce Utilization Report Snapshot showed 2,066 workers and only 36 were African Americans with one African American female.” [WT#4]

**MBE/WBE/DBE/VBE/DOBEs fronts or fraud.** Business owners and managers shared their experience with MBE/WBE/DBE/VBE/DOBEs fronts or frauds. Other business owners and managers were aware of XBE fronts or frauds but did not provide comments. For example [#1, #2, #4, #10, #15, #16, #20, #31, #36]

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “I don't think that happens anymore. The certification process is so rigorous and tight that I don't think they do that.” [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “hundred percent all the time. But it's nothing discriminatory. It doesn't go back to what I think the question actually is. There are companies that do nothing but use their certification to pass equipment through for people to other contractors to make certification. Happens in every school bid, there's at least one not a legit. Just pay them 3% to buy some of the equipment on the job and they just take 1%. The requirements are usually three or six percent on a contract. They'll buy whatever you need them to buy to hit that. And then they just charge you 1% of the contract. So, they're literally just passed through. If you don't have it and you can't, you'll have to actually use a subcontractor or you are the subcontractor with that, so you don't need to pay them, then you might be paying more.” [#2]
- The non-Hispanic white male representative of a majority owned construction firm stated, “I've heard of one or two situations in the last year where somebody was, an agency got involved, I don't know if it was federal agency, but yeah there was some manipulation or

such. Our admin used to work for one of the companies that got busted. She was dispositioned for it.” [#4]

- The non-Hispanic white male owner of a construction management firm stated, “I know people that have like signed their companies over to their wives or their daughters or to get status. I don't know. And I think they kind of take advantage of that. Not all of them. I'm like do you think so and so owns such and such? I mean that stuff happens, but I think they also realized that they kind of have to get picked, so they're not usually as like on point, on task.” [#10]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “fronts in the sense of, there's a lot of DBE or woman-certified businesses where the business is put under the wives' name, say they're Caucasian, it's put under the wives' name, and they run as DBE or woman-owned. But, in reality, it's the husband running things. And, I mean, I know that for a fact because I have called where the wife answers the phone, and they can't answer general questions. I would say, out of 10 companies, maybe half, or like 40-50%.” [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “we see it, but if you're going to dance with the devil, you be careful with what the outcome's going to be. You run your business how you want to run your business, just don't be surprised if you get caught.” [#16]
- The non-Hispanic white male owner of a construction company stated, “I think it's pretty rampant. There's a term in the industry called rented vet, where I could rent a vet, essentially a disabled veteran and say, create an entity. All it takes is an attorney. You get your corporation and you put them like essentially a poster child. And that, it's the same thing when I was first looking into this, and I was like, I'm going to put my wife as the owner of the company. She's not an electrician, she's not a construction worker. She's an attorney. She said 'absolutely not. I don't want to do it. I don't feel like I can actually take that.' But I do know a lot of businesses that maybe a spouse or sister or some relative has never worked in the field or lifted a piece of paper, but they're the head of the company or owner of the company or whatever. So, I think it's pretty rampant. It's something I haven't done.” [#20]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, “I think that's where the issue that's being created because they are so ambitious about what they wanna do, they're making it almost too easy to be qualified and not filtering so that they don't create chaos.” [#31]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I know certain people who have companies. They put their wives as the woman-owned owner. The wife doesn't have anything to do with the company. So, it's a woman-owned company. That's not the right way that was intended. I think some of those are fraudulently positioned. We had at our town a black contractor who was providing plumbing supplies and they were simply a conduit. They weren't a plumbing store, but it was just the local

hardware store. Wonderful people. They got these huge contracts just so that they could purchase and then sell. They were just an intermediary. I don't think that's what the purpose of that kind of regulation was for. It's helped the minority business, but not grow them. They were just sitting there handing from one to the other. I thought that was stink. I didn't say anything because they weren't my friends." [#36]

**False reporting of MBE/WBE/DBE/VBE/DOBEs participation.** Business owners and managers shared their experiences with the "Good Faith" programs, which give prime contractors the option to demonstrate that they have made a diligent and honest effort to meet contract goals. [#1, #7, #10, #11, #15, #16, #20, #22, #23, #31, PT#11, WT#4]

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "sometimes primes bring on subs to just meet their requirements of the agency. But then they don't give any work away to the subs. They end up either doing it themselves or making excuses or something like that. And that's happened, I've seen that happen in the industry. So, they bring you on just to meet the requirements, but they don't actually give away [the work]. You don't get paid if you don't work. And agencies typically track small business requirements and participation, but sometimes they don't track. Again, you go through all the effort, put it together and you don't get any work out of the contract. It happens all the time. Depends on what the project needs are, it's even harder on an on-call contract. Because if the prime is bringing on everyone, you just say they have the capability, but you never get anything out of that contract, not necessarily fault of the prime, sometimes it is, because they end up doing it themselves. But if you participate, and you don't get anything out of it, then you've wasted your time providing the proposal and resumes and everything else. And if the agency does not follow or track, then they get away with it. A lot of agencies do track or ask why they weren't able to engage their small businesses, but some of them don't. So, it just kind of goes by the wayside. They require maybe monthly reports and things like that. But there are some that don't. I can't specify who does and who doesn't. I know like San Diego Airport does. I think SANDAG does. Well, like I said, if they don't have a tracking mechanism, then it comes to end of the contract. They might do it at the end and say, 'Well, you had a 12% goal, you only had 10.' It's too late, by then they can't really do anything about it. They may get penalized for the next contract because they can't show proof that they did it. But if you go through all this trouble of bringing on small businesses then you should at least make sure they're being utilized." [#1]
- The non-Hispanic white female representative of a majority owned construction firm stated, "I would say five years ago, yeah. I could say that there was stuff, not necessarily being verified. And some of the way their contacting was, I don't think they would have ever got a response on, which is why part of our paperwork's gotten so much more depths, because they're trying to keep that stuff from happening. It's significantly reduced lately." [#7]
- The non-Hispanic white male owner of a construction management firm stated "I worked for an 8a company, I worked for a HUBZone company. So, I've worked for a bunch of those kind of companies when I was a contractor. They're fine, they're good programs. I think

with the Sam laws changing at the federal level when Obama was in, they got a lot better. I worked for a company years ago, I will not name any names who was a disabled vet. And we would just get calls from generals and they would say, we need 3% what do you want to do? And we'd say, okay, well we'll do this. And they go, here's our subcontractor you hire them, mark them up 3% and send it through. And that was how it was back then. That was in the early 2000s, it was super scummy. I didn't like it. I didn't work there very long. But I think really, like I said, the Sam rules that Obama put in place really fixed a lot of that." [#10]

- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "I've heard about it, but I've not seen it. That they never did the work yet. They got paid and that sort of thing." [#11]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "I would say, one project in particular, they had their own trucks, and while they did hand us some work, they didn't hand us all the work. So, there's that, I forgot what the form is. When you want to bid there is a form, I don't know if it's the DBE good faith form. It's some sort of DBE form where they actually write down what line item you're fulfilling, or what's, you know, your scope of work and the amount that it's going to cost. So, I would say that we maybe met half of that amount in work, but they also have their own trucks, so I know that they were using their own, for a fact." [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "I've seen it with other companies, it happens." [#16]
- The non-Hispanic white male owner of a construction company stated, "yeah, I would say that's an issue" [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "some people subcontract us because they need their DVBE credit, so they want to have us on their team and they put our name on the proposal, but then they never give you the work I think, these are ones that say, 'This is the goal, try and meet it.' So, they don't have to, but they should. So that's how they can get around it, because then they can just keep all the work for themselves. And I know DGS, California Department of General Services, are trying to crack down on that. I've been to some meetings and you know, they encourage you to report companies that do that sort of thing. Because you can just get blanket e-mails from clients saying, 'We need a DVBE on our team,' like, blah, blah. So, you send back your information and I think they just use your name, and then that's it. And you never hear from them again." [#22]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "to be honest with you, the good faith effort is bogus. It's laughable. I've been to these meetings. They will say, 'Hey, good faith effort.' So, what they will do, the company will spend \$10,000 and they'll hire a booth at a local event, and you go to the event and no one from estimating is there, no one about the project. They just have an individual that represents the company and that's it. All they had to do was provide a booth and go take a picture of it, document the fact that they were there and that's it. And beyond

that, there is no enforcement of connecting me to the project. It was just, we are here, here is our evidence, this is our good faith effort. But there is no... Beyond that there is no effort. This is an MBE company; they gave us the fee and we have to use it. Even though we are MBE, we give them a fee, they don't use us because they don't have to by law. Because they did a good faith effort as far as sending out e-mails or went to a website and publicly put that information on the website, and that's that. That's the extent of the good faith effort. And the good faith effort is bogus. It doesn't mean anything. At the end of the day it doesn't produce revenue for MBE. It's just a waste of time, in my opinion. They won't hire me, and not even talk to me. All they have to do is spend \$5000 and put a booth in an event and have a kid that they hired to sit there and you go talk to the booth and, 'Well, I'm not involved in a project and if you call this guy so and so, and you can call this guy so-and-so,' and he never returns your calls. So, for them it's just a good faith effort. So, they'd rather spend \$5000 or whatever to actually have to really enforce the MBE. So, for me, and I'll give you some background, so I have three college degrees. My last was a master's in public administration. And I'm saying that not to boast but... Because I understand how it works. So, these companies, they are smart. They've got wise in their use of the dollar. So, for them, if they can just hire and pay someone \$80,000 a year, \$100,000 a year and have a diversity guy on staff, all they do is go to events and sit there but there is no connection beyond that. Where if the contract said, hey, it's not a good faith effort, you have to hire somebody, and you have to give them 3% of something. Now that forces the company to say, well we need to find somebody with an MBE now. If they put an advertisement out and I didn't know about it then that's fine, but if we knew about it then they would have to give us a chance to perform the work. Because otherwise it's just bogus. It's just people spending money. We have to get certified, we had to provide all this documentation. And for what? Just to have a certificate? It's useless. It doesn't mean anything. And for them, like I said, they'll spend \$200,000 not to have to deal with that issue. I'll spend \$200,000 a year, hire somebody, give them \$100,000 budget for business development and your job is just to go around and provide documentation to the agency that you are advertising for MBEs. Boom, we are done. It's just a shell. And that's reality. I'm being honest because if the incentive is to give a minority company business, then why not make it an enforceable thing? Like if you really want to give... Then make it enforceable. You have to. And if you don't find someone, you've got to give us 5% back on the contract. And that would force contractors to engage individuals like us. Unless it's enforceable, it's not going to happen. It's like a police officer. If you don't have officers enforcing the traffic laws, people will do what they want. And it's like telling somebody, 'You have to stop at a red light, but if you do it, we may not say anything because there is no enforcement, there's no requirement.' So, it's just basically for show." [#23]

- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "as the years pass, it's getting much more difficult for that to happen because the agencies have figured out those certified tales and payment verification they can find a way to confirm the information they have been given." [#31]



- From a public meeting held in San Diego, an attendee stated, "they generally don't deny good faith efforts anymore for most agencies. And it's kind of that loophole that allows them to get away with not filling goals." [PT#11]
- Written testimony from a local trade association stated, "the legal loophole used by most private contractors doing business with the City of San Diego and other governmental agencies is 'Good faith (Fake) efforts,' where contractors will send letters to minority community base organizations announcing that they don't discriminate on the basis of race and gender and that they are actively seeking women and minorities to work for their company. Then there are those who tell you they are hiring and when the BCA send people to that company, the job seeker is told that they are not accepting applications at this time and to check back later, so there is no record of African Americans or Women applying for jobs." [WT#4]

**Any other related forms of discrimination against minorities or women.** One interviewee discussed various factors that affect entrance and advancement in the industry. [#31]

- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "I think that the only group within the greater minority marketplace that has a problem, is the Middle Eastern community because of the worldwide opinion at times that goes on, especially the leadership in Washington. So, I think that gets screwed up and then dissipated depending upon what's going on back there. But the news has a tendency to put on certain ethnic to cities are grouped at times and make them up or character-assassinate them in a certain way. So, I think right now from what we have seen, because we are a minority-owned business and we hear a lot of stuff going on, that seems to include that sector out more than in the platform and minority of Hispanic type of community." [#31]

## **J. Insights Regarding Business Assistance Programs or Other Neutral Measures**

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.

- Awareness of programs in general (*page 173*);
- Technical assistance and support services (*page 177*);
- On-the-job training programs (*page 180*);
- Mentor/protégé relationships (*page 181*);
- Joint venture relationships (*page 184*);

- Financing assistance (*page 186*);
- Bonding assistance (*page 189*);
- Assistance in obtaining business insurance (*page 190*);
- Assistance in using emerging technology (*page 190*);
- Other small business start-up assistance (*page 192*);
- Information on public agency contracting procedures and bidding opportunities (*page 194*);
- Online registration with a public agency as a potential bidder (*page 195*);
- Hard copy of electronic directory of potential subcontractors (*page 197*);
- Pre-bid conferences where subs and primes meet (*page 198*);
- Distribution list of plan holders or other lists of possible prime bidders to potential subcontractors (*page 201*);
- Other agency outreach (*page 203*);
- Streamlining/simplification of bidding procedures (*page 205*);
- Breaking up large contracts into smaller pieces (*page 207*);
- Price or evaluation preferences for small businesses (*page 211*);
- Small business set-asides (*page 213*);
- Mandatory subcontracting minimums (*page 216*);
- Small business subcontracting goals (*page 217*); and
- Formal complaint/grievance procedures (*page 218*).

**Awareness of programs in general.** Business owners described the programs to support small businesses that they had had prior experience with or noted that they were unaware of any programs to support their type of firms. [#1, #2, #3, #4, #5, #7, #8, #9, #12, #13, #15, #16, #20, #22, #25, #27, #28, #34, #36, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "if I did not have that network, attending organizational functions is really good. Like APWA or WTS. These are some of the organizations within my industry. I've been actually going to meet folks in those organization events. I've been going to Orange SANDAG/NCTD in L.A. to attend some of their functions. ACEC is another organization, American Council of Engineering Companies. So, once you get a business card,

then it is just the matter of follow up and setting a meeting or phone call or one-on-one to just explain what you do and what you can do. So, it's all part of the networking and relationship building." [#1]

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "I don't know of any in either direction." [#2]
- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "I think at the beginning, going to all these networking functions that people are helping you fill out forms and stuff like that, I think it's helpful. It gives people hope. But I think after ... I guess it gives new people hope, but after a while then, after one or two years then the companies that are still in business don't go to those anymore. They don't have to. They would see it as a waste of time. But as a new owner, at the time I was excited that there were people around to help. Caltrans mentoring program was helpful in a sense, but it hasn't been successful in another sense in terms of projects. So, there's two different gauges, I guess. One is, yeah, at a personal level, yeah, it made me better, learning how to do things, but financially as for the company, it didn't do any good. So, we wasted a lot of time doing a lot of admin hours going through all that stuff, but it didn't pay out. You know? Just because I didn't get a project, doesn't mean that the program failed." [#3]
- The non-Hispanic white male representative of a majority owned construction firm stated, "I think it's great that they have these opportunities, and they don't affect our business in any way, and I can't say that there's any cons or negatives to it, I don't have any direct experience." [#4]
- The non-Hispanic white female co-owner of a construction firm stated, "you know what I have found in our business, and in other what I'll call 'blue collar work,' because my son-in-law is a concrete finisher, is that once you are licensed you get a lot of stuff in the mail. You get on the state board licensing list and he got flyer after flyer after flyer for insurances, for bonding companies, for general liability. You name it. And we still do. I mean, we actually hired a firm that takes care of that for us, so we don't get all of that individually. So, it's out there. I am not sure how I found out about that, probably the same way. They were a company that saw that we became a corporation maybe. I don't really remember, but my husband and I looked into it and said, 'Hey, this is a landscaping professional's association. This is something that they will do the work for us, so let's go for it,' you know? And yeah, so they do all the sorting through all the different companies that are out there for ... Because we have to have workman's insurance and general liability insurance and a bonding company and that kind of thing. Every once in a while, I get phone calls that's like, 'Looks like your whatever is ...' I said, 'No, I'm fine. I'm doing good. I want to stay with my association, I don't want to try and do this independently,' because there's so much choice. So, I think that if ... And they seem to do a really good job of advertising what they offer and the resources that they offer. So, I don't know if they need to do more... I don't really think so. A lot of people that we know, if you're a contractor, you get bombarded with information. So, I don't think that's an issue. So, I don't know if there's any barrier or any kind of difficulty or any business doing anything more or better. They're already kind of doing it. It could be if there's someone kind of new at it, doesn't really know what they're

doing, doesn't have personnel or local resources to guide them through it, but there's a lot of that, too. I think, using my son-in-law again for an example, he says, 'Hey, this guy's right here, locally right here in Poway. Do you think I should go with him?' I said, 'Give him a call. Get your feeling for him. Check with the Better Business Bureau or with the state licensing board, see if they're legit. And if he's legit, then go for him,' because this is overwhelming to some businesses starting out. And it's been so long ago we started out, I can't even remember how difficult it was or wasn't for him to do. I do know for a fact it was a lot easier then. There was less rules and regulations. But California is a huge agricultural and landscape-oriented state, so... And there's a lot of money in it, so there's a lot of information that attends to it, you know." [#5]

- The non-Hispanic white female representative of a majority owned construction firm stated, "I think they all can be helpful, if they are used correctly." [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "SBDC is pretty good. Again, like I said, Accion, I don't know, you just have to read who they are and then you just have to be careful of the financing funding companies and registering for worthless registrations for stuff that services aren't of value to you. PTAC, they've been good resources for small business assistance and startups and MiraCosta College." [#8]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I was made aware of the SBDC, the small business development center. They have them all over. I became aware of the center a couple months ago when I was at the City of Menifee mayor's round table. It was something they put on quarterly, the local chamber of commerce puts on with the City. So, I was there and they had a representative from the SBDC there. And I had seen something on a TV show about how they can help, with new businesses, they can do market research and things like that to find out if you want to start a business, where you might want to start one or what type of industry or whatever. They offer all kinds of free services and they're federally funded, I believe. So, I met this woman at this round table and one of the primary things they do is help firms get certified, like DBE, SDE, whatever. And the way that they help them is just by advising them on the different types of certifications that are available, walking them through the application process. Because sometimes you're really not sure what to provide, or things like that. I contacted the SBDC and they did help me with questions that I had on reapplying for my DBE certification that were very helpful. And they also put me in touch with another agency. I don't know the name of it, but it a different agency, but they work with the SBDC and they work fully with federal agencies. So, they could help with good faith efforts, and then they also can help make connections for federal contracts. There is help available to small firms and DBE firms that do public agency work. But it's not very well known, and I just happened to stumble across it. You know what I mean? This is my fourth year in business, and this is... Some of this stuff could have helped me years ago, years and years ago, probably with getting on different lists, with potentially getting contracts, with getting certifications." [#9]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "Southwestern College has a small business development agency. I know there's an

East SANDAG/NCTD Economic whatchamacallit. What's that... the East SANDAG/NCTD EDC? Economic Development Council or something like that. I think they help connect you to resources or something like that." [#12]

- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "I think the helpful ones would be the Small Business Program as well as the DVBE program. Usually when I reach out, I first identify myself as a disabled veteran in business. They are very helpful as far as trying to help me get started. They showed me who my customer could possibly be and stuff of that nature." [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "I would say definitely the Small Business Development Center, SBDC. They provide free services to small businesses, including training. They promote or put together the meet-the-buyer events, and, also, I know they provide financial advice. They are full of resources as far as who you can go to. They will, you know, advise you or recommend somebody to you, you know, depending on your needs. In addition, I know for the guys that I helped become DBE certified, they helped them apply to all sorts of certification programs for free, at no cost." [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "I mean 8(a) was crucial. MBE, locally, I think it's helping us now as I seem to realize there's much more outreach for MBEs. DGS we were a small business with the Department of General Services, that helped as well. Those are the ones that I can think of. They allowed us to be able to participate. The agencies are required to meet a certain percentage, so that allows us to be able to be considered much more." [#16]
- The non-Hispanic white male owner of a construction company stated, "The Airport Authority had that great program. It was like eight weeks. Very informative. I felt like I would be ready to bid public jobs at the end of that session. So, I would say yeah, that's great. Extremely helpful, especially if you meet the qualifications for what they're looking for because they're looking for minority, women, things like that." [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "actually I don't know if you're familiar with the organization PTAC, and I'm not sure if that is a government or a local government agency. But they put on a lot of workshops about how to win business. It stands for Procurement Technical Assistance Center. And they put on, yeah, a lot of workshops about, you know, writing good proposals, how to win work with the government. So that's a really good resource. Also, the department, DGS, General Services for California run a lot of workshops about how to get certified, how to get into their portals. You know, how you can make your profile look really good, so primes will choose you. There are tons of veteran... Veteran In Business Network is one, there's a lot of veteran resources you can use. They just had a big conference, the VIB, Veterans In Business, down in San Diego in one of the resorts there. And that was really useful for matchmaking and networking. So, there's a lot of resources out there that we can use, for sure." [#22]

- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "the Caltrans Small Business Mentorship was great. I don't know if that's still around or not, but it did help us a lot because they put us with AECOM." [#25]
- The non-Hispanic white male co-owner of a construction company stated, "no. Talk about it more." [#27]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "to be fair, I never was contacted by SANDAG or North SANDAG/NCTD Transit. I had no idea that there were opportunities for small businesses. Like I didn't know if they had a special program or special outreach. I was never contacted in my year and a half of doing business to solicit me to come-- determine if there's any contract opportunity. Caltrans had a regular program and I would get e-mails, solicitations from Caltrans, but I never got anything from SANDAG, and I never got anything from North SANDAG/NCTD Transit. I didn't even know about the opportunity SANDAG might even offer my firm." [#28]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "I'm in the Cal Mentor program right now. I would say that the Caltrans small business council meeting or the association is really good for all of this. They kind of basically offer free business consulting advice to kind of help you get more familiar with the opportunities available, that when you're a very small company, and you don't have a business background or any association with these contracts, it's very hard to obtain the information without combing through thousands of lines of text. It's good to have someone that you can ask specific questions to and they can anticipate the problems that you might be looking at." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "put on by Caltrans and the BIA, meet the prime. I've gone to a couple of those just to see what's going on. Those are very good. It levels the planes to go. People take cards. They hear what the primes need. You know off the bat if you're qualified. Those kinds of fairs. They call them work fairs. That doesn't sound right. It sounds like they're looking for a job. Meet the primes, I think of that as I come for it. Those are very helpful." [#36]
- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, "the 8(a). It's probably the best program they have out there. I don't know if that the women on small businesses qualify for that, but they do have the WSB, so. They set aside the job to wear only whatever, if it's a women-owned business like WSB or an 8(a), only those type of companies can bid it, it's not open competition." [#37]

**Technical assistance and support services.** Twenty-four business owners and managers thought technical assistance and support services are helpful for small and disadvantaged businesses. [#1, #2, #4, #5, #7, #9, #12, #13, #15, #16, #18, #20, #22, #25, #26, #27, #28, #29, #31, #32, #34, #35, #36, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I would be eventually looking to bring on a bookkeeper

to be able to help, when I get busier, to be able to keep my books and things like that. Right now, I just use QuickBooks and I'm okay with that. But those are helpful. Because a lot of times small businesses can't afford to hire full-time support services. So, it's always nice to be able to have a bookkeeper or some legal help and things like that." [#1]

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "there are not any programs that I know of. I know that like AGC and ABC have like classes and stuff that help with it, but I don't know that they're specific for any of the certifications. Maybe on the payroll stuff, yeah it would be helpful. Just sort of it was a pain in the butt. A lot more paperwork has to be done right, has to be reported. I think there's like three different reporting steps." [#2]
- The non-Hispanic white male representative of a majority owned construction firm stated, "I would say they could all be helpful." [#4]
- The non-Hispanic white female co-owner of a construction firm stated, "I think it could be helpful. Because small businesses may not readily know what their resources are in those particular things. Especially bookkeeping. I mean, I wouldn't know how to give an estimate unless someone was teaching me or observed. I'd have to go out with my husband and see how he does it and why. I'd have to learn what things cost and that kind of thing. So, I would think women, especially, might be more ... If they knew that there would be, say classes or some kind of resources that they could take advantage of, that they might feel more empowered to do the work. Especially because the landscape industry is dominated by a male workforce." [#5]
- The non-Hispanic white female representative of a majority owned construction firm stated, "support services like bookkeeping, estimating? I don't... well, technical they might need, but the rest of that, no." [#7]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "with demolition, having the demolition license, I think learning how to bid for that would be very helpful. For what I'm doing, no. The rest is just the junk removal, but for that part of the business, the demolition and construction clean-up, yeah, that would be helpful." [#12]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "it would definitely be helpful for a new business that is starting up that don't have the wherewithal to do certain parts of their job. At least they need to have someone to reach out to." [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "it would be helpful." [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "there is a phrase our present CEO likes to use, it's called 'learned helplessness.' I think sometimes when you offer too many things, I don't want to call it

handholding, but there needs to be a certain point where the people, a business owner needs to take on that responsibility. Go take a class, whether it's free or whether it's offered through PTAC or other agencies. We literally went to every single class that was afforded to us because we wanted to learn for ourselves. It's OJT, on the job training, you need to learn how to do the work. Just, you have to do the work. I mean on the job training like jump in and do it." [#16]

- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, "the county, in effect, does that when I'm dealing with them. Because, they do the bookkeeping and all I have to do is hold the paperwork until the payment is made, because they handle all that process." [#18]
- The non-Hispanic white male owner of a construction company stated, "that'll be huge. I can tell you when I signed up ... Well, my bankers one day said, who's your bookkeeper, and I didn't have one. But as soon as I got a bookkeeper, then I could tell that I was losing money here, I was making money here, that kind of thing. And then the business really shot because I would stop doing things that weren't profitable and start doing things that were just focused on those." [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "the first one, technical assistance and support, PTAC offer all of that. Yeah, so they help me write bids and help... They help me with everything, really. Like, finance information and stuff like that." [#22]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "maybe at the beginning when we were starting, doing big public work bidding. That would have been helpful, helping with the estimating and bidding, putting a proposal together and all that. By now, we've learned from trial and error what works and what doesn't work. But at the beginning, when we just started, that definitely would have helped." [#25]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "if it applies to the type of work, the special type of work that we do- yes. But if it's just a general kind of meeting for contractors then no." [#29]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "my specialty does not lie with this. So, any information or help that could be given to me to help me be more familiar with, then I'll be better at this. I mean, this is an important part of running a business, so yeah, any additional help is going to be beneficial." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "that's extremely important because it's fine tools to the potential bidder what agency's needs are. It's just the matter how much time it takes to do that." [#36]



**On-the-job training programs.** Eighteen business owners and managers thought on-the-job training programs are helpful for small and disadvantaged businesses. [#1, #4, #5, #7, #11, #12, #13, #15, #16, #17, #20, #22, #26, #27, #28, #31, #35, #36, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “it’s a little difficult to do that with the professional services. This is not trade industry, maybe trades or something like that. But it’s more difficult, I think to do that with professional [non-trades].” [#1]
- The non-Hispanic white male representative of a majority owned construction firm stated, “I would say they could be helpful.” [#4]
- The non-Hispanic white female co-owner of a construction firm stated, “I haven’t heard of any, and I’m sure they would be beneficial, but I can’t speak to it. Hands-on is definitely necessary, because you have to observe it. You have to see how it’s done; you have to learn how it’s done; you have to know how the materials are used in order to do the work.” [#5]
- The non-Hispanic white female representative of a majority owned construction firm stated, “I always think on-the-job training programs are a good thing. For example, this is going to be a long time ago when they used to be called ROP programs. Truck drivers, auto mechanics, painters, they allow people who may have not found that one person that can help them or teach them. But it opens up those doors for people to have that opportunity to look into these programs. And that’s the one thing, like I said, about having the apprentices and things, the paperwork can get to be tedious, but it’s a good thing because we have to get more and more people out there working, and in the good jobs that pay better than minimum wage and be able to support their families and things. So anytime that there’s a way to help somebody with training or pay a company to help cover part of the wages for a length of time so these people can learn. I’m always for that. It’s a big help, I think.” [#7]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, “if the agencies provide seminars or presentations on how minorities can work with their prime contractors. Or even participating minorities to work in-house with the entities. That would help.” [#11]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, “on the job training program? You know, I think if somebody wanted to do that, I would recommend them, yeah going with somebody would be helpful.” [#12]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, “for a new company, yeah. Some type of apprenticeship on the job would be helpful for them.” [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “I guess, on the job training would be helpful. I guess for us in particular, and I don’t know if it’s particularly on the job training, being that we are not a prime, as far as their systems go and stuff like that, a lot of our guys are not very computer savvy, so that

type of training would've helped, being that they are SANDAG systems. And I believe the prime did provide them, but I think their flexibility was not there." [#15]

- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "I wouldn't recommend it, it would be too costly. But there's so many programs that are already out there for people to take advantage of, I get e-mails constantly about free this, free that, other agencies, people offering their time." [#16]
- The non-Hispanic white male owner of an inspection services company stated, "that's always helpful for small businesses." [#17]
- The non-Hispanic white male owner of a construction company stated, "there was one and they were training people how to do solar. It's the actual physical installation work, and I think that's great." [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "I suppose for safety, in our line of work. I mean, we have a safety representative and he does a lot of training, but if there were places, you know, you could learn. I don't know." [#22]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "I don't know what specifically the training would be, but I would imagine any kind of training would be helpful." [#28]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "it would work better in the private sector because, in the public sector, you have to make a big commitment to hire somebody. It's a big deal." [#36]

**Mentor/protégé relationships.** Thirty-one business owners and managers thought mentor/protégé relationships are helpful for small and disadvantaged businesses. [#1, #2, #3, #4, #5, #6, #7, #9, #10, #11, #12, #13, #15, #16, #18, #20, #22, #26, #27, #28, #29, #31, #32, #33, #34, #35, #36, #37, AV#30, PT#4, WT#2] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I was myself a mentor for about five years, a couple years myself that I had other people that I was directing to go and get involved in the program. And we built more of a long-lasting relationship with that firm, at least to the point when they call and want to get on a team, I knew there are mentees, so I would give them more preference than somebody else added off the street. We talked about Cal MENTOR; I think those are helpful. As long as the firm, the mentor firm, really puts forth the effort. Because I've also seen relationships that did not work well because really, both either the protege or the mentor firm didn't put their effort into it. But I think those are very helpful in building relationships and learning, learning how to, improve your business. I've actually applied to be a mentor for Cal MENTOR this time." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "I know they exist and then you get more work if you're a general but as a

subcontractor it doesn't necessarily affect us. The only thing that's good is sometimes the smaller generals that you have a relationship with, will start a mentor protegee with one of the bigger ones. Now you got a foot in with one of the bigger ones. I don't know how they go about them or what the requirement is. I know the military stuff has a mentor-protege program to get into max and I know that on some of the schools I've seen it, but I don't really know how or why or what." [#2]

- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "we were the protegee, which is kind of weird. But it's helpful, learning from a big firm how to market, how to position yourself to better qualify or better win projects." [#3]
- The non-Hispanic white female co-owner of a construction firm stated, "I think that would be great. I don't know of any, but I think in our industry that does happen, but it's on a casual sort of basis. For example, my husband has had his cousin work for him on and off over the years, and he's learned quite a bit. So, it's been more like a mentor-mentee sort of situation, and he's learning that my husband can send him if he's not available, can send him to do a simple repair that he can diagnose it and take care of it. Yeah. I think in our industry, that's actually highly desirable as opposed to taking courses or something like that, because theoretical doesn't work in our business." [#5]
- The non-Hispanic white male representative of a majority owned professional services company stated, "looking at it from a standpoint that my services are as a landscape architect. I know what it takes to be a good landscape architect, and so I don't need a mentor in that. Now, if you're talking about how to get around certifications and credentials in order to get a project. Sure, a mentor or a protegee might be helpful. But to me that's not doing what we do. That is simply just, that's how somebody is able to sneak in through the gate." [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, "I agree with that. And even with us, that's what we try to do when we bring somebody new in, we'll try to pair them with somebody or ask one of the more senior guys, 'Hey, keep an eye on this one. Try to help them out. Kind of get them going'. And so, we even do that in here." [#7]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "there's something through the appraisal institute. And I know of something sort of locally, like something through, it's just a group of volunteers locally that they do stuff like that. I think it could be helpful if you know about them. I just think a lot of things I don't hear about until years in business and it's something that would have been a lot more helpful in the beginning stages of opening a small business." [#9]
- The non-Hispanic white male owner of a construction management firm stated, "like SCORE or whatever they do that." [#10]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "it pretty much goes hand-in-hand with on the job training. If you have a

mentor or someone you can ask questions, in my case, it's the Veterans Outreach Center that helps me a lot with questions I might have." [#13]

- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, "I have, over the years, a couple of times, had someone, especially when it was school, that if I thought that they were really interested in their field and they needed to miss a week and a half or something, I would allow them to come in and make up time for what they missed in class, and actually do it as hands-on experience. I have done that, but not recently. But most people want to get paid for it. That is a barrier for small businesses, having to pay for mentees, because the hassle of having an employee. If you're not having five employees, if you're only having one; having to deal with social security and that franchise tax board and IRS, and then having the worker's comp and all of that. It's not cost effective. It's easier to work an extra hour yourself than it is to pay somebody to do it, and then they don't do it the way you want it done anyway." [#18]
- The non-Hispanic white male owner of a construction company stated, "absolutely. My company mentors people. Just part of the business. You have to bring people up and teach them, elevate them to a higher level to do more complicated work." [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "there's a program run by Goldman Sachs in association with Port of Long Beach. And it's like, a mentor program for business owners. It's free. It's great, but it's in LA so it's kind of far for us. And you have to commit to two days per week, so it was impossible for our owner to do." [#22]
- The Asian Pacific American owner of an SBE- and DBE-certified construction company stated, "I think that it would be very valuable, and I think I'm actually in one relationship where I'm a subcontractor working for a prime in helping them out, so it does work and it's valuable." [#26]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "I am indeed a protege going on right now with Caltrans. We won't start until November. But, yeah, that helps the mentor-protege program. I think it definitely helps." [#29]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "actually, I just remember I think it was through SANDAG, it was a SANDAG mentorship and I was assigned someone and that was very beneficial." [#33]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "it's the same reason that I'm doing any of this is I'm trying. I don't know the system, so this is the best way for me to learn how to, I guess, prep myself for being more familiar with the contract, what's involved with these contracts, and make myself more prepared to take on these contracts." [#34]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, “San Diego state tried that for a while. They had some students that wanted to do Biology. It's good if they fit what they're going into. They thought I was like some biochemist or something. They didn't realize I was the person that walked out in the field and looked at the birds and plants. Yes. You got to match them correctly. If it's matched correctly, it's huge because that breaks all these cultural problems.” [#36]
- The non-Hispanic white owner of a construction firm stated, “I know there are avenues to help such a score and other similar program or mentor programs but there can be difficulties for a small company to land certain sized companies or work with certain GC's it can be hard to get our foot in the door.” [AV#30]
- From a public meeting held in San Diego, an individual stated, “I think that would be beneficial, like a mentoring program.” [PT#4]
- The representative of a WBE- and DBE-certified construction company stated, “a mentoring program is recommended. Large firms mentoring small business/DBE.” [#WT2]

**Joint venture relationships.** Twenty-one business owners and managers thought joint venture relationships are helpful for small and disadvantaged businesses. [#1, #2, #6, #7, #8, #10, #15, #16, #17, #20, #23, #25, #27, #28, #31, #32, #33, #34, #35, #36, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “I think joint venture relationships are good and many times it may benefit, really, it benefits both the prime and the sub, especially if the agency puts a lot of emphasis on it. For example, for L.A. Metro, they made it very clear that they wanted small business just to be engaged at a higher level. So, it kind of came out that if you joint venture with the small business, you have a better chance of winning a job. Well, everybody started joint venturing with small businesses, and the ones that did were selected. It sends a different message, a very strong message to the prime community that you need to engage small subs as a joint venture. I think that was very helpful.” [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “it just kind of introduces you to more contractors potentially, but I don't know.” [#2]
- The non-Hispanic white male representative of a majority owned professional services company stated, “I think those are great opportunities when you have, especially with two or numerous smaller entities, that give them the ability to potentially compete against these larger conglomerate firms.” [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, “we're kind of unique because we are a small company. So, we actually work with a couple of other small companies, and we help each other out. So, if they're short-handed on a project, if we can help them, we'll send a couple of our guys go over there, and they'll work for them. And the same thing, if we need the extra help, then we can bring their crew

aboard, and they'll help us. Yes, we do. We work with other small businesses to do that.”  
[#7]

- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, " if they have these kinds of contracts and you're talking about a \$4 million contract and it's a seven-year whatever project, instead of giving that contract to the prime and then having that prime sub it out. Well, then if you're talking 700 hours a month or something like that, or it's a big, big project specifically to security, then you make that prime, give 10% of the value of that contract and you take that 10% and you break it down and put five small security companies, veteran-owned, minority-owned woman-owned whatever you want to label in that category and give them all 168 hours. So, if it's 10% and each one of them 2% is a 168 then you give them the 168 and let them maintain it and make sure that they get paid properly. But that'll never happen because that's too farfetched. Because the prime won't do it because then they'll end up crying about losing money, especially if it's the lowest bidder wins the game on the contract. When the contract actually needs to be serviceable so that you could have those entities work together and provide that service. And that's the other way of the City, County and state being able to keep a small business like me out because you think about it, you give a small business security company, and I'm not saying me specifically, because normally when I fight these battles, it's not all about me. You give the opportunity to have four or five small veteran-owned businesses, male, female, whatever, to bid on a contract jointly together all that money stays locally here in the economy versus it going far away to almost state.” [#8]
- The non-Hispanic white male owner of a construction management firm stated, “they do provide other tools, like they'll ask for joint venturing and stuff. But even then, if you joint venture with a big company, you're treated like a second class citizen. ‘Yeah, you get what we don't want to do. You get the scheduling, or you can get all the budgeting and stuff’ and you're like, that's not what we're here to do. We are here to be construction managers, give us parts of the project to manage. If price doesn't matter, the way that little companies get in is by joint venturing. And a lot of agencies say you kind of need a joint venture with some-DBE, SBE all the letters disadvantaged and all that stuff. You got to partner with them. Well then, it's cool you get partnered with them, and usually your partnership volume is so small that it's not hardly worth it. And like I said, you end up doing things like scheduling and pay application reviews, and I guess some guys are fine with that, that's not what I came to do I think they're probably as good as we got right now.” [#10]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “I believe they already have joint venture relationships. I know the MCTC project is a joint venture between 3 companies. But I think maybe promoting, instead of having had 3 brokers working separately, maybe a joint venture would've been great because then the work would have been distributed evenly, you know?” [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “they're there if you want them. Are these questions for something SANDAG is considering doing as well? Because the type of programs that you mentioned, they are already out there, it's just different agencies I think offer them, I'm not sure if it's

something that SANDAG allows for joint venture participation on their bids, I know that for a fact. MCTC is a joint venture between two large primes. They're absolutely helpful, without question." [#16]

- The non-Hispanic white male owner of an inspection services company stated, "those are helpful in small business relationships. One needs the assistance of the other to get the business started." [#17]
- The non-Hispanic white male owner of a construction company stated, "it sounds great, but I don't know of any opportunities." [#20]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "because a joint venture, you are actually joining a project with individuals to get work. That's what I see. Like the mentorship program, I think it's useless because, for example, if I am fabricating pipe, I already know what I'm doing, I don't need bookkeeping experience, I don't need estimators. That would be for someone that doesn't know what they're doing. And if you don't know what you're doing, you shouldn't even be offering your services to a prime. So that's more like a company that's starting out from scratch. But we are talking about... We are talking specifically about a prime giving a contract to an MBE." [#23]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "it gave us an in through a lot of City of San Diego projects that we would have never had access by ourselves because we don't have the qualifications. And the City wouldn't have trusted us to do it." [#25]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "I look at it kind of from a networking perspective is - what kind of relationships can I form where it would be a mutual advantage to the team with someone. I mean, yes, yes." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "because it helps catch some of the weaknesses in the minority business background and gives them the ability to work with somebody who's watching out for them." [#36]

**Financing assistance.** Twenty-four business owners and managers thought financing assistance can be helpful for small and disadvantaged businesses. [#1, #2, #4, #6, #7, #8, #9, #10, #11, #12, #13, #15, #16, #17, #20, #22, #26, #27, #31, #32, #34, #35, #36, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "those are very helpful to a small business as well. I know that SPDC brought in several financial institutions to basically expose them to the small businesses that were going through the workshop. So, there are places that do that." [#1]

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "I'm sure there's some out there, but I don't know. Again, I haven't had the pleasure of working for a company that needed it." [#2]
- The non-Hispanic white male representative of a majority owned construction firm stated, "I would say they could all be helpful." [#4]
- The non-Hispanic white male representative of a majority owned professional services company stated, "I don't know how that is helpful, because either as a business you have the means to pay for your overhead or you don't." [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, "that's interesting because I was just working on some of that. I do think sometimes that finding the finances assistance is needed. And especially if a business is trying to expand, they sometimes need that extra help just to get over that hump. And so yes, I think that's very important and it would be nice that if they could do more of that type of help." [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "I've finally found one now, probably two financing companies, but then their interest rates is through the roof and then I still can't get a line of credit. I'm really trying to figure out how do I establish credit for my company." [#8]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "there's two or three, so let's see. The one that I've been using is called Express Capital Funding, I think they're for small businesses. Yeah, small business lending and they're local, local meaning Anaheim, I think. That's who we've used. And then there's another one that I became aware of at that same mayor's round table breakfast and it's called Accion. Getting funding is an issue. It is kind of an issue for a small business because, especially for us, like we don't have any inventory or any like collateral, we're just services. So Express Capital Funding looks at your last three months of bank statements. So when I've been denied before when we've needed some working capital because, hello, the reason I need the capital is because I haven't got paid in three months. So yes, it's needed." [#9]
- The non-Hispanic white male owner of a construction management firm stated, "I'm not familiar with any programs." [#10]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "that would be great if that can be provided." [#11]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "yes. We want it. Yes." [#12]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "absolutely yes it would be helpful." [#13]



- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “definitely, especially when it comes to guaranteed contracts, maybe if they could do some sort of like advancement, you know what I’m saying? That would be really helpful.” [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “I would argue that being a minority has probably given us better access to capital.” [#16]
- The non-Hispanic white male owner of an inspection services company stated, “that’s always helpful.” [#17]
- The non-Hispanic white male owner of a construction company stated, “the SBA loan program is good. It’s out there, it’s a challenging process. I don’t know, but to get one of their loans I probably ... I was trying to get an SBA loan and between just the time delay, the bookkeeping, they want everything single piece of mail, every single bill. They want a background story, they want 10,000 pieces of information, every credit card receipt. And then when they take a month..., then they want everything again. And so, it’s like well, I dedicated 40 hours to amassing all this information, putting in a logical order and then giving it to you. And now it’s old and now I’m going to dedicate another 10 hours to clean it up and update everything. And so, it’s insane.” [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “SBA, Small Business Administration offer a lot of information about financing and getting loans and things like that when you’re starting out. And, there’s particular banks that offer small business loans that I’ve seen at conferences and things. But I think SBA offers the best rates.” [#22]
- The Asian Pacific American male owner of an SBE- and DBE-certified construction company stated, “I think that if there was a system in place where there was financing that was easy to do, that the SBE backs up by maybe project specific. So, for example, if I’m bidding on a job that is a million dollars and I need financing for that, if SBE could look at project specific and says, ‘We see. We see the numbers. We’re going to help you with the financing,’ that would certainly be valuable.” [#26]
- The non-Hispanic white male co-owner of a construction company stated, “yes. That would be great.” [#27]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, “that would be very important for anyone who is starting out. I had an extremely difficult time getting a loan. I couldn’t get a loan from anyone and had to eventually get a family personal loan in order to not go out of business. So, if I hadn’t had that loan, I mean, it’s paid off now, but if I hadn’t had that, there’s no way that I would have been able to stay in business.” [#34]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, “the best thing would be a payment from the agency to get the project started. We'll call it the mobilization payment. That lets the small business with poor cashflow get started.” [#36]

**Bonding assistance.** Sixteen business owners and managers thought bonding assistance can be helpful for small and disadvantaged businesses. [#1, #4, #5, #7, #8, #16, #20, #23, #26, #27, #28, #31, #34, #35, #36, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "of course, I think that's helpful. I'm not in that type of business, but I'm sure that was very helpful for small contractors." [#1]
- The non-Hispanic white male representative of a majority owned construction firm stated, “I would say they could all be helpful.” [#4]
- The non-Hispanic white female co-owner of a construction firm stated, "I don't find it difficult already. I don't find that to be difficult." [#5]
- The non-Hispanic white female representative of a majority owned construction firm stated, "I think those do help, and I don't remember the name of that program that she was talking about, but yes, those do help." [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "I'm trying to figure out how to do that because they run the credit, they run my background check or run my credit check and then they tell me based off my credit I can't get bonded. Which to me is not fair when it's not me, it's the company I'm trying to get bonded so that I can get on the contract." [#8]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "yes it would be helpful to companies." [#16]
- The non-Hispanic white male owner of a construction company stated, “bonding assistance is huge, because when I did the airport program, I walked in and essentially, they checked my credit and gave me a \$50 million dollar bond on the spot. And I didn't realize how significant that is, and I've never used it. But without that you can't bid on any projects that are commercial. Well, you can bid on face to face commercial business owner, but you can't bid on public without that. And so that's huge. Without that all the people that I went to class with couldn't do anything. When you walk in there, they're like, do you meet these criteria? You get this bond. And I was a fairly, newly established business and they just gave it to me. If I was a minority with no business, then I think I would have taken off very nicely.” [#20]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "sometimes they want you to submit a bonding with the actual bid and I don't like to do that because that's money out of our pocket. So, what I tell people is, if we get the job, we will give you the bond. But to require the bond... Sometimes

they will say, 'We want all the primes or all the bidders to give us a bond.' It's just time being wasted to have everybody go get that. Now you can say, 'Hey, we do want a bid bond and performance bond, but it will be within 10 days of issue of PO if you get the job.' That would be one less deterrent." [#23]

- The Asian Pacific American male owner of an SBE- and DBE-certified construction company stated, "I think that is very important and valuable. I've established myself long enough that I'm getting the bonding that I need, but certainly I think some of the requirements and when the bonding increases it becomes a challenge." [#26]

**Assistance in obtaining business insurance.** Fourteen business owners and managers thought assistance in obtaining business insurance can be helpful for small and disadvantaged businesses. [#1, #7, #12, #15, #27, #28, #30, #31, #32, #33, #34, #35, #36, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I think that may be helpful for getting competitive rates, or maybe sometimes group rates or something like that where small businesses can be taken advantage of. One of the problems with insurance premiums is small businesses, a lot of times, are held to the same standards and limits premium or liability limits as the prime. And that's difficult for a small business when the liability limits are increased. Like sometimes, San Diego Airport wants a \$10 million liability. Well, that's not easy for a small firm to handle without having to pay very high premiums. So, there's got to be some balance or some type of exception for a small business when it comes to insurance liability." [#1]
- The non-Hispanic white female representative of a majority owned construction firm stated, "I'm sure there's some people that need that. We've been lucky. We haven't had to have that." [#7]
- The Hispanic American male and non-Hispanic white female owners of a construction firm stated, "I think knowing what you need and the process of whatever trade you're doing, sure that's important." [#12]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "we don't need assistance because we have a broker who does all that for us. But I think maybe initially as a new business, that would've been helpful." [#15]
- The female owner of a DBE- and WBE-certified professional services company stated, "maybe for liability or workers comp, that would probably be helpful." [#30]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "it's the single costliest piece of any contractor's component right now." [#31]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "I knew people and got appointed or kind of sent a broker. If I hadn't have had those people that helped me, I think it would have been a very difficult process for what I'm doing." [#34]

**Assistance in using emerging technology.** Twenty-five business owners and managers thought assistance in using emerging technology can be helpful for small and disadvantaged businesses. [#1, #2, #5, #6, #7, #10, #11, #13, #15, #17, #18, #20, #22, #26, #27, #28, #29, #30, #32, #33, #34, #35, #36, #37, AV#20] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “support with emerging technology definitely is important. I think sometimes small businesses are the ones that fall behind in this area because they can't afford to make the investment. But it's required either by the prime or by the client. So, having some assistance, support in that area would be very helpful.” [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “the AGC offers classes for Rev and Excel and BIM. So, I mean, I guess, very useful.” [#2]
- The non-Hispanic white female co-owner of a construction firm stated, “my experience with that is that it's readily available. I go to continued education seminars, and they always have things for assistance. They always have vendors there showing new product, they talk about their new product whether it be tools or chemicals or whatever.” [#5]
- The non-Hispanic white male representative of a majority owned professional services company stated, “not any emerging technology that has been critical to the projects that we go after. With the exception of, I think I've seen where there are some new technologies that people think are ... just mind-blowing and better for what we do. And the reality is that all it is administrative overhead types of stuff. So no, I don't see any of that.” [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, “yes, I'd like to see more of that because, as technology changes, it doesn't mean the people always learn the technology. I can give you a real dumb one. With a Resource Board, they brought in all these DPF systems and these systems to reduce the smog. Well, we have one of those machines and so it will turn itself on when it needs to be cleaned. Even though everybody knew about this, they weren't used to this. So, they would keep trying to turn off this light that was on. And SANDAG provided some kind of training for them. What was even better was we took it and had it put in the shop to have it done. And the people that we took it to are the manufacturers of it, but of the machine, not of the engine. So, because that part was with the engine, they couldn't reset it for us. So, then it had to go to another company who had the software so they could go in and tell the system that yes, it was clean and that it's back to running correctly And so, yes, technology changes, but sometimes the people aren't keeping up with the technology.” [#7]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, “yes. When I was in school, it was not required to type. Typing wasn't a thing to do. But for a lot of the older business owners, such as myself, I have to rely on the younger people to tell me how to put stuff on the computer, and take it out, and add it, and tagging and all of that. And a lot of times, at least my wife has been helping me with, she's more clerical than myself, so she knows how to go and attach things and do that type of

stuff. So, if she wasn't there helping me, I wouldn't know how to do that, go online and do all of that." [#13]

- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, "I have a couple of friends that are computer savvy and that's their business, so if I do have a problem, I just call them. It makes sense to have friends that are IT specialists. But for other people it could be." [#18]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "there are technology conferences we can go to learn more about emerging technology. One company that runs them regularly is called Esri and they're a mapping software supplier who are always coming out with new technology, and they run conferences often so you can learn about it all. But again, our people usually just keep on top of that themselves, you know?" [#22]
- The Asian Pacific American male owner of an SBE and DBE-certified construction company stated, "I think that's the way that I would like to go. I know I do a lot of federal contracts. All federal contracts have gone electronic bidding, except for a few of certain types of that. One that is notoriously bad in terms of public agencies, that's still not doing online bids, is Caltrans. We have to physically send our bid documents to them, whereas a lot of them are now we just send electronically." [#26]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "if we can learn these emerging things when they're first starting, it's a huge tool because you're comfortable with the technology." [#36]
- The Hispanic owner of a construction company stated, "the digital marketing component is getting harder and harder, it's tough to stay on top of the market. And now we've got trained competitors and we're just a family owned business." [AV#20]

**Other small business start-up assistance.** Business owners and managers shared thoughts on other small business start-up assistance programs. Nineteen owners agreed that start-up assistance is helpful. [#1, #2, #5, #7, #9, #13, #15, #16, #22, #26, #27, #28, #29, #32, #33, #34, #35, #36, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "that to me is very helpful. And there are places like I said with SBDC, there's also another organization called Score that does mentoring. They actually provide small business mentors. There's also another program about procurement, contracting and procurement assistance and things like that. So, there's several around town that people should be aware of to use." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "I think the mentor protege joint ventures are probably the most helpful. It's just a matter of getting in with those. But again, it kind of goes back to the good old boy network and who you know. A lot of people just have it without it being an official thing. I

know that a formalized program would really make ... I'm sure it would help somebody coming into San Diego or California that doesn't know anybody out here." [#2]

- The non-Hispanic white female co-owner of a construction firm stated, "I don't really know. I mean, we did it on our own without a whole lot of assistance. The guy that we bought the business from, we asked him how he went about doing it, and again, like I said, our particular industry is more like a master, journeyman, apprentice sort of situation. So, it probably would be good for some people. You know, we're also competing against your unlicensed gardeners, the guys that throw an advertisement with some pebbles in a plastic bag in your driveway and it's like, 'Hello.' You know. But if they ever wanted to expand it, it probably would be beneficial for them. I don't see why it wouldn't be, but I couldn't tell you who that might be." [#5]
- The non-Hispanic white female representative of a majority owned construction firm stated, "that would be nice. I think if there's a need for particular field, it would be an incentive to help people and to start more businesses." [#7]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "I guess if there were, if they could provide more training on what different things mean, and what applies to us as subcontractors, as opposed to, you know, what applies to the primes, like differentiating between the two. More training maybe on prevailing wages. There's you know, the California and Davis-Bacon, which is the federal prevailing wage, there's still like a lot of unanswered question. And there's definitely trainings out there, but they cost money, so you know, it's like you have to seek it out yourself, and then it costs money." [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "I think the problem is that we listen to it, and we're like well, you got to do it yourself. But, yes, would it help other small businesses that are barely emerging? Absolutely, it could help them into opening their eyes into what they need to do in order to be successful. It may actually curtail them into, 'yeah that's not for us,' we didn't realize how much work it was going to take. And that's a good thing, sometimes people are like 'oh yeah I want to go be a contractor.' Are you sure? Do you understand the capital that you need? Do you understand the bonding and the insurance? All these things and compliance, and it never stops." [#16]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "PTAC is the go-to place for that." [#22]
- The Asian Pacific American male owner of an SBE and DBE-certified construction company stated, "I think there is an organization called SBDC, Small Business Development Center. I think for small startup businesses, they're very helpful." [#26]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "the Chamber Commerce does that all the time. It tells you what your tax and liabilities are,

the papers you have to file, all that kind of stuff. That's just any business of consulting.”  
[#36]

### **Information on public agency contracting procedures and bidding opportunities.**

Twenty-five business owners and managers provided their thoughts on information from public agencies contracting procedures and bidding opportunities. Many thought the information is helpful for small and disadvantaged businesses. [#1, #2, #6, #7, #9, #10, #11, #12, #13, #15, #16, #20, #22, #25, #26, #27, #28, #29, #31, #32, #33, #34, #35, #36, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “that's available online, but I don't know if everyone knows how to get on it. So yeah, providing training or information on how to get on those types of vendor lists is important. I knew it because I was already working for a prime firm, so I was able to just join all of those.” [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “it could be more widespread or uniform. Some of them use PlanetBids, some of them use their own, like UCST. You have to pay attention to their website where some of the school districts put it down on a PlanetBids, but other school districts don't. And so you just sort of find out somehow. A more uniform practice would be fantastic. Some school doesn't pay for the PlanetBids or the quality bidders, but it's also through their pre-calls. So as soon as you're pre-called you get on those e-mails, but not everybody's doing it.” [#2]
- The non-Hispanic white male representative of a majority owned professional services company stated, “I think I understand it. It's probably good to, every now and again, get kind of a refresher on that if there's anything different. But when you ask the question, everybody tells me the process is still the same.” [#6]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “once I signed up with DGS and got my certification, so it's micro small business and then you can click on what counties you want to hear about work from. They do a lot of outreach, so they send you e-mails out, “Okay, Caltrans is having an outreach at this district,” it could be San Diego or whatever. And they're having a job fair or they're having a something where it's meet the primes where there's all these primes there and different agencies. So, there is some level of outreach but it's like you only get that once you kind of sign up for it. But it is helpful.” [#9]
- The non-Hispanic white male owner of a construction management firm stated, “SANDAG and those guys, they all hold outreaches. Port of San Diego has outreaches, so I just went to one the other day. I didn't need it, but I went with a friend who didn't have a lot of background. She's from the technology industry. And so, for me, I've done tons and tons of contracting. To me it's like, I know all these guys shaking hands, ‘hi, Dave.’ But it was good for her, she had never met all these agencies or seen how they work, because she's in like firewalls and servers and all that kind of stuff. So, they're not used to it as much. So, it was good for her. She got a ton of information out of it.” [#10]

- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, “I don’t know of one other than participating in the City of San Diego’s list of minorities. Once you register with them, they put you down in their list of minority-owned businesses.” [#11]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, “if we had that information, we’ll know how to bid and who to direct the bids to.” [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “I think if you search their website, the information is there, you just have to take initiative.” [#15]
- The non-Hispanic white male owner of a construction company stated, “that’ll be really good to know about.” [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “PTAC can help me with the writing, and help you out with the contracts and analyzing the contracts.” [#22]
- The Asian Pacific American male owner of an SBE and DBE-certified construction company stated, “I think that certainly eProcure Cal has certainly consolidated, and that’s very, very valuable for us. Unfortunately, every agency has their own system, and so we rely on these private sectors that basically farm all that information sent into us, and that’s how we do it.” [#26]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, “something like that could help.” [#29]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, “those are helpful but a lot of times they... for we have attended them. They lack a certain amount of follow-through and substance, okay? It seems like they’re almost patronizing the communities where they hold them. But, they don’t give you any quality substance for follow-up.” [#31]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, “if you don’t know where to look or all the available pathways to obtaining contracts, then you’re going to struggle.” [#34]

**Online registration with a public agency as a potential bidder.** Twenty business owners and managers thought online registration with public agencies as a potential bidder are helpful for small and disadvantaged businesses. [#1, #5, #7, #9, #10, #15, #22, #23, #25, #27, #28, #29, #30, #31, #32, #33, #34, #35, #36, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “those are available in just about every agency.” [#1]



- The non-Hispanic white female co-owner of a construction firm stated, “we are on an online registration with an online registration site. But we have not yet used it. It's brand new to us and we haven't used it yet. It's something we joined in order to be in collaboration with this one prime contractor that we subcontract.” [#5]
- The non-Hispanic white female representative of a majority owned construction firm stated, “I find some of that is hard to do as well because you can get on and they'll send you every project, and then you're still having to go through each one of those, trying to see if this is something you're interested in or not. And so, they haven't got it narrowed down yet. So like filtering them is hard, and their filters don't exactly work.” [#7]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "it would be nice if there was a central place where all the agencies in California had to register or something, you know what I mean? If there was like a one stop shop, instead of having to literally go to the website for every single city or county and finding out, is it directly through their own website, they have their own proprietary system or use PlanetBids or some other, BidSync or something. And then having to register, you really have to go and register for every single one you think you might want to be a client. Now, the only other thing that's nice is once you're on PlanetBids stuff and you're like, okay, you already have your codes in for appraisal, they will e-mail you every so often it'd be like, ‘Oh, this city just added... Like City of Moreno Valley is now on PlanetBids, do you want to sign up?’ And so that is helpful. And so, a lot of them do those these kinds of bids. But if they're already on there and you didn't go specifically to request that city you're not going to get on their list.” [#9]
- The non-Hispanic white male owner of a construction management firm stated, “like PlanetBids and all those like eBidboard, they're great.” [#10]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “I know for the Mid-Coast Project, we definitely added our name to the bench. They have, you know, a bench where you registered online. Maybe making that available for all their projects for SANDAG in general?” [#15]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “the only one that I can remember that's helped with that is the California DGS. They did a workshop on, you know, how to make yourself look good on their portal. I haven't seen that with any of the other agencies.” [#22]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, “I could not grow business in San Diego, but I could grow business in LA. Part of the reason for that were these roster contracts. So, all I had to do was qualify to get into the system and then I could go market the individual and saying, ‘Hey, I have a contract mechanism for you to hire me.’ See the difference there? San Diego did not offer that. I could not find it. At least I didn't find it in my year and a half in business. I did not find an opportunity to put myself on a pre-approved roster that had a contract that allowed me to go hunting. That was probably one of the biggest things. If I had had a contract mechanism

to access clients in San Diego, I would have been knocking on the doors like crazy. But I have no contract mechanism. So, LA County has rosters, Orange County has rosters where you can just get on and be pre-approved to do business for those counties when the contract mechanism in place. Sometimes they asked for a rate sheet and sometimes they didn't. And when they came back and asked you for a bid or a quote, you would then provide your rate sheet for that individual quote. But all the insurance, all of the contracts, all of that stuff was all done. Like the agreements were in place to do business." [#28]

- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "I have been for the longest time, nothing comes out of that either." [#29]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "oh yes, we use the, what is it called? PlanetBids all the time." [#33]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "that's huge because then you automatically get these solicitations and you look at the codes or look at the description and say, "It's not me." If they want, sometimes they'll have to say, "I'm not interested." Otherwise, just don't do anything." [#36]

**Hard copy of electronic directory of potential subcontractors.** Twenty business owners and managers thought a hard copy of electronic directories of potential subcontractors would be helpful for small and disadvantaged businesses. [#1, #2, #5, #6, #7, #9, #11, #15, #16, #22, #25, #26, #30, #31, #32, #33, #34, #35, #36, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "yeah, that would be not hard-copy. But I think electronic online lists would be helpful, which is something like the SANDAG bench breaks that for example." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "like google? I mean I guess if there was a database, where you could find out who has which certs easier, there's already some, I think the DAR website has some, but it doesn't tell you local certifications. So maybe if you were AGC, that would be helpful." [#2]
- The non-Hispanic white female co-owner of a construction firm stated, "that is useful. Electric directories are really quite good. I use the California state board. They're electronic, yeah, online. Yeah. To see if they're who they say they are and if their licenses are suspended." [#5]
- The non-Hispanic white male representative of a majority owned professional services company stated, "it might, but most all of us, I believe, have those. We've created our own." [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, "that would be good because those are going to change year to year. And so, if there

was a way to get electronic or hard copy, it would be nice. Because then you could see who is current that year.” [#7]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "the ones that have certification, there are programs online that you can look up. Like you can look up through Caltrans website for DBE certified, for ones that are CUCP, DBE firms. So that is easy. Otherwise, it would be you just have to know where to look. Like for instance, if you want somebody that is a member of the appraisal institute, then you can go on their website and look up that type of sub. Otherwise it's just kind of knowing where to look.” [#9]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, “there is not one that I'm aware of.” [#11]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “I guess that would be a good thing. You could also search the Caltrans website, the DBE website.” [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “I think that’s always available to anyone. There’s a directory that you can get from the state of California that gives you every designation from every sub-contractor that bids to agencies. Yeah, it’s very readily available.” [#16]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “the California DGS have a... Like, a lot of the large agencies, LA County has a search thing and you can type in a keyword and then it comes up with the different subs.” [#22]
- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "the primes use it. We are on the City of San Diego list, we are on the SANDAG list, we're on Caltrans' list and the primes do call us for it, so yeah, helpful.” [#25]
- The Asian Pacific American male owner of an SBE and DBE-certified construction company stated, "I think hard copy is archaic, ancient, and electronic would be the way. Somebody could somehow, just like eProcure, consolidate vendors on one system just as eProcure does for bidding purposes, that certainly would be helpful.” [#26]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, “a list of anybody you could potentially partner with or your potential competition is going to be useful.” [#34]

**Pre-bid conferences where subs and primes meet.** Twenty-six business owners and managers thought pre-bid conferences where subs and primes meet are helpful for small and disadvantaged businesses. [#1, #2, #6, #7, #8, #9, #10, #13, #15, #16, #20, #22, #23, #25, #26, #27, #28, #29, #30, #31, #32, #33, #34, #35, #36, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I don't know a lot of primes in my field. I know primes that have done it, I know projects that delivered, roadway projects and transit projects and airport projects. But I don't know primes that I've done strategic planning. I don't know primes that have done coaching or training or something like that. So my dilemma is that I'm not ahead of the schedule. So, when the announcement comes, then I attend pre-proposal meetings to see if there's anybody that might be interested in putting me on their team or something like that. So that's a disadvantage I have right now. Not having that information. Well, I think it's over time when you go to these meetings and pre-proposal meetings, you see who attends depending on what type of work it is, you see who attends I think that's really important. The only problem with that is that many times the primes have already formed their team. So, they don't really need anybody else. The best thing to do is hopefully have these types of pre-bid conferences way before the bid comes out. If they're going to have... SANDAG try to do that with the planning contract, but they were too late. When they did an outreach, they were supposed to do it as a way of matching primes and subs before the RFP came out. But by the time they got around doing it for the planning contract, the RFP was already out. So, a lot of times prime firms that are pursuing projects know well in advance what their strategy is for that pursuit. And they, in advance, have their team put together. Because they go meet with clients, they hear in the news something is happening, they have their ears to the ground, they understand, they go to a board meeting and they know this contract is coming out. As a prime consultant, I had a long lead on projects -- a year, two years in advance, and I would track that. And let's say if six months before the contract, or earlier, I had my team put together, I would go meet with everybody before they get taken by somebody else. If I wanted an exclusive team and I say, 'Hey, you want to be on my team?' So, I already have my team together. So, by the time I get to the pre-bid, I already have my team. So that poor sub that comes and wants to talk to me. 'Hey, can you put us on your team?' 'Sorry, we already have our team put together.' So advanced notice is better than the pre-bid. Because the pre-bid, some firms just come to just see; maybe we should go after it or not. But I don't consider those firms very competitive as a prime because they haven't looked into the project. They haven't talked to the client; they haven't identified the challenges of the client. So, they can put a good, responsive proposal together. So here you go and get on that person's team and they won't win because they haven't done their homework." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "that's like the job lock. You always find out who your competition is and tells you if you really want to bid the job or not. And shows you what GCs are on it. So yeah, they're helpful." [#2]
- The non-Hispanic white male representative of a majority owned professional services company stated, "definitely, those are valuable. Yeah, we'll go to ... There are a number of RFPs that do require you to go to those. So yeah, if they're required, we're going to definitely go. Unfortunately, though, I don't always find them to be as effective as intended, primarily because most of the bidders don't want to speak to something that they think is a subject matter that is unique to them, and they don't want to talk about it." [#6]

- The non-Hispanic white female representative of a majority owned construction firm stated, "that would be good. Because, same thing, that will allow them to better connect and put those bids together." [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "sometimes you'd have to go to a pre-bid and that's the other thing where you'll get an e-mail two days prior saying you need to show up on this day for a pre-bid meeting or you can't bid on a contract at all. Seen a lot of those, and I've been lucky, too. I always check my e-mails every morning, everyday so that I go, 'Pre-bid. Okay, I'm going.'" [#8]
- The non-Hispanic white male owner of a construction management firm stated, "done lots of those, they are great." [#10]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "being a DVBE. Disabled veteran business, they send me invitations. You know, meet-the-buyer events, get-in-the-game events and stuff of that nature. The Caltrans DVBE has been working with me as far as saying, okay, you may want to do this in order to do that, so I'm just basically learning the way and making contacts along the way. Yes. Like some of the meet-the-prime events and stuff. That helps a lot because they talk about the upcoming bid, and they introduce themselves and say, 'I'm with so-and-so contractor,' and you just give them your card, and they will send you information on whether you want to bid on this product or not, and I think that's very helpful." [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "that would help, you know, kind of like a networking event, mandatory meetings or whatnot." [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "I've attended. I have, if it's required. We can still bid without it. In that respect, I'll be honest, for the general contractors, that's a check the box thing, but they all do it. I'm not saying they consider a waste of time; I'm saying it's just like 'we have to do it, it's one of the requirements that the agency is saying we have to put on.' It's important because they're getting their name out there to other small businesses that may not have access to it. But I think a lot of times they think 'I'd rather be back at the office putting effort into my bid.' For a small business it may be a good opportunity to start networking with these primes that... maybe they can't just walk into their offices... for somebody that's starting." [#16]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "there's tons of them all the time, matchmaking events and meet the primes events. The San Diego Airport had one, not that long ago actually. I think the ones where it's just set up in a conference hall, and they have booths and you just walk around and talk and take business cards, I don't think they're that helpful. The better ones are where they actually do strategic matchmaking, so you might present to the primes and say, 'This is our company, this is what we do.' And those people that are interested in your services contact

you afterwards for a one-on-one meeting. That's better because then you know who's interested, rather than just going around every table saying, 'Yeah.'" [#22]

- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "they would be more beneficial if the prime knew that it was mandatory. So that a prime would have a fiduciary responsibility to make sure that he actually meets an MBE. Because if it's just a good faith effort, they can just get a booth and show up and not care because the good faith, they already did the good faith. By them showing up, they already met the requirement. It's done. Once they showed up, they are not obligated to do anything else. There is no mechanism to force them to engage us." [#23]
- The Asian Pacific American male owner of an SBE and DBE-certified construction company stated, "I think it's valuable, and it's sometimes maybe necessary, may not be necessary, but I think it's okay. Now, there are times when an agency will do a pre-bid meeting and it's not mandatory, and what happens is they just go through a PowerPoint. Well, you mean I drove two hours to look through a PowerPoint when you could have just sent it to me? And that becomes annoying. Now, sometimes they'll make it mandatory, and so sometimes not necessary to make it mandatory, because you can't bid on it. It sometimes can be very simple and they'll make it mandatory, so for me to bid on a job in, let's say Santa Barbara, and it's a small job, I know what it is like, and they make it mandatory, then I can't attend. It forces me not to bid on it because I have to physically be there for a small job." [#26]

**Distribution list of plan holders or other lists of possible prime bidders to potential subcontractors.** Twenty-six business owners and managers thought distribution list of plan holders or other lists of possible prime bidders to potential subcontractors are helpful for small and disadvantaged businesses. [#1, #2, #6, #7, #8, #10, #11, #13, #15, #16, #20, #22, #23, #25, #26, #27, #28, #29, #30, #31, #32, #33, #34, #35, #36, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I have reached out to SANDAG, for example, and got copies of proposals from all the people who submitted on the strategic planning contract they had, and they were nice enough to send that to me. So, I have a list of those firms that if there's another opportunity in San Diego maybe, and I've reached out actually to some of them, connected with LinkedIn, and try to talk about other opportunities. So that's how I was able to find some of that information. There is a Public Information Act. And if, for example, most agencies have this ability, if they solicit for a contract, anyone can go and ask for a copy of the proposals that were submitted for that contract. I just simply went to the contract manager at SANDAG and requested it. And she e-mailed everything to me electronically. So, I have proposals from like, I think like maybe 10 different firms who submitted for that opportunity. City of San Diego does it, I know they don't give you copies but you can go and sit and review. That's typically done on the, some of these like PlanetBids or something like that. Again, it is helpful if the team hasn't put their full subs together." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "I think there's already a couple that do that. I think the reprographics

houses already do that. So, there might already be something like that. Maybe, more uniform and more obvious would be helpful. Everything online.” [#2]

- The non-Hispanic white male representative of a majority owned professional services company stated, “I do know if they are polling RFPs, because most of the public sector work, there are sources, whether it be at the cities or through... Was it PlanetBids? I think that's it... but in order to get the details of the RFP, you have to register. You're registering at that city, or not, and so the names of everybody who is interested in going after that particular project is available for us all to see. That's out there.” [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, “I haven't seen one in a while, but I know that they used to, a lot of times you'll get a project and you would get whoever the prime is and any of the subs that had already come on, so you would be able to see that. So yes, it's a great help.” [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "you can get those, but now it's cross your fingers that they're going to respond back to you when you ask.” [#8]
- The non-Hispanic white male owner of a construction management firm stated, “they're really good. That's usually on eBidboard or PlanetBids or all those. You can see who's bidding and it's great to be able to see and they put in their trades and so you can reach out, and they know you're a prime and you know they're a sub.” [#10]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, “through the City of San Diego, they tell you where to go look at the plans.” [#11]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, “absolutely, yes it would be helpful.” [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “the City does it, so that would help if they provided it, even if it's on their website. I think Caltrans removed that. So, if the primes do not ask for help, then you don't know who is actually bidding.” [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “oh yeah. Absolutely helpful.” [#16]
- The non-Hispanic white male owner of a construction company stated, “I'm not familiar with any programs that do that.” [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “large contracts for example, I met a guy the other day that works for the Navy and he sent me a list of primes that are working on the large contracts that might need survey or mapping work. You can also look, if you are bidding on something, you can look on PlanetBids and it tells you which primes are going to submit a bid so you can contact them that way. You can see them on some of the portals. So, there are ways to get hold of

them, but there's no one place you can go to... It's hard, because it depends on the agency. They all have their own different portals; there's no one place. If they had all of the local government bids in one place that you could look at, and then you could see, you know, which primes won it. You could approach the prime, and which prime's bidding at least.” [#22]

- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "what I do is I call the agency and I ask them for the plan holder's list. And many agencies, if you don't do a job walk, you can't bid on a job. So right then and there, once the agency sends us the list, I know all the primes that are bidding. And then what I do is on bid day I just send my proposals to all the primes.” [#23]
- The Asian Pacific American male owner of an SBE and DBE-certified construction company stated, "I think if they can make that available, that would be great. If there is a place where we can sign up and put our e-mails in and then they'll automatically send it to us, that would be great.” [#26]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "I've heard about it. But by the time the RFQ comes out, it's too late. Because the teams are already formed—the word of mouth that the agency is putting out a contract is way before RFQ comes out. So, by that time most of the teams are already formed. I have already been approached, about three, four times right now by primes that are going after, I think it's a Caltrans contract that is coming out in January. The RFQ is nowhere close to come out yet, but these teams already know that this contract is coming out and they have approached me, you know, these companies, these primes are already forming their teams and the contract, the RFQ is not coming until January. So you see how far ahead you need to be part of that team before the RFQ comes up or the plan holder's list is formed.” [#29]

**Other agency outreach.** Twenty-one business owners and managers thought other agency outreach could be helpful for small and disadvantaged businesses. [#1, #2, #5, #6, #8, #9, #10, #13, #17, #20, #22, #25, #26, #28, #30, #31, #32, #33, #34, #35, #36] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I have signed up for all the relevant agencies on big projects that I would be interested. I go to their vendor portal and register to get announcements. So, if I hear of an opportunity beforehand, I contact the primes to talk to them about possibility of being on their team. My problem is, I'm starting a different type of business than I have been working in for the past 35 years. I mean, there's a lot of outreach programs out there and you go meet with people, SANDAG does, where they have the speed meetings or whatever. It's just, to me, a lot of times nothing comes out of that, because it's just such a short amount of time to talk to someone, and then you move on to the next table or whatever. You don't build a relationship based on that. So, I like Cal MENTOR for example, Cal MENTOR is a good program, because it pairs up a mentor with a small business and helps them learn about how to bid on a public agency contract. But sometimes these forums... I've sat at the table as a prime. And people come in, in front of me and I



talked to them for five minutes or two minutes, and they move on to the next table. And at the end of the day I have, 50 different cards or whatever. But I haven't built a relationship with anyone necessarily, unless the ones that I knew were already there. So, it may seem like it's an opportunity, but the way the format is, to me, it doesn't really help, if you don't know the firm, they're not going to be your next on your list of calls. Again, those are good because it does provide networking opportunities, but do it before the contract is going to hit. Do it six months before. If you know you're going to have a contract coming out, do it before so people can get an opportunity to talk to each other and get on a team instead of waiting for the RFP to hit. But that means you have to have your act together. That means you have to know what your scope is going to be as the agency to come out and say, 'This is what we're going to advertise six months from now.' And give people an opportunity to talk to each other. It should be that if SANDAG is going to do their speed dating or they're going to do it specific to their contract opportunity and do it in advance. You know what the scope is going to be. Most of these contracts are re-app. They're not brand new. And even if they're brand new, they been working on it for a while. And I don't know their agency requirements, they have to get approval by the board and all that, that may be kind of a hindrance. But if they know that this project is going to come out in six months, they're working on the RFP, why not go to the industry and let people know that this is coming out to create that forum for networking at that point. And then once they get approval by the board, the RFP comes out, people have already teamed up, and a pre-bid is just to provide more information about what the project is and help people kind of finalize their questions about what they're going to submit." [#1]

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "they do or now they're just not well advertised, which is probably better. It keeps it down a little bit, but a lot of times it's just free food though. They put their girl Friday there, not someone that you actually want to talk to or meet or that can actually make any decisions or impact." [#2]
- The non-Hispanic white female co-owner of a construction firm stated, "I go to continued education, because I hold a qualified applicator certificate, that's for the chemicals our company applies, they have vendors and I think they're a pain in the butt. Frankly speaking, they're annoying. But that's because I'm not a buyer, and I see several of the attendees checking it out, talking to the guys. And it's usually because it's a product that the company is already providing for them, and maybe they've done an upgrade or something like that. So, I see a handful, but there's a good 500 people at these seminars and maybe less than 100 will talk to these vendors. So, I don't know that they're that beneficial." [#5]
- The non-Hispanic white male representative of a majority owned professional services company stated, "I've historically tried some of those things, but I don't know that I got a sense that I accomplished anything." [#6]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "they're helpful because you can put a face to it, but then you're still at the luck of the draw if you actually get a contract or a bid with them." [#8]

- The non-Hispanic white male owner of a construction management firm stated, "I've done lots of those. I think they're okay. To me not personally, but I know to people breaking in they're great." [#10]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "I just mainly been relying on the BVOC. That's off of the VA. They help me with everything from a business plan to direction, and they give you what the customer expects. How to bid on projects and stuff of that nature. But so far, I haven't been able to get in the arena to bid for a project. So, I am learning how to bid on projects." [#13]
- The non-Hispanic white male owner of an inspection services company stated, "networking is always good." [#17]
- The non-Hispanic white male owner of a construction company stated, "we've done a couple of those and they really haven't been very productive. We've been to five or ten and just really never received much from them." [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "I mean, there's a lot of them already. You can get information, and often a table will have like, their upcoming opportunities printed on a piece of paper. So, you can take that away and see which ones suit you, like the requirements." [#22]
- The Asian Pacific American male owner of an SBE and DBE-certified construction company stated, "I think that it sounds good. I've been in the business a long time. It looks like that the agency is doing everything that they can. But in reality, and I'll give you an example, let's say Caltrans, and I think I've seen this, well they'll do a vendor fair, Caltrans vendor fair, but almost all that opportunity is already on the Caltrans website, so if the vendor fair is ... It doesn't do any good for us, because we can easily go online and get the same information." [#26]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "the SBA, you know, I took all their classes. I read all their blogs and did everything to follows their entire process and it really streamlined and-- my starting on my business. That was huge. Finding the SBA. SBA was huge." [#28]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "sometimes they lack. It seems like they're doing them because they need to, not because they want to. Or they want it legit so they have to, not because they need to. Better follow-up would be project-specific documentation, not just the contract person there, but a project manager, an engineer, somebody who understood that if the rebar manufacturer was gonna show up -- who understood what kind of products they were gonna be using on the job -- that was specified, these are generalized people. They're gonna be because who's going to those things? Maybe what they oughta do instead of having a broader vendor fair, how to do business with the City of San Diego, they ought to break the buyers out by department so that they-- because what you do is to get the office supply

person in there with the guy who supplies concrete and just the range is too broad for some of these groups.” [#31]

**Streamlining/simplification of bidding procedures.** Twenty-three business owners and managers thought streamlining/simplification of bidding procedures would be helpful for small and disadvantaged businesses. [#1, #2, #6, #7, #9, #10, #13, #15, #16, #20, #22, #26, #27, #28, #30, #31, #32, #34, #35, #36, #37, AV#32, PT#4] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “that would be very helpful if they can do that. If the agency lawyers allow that. There's a lot of legal requirements.” [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “I think it's already pretty streamlined.” [#2]
- The non-Hispanic white male representative of a majority owned professional services company stated, “over the years, we've all heard about the attempt to streamline and be more transparent, but yet I don't necessarily know that it's made things any easier and more efficient. But I don't see that as being the biggest hurdle to have to deal with.” [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, “I think the simpler they can make them, the better off and the more people they're going to have bidding.” [#7]
- The non-Hispanic white male owner of a construction management firm stated, “I don't know how you'd do it, but I'd love that idea.” [#10]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, “the simpler it is, the easier to get it done.” [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “I guess for us it's not as big of an issue I think it's because we're subs, and we've done our research where we have our set little packet. We did it ourselves, looked at, you know, other bidding packets. It used to be that through Caltrans, you can see other people's bidding packets, or the prime would submit it whenever they submitted their good faith efforts, so you know, everything was on there, we were able to compare.” [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “it kind of is what it is, it's an open playing field, we've got to all go through the same process.” [#16]
- The non-Hispanic white male owner of a construction company stated, “that would be really nice.” [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “there's often a lot of paperwork, many forms you need to fill out. I don't know whether anyone actually uses that information or not.” [#22]

- The Asian Pacific American male owner of an SBE and DBE-certified construction company stated, "I think the best way to do it is to go electronic bidding. Some agencies are still doing hard copies, just makes it a challenge. And another thing that becomes very, very annoying and just one layer of burden that is there, that Caltrans is actually recently dropped, and I think maybe because somebody had complained about it or something, is notarizing every bid becomes very, very challenging and annoying. Because now, first of all, if you notarize, that means you have to do a hard copy mailing, correct? Secondly, we have to physically go in there and notarize. Electronic bidding should be sufficient to say that you're the organization, now it's pretty streamlined, so sometimes when an agency requires to be notarized, it just makes it that much more difficult. We have to go hard copy and we have to go physical and have to pay extra money to do it. So, Caltrans has recently dropped. It used to do that all the time for every bid, and now we don't do that." [#26]
- The female owner of a DBE- and WBE-certified professional services company stated, "any way they can make it simpler and take less time. Requiring less time is great." [#30]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "the issue with that is always in the detail. If they provide better detail, then it can be streamlined. But the challenge is usually the detail is very broad." [#31]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "cut out some of the extra paperwork. It just makes life better for everybody." [#36]
- The Hispanic owner of a professional services firm stated, "one thing we encountered over the years, especially with a lot of proposals going out with PlanetBids system, sometimes we've had difficulties with that system because sometimes there is pertinent information missing from proposals." [#AV32]
- From a public meeting held in San Diego an individual stated, "updating the process, updating the system in general." [PT#4]

**Breaking up large contracts into smaller pieces.** Twenty-eight business owners and managers thought breaking up large contracts into smaller pieces could be helpful for small and disadvantaged businesses. [#1, #2, #4, #6, #7, #8, #10, #11, #13, #15, #16, #17, #20, #22, #23, #25, #26, #27, #28, #29, #31, #32, #34, #35, #36, #37, PT#9, PT#3] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "if there were smaller contracts where, the small businesses could participate in, then it's a little bit easier for my business to do that, but many contracts that they hire for large multimillion-dollar contracts. And as a one person show, I can't really go and do that, just depends I think. That's good. The problem is, sometimes they can't restrict other, prime contracts to go after things. And they go after everything. SANDAG did that with the planning contract, they went small, medium and large. So that's, yeah, that's another way of doing it." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, "they do that and it's annoying. I guess for small emerging business it's

better if your bonding capacity is littler. In the long run it affects the end user though because you might end up with three different contractors with three different standards and performance levels completing one job.” [#2]

- The non-Hispanic white male representative of a majority owned construction firm stated, “I think that would probably be helpful, yeah. Especially like, there’s too many times we get these contracts and, you know, so much of it doesn’t relate to construction rental fence. I mean, it’s like it would make sense to so many other parts, not to a non-constructive site service. So, it’d be great if there was some smaller contract that would just, yeah.” [#4]
- The non-Hispanic white male representative of a majority owned professional services company stated, “I think there's some definite advantage in that because some of these types of projects can go years, and if they were smaller contracts, that they might be more efficient. But the longer that some of these things drag out, the more inefficient I think they are. One of the biggest challenges that I think small businesses have is competing against the bigger companies when there is nothing but big projects. Then, I think that most smaller businesses know that they've tried to go after those things and don't have much luck, or it's a very limited collection of people that seem to have luck, and it's hard to get in on the other side of that equation.” [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, “that's what we were talking about, you get these large projects and you got all these people on them and trying to get through them and get paid.” [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "they don't want to break the contracts up. The contracts sometimes are too big and then when you look at the prime, the prime is already struggling with the contract, but they don't want to show the contract, so then they would rather just take the loss of we've got an empty site a couple times a week instead of pooling it out to a smaller company that'll make it work.” [#8]
- The non-Hispanic white male owner of a construction management firm stated, “I think probably having some of these, like big state agencies really give some smaller RFPs to smaller companies like us. Like instead of doing five years, \$5 million, maybe put out one year \$100,000. So that it kind of convinces the bigger firms to stay out of it and let some of the smaller guys get in there and you'll see some better competition. And I think you'll see better pricing because we'll all price a little lower, we have low overhead. Most of us work from home. I mean my office is my spare room. I don't have a three-story building and a bunch of accounting. I've got a part-time admin and me. So, I think if they made their RFP smaller and I understand that, that's an inconvenience for the agencies. That's why they do five years, \$5 million, or five years, \$10 million. Because now they have a company they can just go here, do this, do this, do this, do this. Yeah, and maybe that's what they need to do, is put out a bunch of little ones, or do one and then say, okay, these are all going to go to small firms, like under 10 employees or under five employees. And then just have a longer list. I don't know. Because a lot of times they'll shortlist like three companies. So, they'll say two years, \$6 million and we'll pick three companies and we just rotate through the three

companies. But that gets the big guys to come in, or the bigger firms to come in. So maybe breaking some of that up.” [#10]

- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, “any experience on those? No.” [#11]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, “one of the things they made very clear to me is that, one of the worst things you can do with winning a bid, because if you miscalculate or if you win the bid, you have to be able to produce. If you do not, you will be kicked out forever. So, I don't want to do that. For a start. I wouldn't want to bid a huge contract that I know I can't fill.” [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “that would be great, I think Caltrans has done that.” [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “not a fan. It's going to create so much extra work for the agency that's trying to issue the contract. And that's taxpayer dollars. It's not going to be as effective for the taxpayer if you do that because it's going to take so much more time and effort to administer when you break up contracts like that. Now if they want to impose a higher small business participation percentage, yeah, go for it, but you start breaking up contracts, it's going to cost even more money for these projects.” [#16]
- The non-Hispanic white male owner of an inspection services company stated, “sometimes they can't handle it all. You know, they don't have the expertise to handle it all, so they split it up and part it out to the smaller businesses that can handle it.” [#17]
- The non-Hispanic white male owner of a construction company stated, “that would be nice. Absolutely. Because when you take on a \$100,000 project as opposed to a million-dollar project then it becomes doable.” [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “there is a lot of public sector work out there, construction, et cetera. But we would have to team with somebody to do it. There isn't generally many RFPs to deal with just survey or just GIS, you know? They're going to say like, “Build this,” I don't know, “big building and then you can do the survey work on it.” But then we can't do the rest of the scope because we can't build it. Yeah, that would be helpful for us, because if they had a construction bid, for example, that required... design, build, but as part of that there was, you know, a survey scope, a mapping scope. And then, you know, people could bid on individual portions. Otherwise you get large primes who win, and often they can do all the work, they have in-house surveyors, they have in-house mappers. So, if there's no DVBE goal then you can never win, because they only give you a little portion just to meet their goal.” [#22]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, “that's beneficial. And then forcing the GC to give that small

portion to an MBE. It would help us because we are able to install pipe as well. So, we can fabricate it and install. So, if it was smaller because then you have bonding requirements, you have all that. So that would be a benefit. That would definitely be a benefit.” [#23]

- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "I think that's good. Give everybody more of a chance. It would increase small business participation." [#25]
- The Asian Pacific American male owner of an SBE and DBE-certified construction company stated, "there's a double-edged sword to that, okay? I know, for example, I'm dealing with one, the Navy. Navy has gone towards consolidating all the work into for ... Because they have different locations, into one big contract. Well, the challenge now is that only one company benefits from that, and others don't even get to be a subcontractor, so there's a disadvantage. Breaking into small [contracts] gives opportunities to a lot of people, and I think that if I had a choice, I'd break it up, run and have one company to get the advantage. In fact, as we speak, I'm working on one very large Navy contract that encompasses three or four states. That's the direction that they're going, they just want to deal with one vendor. But it would be nice if they broke it up, and then everybody would have a piece of the meat." [#26]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "that would be beneficial if it was just increasing the amount of work that goes to smaller businesses or DBE business that would be beneficial." [#29]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "they're not going to be able to provide all the products because we're limited in our size value, right? I mean, \$8 million over three years or \$30 million in three years. So, because of that, we're all looking for access points. The problem is the agencies, while they put it out there that 18%, 20%, 30%, whatever, it has to be done with DBEs. They're not breaking it out, so the DBEs can find a way in. Instead of building 100-mile job by one guy, why don't they build a mile at a time by 100 guys. I guarantee you will go a hell of a lot smoother." [#31]
- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "it will enhance their ability to be a prime on a contract. Essentially, I would never want to be a prime on some of the contracts that I'm involved with because there are too many aspects that I don't understand about what needs to happen. So, yeah, having it broken down into some subcategories that I'm more familiar with would increase my chances to want to be involved as a prime." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "that's extremely valuable because it's doable by a smaller firm. The commitment is not as great. The potential for loss or delay by the prime is reduced significantly. It's more complicated for the prime because you've got more cats. If you lose one cat, you still have the rest of them and the project's not damaged not significantly." [#36]

- The non-Hispanic white representative of a DBE-certified Native American owned construction firm stated, “it’s a waste of money.” [#37]
- From a public meeting held in San Diego a speaker stated, “the other thing is like this, the gentleman said, it’s just kind of broadening out contracting opportunities, even on one particular job, hire as many contractors as you can. That’s one way to do it, and even if they get a smaller piece of the pie, right? At least you’re giving more firms the opportunity and if it’s a smaller firm or a minority firm, then you start them out with a small job perhaps just to get their foot in the door. You know what I mean?” [PT#9]
- From a public meeting held in San Diego a speaker stated, “smaller contracts. I happen to be on a contract here with NCTD, but I’m retained through a larger firm because of the three-year contract. If there were 20 jobs that represented between \$300,000 and a \$1.5 million jobs, they’d have a bunch of small businesses going after it because it’s not attractive to the larger businesses. They have to think about the model that they’re putting out, whether it’s attractive to a small business as you said, to establish goal or no goal.” [PT#3]

**Price or evaluation preferences for small businesses.** Twenty-four business owners and managers thought price or evaluation preferences for small businesses are helpful. [#1, #2, #6, #7, #8, #10, #15, #16, #17, #20, #22, #23, #27, #28, #29, #30, #31, #32, #33, #34, #35, #36, #37, PT#7] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “I don’t think price should not be included in the evaluation process.” [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “some you get like a 10%, wiggle-room if you’re high. If you’re the second low or third low bid, so there’s someone lower but you have that. Then some of them give you a 10% credit, I guess. So, then you’re suddenly low bid. I don’t know how else to explain it. It’s out there, it’s not as widely used. At least, that I know of, the public and military side does it all the time. They’re just going to award them a contract they might not be able to do.” [#2]
- The non-Hispanic white male representative of a majority owned professional services company stated, “the thing is if it’s all about just giving you credit or some means of allowing you to have a qualifying bid, that’s one thing. That gets you in, but you’re still in competing against these bigger firms. So that’s the biggest hurdle to get past. Why are we even competing against a big firm? That, to me, they’re trying to give you the ability to compete against them, but the reality is that we’re competing for the design of something. We don’t have the experience for the design of these amazing projects that are beautiful, that are in magazines and stuff that we all are quite jealous about. Okay, we get to compete against them. We get to compete by submitting a proposal? How does our proposal in the graphics and the pictures that we show of the projects we do, how does that truly, truly show us as equals? We’re not, we’re not equals.” [#6]



- The non-Hispanic white female representative of a majority owned construction firm stated, “I believe everybody should have a chance to get them. And the one thing I think they should do is, for the small businesses, is to give them actually a little larger leeway. Usually it’s 10%, 15%. I think that needs to be given a little bit more because of these larger companies. I’ll give you an example, like when City College was adding on a few years ago, we were wanting to bid part of that. But what we discovered is that the companies like SRM, which Superior Ready Mix is their material side of it, but SRM is their bidding side of it. So, there is no way we can outbid them because they’re supplying their own material. They’re cheaper, there’s no way we can get that price to do that work. So, there are some things like that, that makes it harder for us, a smaller business, to get into. And that’s even with like, Vulcan has the same thing. They have a team of estimators that will go out and estimate, and they are the larger jobs, but if there’s something that somebody smaller like us would like to get in, it does make it a little harder for us to get in. So, things like that, there are that and sometimes that little percentage is not quite enough to give the smaller business a fair ground to play on. Yes, I think that would be a good thing and it kind of goes with breaking the big contracts down because then some of the smaller people that are newer and coming up would be able to get in easier and have a chance to grow. And I think that’s important in this industry.” [#7]
- The non-Hispanic white male owner of a construction management firm stated, “in the construction side, they’ll give like say a 5% preference for being small business, or for being hub zone or whatever. And I think those are pretty good, but they don’t really have anything like that for RFPs. Maybe that’s what they should have is maybe give us some sort of evaluation points for being small or whatever.” [#10]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “that would be great, I know the San Diego City schools does that, they have like small, I think it’s, I forgot what their amount is, but they have small contracts for small businesses.” [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “they have them where if you’re a minority business you get a 5% bid advantage or if you’re women-owned you get a 5% bid advantage. That works for us 100%.” [#16]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “they definitely do that if you’re bidding on state of California work. Some RFPs you win points for being a disabled vet or whatever, but yeah. The larger projects, I think it’s harder.” [#22]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, “I don’t like it because they will say, okay, if someone gives you a bid, say I’m an MBE, I give them a bid for \$25,000. And then another company is established and has been in business for years gives you the bid for \$20,000. In order for me to be able to do the work I have to bid it for \$25,000. But sometimes they want you to be within 1% or 5%. And that’s not realistic if you are using an MBE. That they would be, you

know what? The MBE came in at \$25,000, the next guy was at 20K, we are going to give it to the MBE because then that money and that experience and that resource allows us to eventually get to \$20,000. But in the beginning, because we don't have the resources, so they may have machines that can bend pipe and I may not have it. I may have to go sub it out. And that \$5000 allows me to ship it out, get it done, ship it back to the office and do it. So, I can't compete with an established company has been around for 25 years and they have equipment. So, I have to be resourceful and I have to use a sub to do that part.” [#23]

- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "I think that's appropriate; I've been involved in that, I think it's a good idea." [#33]
- From a public meeting held in San Diego a respondent stated, “my particular industry is information technology and anybody here who is also involved in the information technology industry, they're affected by this also. Here's how it happens. I have tried to do business with North County Transit. I've tried to do business with SANDAG. I got one order from North County Transit. This is what happens. A small business, whether it's minority or women owned, they go out to... and they discover an opportunity. They go, 'Oh, I want to pursue that.' It requires computer equipment. They go to the computer manufacturer and they say, 'Hey, give me a quote. I want to submit this proposal to North County.' And the manufacturer says, 'No. We've already given somebody a deal registration, but we'll give you standard discount pricing.' And so, what happens, the manufacturer eliminates all small business enterprises, all women and minority owned enterprises who don't have that deal registration. They give one deal registration. Now, there are small business environments, women, minority owned, small business environments who can get that deal registration, but they got to be extremely lucky to get that. Why am I going through this long diatribe? Because I want SANDAG and North County Transit to go back to the information technology manufacturers, HP, IBM, Lenovo, all the big boys and say, 'Forget about deal registration, everybody gets the same discount.' And if you put deal registration on the table, if we discover deal registration, you're out. Having said all that, what do you think? I want that discount applied fairly across the board so I can look at my financial statement and I can make the decision how deep I want to go on a discount when I put in a proposal.” [PT#7]

**Small business set-asides.** Twenty-seven business owners and managers thought small business set-asides are helpful for small and disadvantaged businesses. [#1, #2, #6, #7, #8, #9, #13, #15, #16, #17, #20, #22, #23, #25, #26, #27, #28, #29, #30, #32, #33, #34, #35, #36, #37, PT#9, PT#11] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “Caltrans just did that recently with a landscape contract. They wanted an on-call landscape, a smaller business consultant. But first of all, small businesses were afraid of going after it because they knew that big consultants were going to go after it and they were not going to be successful. So, they didn't bid. Caltrans had to pull the bid because I don't know if they got enough bids or they didn't get enough bids or something like that. L.A. Metro has now put together several, set aside small business contracts. They announced it, they said these are for small businesses. If three small

businesses bid on, you can bid on it, but if three small businesses bid on this, then there they are going to be selected or given opportunity first before anything goes to the primes. So, there are ways of creating those opportunities for smaller contracts.” [#1]

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “that's just handing them the jobs. That's why you get certified. So, kind of, we touch on it earlier just to get work handed to you. Because you've jumped through the hoops to do this paperwork.” [#2]
- The non-Hispanic white male representative of a majority owned professional services company stated, “if agencies like Caltrans, NCTD, SANDAG, these larger agencies along those lines, it would be nice if they had almost a classification of small projects that only smaller companies could accept. We basically have, and I think I can speak for most all small business owners, it's extremely frustrating when you're competing against these big firms and we don't have the resources to do that. We're competing against companies that their marketing budget, just marketing alone within their company, is larger there than our entire annual payroll for everybody combined. How do we compete against that? How do we compete against firms that have these projects that they did in Beijing, China, and it's just this small little project here locally, but yet they submit their proposal with these credentials for doing this unbelievable big project in China, as I say? And that's influential to those people that are reviewing these proposals. The small business credential that you, I guess, get, whatever that is. I'm not sure you'd exactly get anything for doing it other than to be able to be in the picture. If I don't have that, I can't submit. So, I submit, but we're competing against the big firm that bring on three different minor subs that are small business, or woman-owned, or some other disadvantage. So, they get that title, they get the ability to submit, and now they're won over by what? That woman's business? No, they get the project because of these big fancy projects that they did. If I'm not part of that, I'm excluded, okay? What if they were to put a cap on the amount of business that you do. If you do more than \$2 million worth of work, you can't bid on this.” [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, “I think it's a good idea. But then again, are we then turning around and discriminating in different direction. And that's the hard part, it would be nice that 10% or 20% or whatever, that goes to just the certified small people because, same thing, it gives them a chance to hopefully grow, bring on more people, more employees, and to grow. But you have to be careful with that because... It's a fine line. That's that fine line. So, it makes it kind of hard.” [#7]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, “I think that's great, yes. Well because otherwise a lot of the small businesses wouldn't get a chance to win anything because when a small business comes in, they have limited capital, a lot of times limited experience, and the big companies would just squeeze them out if there wasn't some type of set aside.” [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “that would be great. Yeah it would help in getting contracts. But if there is

any work where you don't have to work for, you know, such large primes, you could just have a smaller, I don't know, independent general contractor, you know, that's doing the work." [#15]

- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "we definitely have set-asides on federal work that I've seen for small and disabled vets. But I don't know if you're familiar with the federal government bidding process, but they do a market research first and then they send out saying, 'We're going to put out a request for proposal on this topic. If you're interested, please respond.' And then if they get two or more DVBE or small business responses they'll set it to whatever they get the most responses from." [#22]
- The Asian Pacific American male owner of an SBE- and DBE-certified construction company stated, "since my company is an SBE, when there is an SBE set aside, it certainly is beneficial to me, and that's good. There's one contract that I just came across where it requires 25% SBE. I think that's great. It would be nice if it was 100%, but I can see that they're proactive in doing that. However, the challenge comes in if I'm a prime and they're requiring a 25% DVBE or a 5%, that is the challenge, then it doesn't work out for me, so there's kind of a double-edged sword in there. Also, for small business, one challenge that I think that all of us are facing right now, whether it's DVBE, SBE, WBE, is there are nonprofit organizations that are coming in. As an example, the Urban Corps of San Diego, their requirements, they're exempt from prevailing wage requirements. That just puts us at a disadvantage, because we are supposed to ... We're required to pay prevailing wage on jobs, and they're coming in and first of all not requiring to pay prevailing, then because their organization is a voluntary, they're not even paying anybody. So, now what we're seeing in a lot of those instances, they're coming in and taking almost all the bids, because one, they don't have to pay employees, and two, they don't have to register in the prevailing wage way. So, they have basically taken a lot of the contracts from WBEs, MBEs, SBEs, because they are the different category all together, and the state is allowing them to do that." [#26]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "from my understanding in the public sector the companies that I know that are repeat contracts with public agencies, they're small and minority and women-owned business requirements. So, to me that says it is successful. All of those contracts that have those requirements. So I feel those, that the contracts that have set aside before for specific quantities of work that must go to small woman-owned minority-owned businesses I feel like those are successful." [#28]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "for really small or you know, let's say, for the DBVE for better unknown companies that they set aside and that's something that Caltrans or SANDAG don't have." [#29]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "I think that's a really good idea, in fact, I think I've been involved in pursuing work that way." [#33]

- From a public meeting held in San Diego a respondent stated, “the set-aside. You might be knocking out two birds with one stone, right, so that's one thing.” [PT#9]
- From a public meeting held in San Diego a respondent stated, “prime opportunities for the smaller businesses in the DBE businesses helps them become more sophisticated.” [PT#11]

**Mandatory subcontracting minimums.** Twenty-two business owners and managers thought mandatory subcontracting minimums are helpful for small and disadvantaged businesses. [#1, #2, #6, #7, #8, #10, #13, #15, #16, #20, #22, #23, #25, #26, #27, #28, #29, #30, #33, #34, #36, #37] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “a lot of times they're doing that with the goals that they set for small businesses. So, that's kind of happening already. I don't think the prime firms would like if it's a high percentage, but L.A. Metro, for example, is going to 25% sometimes for small businesses.” [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “I've actually never heard it that way. I've always heard it the other way where it's a minimum mandatory self-performing general contractorship of the firm. So much of their own contract instead of just being paper pushers. I've never heard it the other way around so, interesting. I don't know that will make any difference. Most generals don't self-perform all of the trades. They already won divisions of work on a job. So, they're probably going to be subcontracting out.” [#2]
- The non-Hispanic white male representative of a majority owned professional services company stated, “I see problems in that. I would suspect that there will be significant problems because that's just still some of these bigger firms finding ways to manipulate. And there are as well some of the larger firms that have separate small wing companies. Then, do they get to bring those in?” [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, “that would be a good idea because then you could have some of those smaller companies being able to get in and working with the larger, which also hopefully, will give them knowledge and experience and all of that. So, I would be okay with that. Yes.” [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, “I would like to change that from the 3% to the 10% depending on the size of the contract and then make them share it with more than one sub. When it comes to my industry, so security-wise, make them share it with more than one sub even if it's only giving each 168 hours, make them share it.” [#8]
- The non-Hispanic white male owner of a construction management firm stated, “I've never seen a minimum, I've usually seen maximum where it says no more than like X percent can be contracted out. Maybe in the RFP world it might be okay. I would say in contracting it's not always best. Having more trades doesn't improve the quality of work. And trades are generally trades like flower contractor, you're not going to break the flower kind of two

trades. The window guys, you're going to break that into two trades, it's one guy. So that's just you have what you have. For RFP you could definitely break it up, so that might be a good thing to saying you have to bring in X number of subs." [#10]

- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "it goes along with saying if you have a big contractor to win the bid, if he is just going to hoard everything for himself, the little man would never get in. I think it is good to be able to share the wealth." [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "I guess that would be helpful because it would guarantee money for smaller businesses. But in a sense, I guess the DBE requirement is supposed to do that, you know, so I don't know." [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "they already mandate them. I've been able to take advantage of that." [#16]
- The non-Hispanic white male owner of a construction company stated, "I don't think it's going to be an advantage. The reason why we don't do a lot of subcontracting is the quality control can get lost, which is expensive. If it's a goal to have a small business as a sub, then that makes sense. If it's a goal to have a small business sub out, then that doesn't make much sense, because that's what small businesses usually want to do via sub and do the work. Because at some point you're so small, when they bring you in you don't want to give half of it away or three quarters of it away." [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "I mean, DVBE's always the lowest percent, so to give disabled veteran businesses more opportunities, perhaps that could be increased." [#22]
- The Asian Pacific American male owner of an SBE and DBE-certified construction company stated, "as an SBE, I would say that's great if SBE is included and if it's 25%, 30% or so. If it's 3%, 4%, 5%, it's just a nuisance for us to even get involved in it. And so mandatory subcontractor requirements, it has a double-edged sword. It's got to be substantial, and I think it should be optional because sometimes it puts us in a disadvantage." [#26]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "increasing that, yes." [#29]
- The female owner of a DBE- and WBE-certified professional services company stated, "it doesn't really work. You might try it, but I think you'd have issues with-- a lot of times with Landscape Architecture they were always guaranteeing 1% and if it wasn't 1% then what happens with the prime contractor is they wouldn't make it 2% just in case of scope of services required more than 1%. They were always saying, 'Well, we need to work with that 1%.' There are issues with the percentage." [#30]

**Small business subcontracting goals.** Twenty business owners and managers thought small business subcontracting goals are helpful for small and disadvantaged businesses. [#2, #6, #7, #8, #10, #17, #22, #23, #25, #27, #28, #29, #30, #31, #32, #33, #35, #36, #37, PT#4] For example:

- The non-Hispanic white female representative of a WBE- and SBE-certified construction company stated, “when you end up with set asides that now you're required to use the two controls guys that have it or using a pass through to meet it and you're not really meeting it, but you are. So, it's just pretend, to make someone feel good about themselves.” [#2]
- The non-Hispanic white male representative of a majority owned professional services company stated, “this whole thing still comes back down to, and this is the thing that I think this is all missing, we should all be competing based upon our ability to design certain things and what our experiences are. And if you're going to just try to give someone some kind of a status that says that, ‘Yes, you can compete,’ we're still competing against these larger firms. And that to me is ... I don't want to be competing against them.” [#6]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, “you still need to hold the prime accountable for finding the subcontractors and then making them give proof that they talk to those subs. Because all day long and they can say, ‘Yeah, we talked to the subs.’ ‘Okay. Show us proof that who you talked to.’” [#8]
- The non-Hispanic white male owner of a construction management firm stated, “it's great. I love that.” [#10]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “sometimes it's a goal, sometimes it's mandatory. I think they should make it mandatory.” [#22]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, “yeah, but it has to be mandatory because if it's not enforceable the complaint is useless.” [#23]
- The female owner of a DBE- and WBE-certified professional services company stated, “I think that's a good idea. Anything that makes it a little more inclusive and gives them some basic requirements they have to follow, that's good.” [#30]
- From a public meeting held in San Diego stated, “I think the incentive has to be for the primes to sub with DBEs” [PT#4]

**Formal complaint/grievance procedures.** Seventeen business owners and managers felt formal complaint and grievance procedures are helpful for small and disadvantaged businesses, while others highlighted the need for protections for those who file complaints. [#1, #5, #6, #7, #10, #15, #16, #20, #22, #25, #26, #31, #32, #33, #34, #35, #36] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, “I mean, it’s nice to be able to have that if there’s no repercussions. Well, if you’re a complainer will you get selected again in the next contract? If it was anonymous you really can’t resolve your problem if it’s anonymous. But a lot of people don’t protest. They don’t want to engage in that, even though they know maybe they were wrongfully not selected, or something happened, or it was favoritism or whatever, but nobody usually complains because they’re afraid of what would happen if they do. So, they may want to do that, but people don’t usually, unless they are just so brazen that it doesn’t matter to them. Contractors do this more than consultants, because contractors are selected based on low bid. So, they could complain all they want, they could file a claim against you, a lawsuit, but if the next opportunity comes if they outbid everybody else, they still get it. So, they don’t mind doing that. But it’s different in the consultant work.” [#1]
- The non-Hispanic white female co-owner of a construction firm stated, “there is a way to do it, and people have done it. Again, because this state and our industry this day has a lot going on that there’s a backup on anything that’s formally filed, but it gets taken eventually.” [#5]
- The non-Hispanic white male representative of a majority owned professional services company stated, “I don’t think it’s worth it. I’m really negative about grievance. It’s one thing to just say, ‘I don’t feel like I was treated fairly on something,’ but to go through a long process, it’s just not worth it.” [#6]
- The non-Hispanic white female representative of a majority owned construction firm stated, “most entities, as far as SANDAG and the Unified... they do have a formal complaint way to process things, procedures, but how effective they are, I do not know.” [#7]
- The non-Hispanic white male owner of a construction management firm stated, “I mean I’ve been through those. They’re never great. They’re pretty arbitrary. I got tossed out of an IID project for no reason. We went through the entire procedures. They never gave us the job just because we weren’t from the region. And we finally went back, and we got another job. And then I built like five other jobs from them and I still know them to this day. So, the first time we got kicked out just because we literally weren’t locals. And we went through the grievance process and we got nowhere, but we just kept in until we got one.” [#10]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, “that would be great if there were, you know, a contact person. See, I know people within, like I have a friend who I went to high school with, who works for the City of San Diego, and he attends meetings, he told me who to contact within SANDAG. That’s how I was able to let them know what was going on, but I really didn’t know initially who to go to.” [#15]
- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, “whether it’s a federal agency or not, they have programs that are anonymous that you can e-mail to and they’ll hear you out.” [#16]



- The non-Hispanic white male owner of a construction company stated, “it's discriminatory towards small businesses because we don't have the staff to deal with something like that. The business owner deals with all of those issues himself. So, if I have to have a procedure book to deal with that, as opposed to just making it right with the employee then that definitely discriminates against small businesses because we can't manage.” [#20]
- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, “I wouldn't really know where to go to complain about that. I know California DGS, as I said, you can complain to them somehow, but I don't know how. Yeah, so maybe in the RFP there could be a little section to say like, ‘If you are on a team for this work but you don't get anything, let us know.’” [#22]
- The Asian Pacific American male owner of an SBE and DBE-certified construction company stated, “they have a system built in where you can do that. I've noticed that DGS, the Department of General Services, when you file a complaint with them, a bid complaint, it takes forever for them to respond. When you file a complaint, the decision should really be made within a couple of weeks. Their system is that it goes in and two, three, four months later they'll come back and give you a result, and that shouldn't be the case.” [#26]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, “that's probably the thing that creates the issues that I'm dealing with today because they know that they're not gonna called out on anything because unless there is an individual. Let's say there is a resident engineer that Caltrans says, ‘I don't care about your problem, work it out, not my issue.’ Well then, what do I do? Okay, if there is a SANDAG inspector on the job and he doesn't want to hear my grievance with the GC, that's between you and then I'm here. You're invisible because my responsibility is with the GC. I have the contract but I don't care who you are.” [#31]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “that has to be done, but has to be done-- You can't call them the whistleblower thing. They have to substantiate the grievance, but there has to be known retribution for subsequent events. That's the issue. People hesitate to do that because if they do this, they're not going to even look at my bid. There has to be an assurance that that's not going to happen. No retaliation.” [#36]

## **K. Insights Regarding Any Other Race-/Ethnicity-/Gender-/Disability- or Veteran-based Measures**

Business owners and representatives shared their experience with the SANDAG/NCTD's CUCP program and provided recommendations for making it more inclusive. For example:

- Experience with the SANDAG/NCTD's CUCP program (*page 221*); and
- Recommendations about race-/ethnicity-/gender-/disability-/ or veteran-based programs (*page 223*).

**Experience with the SANDAG/NCTD's CUCP program.** Some businesses commented on their opinion of SANDAG/NCTD's programs [#1, #6, #11, #13, #20, #26, #29, #31] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "my experience has been as a prime, having to comply with those requirements. Depending on the percentages required, it's nice to give the opportunity to small businesses to work. If the small businesses are qualified, not everyone knows the business or knows how to deliver SANDAG work. So sometimes that hinders the prime's ability to really deliver, a good product. But I think it's needed for small businesses to have an opportunity to be engaged in those contracts. And if you're brand new to the agency, then there's a learning curve that you have to have in order to figure out, 'Okay, this is how they want their plan sheet to look. This is how they want their report to look. This is how they want the invoicing to be done.' So, all of that is additional time and cost that may impact the efficiency of the project and the delivery. It's just sometimes difficult if the firm, a small firm doesn't come up to speed right away and has the difficulty because they have never worked with agency and they have to learn that system. There's a little bit of learning curve that has to happen at the beginning, which is not as efficient, but they'll eventually learn it." [#1]
- The non-Hispanic white male representative of a majority owned professional services company stated, "I'm saying that as a business, we'd probably like to have all of these different involvements. But I've found it very challenging to get into it. I'm at the point where I don't want some kind of a false labeling that all that does is just get me in the door, because I know what the results will be if I'm given this label that allows me to be part of something. Now there's a flip side to that, and that is that certain labels are helpful if I'm a sub to someone else who's going after this. Some of my engineer companies that I work with would like me to have one of these classifications. It would help them because it's a matter of checking the box as part of the application. And it's sad, but that's where it would be nice to be able to have that. But that's the problem with being a small business that isn't obviously minority- or woman-owned." [#6]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "I think most public agencies try to do a good job at participation of minorities." [#11]
- The non-Hispanic white male owner of a construction company stated, "I think currently they [MBE/WBEs] have a well-earned advantage over standard white male and 'Good Ole' Boys' network. I don't know. I think they're working. I think that at the end of the class for the airport authority, I made a lot of friends in that time, but they had a concern hiring me as a sub because I was a white male, that I might detract from their ability to gain contracts. And they were nice about expressing that to me. The minority contractors that I was speaking with, they were concerned that they wanted more of their pool of contractors and associates. They wanted them to be also minority-owned businesses. And because I don't meet that criteria and they knew that I wasn't going to try and meet that criteria necessarily, they're like you're a small business and might qualify with that. But their understanding of the system was that by having me be a female, black, Hispanic veteran, let's say that was the case, if I was that they would love to have me in their pool. Because

then I would qualify and help them meet more of their qualifications, which would make them more attractive to the government bids. I'm sure if I would have got into that, then I would be doing much larger contracts. But it's not a bad thing because I just focused on the private sector and I'm still going. But who knows? If I had \$2 million or \$3 million government bids coming in, then maybe I would be doing better." [#20]

- The Asian Pacific American male owner of an SBE and DBE-certified construction company stated, "NCTD I think does give you an option, voluntary option to use DVBE, I don't think they make it mandatory. Which I think is great, because if I had to use it, it would be a challenge for me to be able to qualify and to meet the requirement, so they encourage DVBE participation, and I think to me that's great. My recommendation for NCTD is to either have set aside completely for DVBE or DBE and not break it into small pieces and say, 'It's DVBE set aside, but we want 5%, 6% to go to DVBE,' then it becomes difficult for us to do and vice versa. I have not seen any that specifically comes and says, 'This is set aside for DBE,' or, 'This is set aside for DVBE.' They'll say small business, for example, and DBE or DVBE is encouraged, things like that." [#26]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "SANDAG and Caltrans don't have any percentages for veterans. I think the County is the only one that has a little percentage for veterans. I would like to see, you know, the City of San Diego, the Caltrans, SANDAG maybe have a small percentage for Disabled Veterans. Okay, so my experience is the agencies request from the primes, that a certain percentage of the work is going to go in their team. A certain percentage needs to be given to DBE or small businesses. The contractor does that due diligence and finding small businesses with DBE certification. But once they win that contract, and if they win that contract, none of the work or maybe 1% of the work goes to the... so they gather the prime... gathers let say 10 DBE companies to meet the requirement. But once the work is given out, then the agency does not have any regulations or any way of checking if any of those DBE get anywhere, because normally we don't. Most of the workers to the contractor... once the contractor gets the contract, he hires more people to meet the demands for inspection or whatever the work is. Because they make more money off of that. Once they win the contract then everybody's on their own, you know? They don't give you the work. And the agency has no way of checking that all of the DBEs participated in that contract, or get any of the work. So, I've been with a lot of primes that won contracts for the big agencies and yet to say that I got any of the work, you know? I was with the company; they want their large contract project. I got six months of work out of that contract, which is a five-year program and that's the only time that I've done any work; one in SANDAG, a little bit of work, but not an extreme amount of work. You know what I'm saying? They hire more people to meet the demands rather than give the money to the subs." [#29]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "just into the qualification process, it seems like their system, like I said, from what we have evaluated, it seems like the system is one that is saying, "Okay, we want to put out a certain amount to the local small businesses and so forth." But once you submit your documentation, finding the people to contact for follow-up for resourcing to draw into

an issue and so forth, that seems to be the biggest challenge for us. I want them to post on the website or through the contracts, name, contact phone number, e-mail, something like that to resource, should an issue develop.” [#31]

**Recommendations about race-/ethnicity-/gender-/disability- or veteran-based programs.** A number of business owners provided recommendations and other insights. [#1, #3, #7, #9, #11, #13, #15, #16, #18, #20, #22, #23, #26, #28, #29, #31, #34, AV#40, WT#3, WT#4] For example:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated, "I mean, even just the regular networking is better than the speed dating to get in front of everybody for two minutes and handout a card and say all about who you are. Because a lot of times, the people that were asked to come sit at those tables, they were just asked to come, they're not the decision makers, sometimes they're not necessarily the people that would actually be interested in building those relationships. Then networking before and after, might be even better when people are just casually talking to each other and learning about each other and things like that. Like I said, I like the Cal MENTOR Program better because it's a longer period of mentoring relationship than just a two-minute conversation, which really does not go anywhere after a while. I mean, you just go and do your thing. And the prime is there, they're there to support SANDAG in this program, but I don't think much comes out of that. Especially because then you have a bench program, so you just go sit on the bench. You really don't have access to being able to get on a team because of the fact that you had a two-minute conversation with somebody. I just don't see the benefit of it as much. So, like I said, I've sat through those SANDAG outreach programs and I've met 100 firms maybe, but I don't remember their names. I don't remember what they did. And I didn't necessarily pick someone from that list because they sat with me for two minutes. If I was going to pick someone, it's more on a relationship and trust and knowing what they've done. Unless it's a really specialty niche that I couldn't find anywhere else. And all of a sudden, they appeared in front of me and I go, "Oh, my God, I'm so glad you came in finally." Otherwise, that's not how we select our teams. I mean, everybody shows up. That's the thing. Everybody shows up and you're sitting there as a prime and like I said, you meet maybe 20, 30 firms. 30 people or 50 people because there's so many people that show up and you have a two minute conversation, they hand you the information, unless there's a follow up to that, where you're going to sit down one on one without all that disruption. Everybody talking and really get to know that firm, what's the use. It's the same as me sending an e-mail to someone saying, "Hey, I'm so and so, hire me." Having a two-minute conversation or sending an e-mail, that's not going to get that from to say, "Oh, you know what? I got to pick up this person because they e-mail me or because they sat in front of me for two minutes." To me that's not effective. But you got some opportunities afterwards, where people are standing and talking to each other or you go to the tables and you talk maybe a little bit more with the people, you're not rushed. That's the problem, is such a rush thing. You barely are getting to know the person, and all of a sudden, the whistle blows and you move on to the next one. It's like, what did you get in two minutes? You didn't build that rapport. Yeah, the connection. I think maybe if there's some training, let's say you have a new contract, a big contract ramping up and you set up procedures or some kind of a training for submitting invoices, or this is the kind of stuff you

want to see, if there's that type of training or seminars maybe, that might be helpful. And I've seen that, I think I've seen that happen, SANDAG has had that type of thing, but they kind of combine it with the speed dating, sometimes. And it's just kind of not the right forum to me because it's just too many people there and people are not necessarily paying attention but just some kind of when you don't open it all to the whole world, but it's more specific to people who actually have contracts and are signed on or something like that, that might be helpful." [#1]

- The Asian-Pacific male owner of a DBE-certified civil engineering firm stated, "the big project, they already have on-call firms, that's fine, but the thing I want to talk about more is they should set aside smaller jobs with smaller budgets for the smaller people because I haven't seen that yet. Without that, the smaller firms don't have a chance. If you're putting out a \$250,000 job, \$500,000 job, the big firm, they're not going to go after it because it's not worthwhile for them. They're looking at the \$5 million, \$10 million, big jobs. They're feeding a big machine, so they wouldn't compete with us on a \$250,000 job. because you can't really do any job with \$250,000 because every job needs about eight teams on there, right? You have all these subconsultants, so make it worthwhile. I think it has to be half a million to \$1 million Unless the program teaches you how to land a project, that's the best way to teach a new firm. Or the new firm, unless SANDAG gives an opportunity for the new firm to work on a project, that's more beneficial than to go through the process and say, Oh, talk about how to market. Talk is talk, right? Talk is cheap until there's real, live results. It would be helpful if there's a site that people can go visit and read about certain things that SANDAG expects, and then have links to a program that is acceptable to them. And then maybe have, like you said, the bookkeeper, the accountant, that they would recommend, even though they're not supposed to do that. But a place that you can go to get everything. Right now, when we started our business we kind of went, okay, we picked this, we picked that. We had to explore it and figure it out ourselves. There wasn't a place where you can go and know, yeah, if you go through SANDAG you need to go through these eight items, so we're still learning as we go." [#3]
- The non-Hispanic white female representative of a majority owned construction firm stated, "overall positive. But, if you could make it easier for someone else, what would you do? They really do need somebody that is experienced in their program and in their bidding process, and to have that person available to help, even the prime, but the subcontractors and the people that are coming in new, because when we did, for an example, when we were working with Homeland Security, I sent in my request for payment three times, and it got rejected. But no reason to why it was rejected. No. So and somebody said, 'Oh, well, it could be this, it could be that.' Okay, so I changed that, sent it back and got rejected. So, I started making phone calls. And it took me a month to get ahold of this person. And I finally got ahold of them. And I said, 'I am sorry to bother you, but I had been trying to get my payment through the system. And it gets rejected. And I do not know why.' And I said, 'People have told me 'It could be this, it could be that' I've changed it, I've tried to fix it.' And I said, 'But I'm not getting a reason.' So, he goes, 'I just got back, let me take your name and number. Give me a week, let me go pull your file up and see what I can find out for you.' So, a week later, he calls me and says, 'I didn't forget about you.' 'Oh, thank you for that.' He

goes, 'Yes. It's something really simple. Just you missed an X.' 'My heart, yes. Thank you!' And he goes, 'What I want you to do to is to fix it there. Don't send it to where you been sending. I want you to send it to me, and I'm going to walk it through for you.' I said, 'Really?' He goes, 'Yeah, because it's been rejected so many times, it's going to just be harder.' So, he goes, 'Let me...' So, I did, and I sent it through, and he walked it through, he called me says, 'Now I've handed it off, this is who has it, this is the number. And if you have any questions from this point forward, call this person.' And it's like, 'Well, thank you.' And it's like, 'I'll work for you anytime.' And that's what I mean, sometimes it just needs, we need that one person of contact." [#7]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I understand the intent of it. And I think that it probably works really well in other, bigger industries to level the playing field, to allow some firms that maybe are qualified and can do the work, but maybe wouldn't have gotten in because they're just not as big or whatever it is, it just doesn't make as much sense in the appraisal world, just because of the nature of the work that we do and the so few firms that do it. And so, it just makes it really difficult I think on several levels. Different industries, different types of work need to be looked at I think a little differently. But it is what it is." [#9]
- The Hispanic American male owner of an uncertified MBE civil engineering firm stated, "I think what's in place is good. My experience has been that the prime contractors need to participate minorities, and it appears to me that they have their group set up and sometimes when they get multiple projects, they need to mix that participation of minorities with them. So, that's not always the same group of people, and they give opportunities to firms like mine That's been my experience, is that they've got their team, they've got their group, and they don't deviate from that. Other than continue the requiring of the participation of minorities, and woman-owned businesses. I think that's important. And really make it a requirement. Sometimes they set aside a minimum percentage, well, gee it could grow. I mean, why just meet the minimum? Why not make it larger than just what the minimum is, or somehow motivate the prime contractor to do that. I have no idea how you would motivate the contractor. increase the project fee, or whatever." [#11]
- The Black American male owner of an MBE- and SDVBE-certified construction supply company stated, "I definitely want more experience working with SANDAG and what they represent. In other words, I want to be able to know how to go and bid on something, and where do I find that information in order to bid on. Well, yeah. I definitely want to. Cause right now I have all these certificates and all these qualifications. But I don't, in order words, I'm all dressed up for the prom, but my date hasn't shown up. I don't know where to go to the next step. So, I have all this stuff but I'm kind of just waiting towards okay, what do I do now? What am I missing out on? I guess I just need to be more familiar with what's going on and how to apply for this stuff." [#13]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "like I mentioned before, like the training classes or stuff like that I guess if the percentage could increase, you know. Caltrans already increased, I know, their percentage to like 17% from like 12 or 15. But I don't know if SANDAG sets that, they're the

awarding agency, but I don't know if it's the funding agency that sets that. Yeah, before this project, nobody knew in San Diego County, well not nobody, I can't say nobody. A very small percentage of minority-owned small businesses knew what DBE was. They had no idea, even after they obtained their DBE. They knew it could help them, and that it was going to guarantee work on this project, but they didn't know what it stood for, you know what I'm saying? They didn't know the power behind it." [#15]

- The non-Hispanic white male representatives of an MBE-certified construction and supply company stated, "if I could suggest anything, maybe an open house event for certain counties, for SANDAG, for inviting minority business enterprises to their offices, maybe getting to know them. Because typically when they do those outreach, they'll have the table, there'll be the outreach person, and then sometimes I will e-mail them, and they'll connect me, they'll give me some facilities managers, they'll identify where you fit, and they'll give you an e-mail, but I don't remember going past that. So maybe something where there's a more open MBE or small business or DBE certification kind of event where people can actually have a little bit more interaction with more people from SANDAG. Because I can imagine the outreach agents get overwhelmed with tons of people that they meet at these events because there's tons of people in line waiting to meet because they want to meet SANDAG, they want to get that opportunity. I don't know what the outcome is for all of them, but I can only speak for ourselves, that maybe I would like the opportunity to shake other hands, informally or formally, however it would be, it may be with other divisions. I think that would give me more of an opportunity to start building a relationship and present our company and say, 'hey look this is what we can do for you'. It's kind of hard to do that, at least for me, it hasn't been easy to be able to meet more people other than the outreach person. I think that would be interesting in order to maybe even have them open to invites, I could invite facility managers for SANDAG into our showroom, show them, 'hey we're from San Diego, this is what we do, this is what we've done,' share the story with them and then maybe catch their interest from there. And I'm looking at it from a sales point, right, because in the end, that's what we're trying to do, how else can I sell you more of my company? So, something like that maybe." [#16]
- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, "in my teaching experience, I don't know how to promote women. I see a lot of, as far as ethnicity of all countries in the program, but specifically woman and very, very few in a minority, like Asian. Yeah, they get to work in the office. There are very few that could have potential, but it's not culturally good. So, getting more woman involved, diverse backgrounds out there And to encourage them to try something that is socially discriminatory. I could tell you the number of times that... Of course, my friend that worked for me was 5'8" and 200 pounds, so it wasn't uncommon to see her. But for me, it was like, 'You're going to do what?', kind of thing. People have certain opinions of what you should be able to do based on your physical size and whatever. I don't know how to promote that, but it's should be done. Yeah." [#18]
- The non-Hispanic white male owner of a construction company stated, "I love the training courses. I think if they want more small business then they're going to have to address some of the criteria that's being looked at. Well, I'm probably not going to qualify unless I rent a vet or somehow change my ethnicity. I think as a small business, I would. And that

might just be something that's not under my understanding in that if I was to compete against a woman-owned business, or a veteran owned business or whatever, even if I was a small business, if that weighs out equally, I guess that would be good to know. Because I just assumed that one of those would be ranked much higher on the evaluation scale. Yeah, I think I could get a certification fairly easily by filling out some papers. But I think as far as actually getting bids, if I would be weighed as highly, if somebody said you're just as valuable as a vet or a minority, in your bid you can go ahead and bid that 10% higher and still receive the award than say for a white male or something. I'm trying to think who knows that information, whether I'm a minority. Can they put that on my license? I don't know. I don't think I did. That would be really challenging. That would be sensitive too. I'm trying to think if I received a letter in the mail saying, congratulations, you're a white male, but you could bid on this job and compete against all these other races and minorities and vets and stuff like that. I feel like that would ... there'd be a lawsuit for somebody in that case because you just can't say stuff like that. If it showed equal weight somehow with these other things, then that would be a big motivation for me to say let's go ahead and get a certified small business. But then we'd also have to educate a lot of the other contractors because one of the reasons why I really didn't buddy up with anybody in the course I took with the airport authority was because they thought having me under their belt just as a small business might not be as valuable as having me as a small business with a woman owner." [#20]

- The non-Hispanic white female representative of an SDVBE-certified professional services firm stated, "I can't think of a specific DVBE program that only lets DVBEs do it. I mean, there are a lot of workshops just for DVBE businesses, because they're run by veterans and they try to help the veteran businesses. But I expect you could just go to any old business conference and it would be similar information. So, my main things are increase the DVBE percentage in the contracts so we can win more than 3% of the work. Make sure that it's mandatory, not just a goal, so we don't run into that problem of people having us on their team just for the name and the certifications. For San Diego County, I don't know if they have, they probably do, a portal where you can look for DVBEs and small business. I expect they do, I just don't know about it. Because if these large primes need to find somebody then they can look in there. I know California state has one, so maybe they use that. So overall for the county, local government agencies, I just don't know how they market to DVBEs. We don't hear of many of their contracts, and I expect they all go in PlanetBids, but each individual agency has their own PlanetBids instance, so it's not just like, one platform you go in and you see all of the work. You have to log in and then it's like, "This is the Airport one, this is City of San Diego, this is Port of San Diego." so if you don't know that one agency has a PlanetBids and you're not in it, then you never hear about the work they're doing." [#22]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "if I was SANDAG or the City of San Diego, I would either contract directly with the MBE and force the company or force the GC to use us that way or make it a requirement that it's not a good fit, therefore you have to hire somebody and you have to show documentation that no one gave you a quote. And only then let them off the



hook. Because if it's not enforceable, it's just a waste of time. It should be mandatory to subcontract with minority-owned businesses. And it doesn't have to be big. So, for example, with us, say the pipe is \$1 million or \$800,000 worth of piping. Give the minority company 5% of that. Give them a \$20,000 contract or something. Or give them a small portion of that. And this will force the GC and the City and the minority companies to have a relationship. And then once the trust is established, then your GC would use that company more. Because I know, for example, say Kiewit gets the job and its \$10 million. The PM on the job has a requirement to meet a certain quota for profit. So, he already has his subs that he has a good relationship with, and they do good work with him. Now the good faith effort is not an incentive to force him to use an MBE because in the marketplace, if I already have my subs that I've been doing business for 10 years that take care of me, why am I going to use an MBE? I don't know what they do, I don't know the quality of the work that they do. And if I use them and I give him a say a \$200,000 piping job and they do me wrong, I'm now facing LDs because I'm out of schedule and I have bad product. So, it has to be seen that, hey, how can I force Kiewit or Shimmick to begin to have relationships with these MBEs? And the MBE's understand, we're going to make it enforceable, but you have to produce. And if you don't produce, we've done everything we can to help you. Now it's on you. If we force the GC to say, out of this \$800,000 of piping, give us 2%. And I'm okay with \$10,000 worth of piping because I know that once they get my fabrication drawings, once they get my pipe, they are going to be, 'Dude, this is equal to what I can give you if not better.' Now the PM has confidence in me and the level of risk that he partook was not a lot of risk, it was a manageable risk. So, if I have hurt him with \$10,000, he can call this other and say, 'Hey, I need you to fabricate this portion of it', it's \$10,000. So, he doesn't lose much. So the intent for him is, okay, I'll give our company a shot, I'll give him a \$5000 PO, he can just give me 30, 40 feet of pipe and all that and then once he gets it and he sees then, these guys did a good job. They were responsive, they were real educated, they did great work, the fabrication drawings are exceptional. Oh my God, they do good work. But without that mechanism, there is no incentive for him to do that because it's business, it's the marketplace. So, if I buy tires from Les Schwab and he always does a good job, why would I go to a minority company? Why would I drop money if I don't know the product, I don't know the service, I don't know the quality? Maybe I might go buy a spare because if I buy a spare, I'm not out a thousand of dollars, I'm only out 100 bucks. So that risk is more manageable. So, if you guys said, hey, you know what? We need to change this from a good faith effort because it's useless to a mandatory but a small percentage. And then encourage the GC to develop a relationship with the client. And after that first job, if they see how they do great, okay, now you know that the sub does a good job, we are going to increase it to 5%. Make it more competitive. But I think there has to be that level of requirement or forceful interaction, otherwise it's not going to happen. We are just wasting money and time. I'll bet you if you guys made it mandatory, all this investment in time that you guys do this, you will produce fruit. And right now, there's no fruit produced because there's no requirement for the tree to produce fruit. Right now, we are telling the tree, 'Okay, if you want you can produce, as long as you are a tree.' But the fruit is an MBE being able to partake of the marketplace. And right now, if it's not mandatory, then it's useless because we are just going in circles hoping that a prime might get touched by God and move their heart and do work. But that's not how the marketplace works. There are some good companies that do have good hearts and

do that, but I'm pushing for mandatory requirements that they have to use MBEs. And if you do that, I think you will see the minority community begin to grow financially because now it's a requirement and not an option. And if they don't do it then they don't get the job. And like I said, I would make it small. Because the GCs, they're going to push back. And think about this. If the intent in the beginning was really to give work to minorities, it would've been enforceable. But the people who made the MBE, they know that there was going to be a pushback from the community of GCs to work with MBEs. So, they just appease the minority community, they just appeased them which forced them to become certified. We spend money, we have to provide all this paperwork and then we'll make it a good faith. So, it's like going to war with no guns. Yeah, we've got troops, but they can't shoot nothing. So, if the people really want to help the minority community, it has to be enforceable. And otherwise it's a joke. That's why we are not seeing the growth, the economic growth or the economic impact in the MBE community because it's optional. And every time you give an option to somebody, if they can save a buck then they aren't going to do it because you are participating in the marketplace and in the marketplace the goal is to create profit, keep costs low and provide a product. And now you're giving them an option to maybe work with me, maybe call me and then like, no, I don't have time to call Davis, it's not a requirement, it's not mandatory, I don't have to, so I'm going to keep on moving on. But if it became mandatory, I guarantee you within one year of you guys making it mandatory, you will see the minority MBE companies begin to grow. That's a fact." [#23]

- The Asian Pacific American male owner of a SBE- and DBE-certified construction company stated, "it's a challenge for me as a small business when there is a DVBE requirement, which is a Disabled Veteran Business Enterprise, that makes it very, very challenging for us, especially when there is a 5% requirement or a 3% requirement, and just makes it difficult for us to find somebody to be able to do that work. And so sometimes the most of them are now requiring mandatory and just becomes a nuisance for us to fulfill that requirement because of a lack of DVBEs and not many people want to do 3% or 5% of the work." [#26]
- The non-Hispanic white female owner of a WBE- and SBE-certified professional services agency stated, "there's a difference between DBE and WBE and sometimes I think that there was more opportunities for DBE than WBE." [#28]
- The Hispanic American male owner of an DBE- and DVBE-certified construction management company stated, "the owner needs to check your participation. The participation is not there and the checking on that is not there, you know?" [#29]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "the program does not have a graduating capacity, meaning you could be, let's say 100% of all of the money that we submit gets qualified right now, as long as we stand at \$32 million over a three year period. If we grew, if success led us to become, let's say a \$60 million company over the next two years, with the programs that have the ability to say, "Okay, so once you meet that criteria, if you get to the next level, instead of 100%, 75% of your dollar qualified. And then let's say it allows you to get that \$75 million or \$80 million company before you lose all your certification. But let's say between 50 and 80 million, they should say, "Okay, then 50%, of your dollars qualified." That way, the general

contractor that can build a true partnership with your organization and continue to use your company, you continue to have opportunity to hire people and develop up their skill sets. And then when you get to about \$70 to \$80 million, if you lose all your certifications, you're big enough to be able to sustain your business through cash flow, through profit and so forth, that then you're really successful. But right now, doing \$32 million over three years, it doesn't say you can't do it all in one year. It doesn't say you can have a \$2 million a year, \$20 million a year, as long as you don't exceed \$20 million again, and let's say you have a fallback here. It doesn't mean your business is successful just because you generated \$32 million in three years. That's where the flaw is, okay? It's the fact that the program lacks the substance of promoting graduated growth and long-term success." [#31]

- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "when I got involved with this for the first time, it was a lot of me seeking out information and me trying to figure out how do I find out more information about this, figuring out what you need to do. I had people recommend me attending these meetings, otherwise, I would've never known about them. Basically, if there was something to where when you got registered as a small business in the State of California, maybe there was someone who that information got distributed to, certain entities that would make you aware of things that you should look into without going into too many details, having people reach out to you because as a small business, I was kind of shooting in the dark. I didn't really know what to do and didn't know a bunch of these meetings were even available, like the small business council meetings for Caltrans or stuff so, I guess, having someone reach out to you once you're registered as a small business." [#34]
- The non-Hispanic white owner of a professional services firm stated, "I think that SANDAG and NCTD restrict businesses when they give work to minority owned businesses." [AV#40]
- The representative of a DBE-certified construction company stated, "in my opinion- SANDAG DBE goal of 10% is very low considering other agencies in San Diego County such as: City of San Diego: 25% SLBE Goal Caltrans D-11: 18% DBE Goal Metro: 35% DBE/SBE Goal A small DBE goal allows the primes to give out small portions of work to DBE firms. SANDAG needs DBE goal to be much higher." [#WT3]
- Written testimony from a local trade association stated, "in recent years the construction industry commonly reference to race by the term minority in reference to a group of minorities, which it has been used to scapegoat identifying each race by its ethnic group and use to hide groups or genders who are unaccounted for as workforce participates and openly excluded; which has been permitted by city and other public agencies who report gross numbers of "minority participation," in the workforce painting the perception on large numbers of minorities; which by the greed of one group over the other excluded African Americans, Women and other minorities." [WT#4]

## **L. Any Other Insights and Recommendations**

Interviewees provided other suggestions to the San Diego Association of Governments, North County Transit District, and surrounding San Diego County agencies about how to improve their

certification programs. Interviewees also shared other insights or recommendations. [#1, #2, #3, #4, #5, #6, #7, #8, #9, #12, #15, #17, #18, #20, #23, #25, #26, #27, #28, #30, #31, #33, #34, #36, AT#4] For example:

- Enhance the availability and participation of small businesses (*page 231*); and
- Other recommendations for the San Diego Association of Governments, North County Transit District, or other public agencies in the San Diego area (*page 234*).

**Enhance the availability and participation of small businesses.** Suggestions made by various business owners included:

- The Asian-Pacific male owner of an DBE-certified civil engineering firm stated, "I think it's positive that you guys are doing this survey, but maybe have an open session and invite people to attend and then maybe brainstorm, and maybe we'd get out more input from other people. And at the end of the day, I think it's the project. I think if you can cut the project down to little pockets of projects, then at least the new firms, so the small firms can be exposed to that and start gaining experience. And hopefully all those little small firms will join together and compete with the big firms. I don't know." [#3]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "maybe a centralized bidding site, something if it was like not even the whole state but each County, every public agency went through some kind of bidding site. And I understand that the nature of the projects are different but even some level of uniformity in the proposal requirements would be helpful. They're just very, very time consuming. And it's like you don't make any, obviously, any money on proposals, if you get work later on that counts. But I mean literally some of them are so, so time consuming and it's hard to get, it's just very hard... It's the nature of our business, but it's hard to get work done and submit these lengthy proposals. And I know...some of it because it's just they have different requirements for different projects. Like a utility company would have a different requirement for some of their stuff then SANDAG would. But I feel like there could still be some uniformity in the proposal process, at least the first parts of your proposal, like your firm experience, like some kind of... I don't know. I'm sure it's very far but something where part of it was the same and then having one section where it's more detailed of how your firm can meet the requirements of this specific work for this contract, you know? But the way that they ask for just even your certifications of your firm, your personnel, it's set up differently in every single proposal." [#9]
- The non-Hispanic white male owner of an inspection services company stated, "you should always give the small businesses I think the first opportunity to bid on any contracts. It's going to enable them to succeed." [#17]
- The non-Hispanic white female owner of an uncertified WBE inspection firm stated, "they should look for the smaller company who... It's not necessarily doing bulk advertising on their vehicles, because those people are paying a lot of money to the agency, and yet, it's coming out of their own pocket. The only reason that they can afford to pay for that poster

on the bus is because they're charging somebody an exorbitant amount of money for something that may have been able to be done elsewhere for half the price. I liken it to a dealership. If you take your car in to the dealership, and they're labor rate is based on so many things not associated with the sales department. Because first of all, you have the little lot guy who comes and takes your car back and parks it. Then you have the guy that's got to wash it and clean it for you while it's there. Then you have the dispatcher who sorts out who's going to work on the vehicle. You have the mechanic; you have the mechanic helper. Then you have the assistant service manager and you have the head service manager. Plus, the secretaries or the bookkeeper that takes care of all the billing and all that. So, you've got all these people that have to come out of your tune up. There has to be a percentage for each one to get paid. It doesn't miraculously happen. And then when you add the advertising on top of it, it's just incredible. If they're on TV, they're on the radio, it's coming from somewhere and it isn't out of their pocket. But people don't look at it. They see it on TV, I saw so-and-so and he looks like a nice guy. Well yeah, but how is he paying for that? You go there, and you're paying for it. So, the smaller, more intimate relationship with someone who's local and has an investment, is usually better." [#18]

- The non-Hispanic white male owner of a construction company stated "if they had more projects that were ... I don't know. I don't want to say more turnkey, but already designed out in smaller packages. I would say from the \$20,000 to \$200,000 range, that would be really helpful. That they get to just send out multiple sets of plans to multiple bidders and be very clear as to what was included in those. That would be really helpful because that would be something that I could sit down and bid in two or three days, and then shoot back a number and say, this is what we could do it for." [#20]
- The Hispanic American male representative of an MBE-, SBE-, and DBE-certified construction company stated, "I would recommend also that maybe grants. Say, for example, a company is growing but they don't have an estimator. Maybe give them a grant to be able to go hire an estimator for one year and go hire a good estimator. A grant, say a \$200,000 grant, to be able to pay an estimator a full-time wage, benefits and all that and that estimator for one year will help that company grow because they are missing that. And then after a year you can... We gave them a grant for this company, they hired a full-time estimator and the estimator was able to go find work and bring it in, now the grant is done but the company can now support the estimator because of work coming in. I see that type of stuff being beneficial. Or we would bid this work, but we don't have the money to bid a drafter because... So, a lot of companies, they don't have business development, minority companies, they don't have estimating because the owner is working, and he doesn't have the time to go home or go to the office and bid work. So, there is no growth there because he's basically maintaining what he has. So, in order for a company to grow, they have to have estimators and have a BD team. The estimating is what helps the company grow. So, if you guys have grants for minority companies, say, hey, we have a grant of 200,000, we are going to give 50 of these out or whatever for one year and we want to see a growth in the award of contracts. And then once they get them, that grant is gone but the company can now sustain itself because now they are bidding, you know what I mean?" [#23]

- The Asian Pacific American male owner of an MBE-, SBE- and DBE-certified professional services company stated, "I think just encouraging prime to share more the work with small businesses, although most of the prime that we work with do make a conscious effort to use small business funded projects. I think the agencies in San Diego County have done a good job of encouraging prime to use small businesses on their projects." [#25]
- The non-Hispanic white male co-owner of a construction company stated, "I guess that you let them know that the job's out for bid for women-owned firms. You might get more bids you know. Some way you have to educate us on how to do it, to begin with. You know it's just a shot in the dark for us so. We'd be in trouble before we even got in the door, probably." [#27]
- The non-Hispanic white female owner of a WBE- and SBE-certified environmental consulting agency stated, "either from an outreach perspective or anything, you just never knew they existed, really would contract and opportunities. So maybe--they should include more outreach? Maybe a broader net, yeah." [#28]
- The female owner of a DBE- and WBE-certified professional services company stated, "I actually worked with a lot of other colleagues, women in businesses and also small businesses, and just do it on my own. We meet and we share information that some of my colleagues might not have and it's open to everyone to share. Like a small business council. I know that Caltrans had a small business council, and I was invited to one, but I didn't go back again. They have a small council that's made up of small businesses. But I don't think that's open to everyone, ended up being close groups maybe. That might be something to consider." [#30]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "I think it's an education process as you have indicated earlier on, what to truly expect from companies that are in the system so that people know what to be prepared for what we see because we've been at it a long time. These people come in wide-eyed and then they-- 6 months they didn't see that follow-up situation and they're like, 'Holy crap, what a nightmare blah blah blah.' And I think that there is, if you're gonna really wanted people to have the courage to participate in these programs, you have to give them the good and the bad so that they can fully be prepared with their staffing, their education of themselves over how to access the work opportunities. And then the agencies have to start developing some spine internally to not just administer our contract but also administer all the elements within that contract and get down at the street level. I think that if that happens, then they'll start seeing much more success and a lot higher level of participation by those companies that are out there. There is a lot of them out there that are working in the private sector that would prefer to come over to the public opportunity site." [#31]
- The Native American male owner of an MBE-, SBE-, and SLBE-certified professional services firm stated, "I would say that the agencies have certain projects that are small enough that would be advertised solely to minority firms for small firms to get their foot in the door. , I would think in my industry the hardest part was to get my foot in the door and build a

portfolio and experience with to pursue more work on my own. And I think that if SANDAG or North County could target smaller projects for smaller minority firms only to propose on it. I think it's two separate things, one, I think the mandatory participation so the primes are kind of forced to use the smaller and minority-based firms but I also think that the agency itself could identify small projects that would go out directly solely to minorities and small businesses to apply for, to get a better opportunity to get a small project and get their foot into the door with the agency to prove themselves." [#33]

- The non-Hispanic white male owner of an SLBE- and SBE-certified professional services firm stated, "the more training and networking opportunities, the better, so having more opportunities for small businesses to learn more. That would be my only recommendation only because I'm pretty limited to being a subcontractor on my actual experience." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "the availability of fairs, of getting on lists... all these benefits small businesses, minorities, or otherwise. I can't see any more to be done would otherwise strength from the focus of the government. If people want these jobs, there's plenty of ways to take advantage of these current systems and get them if they're qualified." [#36]

**Other recommendations for the San Diego Association of Governments, North County Transit District, or other public agencies in the San Diego area** included:

- The female Subcontinent Asian American owner of an MBE-, WBE-, and DBE-certified professional services firm stated "I think if there's a better way of doing the speed dating where you don't really have 500 people in the room trying to meet each other, might be helpful. Some other way of outreach." [#1]
- The non-Hispanic white female representative of a WBE- and SBE-certified construction company suggested, "actual justification or checking or insurance that that's who's getting the jobs. Their bidding platform could be wider. And then to be fair, I don't even think I've ever seen a Caltrans or a SANDAG cross anything in the 10, 11 years I've been in construction. I mean, obviously someone's building their stuff, but it's never crossed my mind. I've never seen it. So maybe a broader outreach." [#2]
- The non-Hispanic white male representative of a majority owned construction firm suggested, "just to clearly define, be more descriptive on any kind of labor requirements for, you know, non-constructive site people, like myself, that have a minimal amount of work. I would love the language to speak of, you know, if the labor is as insignificant as estimated under 100-man hours on the job, then it wouldn't fall under, you know, these type of labor requirements, you know what I mean? Because it's not like we're the guys that are showing up every day, and we're going to be working for the next three to six months, or even a couple weeks. And there are the prevailing wage requirements that will be met. I'm just suggesting, you know, as far as having signatory to unions because of such, there should be some sort of exemption for people? Exemption for temporary site services. Absolutely, everybody, so many. And there are some small businesses, you know, port-a-potty

companies, that would benefit greatly, and, I mean, there's just other temp fence companies. It would benefit the industry, really." [#4]

- The non-Hispanic white female co-owner of a majority owned construction firm stated, "I think, though, my personal opinion about city bureaucracy is just that. It's bureaucracy. Sometimes it's really tied up. There can be ... I don't know about red tape, but there's sometimes waiting or some hoops to jump through that's like, 'Really? Can we streamline that a little bit?' And that's mostly with getting your business license. Well, some have already done that. City of Poway, to get a business license in the City of Poway is like two seconds online, boom. Just renewing, boom. Yes, you have to go in person the first time because they want to see who you are and you have to give your identification, but after that, I mean ... So much has streamlined internet, you know. For me to get my passes, internet. So, in a lot of ways, other people have spoken up and said, "It doesn't have to be like this. Why, in this day and age of technology, why ..." [#5]
- The non-Hispanic white male representative of a majority owned professional services company stated, "this is the part that... I understand the importance of trying to help create a level playing field, but the bottom line out of all of this is that especially if you're doing work for the public sector, I would want the public to be getting the best they can for their money, and who does that, based upon the length of their hair, the color of their skin, their heritage, all of those different things, I don't know that that is what is critical to making sure that, as I say, the community gets the best for their money. Now, I don't know as well though, how you can correct historical past, but I don't know if that is... It is effective, to some extent, but it's not something that I'm so focused on. I don't like to get caught up in current trendy terms, but it is important to have diverse backgrounds, and experience, and history, and all of that because we don't want to just have kind of a single groupthink about things. And so, I'm all in favor of ways that makes sure that everybody has a voice in what we're doing. But to artificially inflate someone to an equal when it's hard to be able to say ... how do you say someone is equal to somebody else? Or their firm is equal to somebody else's? That's what really just muddies, I think, the whole process. I'd like it to be as equal and fair as possible. And unfortunately what I believe though is the thing that causes the greatest amount of inequity is that, and it's similar to what I think everybody believes, and that is the bigger companies are similar to the wealthiest and therefore they have the means to have the greatest amount of influence on decision making. Not necessarily meaning that they're going to be able to give the best product. As I say, I think that my one biggest takeaway would be that I know that there are a lot of good small companies that are similar to my situation. And yet, I don't think that there is a good avenue for us to be competitive in a proper, equitable way. And I think part of it is not about ... See, I think that I see this as to be competitive, do you open up opportunities for small businesses to compete? And that's one thing. So, you're saying you're going to take and you're going to elevate people to be able to compete. Whereas compared, why not look at it in the reverse? And that is what about us excluding those that seem to be doing pretty well as it is, and we exclude some of them because they seem to be dominating the opportunities that are out there? And I know that that might be a different mindset and there may be unintended consequence with pursuing that. But I think it's a huge fallacy to think that just by giving



smaller, disadvantaged businesses, just giving them the pass to get in the door and a seat at the table doesn't necessarily really make it fully fair. And on top of that, I think what's sad about that process, and this is the part that I wish we could find a way to get around, is that those companies, what's their reputation? Their reputation is for the label that's being put on them, not as necessarily a good consultant or a good designer. They are always perceived as what those are. And I like to think that we should all be colorblind and/or whatever you want to say to not be thinking of people and/or businesses from that standpoint. So why not have big business projects versus small business projects and just differentiate them that way? It might be a better way to not have individuals like me see the people that I lose work to because I don't have the right skin color, or I don't have the right gender or what have you." [#6]

- The non-Hispanic white female representative of a majority owned construction firm stated, "just if we could get one site that we could go look at all of them [the proposals] together would be nice." [#7]
- The African American male owner of a SBVBE-, ACDBE-, DVBE-, DBE- and SLBE-certified professional services firm stated, "prompt payment and hold your primes accountable and make sure you have proof that they're actually talking to their subs. Make sure these bids are a lot fairer than what they are. And they should probably put a limitation on how many years you can actually bid on a contract. So, if it's 10 years, then 10 years you need to rotate to another company like it or leave it or not. And change the badging process for that company so that the other company can have a chance." [#8]
- The non-Hispanic white female owner of a trucking/hauling firm stated, "the original phone call from the questionnaire, the survey from SANDAG, the original phone call showed up as a spam." They continued, "you know, I don't know how we got on the list to get... the original phone call, how we originally got that, but it'd be nice to be on an e-mail that links us to resources, that links us to getting capital funding, or even links us to getting maybe a free digital marketing course on behalf of the SANDAG/NCTD or the City or the state even. That would be really cool, honestly. Something like that where they can just assist to help develop small businesses. [Also] something needs to be done about the 52." [#12]
- The Hispanic American female owner of an MBE-, DBE-, and VBE-certified trucking company stated, "I think more emphasizing at events, or advertising more for small businesses. I know SANDAG tries, but I'm just wondering, how else can they increase those efforts, basically?" [#15]
- The Asian Pacific American male owner of an SBE and DBE-certified construction company stated, "I think certainly going electronic is the way to go. Bidding electronically is the way to go. NCTD I think does a fairly decent job in posting it on their own PlanetBids. SANDAG, I'm not quite sure what direction they're going. I'm having a hard time taking the bull by the horns since I want to do some SANDAG projects. Just I can't seem to be able to handle that. Also, I think, their safety requirements, which are required, but making it streamlined by having maybe after you do the initial physical, trying to do online refresher courses instead of this is basically their program for safety, which is, 'You need to come in, you need to bring

your guys in. It's going to be for this many hours, and it's going to be every year,' no option of refresher. Even though they've done it before, no refresher course to streamline it or even making it online." [#26]

- The female owner of a DBE- and WBE-certified professional services company stated, "I think something that both SANDAG and Caltrans have gone through in the past is, when they are looking at payroll I think it's a pre-qualification that you have to substantiate what your hourly rates are. It's hard for really small businesses because you might have payroll information for your employees because they get an hourly rate, but when it gets to the owners that's really difficult and that might be worth having a conversation. I know they've done that in the past because within our firm what we had always done is you might get a salary, but it was usually very small. It didn't reflect your experience in the business, it was basically not based on anything other than maybe covering your payroll taxes, but it was very, very low. When you came you had to prove what your salary rates were, that did really something a challenge. I know it's difficult for low or small businesses because it's just like, 'Well, what do I do now? How do I do this?'" [#30]
- The Hispanic American representative of an MBE-, WBE-, and SLBE-certified construction company stated, "the other problem that the kind of program has is the fact that it lacks escrow account requirements to the general contractor or the agency administering the contract, which means that my pay application has to go to the GC as a vendor, as this material supplier, as this the dump guy or truck or anybody who works for the GC which gets awarded the contract. He gets our money first and then he pays us as his requirement. There are rules that say you have to pay in seven days of receiving the money, but they never do. So our average days until pay is between 75 and 90 days. Our money should get put into an escrow account and their margin on top of us gets released to them when we get our payments released. So, there should be a mechanism for all these programs that create that. And they would also not get paid until we got paid, the distribution. So let's say the general contracts submitted an application for the month for \$2 million. You have 25% of that was performed by subcontractors who met, they have to meet their DBE goal, and they had a 10% margin on top of that. \$25,000 and then \$250,000 would then be held in escrow. Okay? Excuse me, \$500,000 of that would be held on and \$50,000, that's 10% that would be theirs. Now they don't get their \$50,000 until the \$450,000 is distributed to the subs who are part of that payout. And as long as all of our releases are in place, our certified payrolls are posted, we do all the things associated with these projects as required. Okay, everybody wins. But, you know that's now, I'm controlling my own destiny because the agency has somebody sitting there saying, 'Okay, you're good. Push the button, boom, your payments going.' But right now, when they push the button, it goes to flat iron or it goes to granted or it goes to somebody, and then I have to beg borrow and steal to get them to give me money and they lie by corporate policy, they lie to me that they haven't received the payout. And then depending on whether the agency, I can get onto a website that shows me that the GC has been paid in the case of Caltrans, you can. Okay? Then I turn around and this morning, I sent an e-mail to them and said, "Look, I just found the Caltrans website. I have seen that you got the payments for the last three months, but you're on my AR, you still haven't paid me for three months. Okay? So, I have to know that after-- not only do I have to successfully

perform the work and have the staff who have the activated knowledge and professional expertise on how to process all the paperwork that goes along with that. I gotta chase it now. Okay? And then I have to try and justify to them why I should get paid. So, then what happens is the war starts. We put stop payment in this place. We stopped dispatching to the project. We put the project in jeopardy with liquidated damages because I don't send my people out because they don't have the right to spend money that I've already spent. Okay, spend more money and they're not gonna ask me to spend good money after that, alright? So, we get into worse of that and this is what happens in every single job. I have been the General Manager for six years; we end up with a war with the general contractor. And it's all because they don't want to pay us in a timely fashion. So, to play with the industry is that industry is going to implode on itself because the fact that there is nobody at the agency level who want-- they let service do it, but they don't want to take the time to make the program successful. They really don't. There are political games and chase, politicians and agency, boring people running for office or looking good saying look at their little guy and helping you out. They're making me hire people that shouldn't be hired to go because I have these local hiring requirements from a geographic zip code. And these people don't have skill sets and they're the ones that make my workman's comp go up because they can't handle tools properly even after we train them. They're looking for an easy ticket. There's a whole series of issues that we deal with on these projects. And there are too many requirements except go out to do the work properly and get paid timely. If those are the only requirements you could see people lining up at the door of your business. There are so many other flaws to it that you gotta have a lot of hats to be in this industry right now. The other recommendation I have is lining up construction financing because if you get a \$500,000-dollar contract and your payroll is gonna be \$300,000 dollars and your money is gonna be and their profit is gonna be \$100,000, let's say, 20 percent profit. But you don't see the profit till the very end. And you gonna fund the 300,000 dollars in payroll and certified payroll benefits and so forth, pay your vendors and so forth. If some agencies can find a way to get banks, private individuals and so forth, there is a lot of third-party finance companies out there. But keep the rates at no more than 10 to 11 percent maximum for the cash, then you'll see a lot of business owners be willing to get engaged because they know that they won't have to out of pocket all of these funding costs. Because when you spend money, if it is a once a month pay system, if I work the 4 weeks of that first month, I got 4 weeks of payroll, 4 weeks union benefits to pay. Now the DF goes in, 30 days passed they get paid. Another 10 to 15 days past, at the earliest, before I get paid, now I funded the payroll for 45 days and another month has passed and now I got 60 days of payroll in the system with no cash coming in. So the system's loss to help small businesses to work because it says I can only do 32 million dollars over 3 years and I can't have wealthy owners with 100 million dollars in cash in their bank account or else you don't qualify as a DBE. But, yet, at the same time, it also says I have to have enough cash to carry something for 60 days before I see the money. So, I'm on a catch-22. So if the agency might figure out how to line up the financing opportunities for those subcontractors who have been awarded, let's call it 250,000 dollars or more will work on a project, whatever that dollar value might be. So that I think it could be fairly evaluated and the money could be given to us, we have paid interest up to 23 percent from third party suppliers to help us finance the funding cost, 23 percent on the 400,000 dollar loan, have a fund to startup cost. We powered 400,000

dollars on a 3-million-dollar job because we knew we're gonna have at least 60 to 90 days of payroll before we received our first payment. But we had the interest was given at 23 percent for the bank won't finance you. The SPA won't give you that money. It's a fallacy. We have gone, I have spent, I've been here 6 years, probably half of my time here has been trying to find construction financing money for 3 out of my 6 years, my efforts 4 to 5 hours of those days has been to try and figure out a way for us to finance these jobs. It is mind-boggling what is not available to the small businesspeople even though everybody advertises we're a lender for SPA, we are lessors. Yes, but the rules of engagement are horrible, and the banks don't wanna lend money on construction because they find it to be one of the highest risk industries. They lend to a lot of lessors, but they'll never do it. They'll lend you money for equipment, but they won't do your payroll. So, it is the biggest flaw in the industry. The vendor of rebar and concrete can get it because he's got material to offset it. A guy forming a service on a job, a labor function can't get it. So, it is a horrible industry from that standpoint. So, you've got owners going deeply out of pocket, you've got owners borrowing from their own retirement funds. You've gotta borrow to front these jobs and then you're arguing with your customers to pay and cash is king. I mean so they'll say, and the goal makes the rules." [#31]

- Written testimony from a local trade association stated, “the City of San Diego should appoint a representative from an African American trade group such as; the Inner-City Unilateral Apprenticeship Committee and an African American contractors Association such as; The Black Contractors Association to set on boards of governance to inform and be informed on policies and laws that prevent and are being promoted, which will promote discrimination of African American, women and other excluded groups. These representatives must have a connection with Black, Brown, Asian, Women and disable Veteran contractor’s trade associations, and all other excluded groups.” [WT#4]

# **APPENDIX E.**

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## **Availability Analysis Approach**

# APPENDIX E.

## Availability Analysis Approach

BBC Research & Consulting (BBC) used a *custom census* approach to analyze the availability of minority- and woman-owned businesses for transportation-related construction; professional services; and goods and other services prime contracts and subcontracts that the San Diego Association of Governments (SANDAG) and the North County Transit District (NCTD) awarded.<sup>1</sup> Appendix E expands on the information presented in Chapter 5 to describe:

- A. Availability data;
- B. Representative businesses;
- C. Availability survey instrument;
- D. Survey execution; and
- E. Additional considerations.

### A. Availability data

BBC contracted with Customer Research International (CRI) to conduct telephone surveys with hundreds of business establishments throughout the *relevant geographic market area* for SANDAG and NCTD contracting, which BBC identified as San Diego county. Business establishments that CRI surveyed were businesses with locations in the relevant geographic market area that the study team identified as doing work in fields closely related to the types of contracts and procurements that SANDAG and NCTD awarded between January 1, 2013 and December 31, 2017 (i.e., *the study period*). The study team began the survey process by determining the work specializations, or *subindustries*, for each relevant SANDAG and NCTD prime contract and subcontract and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries. The study team then collected information about local business establishments that D&B listed as having their primary lines of business within those work specializations.

As part of the telephone survey effort, the study team attempted to contact 3,954 local business establishments that perform work that is relevant to SANDAG and NCTD contracting. That total included 2,300 construction establishments; 1,099 professional services establishments; 542 goods and other services establishments; and 13 establishments with a primary line of work that turned out to be outside of the contracting areas relevant to the disparity study. (Those 13 business establishments were not considered further as part of the availability analysis.) The study team was able to successfully contact 1,414 of those business establishments (968

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

business establishments did not have valid phone listings). Of business establishments that the study team contacted successfully, 261 establishments completed availability surveys.

## **B. Representative Businesses**

The objective of BBC's availability approach was not to collect information about each and every business that is operating in the relevant geographic market area. Instead, it was to collect information from a large, unbiased subset of local businesses that appropriately represents the entire relevant business population. That approach allowed BBC to estimate the availability of minority- and woman-owned businesses in an accurate, statistically-valid manner. In addition, BBC did not design the research effort so that the study team would contact every local business possibly performing construction; professional services; or goods and other services work. Instead, BBC determined the types of work that were most relevant to SANDAG and NCTD contracting by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period.

Figure E-1 lists the 8-digit work specialization codes within construction; professional services; and goods and other services that were most related to the contract and procurement dollars that SANDAG and NCTD awarded during the study period, and that BBC included as part of the availability analysis. The study team grouped those specializations into distinct *subindustries*, which are presented as headings in Figure E-1.

## **C. Availability Survey Instrument**

BBC created an availability survey instrument to collect information from relevant business establishments located in the relevant geographic market area. As an example, the survey instrument that the study team used with construction establishments is presented at the end of Appendix E. The study team modified the construction survey instrument slightly for use with establishments working in other industries in order to reflect terms more commonly used in those industries (e.g., the study team substituted the words "prime contractor" and "subcontractor" with "prime consultant" and "subconsultant" when surveying other professional services establishments).<sup>2</sup>

**Survey structure.** The availability survey included 14 sections, and CRI attempted to cover all sections with each business establishment that the study team successfully contacted and that was willing to complete a survey.

**1. Identification of purpose.** The surveys began by identifying SANDAG and NCTD as the survey sponsors and describing the purpose of the study. (e.g., "SANDAG and NCTD are conducting a survey to develop a list of companies interested in providing construction-related services to SANDAG and/or NCTD.")

**2. Verification of correct business name.** The surveyor verified that he or she had reached the correct business. If the business name was not correct, surveyors asked if the respondent knew

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<sup>2</sup> BBC also developed fax and online versions of the survey instrument for business establishments that preferred to complete the survey in those formats.

how to contact the correct business. CRI then followed up with the correct business based on the new contact information (see areas “X” and “Y” of the availability survey instrument).

**3. Verification of for-profit business status.** The surveyor asked whether the organization was a for-profit business as opposed to a government or nonprofit organization (Question A2). Surveyors continued the survey with businesses that responded “yes” to that question.

**4. 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 that they perform beyond their main lines of business (Question A4). BBC coded information on main lines of business and additional types of work into appropriate 8-digit D&B work specialization codes.

**5. Locations and affiliations.** The surveyor asked business owners or managers if their businesses had other locations (Question A5). The study team also asked business owners if their businesses were subsidiaries or affiliates of other businesses (Questions A6 and A7).

**6. Past bids or work with government agencies and private sector organizations.** The surveyor asked about bids and work on past government and private sector contracts. CRI asked those questions in connection with prime contracts and subcontracts (Questions B1 and B2).<sup>3</sup>

**7. Interest in future work.** The surveyor asked about businesses’ interest in future work with SANDAG and/or NCTD. CRI asked those questions in connection with both prime contracts and subcontracts (Questions B3 and B4).<sup>4</sup>

**8. Geographic area.** The surveyor asked whether businesses perform work or serve customers in San Diego (Question C1).

**9. Year established.** The surveyor asked businesses to identify the approximate year in which they were established (Question D1).

**10. Largest contracts.** The study team asked businesses about the value of the largest contracts on which they had bid or had been awarded during the past five years. (Questions D2 and D3).

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<sup>3</sup> Neither goods suppliers nor non-professional services providers were asked questions about subcontract work.

<sup>4</sup> Neither goods suppliers nor non-professional services providers were asked questions about their interest in subcontract work.



**Figure E-1.**  
**Subindustries included in the availability analysis**

Industry Code	Industry Description	Industry Code	Industry Description
<b>Construction</b>			
<b>Building construction</b>			
15420103	Commercial and office buildings, renovation and repair	<b>Flagging services</b>	
15419905	Industrial buildings, new construction, nec	73899921	Flagging service (traffic control)
15420000	Nonresidential construction, nec	73599912	Work zone traffic equipment (flags, cones, barrels, etc.)
15419910	Steel building construction		
17910000	Structural steel erection	<b>Heavy construction equipment rental</b>	
		73530000	Heavy construction equipment rental
		17710301	Blacktop (asphalt) work
<b>Concrete work</b>		16229901	Bridge construction
16110202	Concrete construction: roads, highways, sidewalks, etc.	16220000	Bridge, tunnel, and elevated highway construction
17719901	Concrete pumping	16119901	General contractor, highway and street construction
17710000	Concrete work	16290000	Heavy construction, nec
		16110000	Highway and street construction
<b>Concrete, asphalt, sand, and gravel products</b>		16119902	Highway and street maintenance
29510201	Asphalt and asphaltic paving mixtures (not from refineries)	16110204	Highway and street paving contractor
29510000	Asphalt paving mixtures and blocks	16229902	Highway construction, elevated
32720000	Concrete products, nec	47890400	Railroad maintenance and repair services
		16110205	Resurfacing contractor
<b>Concrete, asphalt, sand, and gravel products</b>		16110200	Surfacing and paving
32720303	Concrete products, precast, nec	16229903	Tunnel construction
14420000	Construction sand and gravel		
32730000	Ready-mixed concrete	<b>Landscape services</b>	
		07829903	Landscape contractors
<b>Doors, windows, and glasswork</b>			
17930000	Glass and glazing work	<b>Painting and striping</b>	
		17210201	Exterior commercial painting contractor
<b>Electrical work</b>		17210303	Pavement marking contractor
17319903	General electrical contractor		
		<b>Plumbing, heating, and air</b>	
<b>Fencing, guardrails, and signs</b>		17110401	Mechanical contractor
17999912	Fence construction		
17999929	Sign installation and maintenance		

**Figure E-1.**  
**Subindustries included in the availability analysis (Continued)**

Industry Code	Industry Description	Industry Code	Industry Description
<b>Construction (Continued)</b>		<b>Trucking, hauling, and storage (continued)</b>	
<b>Rebar and reinforcing steel</b>		<b>Trucking, hauling, and storage (continued)</b>	
34410000	Fabricated structural Metal	42130000	Trucking, except local
<b>Roofing, siding, and sheetmetal work</b>		<b>Water, sewer, and utility lines</b>	
17619901	Architectural sheet Metal work	16239904	Pipeline construction, nsk
<b>Traffic signals and street lighting</b>		16230203	Telephone and communication line construction
36480000	Lighting equipment, nec	16239906	Underground utilities contractor
57190202	Lighting fixtures	16230303	Water main construction
50630400	Lighting fixtures	16230000	Water, sewer, and utility lines
36690206	Traffic signals, electric	<b>Wrecking, demolition, excavation, drilling</b>	
36690200	Transportation signaling devices	17990900	Building site preparation
<b>Trucking, hauling, and storage</b>		17959902	Demolition, buildings and other structures
42139903	Contract haulers	16290105	Drainage system construction
42129905	Dump truck haulage	16299902	Earthmoving contractor
42139904	Heavy hauling, nec	17949901	Excavation and grading, building construction
42129909	Light haulage and cartage, local	17940000	Excavation work
42140000	Local trucking with storage	16290400	Land preparation construction
<b>Goods and Services</b>		<b>Office goods</b>	
<b>Electrical equipment and supplies</b>		50440207	Photocopy machines
50630000	Electrical apparatus and equipment	<b>Petroleum products</b>	
50630206	Electrical supplies, nec	13110000	Crude petroleum and natural gas
<b>Elevator goods and services</b>		51720200	Engine fuels and oils
17969901	Elevator installation and conversion	59830000	Fuel oil dealers
50840803	Elevators	28690400	Fuels
35340100	Elevators and equipment	51720203	Gasoline
35340000	Elevators and moving stairways	51720000	Petroleum products, nec
76992501	Elevators: inspection, service, and repair		

**Figure E-1.**  
**Subindustries included in the availability analysis (Continued)**

Industry Code	Industry Description	Industry Code	Industry Description
<b>Goods and Services (Continued)</b>			
<b>Security services</b>		<b>Transit services (continued)</b>	
73810101	Armored car services	41110400	Passenger rail transportation
50849912	Safety equipment	41110202	Trolley operation
50990300	Safety equipment and supplies		
<b>Transit services</b>		<b>Vehicle</b>	
41110101	Bus line operations	50120102	Automobiles
41110100	Bus transportation	55110000	New and used car dealers
41310000	Intercity and rural bus transportation		
41110000	Local and suburban transit	<b>Vehicle parts and supplies</b>	
41110402	Local railway passenger operation	50840602	Engines and parts, diesel
<b>Professional Services</b>			
<b>Construction management</b>		<b>Other professional services</b>	
87419902	Construction management	73891801	Design, commercial and industrial
87420402	Construction project management consultant		
73899907	Contractors' disbursement control	<b>Surveying and mapping</b>	
<b>Engineering</b>		87130000	Surveying services
87120100	Architectural engineering	<b>Testing services</b>	
87120101	Architectural engineering	73890200	Inspection and testing services
87110401	Building construction consultant	<b>Transportation consulting</b>	
87110402	Civil engineering	87480201	City planning
87110400	Construction and civil engineering	87480203	Industrial development planning
87110404	Structural engineering	47850202	Inspection services connected with transportation
<b>Environmental research, consulting, and services</b>		87480204	Traffic consultant
87489905	Environmental consultant	87420410	Transportation consultant
87449904	Environmental remediation	87480200	Urban planning and consulting services
<b>Landscape architecture</b>			
07810201	Landscape architects		

**11. Ownership.** The surveyor asked whether businesses were at least 51 percent owned and controlled by minorities or women (Questions E1 through E3). If businesses indicated that they were minority-owned, they were also asked about the race/ethnicity of the business's ownership (Question E3). The study team confirmed that information through several other data sources, including:

- The California Unified Certification Program's (CUCP) directory of DBE-certified businesses (used by SANDAG and NCTD);
- SANDAG and NCTD vendor data;
- SANDAG and NCTD review; and
- Information from D&B and other sources.

**12. Business revenue.** The surveyor asked several questions about businesses' size in terms of their revenues. For businesses with multiple locations, the business revenue section of the survey also asked about their revenues and number of employees across all locations (Questions F1 through F3).

**13. Potential barriers in the marketplace.** The surveyor asked open-ended questions concerning working in San Diego and general insights about conditions in the local marketplace (Question G1). In addition, the survey included a question asking whether respondents would be willing to participate in a follow-up interview about conditions in the local marketplace (Question G2).

**14. Contact information.** The survey concluded with questions about the participant's name and position with the organization (Questions H1 and H2).

## **D. Survey Execution**

CRI conducted all availability surveys in 2019. The firm made up to eight attempts during different times of the day and on different days of the week to successfully reach each business establishment. CRI attempted to survey a company representative such as the owner, manager, or other officer who could provide accurate and detailed responses to survey questions.

**Establishments that the study team successfully contacted.** Figure E-2 presents the disposition of the 3,954 business establishments that the study team attempted to contact for availability surveys and how that number resulted in the 1,414 establishments that the study team was able to successfully contact.

**Non-working or wrong phone numbers.** Some of the business listings that the study team purchased from D&B and that CRI attempted to contact were:

- Duplicate phone numbers (209 listings);
- Non-working phone numbers (701 listings); or
- Wrong numbers for the desired businesses (58 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time that D&B listed them and the time that the study team attempted to contact them.

**Figure E-2.**  
**Disposition of attempts to survey business establishments**

Source:  
2019 availability surveys.

	Number of Establishments
Beginning list	3,954
Less duplicate phone numbers	209
Less non-working phone numbers	701
Less wrong number/business	58
Unique business listings with working phone numbers	2,986
Less no answer	1,374
Less could not reach responsible staff member	172
Less language barriers	26
<b>Establishments successfully contacted</b>	<b>1,414</b>

**Working phone numbers.** As shown in Figure E-2, there were 2,986 business establishments with working phone numbers that CRI attempted to contact. CRI was unsuccessful in contacting many of those businesses for various reasons:

- The firm could not reach anyone after eight attempts at different times of the day and on different days of the week for 1,374 establishments.
- The firm could not reach a responsible staff member after eight attempts at different times of the day on different days of the week for 172 establishments.
- The firm could not conduct the availability survey due to language barriers for 26 establishments.

Thus, CRI was able to successfully contact 1,414 business establishments.

**Establishments included in the availability database.** Figure E-3 presents the disposition of the 1,414 business establishments that CRI successfully contacted and how that number resulted in the 389 businesses that the study team included in the availability database and that the study team considered potentially available for SANDAG and NCTD work.

**Figure E-3.  
Disposition of  
successfully  
contacted business  
establishments**

Source:

2019 availability surveys.

Note:

BBC included 212 businesses from the 2018 California Department of Transportation (Caltrans) FTA Disparity Study and the 2015 Caltrans FHWA Disparity Study in the availability database.

	Number of Establishments
Establishments successfully contacted	1,414
Less establishments not interested in discussing availability for work	1,030
Less unreturned fax/online surveys	123
Establishments that completed surveys	261
Less not a for-profit business	9
Less line of work outside of study scope	5
Less no interest in future work	63
Less multiple establishments	7
<b>Establishments potentially available for entity work</b>	<b>177</b>
<b>Additional establishments potentially available for entity work<sup>1</sup></b>	<b>212</b>
<b>Total establishments potentially available for entity work</b>	<b>389</b>

**Establishments not interested in discussing availability for SANDAG and NCTD work.** Of the 1,414 business establishments that the study team successfully contacted, 1,030 establishments were not interested in discussing their availability for SANDAG and NCTD work. In addition, BBC sent hardcopy fax availability surveys or invitations to complete the survey online upon request but did not receive completed surveys from 123 establishments. In total, 261 successfully-contacted business establishments completed availability surveys.

**Establishments available for SANDAG and NCTD work.** The study team deemed only a portion of the business establishments that completed availability surveys as available for the prime contracts and subcontracts that SANDAG and NCTD awarded during the study period. The study team excluded many of the business establishments that completed surveys from the availability database for various reasons:

- BBC excluded nine establishments that indicated that their organizations were not for-profit businesses.
- BBC excluded five establishments that indicated that their main lines of business were outside of the study scope.
- BBC excluded 63 establishments that reported not being interested in either prime contracting or subcontracting opportunities with SANDAG or NCTD.
- Seven establishments represented different locations of the same businesses. Prior to analyzing results, BBC combined responses from multiple locations of the same business into a single data record.

After those exclusions, BBC compiled a database of 177 businesses that were considered potentially available for SANDAG and NCTD work. BBC also included 212 businesses from the 2018 California Department of Transportation (Caltrans) FTA Disparity Study and the 2015 Caltrans FHWA Disparity Study in the availability database. BBC only included firms from the Caltrans disparity studies if they were located in San Diego County and perform work relevant to SANDAG's and NCTD's transportation-related construction; professional services; or goods and other services contracts.

**Coding responses from multi-location businesses.** Responses from different locations of the same business were combined into a single summary data record according to several rules:

- If any of the establishments reported bidding or working on a contract within a particular subindustry, the study team considered the business to have bid or worked on a contract in that subindustry.
- The study team combined the different roles of work (i.e., prime contractor or subcontractor) that establishments of the same business reported into a single response corresponding to the appropriate subindustry. For example, if one establishment reported that it works as a prime contractor and another establishment reported that it works as a subcontractor, then the study team considered the business as available for both prime contracts and subcontracts within the relevant subindustry.<sup>5</sup>
- BBC considered the largest contract that any establishments of the same business reported having bid or worked on as the business' relative capacity (i.e., the largest contract for which the business could be considered available).
- BBC coded businesses as minority-owned or woman-owned if the majority of its establishments reported such status.

## **E. Additional Considerations**

BBC made several additional considerations related to its approach to measuring availability to ensure that estimates of the availability of businesses for SANDAG and NCTD work were accurate and appropriate.

**Providing representative estimates of business availability.** The purpose of the availability analysis was to provide precise and representative estimates of the percentage of SANDAG and NCTD contracting dollars for which minority- 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 SANDAG and NCTD work and should not be used in that way. Federal courts have approved BBC's approach to measuring availability. In addition, federal regulations around minority- and woman-owned business programs recommend similar approaches to measuring availability for organizations implementing business assistance programs.

**Using a custom census approach to measuring availability.** Federal guidance around measuring the availability of minority- and woman-owned businesses recommends dividing the number of minority- and woman-owned businesses in an organization's certification directory by the total number of businesses in the marketplace (for example, as reported in United States Census data). As another option, organizations could use a list of prequalified businesses or a bidders list to estimate the availability of minority- and woman-owned businesses for its prime contracts and subcontracts. The primary reason why BBC rejected such approaches when measuring the availability of businesses for SANDAG and NCTD work is that dividing a simple headcount of certified businesses by the total number of businesses does not account for

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<sup>5</sup> Neither goods nor non-professional services providers were asked questions about subcontract work.

business characteristics that are crucial to estimating availability accurately. The methodology that BBC used in this study takes a *custom census* approach to measuring availability and adds several layers of refinement to a simple headcount approach. For example, the availability surveys that the study team conducted provided data on qualifications, relative capacity, and interest in SANDAG and NCTD work for each business, which allowed BBC to take a more detailed approach to measuring availability. Court cases involving implementations of minority- and woman-owned business programs have approved the use of such approaches to measuring availability.

**Selection of specific subindustries.** Defining subindustries based on specific work specialization codes (e.g., D&B industry codes) is a standard step in analyzing businesses in an economic sector. Government and private sector economic data are typically organized according to such codes. As with any such research, there are limitations when choosing specific D&B work specialization codes to define sets of establishments to be surveyed. For example, it was not possible for BBC to include all businesses possibly doing work in relevant industries without conducting surveys with nearly every business located in the relevant geographic market area. In addition, some industry codes are imprecise and overlap with other business specialties. Some businesses span several types of work, even at a very detailed level of specificity. That overlap can make classifying businesses into single main lines of business difficult and imprecise. When the study team asked business owners and managers to identify their main lines of business, they often gave broad answers. For those and other reasons, BBC collapsed work specialization codes into broader subindustries to more accurately classify businesses in the availability database.

**Non-response.** An analysis of non-response considers whether businesses that were not successfully surveyed are systematically different from those that were successfully surveyed and included in the final data set. There are opportunities for non-response bias in any survey effort. The study team considered the potential for non-response due to:

- Research sponsorship; and
- Work specializations.

**Research sponsorship.** Surveyors introduced themselves by identifying SANDAG and NCTD as the survey sponsor, because businesses may be less likely to answer somewhat sensitive business questions if the surveyor was unable to identify the sponsor. In past survey efforts—particularly those related to availability analyses—BBC has found that identifying the sponsor substantially increases response rates.

**Work specializations.** Businesses in highly mobile fields, such as trucking, may be more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering businesses). That assertion suggests that response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to estimate the availability of small disadvantaged businesses would lead to estimates that were biased in favor of businesses that could be easily contacted by telephone. However, work specialization as a potential source of non-response bias in the BBC availability analysis is minimized, because the availability analysis examines businesses within particular work fields before calculating



overall availability estimates. Thus, the potential for businesses in highly mobile fields to be less likely to complete a survey is less important, because the study team calculated availability estimates within those fields before combining them in a dollar-weighted fashion with availability estimates from other fields. Work specialization would be a greater source of non-response bias if particular subsets of businesses within a particular field were less likely than other subsets to be easily contacted by telephone.

**Response reliability.** Business owners and managers were asked questions that may be difficult to answer, including questions about their revenues. For that reason, the study team collected corresponding D&B information for their establishments and asked respondents to confirm that information or provide more accurate estimates. Further, respondents were not typically asked to give absolute figures for difficult questions such as revenue and capacity. Rather, they were given ranges of dollar figures.

BBC explored the reliability of survey responses in a number of ways.

**Certification lists.** BBC reviewed data from the availability surveys in light of information from other sources such as vendor information that the study team collected from SANDAG and NCTD. For example, certification databases include data on the race/ethnicity and gender of the owners of certified businesses. The study team compared survey responses concerning business ownership with such information.

**Contract data.** BBC examined SANDAG and NCTD contract data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability surveys for the purposes of assessing capacity. BBC compared survey responses about the largest contracts that businesses won during the past five years with actual SANDAG and NCTD contract data.

**SANDAG and NCTD review.** SANDAG and NCTD reviewed contract and vendor data that the study team collected and compiled as part of the study analyses and provided feedback regarding its accuracy.

# FINAL Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Customer Research International. We are calling on behalf of the San Diego Association of Governments, also known as SANDAG, and the North County Transit District, also known as NCTD. This is not a sales call. SANDAG and NCTD are conducting a survey to develop a list of companies interested in providing construction-related services to SANDAG and/or NCTD. The survey should take between 10 and 15 minutes to complete. Who can I speak with to get the information that we need from your firm?

*[AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS]*

*[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO EXISTING DATA ON COMPANIES INTERESTED IN WORKING WITH THE SANDAG AND NCTD]*

**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
- 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 [new firm name]?**

*[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 for-profit business, as opposed to a non-profit organization, a foundation, or a government office. Is that correct?**

1=Yes, a business

2=No, other – TERMINATE

**A3a. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates that your main line of business is [*SIC Code description*]. Is that correct?**

*[NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES INFORMATION ON BUSINESSES THROUGHOUT THE COUNTRY]*

1=Yes – **SKIP TO A4**

2=No

98=(DON'T KNOW)

99=(REFUSED)

**A3b. What would you say is the main line of business at [*firm name/new firm name*]?**

*[NOTE TO INTERVIEWER – IF RESPONDENT INDICATES THAT FIRM'S MAIN LINE OF BUSINESS IS "GENERAL CONSTRUCTION" OR GENERAL CONTRACTOR," PROBE TO FIND OUT IF MAIN LINE OF BUSINESS IS CLOSER TO BUILDING CONSTRUCTION OR HIGHWAY AND ROAD CONSTRUCTION.]*

1=VERBATIM

**A4. What other types of work, if any, does your business perform?**

[ENTER VERBATIM RESPONSE]

**1=VERBATIM**

**A5. Is this the sole location for your business, or do you have offices in other locations?**

1=Sole location

2=Have other locations

98=(DON'T KNOW)

99=(REFUSED)

**A6. Is your company a subsidiary or affiliate of another firm?**

1=Independent – **SKIP TO B1**

2=Subsidiary or affiliate of another firm

98=(DON'T KNOW) – **SKIP TO B1**

99=(REFUSED) – **SKIP TO B1**

**A7. What is the name of your parent company?**

1=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 received an award for any part of a contract as either a prime contractor or subcontractor?**

*[NOTE TO INTERVIEWER – THIS INCLUDES PUBLIC OR PRIVATE SECTOR WORK OR BIDS]*

1=Yes

2=No – **SKIP TO B3**

98=(DON'T KNOW) – **SKIP TO B3**

99=(REFUSED) – **SKIP TO B3**

**B2. Were those bids or awards to work as a prime contractor, a subcontractor, a trucker/hauler, a supplier, or any other roles?**

*[MULTIPUNCH]*

1=Prime contractor

2=Subcontractor

3=Trucker/hauler

4=Supplier (or manufacturer)

5= Other - SPECIFY \_\_\_\_\_

98=(DON'T KNOW)

99=(REFUSED)

**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 SANDAG and/or NCTD as a prime contractor?**

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

**B4. Is your company *interested* in working with SANDAG and/or NCTD as a subcontractor, trucker/hauler, or supplier?**

- 1=Yes
- 2=No
- 98=(DON'T KNOW)
- 99=(REFUSED)

**C1. Now I'm interested in the geographic area in which your company serves customers. Is your company able to do work or serve customers in San Diego?**

- 1=Yes
- 2=No
- 98=(DON'T KNOW)
- 99=(REFUSED)

**D1. About what year was your firm established?**

- 1=NUMERIC (1600-2019)
- 9998 = (DON'T KNOW)
- 9999 = (REFUSED)

**D2. What was the largest prime contract that your company bid on or was awarded during the past five years in either the public sector or private sector? This includes contracts not yet complete.**

*[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]*

- |  |  |
|--|--|
| 1=\$100,000 or less                      | 9=More than \$20 million to \$50 million     |
| 2=More than \$100,000 to \$250,000       | 10=More than \$50 million to \$100 million   |
| 3=More than \$250,000 to \$500,000       | 11= More than \$100 million to \$200 million |
| 4=More than \$500,000 to \$1 million     | 12=\$200 million or greater                  |
| 5=More than \$1 million to \$2 million   | 97=(NONE)                                    |
| 6=More than \$2 million to \$5 million   | 98=(DON'T KNOW)                              |
| 7=More than \$5 million to \$10 million  | 99=(REFUSED)/(NO PRIME BIDS)                 |
| 8=More than \$10 million to \$20 million |  |

**D3. What was the largest subcontract or supply contract that your company bid on or was awarded during the past five years in either the public sector or private sector? This includes contracts not yet complete.**

*[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]*

- |  |  |
|--|--|
| 1=\$100,000 or less                      | 9=More than \$20 million to \$50 million     |
| 2=More than \$100,000 to \$250,000       | 10=More than \$50 million to \$100 million   |
| 3=More than \$250,000 to \$500,000       | 11= More than \$100 million to \$200 million |
| 4=More than \$500,000 to \$1 million     | 12=\$200 million or greater                  |
| 5=More than \$1 million to \$2 million   | 97=(NONE)                                    |
| 6=More than \$2 million to \$5 million   | 98=(DON'T KNOW)                              |
| 7=More than \$5 million to \$10 million  | 99=(REFUSED)/(NO SUB BIDS)                   |
| 8=More than \$10 million to \$20 million |  |

**E1. My next questions are about the ownership of the business. A business is defined as woman-owned if more than half—that is, 51 percent or more—of the ownership and control is by women. By this definition, is [*firm name / new firm name*] a woman-owned business?**

- 1=Yes
- 2=No
- 98=(DON'T KNOW)
- 99=(REFUSED)

**E2. A business is defined as minority-owned if more than half—that is, 51 percent or more—of the ownership and control is by Black American, Asian American, Hispanic American, or Native American. By this definition, is [*firm name || new firm name*] a minority-owned business?**

- 1=Yes
- 2=No – **SKIP TO 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 Black American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, or Native American?**

1=Black American

2=Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia(Kampuchea),Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

4=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)

6=(OTHER - SPECIFY) \_\_\_\_\_

98=(DON'T KNOW)

99=(REFUSED)

**F1. Just considering your location, Dun & Bradstreet lists the average annual gross revenue of your company to be [dollar amount]. Is that an accurate estimate for your company's average annual gross revenue 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. What was the average annual gross revenue of your company over the last three years, just considering your location? Would you say . . .**

**[READ LIST]**

1=Less than \$750,000

2=\$750,000 - \$5.5 Million

3=\$5.6 Million - \$7.4 Million

4=\$7.5 Million - \$11 Million

5=\$11.1 Million - \$15 Million

6=\$15.1 Million - \$18 Million

7=\$18.1 Million - \$20.5 Million

8=\$20.6 Million - \$24 Million

9=\$24.1 Million or more

98= (DON'T KNOW)

99= (REFUSED)

**F3. [ONLY IF A5 = 2] Roughly, what was the average annual gross revenue of your company, for all of your locations over the last three years? Would you say . . .**



**[READ LIST]**

1=Less than \$750,000

2=\$750,000 - \$5.5 Million

3=\$5.6 Million - \$7.4 Million

4=\$7.5 Million - \$11 Million

5=\$11.1 Million - \$15 Million

6=\$15.1 Million - \$18 Million

7=\$18.1 Million - \$20.5 Million

8=\$20.6 Million - \$24 Million

9=\$24.1 Million or more

98= (DON'T KNOW)

99= (REFUSED)

**G1. We're interested in whether your company has experienced barriers or difficulties in San Diego associated with starting or expanding a business in your industry or with obtaining work. Do you have any thoughts to share on these topics?**

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)

97=(NOTHING/NONE/NO COMMENTS)

98=(DON'T KNOW)

99=(REFUSED)

**G2. 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

9=(OTHER - SPECIFY) \_\_\_\_\_

99=(REFUSED)

**Thank you very much for your participation. If you have any questions or concerns, please contact Elaine Richardson at SANDAG telephone (619) 699-6956.**

# **APPENDIX F.**

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## **Disparity Tables**

Table	Characteristics							
	Time period	Type	Role	Prime contract size	Funding source	Race-conscious goals	Midcoast contract status	Analysis of potential DBEs
F-2	01/01/13 - 12/31/2017	Includes all	Includes both	N/A	Includes all	Includes both	Includes all	No
F-3	<b>01/01/13 - 05/31/2015</b>	Includes all	Includes both	N/A	Includes all	Includes both	Includes all	No
F-4	<b>06/01/15 - 12/31/2017</b>	Includes all	Includes both	N/A	Includes all	Includes both	Includes all	No
F-5	01/01/13 - 12/31/2017	<b>Construction</b>	Includes both	N/A	Includes all	Includes both	Includes all	No
F-6	01/01/13 - 12/31/2017	<b>Professional services</b>	Includes both	N/A	Includes all	Includes both	Includes all	No
F-7	01/01/13 - 12/31/2017	<b>Goods and other services</b>	Includes both	N/A	Includes all	Includes both	Includes all	No
F-8	01/01/13 - 12/31/2017	Includes all	<b>Prime contracts</b>	N/A	Includes all	Includes both	Includes all	No
F-9	01/01/13 - 12/31/2017	Includes all	<b>Subcontracts</b>	N/A	Includes all	Includes both	Includes all	No
F-10	01/01/13 - 12/31/2017	Includes all	<b>Prime contracts</b>	<b>Large</b>	Includes all	Includes both	Includes all	No
F-11	01/01/13 - 12/31/2017	Includes all	<b>Prime contracts</b>	<b>Small</b>	Includes all	Includes both	Includes all	No
F-12	01/01/13 - 12/31/2017	Includes all	Includes both	N/A	<b>Federal</b>	Includes both	Includes all	No
F-13	01/01/13 - 12/31/2017	Includes all	Includes both	N/A	<b>Local</b>	N/A	Includes all	No
F-14	01/01/13 - 12/31/2017	Includes all	Includes both	N/A	Includes all	<b>Goals</b>	Includes all	No
F-15	01/01/13 - 12/31/2017	Includes all	Includes both	N/A	Includes all	<b>No-goals</b>	Includes all	No
F-16	01/01/13 - 12/31/2017	Includes all	Includes both	N/A	Includes all	Includes both	Only Midcoast	No
F-17	01/01/13 - 12/31/2017	Includes all	Includes both	N/A	Includes all	Includes both	No Midcoast	No
F-18	01/01/13 - 12/31/2017	Includes all	Includes both	N/A	Includes all	<b>No-goals</b>	No Midcoast	No
F-19	01/01/13 - 12/31/2017	Includes all	Includes both	N/A	<b>Federal</b>	Includes both	Includes all	<b>Yes</b>
F-20	01/01/13 - 12/31/2017	<b>Construction</b>	Includes both	N/A	<b>Federal</b>	Includes both	Includes all	<b>Yes</b>
F-21	01/01/13 - 12/31/2017	<b>Professional services</b>	Includes both	N/A	<b>Federal</b>	Includes both	Includes all	<b>Yes</b>
F-22	01/01/13 - 12/31/2017	<b>Goods and other services</b>	Includes both	N/A	<b>Federal</b>	Includes both	Includes all	<b>Yes</b>

**Figure F-2.**  
**Time period: 01/01/2013 - 12/31/2017**  
**Contract area: All industries**  
**Contract role: Prime contracts and subcontracts**  
**Funding source: Federal and Local**  
**Agency: SANDAG**

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	2,269	\$3,092,750	\$3,092,750				
(2) Minority and woman-owned businesses	804	\$489,566	\$489,566	15.8	12.2	3.6	129.4
(3) Non-Hispanic white woman-owned	307	\$107,868	\$107,868	3.5	3.3	0.2	105.8
(4) Minority-owned	497	\$381,698	\$381,698	12.3	8.9	3.4	138.1
(5) Asian Pacific American-owned	98	\$234,648	\$234,648	7.6	0.6	7.0	200+
(6) Black American-owned	53	\$15,663	\$15,663	0.5	0.1	0.4	200+
(7) Hispanic American-owned	264	\$90,147	\$90,147	2.9	7.6	-4.7	38.4
(8) Native American-owned	28	\$25,533	\$25,533	0.8	0.4	0.4	183.9
(9) Subcontinent Asian American-owned	54	\$15,707	\$15,707	0.5	0.2	0.3	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	645	\$202,970	\$202,970	6.6			
(12) Non-Hispanic white woman-owned DBE	235	\$65,281	\$65,281	2.1			
(13) Minority-owned DBE	410	\$137,689	\$137,689	4.5			
(14) Asian Pacific American-owned DBE	66	\$40,320	\$40,320	1.3			
(15) Black American-owned DBE	51	\$15,129	\$15,129	0.5			
(16) Hispanic American-owned DBE	220	\$44,542	\$44,542	1.4			
(17) Native American-owned DBE	28	\$25,533	\$25,533	0.8			
(18) Subcontinent Asian American-owned DBE	45	\$12,164	\$12,164	0.4			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.  
\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-3.  
Time period: 01/01/2013 - 05/31/2015  
Contract area: All industries  
Contract role: Prime contracts and subcontracts  
Funding source: Federal and Local  
Agency: SANDAG

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,004	\$585,046	\$585,046				
(2) Minority and woman-owned businesses	304	\$57,719	\$57,719	9.9	14.9	-5.0	66.3
(3) Non-Hispanic white woman-owned	129	\$19,927	\$19,927	3.4	4.1	-0.7	83.4
(4) Minority-owned	175	\$37,792	\$37,792	6.5	10.8	-4.3	59.9
(5) Asian Pacific American-owned	27	\$5,835	\$5,835	1.0	1.5	-0.5	66.2
(6) Black American-owned	17	\$3,519	\$3,519	0.6	0.2	0.4	200+
(7) Hispanic American-owned	112	\$23,224	\$23,224	4.0	7.8	-3.8	51.1
(8) Native American-owned	1	\$79	\$79	0.0	1.0	-1.0	1.4
(9) Subcontinent Asian American-owned	18	\$5,134	\$5,134	0.9	0.4	0.5	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	244	\$30,786	\$30,786	5.3			
(12) Non-Hispanic white woman-owned DBE	98	\$12,045	\$12,045	2.1			
(13) Minority-owned DBE	146	\$18,741	\$18,741	3.2			
(14) Asian Pacific American-owned DBE	23	\$2,510	\$2,510	0.4			
(15) Black American-owned DBE	16	\$3,161	\$3,161	0.5			
(16) Hispanic American-owned DBE	91	\$10,840	\$10,840	1.9			
(17) Native American-owned DBE	1	\$79	\$79	0.0			
(18) Subcontinent Asian American-owned DBE	15	\$2,150	\$2,150	0.4			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-4.  
Time period: 06/01/2015 - 12/31/2017  
Contract area: All industries  
Contract role: Prime contracts and subcontracts  
Funding source: Federal and Local  
Agency: SANDAG

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,265	\$2,507,705	\$2,507,705				
(2) Minority and woman-owned businesses	500	\$431,847	\$431,847	17.2	11.6	5.6	148.2
(3) Non-Hispanic white woman-owned	178	\$87,941	\$87,941	3.5	3.1	0.4	112.7
(4) Minority-owned	322	\$343,906	\$343,906	13.7	8.5	5.2	161.2
(5) Asian Pacific American-owned	71	\$228,813	\$228,813	9.1	0.4	8.8	200+
(6) Black American-owned	36	\$12,144	\$12,144	0.5	0.1	0.4	200+
(7) Hispanic American-owned	152	\$66,923	\$66,923	2.7	7.6	-4.9	35.3
(8) Native American-owned	27	\$25,454	\$25,454	1.0	0.3	0.7	200+
(9) Subcontinent Asian American-owned	36	\$10,573	\$10,573	0.4	0.2	0.3	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	401	\$172,184	\$172,184	6.9			
(12) Non-Hispanic white woman-owned DBE	137	\$53,236	\$53,236	2.1			
(13) Minority-owned DBE	264	\$118,948	\$118,948	4.7			
(14) Asian Pacific American-owned DBE	43	\$37,811	\$37,811	1.5			
(15) Black American-owned DBE	35	\$11,968	\$11,968	0.5			
(16) Hispanic American-owned DBE	129	\$33,702	\$33,702	1.3			
(17) Native American-owned DBE	27	\$25,454	\$25,454	1.0			
(18) Subcontinent Asian American-owned DBE	30	\$10,014	\$10,014	0.4			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-5.  
Time period: 01/01/2013 - 12/31/2017  
Contract area: Construction  
Contract role: Prime contracts and subcontracts  
Funding source: Federal and Local  
Agency: SANDAG

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	847	\$1,544,097	\$1,544,097				
(2) Minority and woman-owned businesses	391	\$232,019	\$232,019	15.0	13.8	1.3	109.1
(3) Non-Hispanic white woman-owned	156	\$80,200	\$80,200	5.2	3.8	1.4	135.7
(4) Minority-owned	235	\$151,819	\$151,819	9.8	9.9	-0.1	98.9
(5) Asian Pacific American-owned	29	\$49,228	\$49,228	3.2	0.0	3.2	200+
(6) Black American-owned	29	\$9,259	\$9,259	0.6	0.2	0.4	200+
(7) Hispanic American-owned	149	\$65,261	\$65,261	4.2	9.0	-4.7	47.1
(8) Native American-owned	23	\$25,162	\$25,162	1.6	0.7	0.9	200+
(9) Subcontinent Asian American-owned	5	\$2,910	\$2,910	0.2	0.1	0.1	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	312	\$136,412	\$136,412	8.8			
(12) Non-Hispanic white woman-owned DBE	126	\$47,249	\$47,249	3.1			
(13) Minority-owned DBE	186	\$89,163	\$89,163	5.8			
(14) Asian Pacific American-owned DBE	25	\$35,188	\$35,188	2.3			
(15) Black American-owned DBE	28	\$9,083	\$9,083	0.6			
(16) Hispanic American-owned DBE	106	\$19,686	\$19,686	1.3			
(17) Native American-owned DBE	23	\$25,162	\$25,162	1.6			
(18) Subcontinent Asian American-owned DBE	4	\$44	\$44	0.0			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.



Figure F-6.  
Time period: 01/01/2013 - 12/31/2017  
Contract area: Professional services  
Contract role: Prime contracts and subcontracts  
Funding source: Federal and Local  
Agency: SANDAG

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,345	\$1,534,221	\$1,534,221				
(2) Minority and woman-owned businesses	400	\$255,685	\$255,685	16.7	10.6	6.1	157.1
(3) Non-Hispanic white woman-owned	144	\$26,992	\$26,992	1.8	2.7	-1.0	64.1
(4) Minority-owned	256	\$228,693	\$228,693	14.9	7.9	7.0	189.5
(5) Asian Pacific American-owned	67	\$184,991	\$184,991	12.1	1.1	10.9	200+
(6) Black American-owned	22	\$5,939	\$5,939	0.4	0.0	0.3	200+
(7) Hispanic American-owned	113	\$24,595	\$24,595	1.6	6.2	-4.6	26.0
(8) Native American-owned	5	\$371	\$371	0.0	0.2	-0.2	12.8
(9) Subcontinent Asian American-owned	49	\$12,797	\$12,797	0.8	0.3	0.5	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	320	\$64,695	\$64,695	4.2			
(12) Non-Hispanic white woman-owned DBE	102	\$17,355	\$17,355	1.1			
(13) Minority-owned DBE	218	\$47,340	\$47,340	3.1			
(14) Asian Pacific American-owned DBE	39	\$4,703	\$4,703	0.3			
(15) Black American-owned DBE	21	\$5,581	\$5,581	0.4			
(16) Hispanic American-owned DBE	112	\$24,565	\$24,565	1.6			
(17) Native American-owned DBE	5	\$371	\$371	0.0			
(18) Subcontinent Asian American-owned DBE	41	\$12,120	\$12,120	0.8			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-7.  
Time period: 01/01/2013 - 12/31/2017  
Contract area: Goods and other services  
Contract role: Prime contracts and subcontracts  
Funding source: Federal and Local  
Agency: SANDAG

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	77	\$14,432	\$14,432				
(2) Minority and woman-owned businesses	13	\$1,862	\$1,862	12.9	20.6	-7.7	62.7
(3) Non-Hispanic white woman-owned	7	\$676	\$676	4.7	4.9	-0.3	94.7
(4) Minority-owned	6	\$1,186	\$1,186	8.2	15.6	-7.4	52.6
(5) Asian Pacific American-owned	2	\$429	\$429	3.0	0.5	2.5	200+
(6) Black American-owned	2	\$466	\$466	3.2	1.2	2.0	200+
(7) Hispanic American-owned	2	\$291	\$291	2.0	13.9	-11.9	14.4
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	13	\$1,862	\$1,862	12.9			
(12) Non-Hispanic white woman-owned DBE	7	\$676	\$676	4.7			
(13) Minority-owned DBE	6	\$1,186	\$1,186	8.2			
(14) Asian Pacific American-owned DBE	2	\$429	\$429	3.0			
(15) Black American-owned DBE	2	\$466	\$466	3.2			
(16) Hispanic American-owned DBE	2	\$291	\$291	2.0			
(17) Native American-owned DBE	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-8.  
Time period: 01/01/2013 - 12/31/2017  
Contract area: All industries  
Contract role: Prime contracts  
Funding source: Federal and Local  
Agency: SANDAG

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	649	\$2,150,892	\$2,150,892				
(2) Minority and woman-owned businesses	72	\$211,002	\$211,002	9.8	5.5	4.3	178.9
(3) Non-Hispanic white woman-owned	37	\$15,749	\$15,749	0.7	1.2	-0.4	62.5
(4) Minority-owned	35	\$195,252	\$195,252	9.1	4.3	4.8	200+
(5) Asian Pacific American-owned	27	\$180,633	\$180,633	8.4	0.5	7.9	200+
(6) Black American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(7) Hispanic American-owned	5	\$10,720	\$10,720	0.5	3.5	-3.0	14.3
(8) Native American-owned	0	\$0	\$0	0.0	0.2	-0.2	0.0
(9) Subcontinent Asian American-owned	3	\$3,900	\$3,900	0.2	0.1	0.1	188.4
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	26	\$13,390	\$13,390	0.6			
(12) Non-Hispanic white woman-owned DBE	21	\$9,291	\$9,291	0.4			
(13) Minority-owned DBE	5	\$4,099	\$4,099	0.2			
(14) Asian Pacific American-owned DBE	2	\$199	\$199	0.0			
(15) Black American-owned DBE	0	\$0	\$0	0.0			
(16) Hispanic American-owned DBE	0	\$0	\$0	0.0			
(17) Native American-owned DBE	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned DBE	3	\$3,900	\$3,900	0.2			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-9.  
Time period: 01/01/2013 - 12/31/2017  
Contract area: All industries  
Contract role: Subcontracts  
Funding source: Federal and Local  
Agency: SANDAG

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,620	\$941,858	\$941,858				
(2) Minority and woman-owned businesses	732	\$278,564	\$278,564	29.6	27.7	1.9	107.0
(3) Non-Hispanic white woman-owned	270	\$92,119	\$92,119	9.8	8.1	1.6	120.1
(4) Minority-owned	462	\$186,445	\$186,445	19.8	19.5	0.3	101.5
(5) Asian Pacific American-owned	71	\$54,015	\$54,015	5.7	0.7	5.1	200+
(6) Black American-owned	53	\$15,663	\$15,663	1.7	0.3	1.4	200+
(7) Hispanic American-owned	259	\$79,427	\$79,427	8.4	17.0	-8.6	49.6
(8) Native American-owned	28	\$25,533	\$25,533	2.7	1.1	1.6	200+
(9) Subcontinent Asian American-owned	51	\$11,807	\$11,807	1.3	0.4	0.8	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	619	\$189,580	\$189,580	20.1			
(12) Non-Hispanic white woman-owned DBE	214	\$55,990	\$55,990	5.9			
(13) Minority-owned DBE	405	\$133,590	\$133,590	14.2			
(14) Asian Pacific American-owned DBE	64	\$40,121	\$40,121	4.3			
(15) Black American-owned DBE	51	\$15,129	\$15,129	1.6			
(16) Hispanic American-owned DBE	220	\$44,542	\$44,542	4.7			
(17) Native American-owned DBE	28	\$25,533	\$25,533	2.7			
(18) Subcontinent Asian American-owned DBE	42	\$8,264	\$8,264	0.9			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-10.  
Time period: 01/01/2013 - 12/31/2017  
Contract area: All industries  
Contract role: Prime contracts  
Funding source: Federal and Local  
Agency: SANDAG

Large contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	217	\$2,087,284	\$2,087,284				
(2) Minority and woman-owned businesses	31	\$205,327	\$205,327	9.8	4.6	5.3	200+
(3) Non-Hispanic white woman-owned	12	\$12,922	\$12,922	0.6	1.0	-0.4	62.3
(4) Minority-owned	19	\$192,406	\$192,406	9.2	3.6	5.6	200+
(5) Asian Pacific American-owned	15	\$179,059	\$179,059	8.6	0.2	8.4	200+
(6) Black American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(7) Hispanic American-owned	2	\$9,662	\$9,662	0.5	3.2	-2.7	14.7
(8) Native American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(9) Subcontinent Asian American-owned	2	\$3,684	\$3,684	0.2	0.1	0.1	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	11	\$11,541	\$11,541	0.6			
(12) Non-Hispanic white woman-owned DBE	9	\$7,857	\$7,857	0.4			
(13) Minority-owned DBE	2	\$3,684	\$3,684	0.2			
(14) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(15) Black American-owned DBE	0	\$0	\$0	0.0			
(16) Hispanic American-owned DBE	0	\$0	\$0	0.0			
(17) Native American-owned DBE	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned DBE	2	\$3,684	\$3,684	0.2			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

**Figure F-11.**  
**Time period: 01/01/2013 - 12/31/2017**  
**Contract area: All industries**  
**Contract role: Prime contracts**  
**Funding source: Federal and Local**  
**Agency: SANDAG**

Small contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	432	\$63,608	\$63,608				
(2) Minority and woman-owned businesses	41	\$5,675	\$5,675	8.9	35.4	-26.5	25.2
(3) Non-Hispanic white woman-owned	25	\$2,828	\$2,828	4.4	7.0	-2.6	63.3
(4) Minority-owned	16	\$2,847	\$2,847	4.5	28.4	-23.9	15.7
(5) Asian Pacific American-owned	12	\$1,574	\$1,574	2.5	11.1	-8.6	22.4
(6) Black American-owned	0	\$0	\$0	0.0	0.4	-0.4	0.0
(7) Hispanic American-owned	3	\$1,057	\$1,057	1.7	14.0	-12.4	11.8
(8) Native American-owned	0	\$0	\$0	0.0	2.1	-2.1	0.0
(9) Subcontinent Asian American-owned	1	\$216	\$216	0.3	0.8	-0.5	40.1
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	15	\$1,848	\$1,848	2.9			
(12) Non-Hispanic white woman-owned DBE	12	\$1,433	\$1,433	2.3			
(13) Minority-owned DBE	3	\$415	\$415	0.7			
(14) Asian Pacific American-owned DBE	2	\$199	\$199	0.3			
(15) Black American-owned DBE	0	\$0	\$0	0.0			
(16) Hispanic American-owned DBE	0	\$0	\$0	0.0			
(17) Native American-owned DBE	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned DBE	1	\$216	\$216	0.3			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

**Figure F-12.**  
**Time period: 01/01/2013 - 12/31/2017**  
**Contract area: All industries**  
**Contract role: Prime contracts and subcontracts**  
**Funding source: Federal**  
**Agency: SANDAG**

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,232	\$1,771,695	\$1,771,695				
(2) Minority and woman-owned businesses	537	\$262,310	\$262,310	14.8	16.4	-1.6	90.1
(3) Non-Hispanic white woman-owned	215	\$83,984	\$83,984	4.7	4.3	0.5	110.6
(4) Minority-owned	322	\$178,326	\$178,326	10.1	12.1	-2.1	82.9
(5) Asian Pacific American-owned	62	\$68,700	\$68,700	3.9	0.5	3.4	200+
(6) Black American-owned	44	\$15,104	\$15,104	0.9	0.1	0.7	200+
(7) Hispanic American-owned	152	\$57,723	\$57,723	3.3	10.9	-7.6	30.0
(8) Native American-owned	25	\$25,508	\$25,508	1.4	0.5	1.0	200+
(9) Subcontinent Asian American-owned	39	\$11,290	\$11,290	0.6	0.2	0.4	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	450	\$173,485	\$173,485	9.8			
(12) Non-Hispanic white woman-owned DBE	169	\$53,212	\$53,212	3.0			
(13) Minority-owned DBE	281	\$120,274	\$120,274	6.8			
(14) Asian Pacific American-owned DBE	47	\$35,389	\$35,389	2.0			
(15) Black American-owned DBE	43	\$14,746	\$14,746	0.8			
(16) Hispanic American-owned DBE	132	\$36,635	\$36,635	2.1			
(17) Native American-owned DBE	25	\$25,508	\$25,508	1.4			
(18) Subcontinent Asian American-owned DBE	34	\$7,995	\$7,995	0.5			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

**Figure F-13.**  
**Time period: 01/01/2013 - 12/31/2017**  
**Contract area: All industries**  
**Contract role: Prime contracts and subcontracts**  
**Funding source: Local**  
**Agency: SANDAG**

<b>Business Group</b>	<b>(a) Number of contract elements</b>	<b>(b) Total dollars (thousands)</b>	<b>(c) Estimated total dollars (thousands)*</b>	<b>(d) Utilization percentage</b>	<b>(e) Availability percentage</b>	<b>(f) Utilization - Availability</b>	<b>(g) Disparity index</b>
(1) All businesses	1,037	\$1,321,055	\$1,321,055				
(2) Minority and woman-owned businesses	267	\$227,256	\$227,256	17.2	6.6	10.6	200+
(3) Non-Hispanic white woman-owned	92	\$23,884	\$23,884	1.8	2.0	-0.2	92.0
(4) Minority-owned	175	\$203,372	\$203,372	15.4	4.6	10.8	200+
(5) Asian Pacific American-owned	36	\$165,948	\$165,948	12.6	0.7	11.8	200+
(6) Black American-owned	9	\$559	\$559	0.0	0.1	0.0	58.5
(7) Hispanic American-owned	112	\$32,423	\$32,423	2.5	3.2	-0.8	76.0
(8) Native American-owned	3	\$24	\$24	0.0	0.4	-0.4	0.4
(9) Subcontinent Asian American-owned	15	\$4,417	\$4,417	0.3	0.2	0.2	187.4
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	195	\$29,484	\$29,484	2.2			
(12) Non-Hispanic white woman-owned DBE	66	\$12,069	\$12,069	0.9			
(13) Minority-owned DBE	129	\$17,415	\$17,415	1.3			
(14) Asian Pacific American-owned DBE	19	\$4,932	\$4,932	0.4			
(15) Black American-owned DBE	8	\$383	\$383	0.0			
(16) Hispanic American-owned DBE	88	\$7,906	\$7,906	0.6			
(17) Native American-owned DBE	3	\$24	\$24	0.0			
(18) Subcontinent Asian American-owned DBE	11	\$4,169	\$4,169	0.3			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.



Figure F-14.

Time period: 01/01/2013 - 12/31/2017

Goals

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: Federal and Local

Agency: SANDAG

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,172	\$1,764,256	\$1,764,256				
(2) Minority and woman-owned businesses	525	\$261,629	\$261,629	14.8	16.3	-1.5	90.7
(3) Non-Hispanic white woman-owned	204	\$83,363	\$83,363	4.7	4.3	0.5	110.5
(4) Minority-owned	321	\$178,266	\$178,266	10.1	12.1	-2.0	83.7
(5) Asian Pacific American-owned	61	\$68,641	\$68,641	3.9	0.4	3.5	200+
(6) Black American-owned	44	\$15,104	\$15,104	0.9	0.1	0.7	200+
(7) Hispanic American-owned	152	\$57,723	\$57,723	3.3	10.9	-7.6	30.2
(8) Native American-owned	25	\$25,508	\$25,508	1.4	0.4	1.0	200+
(9) Subcontinent Asian American-owned	39	\$11,290	\$11,290	0.6	0.2	0.4	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	445	\$173,374	\$173,374	9.8			
(12) Non-Hispanic white woman-owned DBE	165	\$53,160	\$53,160	3.0			
(13) Minority-owned DBE	280	\$120,214	\$120,214	6.8			
(14) Asian Pacific American-owned DBE	46	\$35,329	\$35,329	2.0			
(15) Black American-owned DBE	43	\$14,746	\$14,746	0.8			
(16) Hispanic American-owned DBE	132	\$36,635	\$36,635	2.1			
(17) Native American-owned DBE	25	\$25,508	\$25,508	1.4			
(18) Subcontinent Asian American-owned DBE	34	\$7,995	\$7,995	0.5			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-15.

Time period: 01/01/2013 - 12/31/2017

No goals

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: Federal and Local

Agency: SANDAG

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,097	\$1,328,494	\$1,328,494				
(2) Minority and woman-owned businesses	279	\$227,936	\$227,936	17.2	6.8	10.4	200+
(3) Non-Hispanic white woman-owned	103	\$24,505	\$24,505	1.8	2.0	-0.2	92.5
(4) Minority-owned	176	\$203,431	\$203,431	15.3	4.8	10.5	200+
(5) Asian Pacific American-owned	37	\$166,007	\$166,007	12.5	0.8	11.7	200+
(6) Black American-owned	9	\$559	\$559	0.0	0.1	0.0	57.0
(7) Hispanic American-owned	112	\$32,423	\$32,423	2.4	3.3	-0.8	74.4
(8) Native American-owned	3	\$24	\$24	0.0	0.5	-0.5	0.4
(9) Subcontinent Asian American-owned	15	\$4,417	\$4,417	0.3	0.2	0.1	177.4
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	200	\$29,596	\$29,596	2.2			
(12) Non-Hispanic white woman-owned DBE	70	\$12,121	\$12,121	0.9			
(13) Minority-owned DBE	130	\$17,475	\$17,475	1.3			
(14) Asian Pacific American-owned DBE	20	\$4,991	\$4,991	0.4			
(15) Black American-owned DBE	8	\$383	\$383	0.0			
(16) Hispanic American-owned DBE	88	\$7,906	\$7,906	0.6			
(17) Native American-owned DBE	3	\$24	\$24	0.0			
(18) Subcontinent Asian American-owned DBE	11	\$4,169	\$4,169	0.3			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-16.  
Time period: 01/01/2013 - 12/31/2017  
Contract area: All industries  
Contract role: Prime contracts and subcontracts  
Funding source: Federal and Local  
Agency: SANDAG

Midcoast

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	340	\$1,433,331	\$1,433,331				
(2) Minority and woman-owned businesses	168	\$274,352	\$274,352	19.1	11.3	7.8	169.1
(3) Non-Hispanic white woman-owned	57	\$57,302	\$57,302	4.0	3.2	0.8	125.8
(4) Minority-owned	111	\$217,051	\$217,051	15.1	8.1	7.0	186.0
(5) Asian Pacific American-owned	24	\$147,941	\$147,941	10.3	0.2	10.1	200+
(6) Black American-owned	17	\$10,869	\$10,869	0.8	0.0	0.7	200+
(7) Hispanic American-owned	47	\$29,155	\$29,155	2.0	7.7	-5.6	26.6
(8) Native American-owned	10	\$22,913	\$22,913	1.6	0.1	1.5	200+
(9) Subcontinent Asian American-owned	13	\$6,172	\$6,172	0.4	0.1	0.3	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	137	\$114,432	\$114,432	8.0			
(12) Non-Hispanic white woman-owned DBE	44	\$31,047	\$31,047	2.2			
(13) Minority-owned DBE	93	\$83,385	\$83,385	5.8			
(14) Asian Pacific American-owned DBE	13	\$20,097	\$20,097	1.4			
(15) Black American-owned DBE	17	\$10,869	\$10,869	0.8			
(16) Hispanic American-owned DBE	43	\$23,720	\$23,720	1.7			
(17) Native American-owned DBE	10	\$22,913	\$22,913	1.6			
(18) Subcontinent Asian American-owned DBE	10	\$5,786	\$5,786	0.4			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-17.

Time period: 01/01/2013 - 12/31/2017

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: Federal and Local

Agency: SANDAG

Not Midcoast

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,929	\$1,659,419	\$1,659,419				
(2) Minority and woman-owned businesses	636	\$215,214	\$215,214	13.0	13.0	-0.1	99.6
(3) Non-Hispanic white woman-owned	250	\$50,566	\$50,566	3.0	3.4	-0.4	89.7
(4) Minority-owned	386	\$164,647	\$164,647	9.9	9.6	0.3	103.0
(5) Asian Pacific American-owned	74	\$86,707	\$86,707	5.2	0.9	4.3	200+
(6) Black American-owned	36	\$4,794	\$4,794	0.3	0.2	0.1	167.9
(7) Hispanic American-owned	217	\$60,991	\$60,991	3.7	7.6	-3.9	48.7
(8) Native American-owned	18	\$2,620	\$2,620	0.2	0.7	-0.6	22.2
(9) Subcontinent Asian American-owned	41	\$9,535	\$9,535	0.6	0.3	0.3	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	508	\$88,537	\$88,537	5.3			
(12) Non-Hispanic white woman-owned DBE	191	\$34,234	\$34,234	2.1			
(13) Minority-owned DBE	317	\$54,303	\$54,303	3.3			
(14) Asian Pacific American-owned DBE	53	\$20,224	\$20,224	1.2			
(15) Black American-owned DBE	34	\$4,260	\$4,260	0.3			
(16) Hispanic American-owned DBE	177	\$20,822	\$20,822	1.3			
(17) Native American-owned DBE	18	\$2,620	\$2,620	0.2			
(18) Subcontinent Asian American-owned DBE	35	\$6,378	\$6,378	0.4			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-18.

Time period: 01/01/2013 - 12/31/2017

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: Federal and Local

Agency: SANDAG

No goals

Not Midcoast

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,092	\$1,143,997	\$1,143,997				
(2) Minority and woman-owned businesses	277	\$131,389	\$131,389	11.5	7.8	3.6	146.4
(3) Non-Hispanic white woman-owned	102	\$24,497	\$24,497	2.1	2.3	-0.2	92.6
(4) Minority-owned	175	\$106,893	\$106,893	9.3	5.5	3.8	168.9
(5) Asian Pacific American-owned	36	\$69,469	\$69,469	6.1	0.9	5.2	200+
(6) Black American-owned	9	\$559	\$559	0.0	0.1	0.0	57.0
(7) Hispanic American-owned	112	\$32,423	\$32,423	2.8	3.8	-1.0	74.6
(8) Native American-owned	3	\$24	\$24	0.0	0.5	-0.5	0.4
(9) Subcontinent Asian American-owned	15	\$4,417	\$4,417	0.4	0.2	0.2	180.1
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	199	\$29,587	\$29,587	2.6			
(12) Non-Hispanic white woman-owned DBE	69	\$12,112	\$12,112	1.1			
(13) Minority-owned DBE	130	\$17,475	\$17,475	1.5			
(14) Asian Pacific American-owned DBE	20	\$4,991	\$4,991	0.4			
(15) Black American-owned DBE	8	\$383	\$383	0.0			
(16) Hispanic American-owned DBE	88	\$7,906	\$7,906	0.7			
(17) Native American-owned DBE	3	\$24	\$24	0.0			
(18) Subcontinent Asian American-owned DBE	11	\$4,169	\$4,169	0.4			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-19.

Time period: 01/01/2013 - 12/31/2017

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: Federal

Agency: SANDAG

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,232	\$1,771,695	\$1,771,695				
(2) Minority and woman-owned businesses	537	\$262,310	\$262,310	14.8	10.6	4.2	139.4
(3) Non-Hispanic white woman-owned	215	\$83,984	\$83,984	4.7	2.5	2.3	191.6
(4) Minority-owned	322	\$178,326	\$178,326	10.1	8.1	1.9	123.6
(5) Asian Pacific American-owned	62	\$68,700	\$68,700	3.9	0.5	3.4	200+
(6) Black American-owned	44	\$15,104	\$15,104	0.9	0.1	0.7	200+
(7) Hispanic American-owned	152	\$57,723	\$57,723	3.3	6.9	-3.6	47.5
(8) Native American-owned	25	\$25,508	\$25,508	1.4	0.5	1.0	200+
(9) Subcontinent Asian American-owned	39	\$11,290	\$11,290	0.6	0.2	0.4	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	450	\$173,485	\$173,485	9.8			
(12) Non-Hispanic white woman-owned DBE	169	\$53,212	\$53,212	3.0			
(13) Minority-owned DBE	281	\$120,274	\$120,274	6.8			
(14) Asian Pacific American-owned DBE	47	\$35,389	\$35,389	2.0			
(15) Black American-owned DBE	43	\$14,746	\$14,746	0.8			
(16) Hispanic American-owned DBE	132	\$36,635	\$36,635	2.1			
(17) Native American-owned DBE	25	\$25,508	\$25,508	1.4			
(18) Subcontinent Asian American-owned DBE	34	\$7,995	\$7,995	0.5			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-20.

Time period: 01/01/2013 - 12/31/2017

Contract area: Construction

Contract role: Prime contracts and subcontracts

Funding source: Federal

Agency: SANDAG

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	500	\$1,301,331	\$1,301,331				
(2) Minority and woman-owned businesses	265	\$184,800	\$184,800	14.2	5.8	8.4	200+
(3) Non-Hispanic white woman-owned	103	\$65,668	\$65,668	5.0	1.4	3.7	200+
(4) Minority-owned	162	\$119,131	\$119,131	9.2	4.5	4.7	200+
(5) Asian Pacific American-owned	25	\$44,358	\$44,358	3.4	0.0	3.4	200+
(6) Black American-owned	27	\$9,056	\$9,056	0.7	0.2	0.5	200+
(7) Hispanic American-owned	83	\$37,658	\$37,658	2.9	3.7	-0.8	78.5
(8) Native American-owned	22	\$25,149	\$25,149	1.9	0.5	1.4	200+
(9) Subcontinent Asian American-owned	5	\$2,910	\$2,910	0.2	0.1	0.2	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	226	\$120,813	\$120,813	9.3			
(12) Non-Hispanic white woman-owned DBE	87	\$39,014	\$39,014	3.0			
(13) Minority-owned DBE	139	\$81,799	\$81,799	6.3			
(14) Asian Pacific American-owned DBE	22	\$30,948	\$30,948	2.4			
(15) Black American-owned DBE	27	\$9,056	\$9,056	0.7			
(16) Hispanic American-owned DBE	64	\$16,601	\$16,601	1.3			
(17) Native American-owned DBE	22	\$25,149	\$25,149	1.9			
(18) Subcontinent Asian American-owned DBE	4	\$44	\$44	0.0			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-21.

Time period: 01/01/2013 - 12/31/2017

Contract area: Professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal

Agency: SANDAG

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	702	\$463,378	\$463,378				
(2) Minority and woman-owned businesses	261	\$75,670	\$75,670	16.3	23.8	-7.5	68.6
(3) Non-Hispanic white woman-owned	107	\$17,661	\$17,661	3.8	5.5	-1.7	68.8
(4) Minority-owned	154	\$58,009	\$58,009	12.5	18.3	-5.8	68.5
(5) Asian Pacific American-owned	35	\$23,914	\$23,914	5.2	1.8	3.4	200+
(6) Black American-owned	15	\$5,581	\$5,581	1.2	0.0	1.2	200+
(7) Hispanic American-owned	67	\$19,774	\$19,774	4.3	15.5	-11.3	27.4
(8) Native American-owned	3	\$359	\$359	0.1	0.3	-0.3	22.8
(9) Subcontinent Asian American-owned	34	\$8,380	\$8,380	1.8	0.6	1.2	200+
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	213	\$50,832	\$50,832	11.0			
(12) Non-Hispanic white woman-owned DBE	77	\$13,543	\$13,543	2.9			
(13) Minority-owned DBE	136	\$37,289	\$37,289	8.0			
(14) Asian Pacific American-owned DBE	23	\$4,012	\$4,012	0.9			
(15) Black American-owned DBE	14	\$5,223	\$5,223	1.1			
(16) Hispanic American-owned DBE	66	\$19,744	\$19,744	4.3			
(17) Native American-owned DBE	3	\$359	\$359	0.1			
(18) Subcontinent Asian American-owned DBE	30	\$7,951	\$7,951	1.7			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.



Figure F-22.

Time period: 01/01/2013 - 12/31/2017

Contract area: Goods and other services

Contract role: Prime contracts and subcontracts

Funding source: Federal

Agency: SANDAG

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	30	\$6,985	\$6,985				
(2) Minority and woman-owned businesses	11	\$1,840	\$1,840	26.3	28.0	-1.7	94.0
(3) Non-Hispanic white woman-owned	5	\$655	\$655	9.4	6.1	3.3	153.6
(4) Minority-owned	6	\$1,186	\$1,186	17.0	21.9	-5.0	77.4
(5) Asian Pacific American-owned	2	\$429	\$429	6.1	0.7	5.5	200+
(6) Black American-owned	2	\$466	\$466	6.7	0.8	5.8	200+
(7) Hispanic American-owned	2	\$291	\$291	4.2	20.4	-16.3	20.4
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	11	\$1,840	\$1,840	26.3			
(12) Non-Hispanic white woman-owned DBE	5	\$655	\$655	9.4			
(13) Minority-owned DBE	6	\$1,186	\$1,186	17.0			
(14) Asian Pacific American-owned DBE	2	\$429	\$429	6.1			
(15) Black American-owned DBE	2	\$466	\$466	6.7			
(16) Hispanic American-owned DBE	2	\$291	\$291	4.2			
(17) Native American-owned DBE	0	\$0	\$0	0.0			
(18) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

\*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the City awarded.

Source: BBC Research & Consulting Disparity Analysis.