



2020 Disparity Study

Boston Planning & Development Agency

FINAL REPORT

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2020 Boston Planning & Development Agency Disparity Study

Prepared for

Boston Planning & Development Agency

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CHAPTER ES.

Executive Summary

CHAPTER ES.

Executive Summary

The Boston Planning & Development Agency (BPDA) retained BBC Research & Consulting (BBC) to conduct a *disparity study* to assess whether any barriers exist that make it harder for minority- and woman-owned businesses to compete for BPDA contracts and procurements.^{1, 2} The BPDA uses *race- and gender-neutral* measures to encourage the participation of small businesses, including many minority- and woman-owned business, in its contracts and procurements. Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses, or all small businesses, in an organization’s contracting, regardless of the race/ethnicity or gender of business owners. In contrast, *race- and gender-conscious* measures are measures that are designed to specifically encourage the participation of minority- and woman-owned businesses in an organization’s contracting (e.g., using minority- or woman-owned business subcontracting goals on individual contracts). The BPDA does not currently use any race- or gender-conscious measures.

As part of the study, BBC examined whether there are any disparities between:

- The percentage of contract and procurement dollars that the BPDA awarded to minority- and woman-owned businesses between July 1, 2014 and June 30, 2019 (i.e., *utilization*); and
- The percentage of contract and procurement dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of BPDA prime contracts and subcontracts (i.e., *availability*).

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

- The legal framework related to the implementation of small business and minority- and woman-owned business programs;
- Local marketplace conditions for minority- and woman-owned businesses; and
- Contracting practices and business programs that the BPDA currently has in place.

The BPDA could use information from the study to help refine the policies and practices it uses to encourage the participation of minority- and woman-owned businesses in its contracts and procurements, including setting an overall aspirational goal for the participation of minority-

¹ The BPDA is the planning and economic development agency for the City of Boston (the City) but represents a separate legal entity. The BPDA comprises two agencies that maintain separate functions: the Boston Redevelopment Authority (BRA) and the Economic Development and Industrial Corporation (EDIC). For additional information about the BPDA’s legal structure, see Chapter 1.

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

and woman-owned businesses in BPDA contracting and procurement. BBC summarizes key information from the 2020 BPDA Disparity Study in five parts:

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

A. Analyses in the Disparity Study

Along with measuring disparities between the participation and availability of minority- and woman-owned businesses for BPDA contracts and procurements, BBC also examined other information related to the BPDA's policies and practices:

- The study team conducted an analysis of federal, state, and local regulations; case law; and other information to guide the methodology for the disparity study. The analysis included a review of legal requirements related to minority- and woman-owned business programs (see Chapter 2 and Appendix B).
- BBC conducted quantitative analyses of outcomes for minorities and women and the businesses that they own throughout the *relevant geographic market area (RGMA)*.³ In addition, the study team collected qualitative information about potential barriers that minorities and women and the businesses that they own face in the local marketplace through in-depth interviews, telephone surveys, public meetings, and written testimony (see Chapter 3, Appendix C, and Appendix D).
- BBC analyzed the percentage of relevant BPDA contracting dollars that minority- and woman-owned businesses are available to perform. That analysis was based on telephone surveys that the study team completed with nearly 800 businesses that work in industries related to the specific types of construction, construction design, other professional services, support services, and goods and supplies contracts that the BPDA awards (see Chapter 5 and Appendix E).
- BBC analyzed the dollars that minority- and woman-owned businesses were awarded on relevant construction, construction design, other professional services, support services, and goods and supplies contracts and procurements that the BPDA awarded during the study period (see Chapter 4 and 6).
- BBC examined whether there were any disparities between the participation and availability of minority- and woman-owned businesses on construction, construction design, other professional services, support services, and goods and supplies contracts that the BPDA awarded during the study period (see Chapter 7 and Appendix F).

³ BBC identified the relevant geographic market area for the disparity study as Norfolk, Suffolk, Plymouth, Middlesex, and Essex counties in Massachusetts.

- BBC reviewed the measures that the BPDA uses to encourage the participation of minority- and woman-owned businesses in its contracting and provided guidance related to additional program options and potential changes to current contracting practices for the BPDA’s consideration (see Chapter 8).

B. Availability Analysis Results

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

1. All contracts and procurements. Figure ES-1 presents dollar-weighted availability estimates by relevant business group for all BPDA contracts and procurements. Overall, the availability of minority- and woman-owned businesses for BPDA contracts and procurements is 17.4 percent, indicating that minority- and woman-owned businesses might be expected to receive 17.4 percent of the dollars that the BPDA awards in construction, construction design, other professional services, support services, and goods and supplies.

Figure ES-1.
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	9.9 %
Asian American-owned	1.2
Black American-owned	3.3
Hispanic American-owned	2.8
Native American-owned	0.1
Total minority-owned	7.5 %
Total minority- and woman-owned	17.4 %

2. 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 BPDA prime contracts and subcontracts. As shown in Figure ES-2, the availability of minority- and woman-owned businesses considered together is higher for BPDA subcontracts (21.0%) than for prime contracts (17.2%).

Figure ES-2.
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-10 and F-11 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	10.0 %	6.3 %
Asian American-owned	1.2	2.9
Black American-owned	3.3	5.6
Hispanic American-owned	2.7	6.1
Native American-owned	0.1	0.2
Total minority-owned	7.2 %	14.7 %
Total minority- and woman-owned	17.2 %	21.0 %

3. Industry. BBC examined availability analysis results separately for BPDA construction, construction design, other professional services, support services, and goods and supplies contracts and procurements. As shown in Figure ES-3, the availability of minority- and woman-owned businesses considered together is highest for construction contracts (19.6%) and lowest for support services contracts (8.4%).

Figure ES-3.
Availability estimates by industry

Business group	Industry				
	Construction	Construction design	Other professional services	Support services	Goods and supplies
Non-Hispanic white woman-owned	11.0 %	9.7 %	13.3 %	3.8 %	6.9 %
Asian American-owned	1.1	2.2	0.5	0.8	0.4
Black American-owned	2.8	7.1	1.1	1.5	2.5
Hispanic American-owned	4.4	0.3	0.1	2.3	1.1
Native American-owned	0.2	0.0	0.2	0.0	0.1
Total minority-owned	8.5 %	9.5 %	2.0 %	4.6 %	4.1 %
Total minority- and woman-owned	19.6 %	19.2 %	15.2 %	8.4 %	10.9 %

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

For more detail and results by group, see Figures F-5 – F-9 in Appendix F.

Source: BBC Research & Consulting availability analysis.

4. Legal entity. The BPDA comprises two agencies—the Boston Redevelopment Authority (BRA) and the Economic Development and Industrial Corporation (EDIC)—that both do business as the BPDA but represent distinct legal entities and maintain separate functions. Figure ES-4 presents availability analysis results for BRA and EDIC contracts and procurements. As shown in Figure ES-4, the availability of minority- and woman-owned businesses considered together is higher for BRA contracts (22.4%) than for EDIC contracts (10.9%).

Figure ES-4.
Availability estimates by legal entity

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

Source:
BBC Research & Consulting availability analysis.

Business group	Legal entity	
	BRA	EDIC
Non-Hispanic white woman-owned	11.8 %	7.4 %
Asian American-owned	1.6	0.8
Black American-owned	5.0	1.0
Hispanic American-owned	3.9	1.5
Native American-owned	0.1	0.2
Total minority-owned	10.6 %	3.5 %
Total minority- and woman-owned	22.4 %	10.9 %

C. Utilization Analysis Results

BBC measured the participation of minority- and woman-owned businesses in BPDA contracts and procurements in terms of *utilization*—the percentage of dollars that those businesses were awarded on relevant prime contracts and subcontracts during the study period. BBC measured the participation of minority- and woman-owned businesses in BPDA work regardless of whether they were certified as such by the City of Boston, the Commonwealth of Massachusetts, or any other organization.

1. All contracts and procurements. Figure ES-5 presents the percentage of total dollars that minority- and woman-owned businesses received on relevant construction, construction design, other professional services, support services, and goods and supplies contracts and procurements that the BPDA awarded during the study period. As shown in Figure ES-5, minority- and woman-owned businesses considered together received 23.4 percent of the contract and procurement dollars that the BPDA awarded during the study period.

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

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

Source:
BBC Research & Consulting utilization analysis.

Business group	Utilization %
Non-Hispanic white woman-owned	21.9 %
Asian American-owned	0.3
Black American-owned	0.7
Hispanic American-owned	0.5
Native American-owned	0.0
Total minority-owned	1.5 %
Total minority- and woman-owned	23.4 %

2. Contract role. Figure ES-6 presents utilization analysis results separately for prime contracts and subcontracts that the BPDA awarded during the study period. As shown in Figure ES-6, the participation of minority- and woman-owned businesses considered together was actually higher in prime contracts (23.8%) than in subcontracts (14.4%). That result is largely driven by a small number of relatively large prime contracts that the BPDA awarded to woman-owned businesses during the study period.

Figure ES-6.
Utilization analysis results by contract role

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	22.2 %	14.2 %
Asian American-owned	0.3	0.0
Black American-owned	0.7	0.2
Hispanic American-owned	0.5	0.0
Native American-owned	0.0	0.0
Total minority-owned	1.6 %	0.2 %
Total minority- and woman-owned	23.8 %	14.4 %

3. Industry. BBC also examined utilization analysis results separately for the BPDA’s construction, construction design, other professional services, support services, and goods and supplies contracts and procurements to determine whether the participation of minority- and woman-owned businesses in BPDA work differs by industry. As shown in Figure ES-7, the participation of minority- and woman-owned businesses considered together was highest for support services contracts (70.2%) and lowest for other professional services contracts (3.8%).

Figure ES-7.
Utilization analysis results by industry

Business group	Industry				
	Construction	Construction design	Other professional services	Support services	Goods and supplies
Non-Hispanic white woman-owned	21.2 %	0.0 %	1.0 %	69.4 %	8.7 %
Asian American-owned	0.0	0.0	2.8	0.0	0.0
Black American-owned	0.1	3.1	0.0	0.6	0.0
Hispanic American-owned	0.2	2.0	0.0	0.2	0.0
Native American-owned	0.0	0.0	0.0	0.0	0.0
Total minority-owned	0.3 %	5.1 %	2.8 %	0.8 %	0.0 %
Total minority- and woman-owned	21.5 %	5.1 %	3.8 %	70.2 %	8.7 %

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

For more detail and results by group, see Figures F-5 – F-9 in Appendix F.

Source: BBC Research & Consulting utilization analysis.

4. Legal entity. Figure ES-8 presents utilization analysis results separately for BRA and EDIC contracts and procurements that were awarded during the study period. As shown in Figure ES-8, the participation of minority- and woman-owned businesses considered together was higher for EDIC contracts (53.0%) than for BRA contracts (3.7%).

Figure ES-8.
Utilization analysis results by
legal entity

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

Source:
 BBC Research & Consulting utilization analysis.

Business group	Legal entity	
	BRA	EDIC
Non-Hispanic white woman-owned	2.8 %	50.6 %
Asian American-owned	0.4	0.3
Black American-owned	0.3	1.2
Hispanic American-owned	0.2	0.9
Native American-owned	0.0	0.0
Total minority-owned	0.9 %	2.4 %
Total minority- and woman-owned	3.7 %	53.0 %

D. Disparity Analysis Results

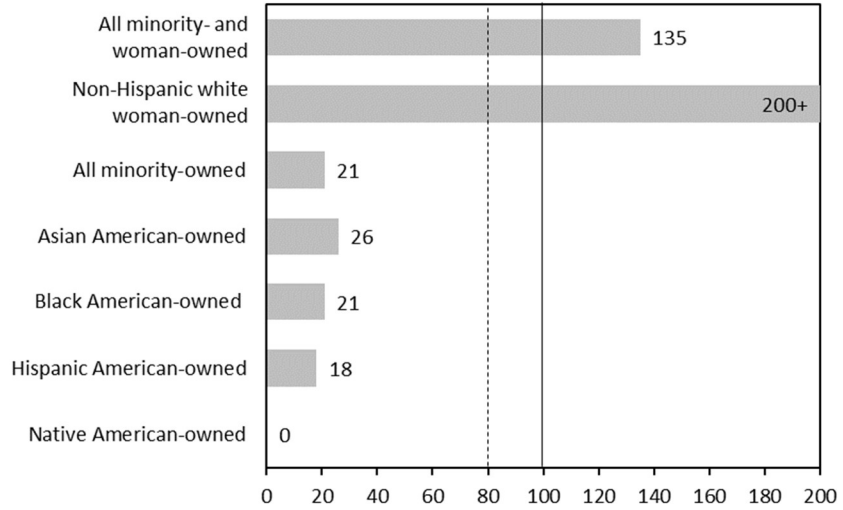
Although information about the participation of minority- and woman-owned businesses in BPDA contracts and procurements is useful on its own, it is even more useful when it is compared with the level of participation one might expect based on their availability for that work. As part of the disparity analysis, BBC compared the participation of minority- and woman-owned businesses in BPDA 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 utilization by percent availability and multiplying by 100. A disparity index of 100 indicates an exact match between participation and availability for a particular group for a particular contract set (referred to as *parity*). A disparity index of less than 100 indicates a disparity between participation and availability. A disparity index of less than 80 indicates a *substantial* disparity between participation and availability.

1. All contracts and procurements. Figure ES-9 presents disparity indices for all relevant prime contracts and subcontracts that the BPDA awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. A line is also drawn at a disparity index level of 80, which indicates a substantial disparity. As shown in Figure ES-9, minority- and woman-owned businesses considered together exhibited a disparity index of 135 for contracts and procurements that the BPDA awarded during the study period, indicating that minority- and woman-owned businesses received approximately \$1.35 for every dollar that they might be expected to receive based on their availability for the relevant prime contracts and subcontracts that the BPDA awarded during the study period. Although minority- and woman-owned businesses considered together did not exhibit a disparity for BPDA contracts and procurements, ES-9 shows that all individual minority groups showed substantial disparities for all contracts and procurements the agency awarded during the study period considered together.

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

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

Source:
 BBC Research & Consulting disparity analysis.

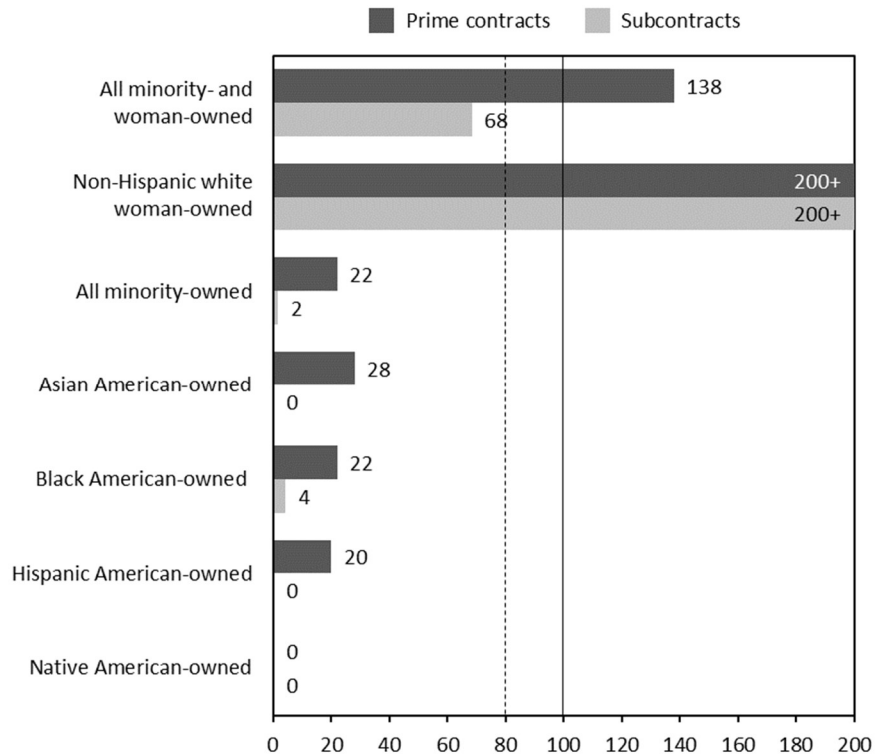


2. Contract role. BBC examined disparity analysis results separately for prime contracts and subcontracts. As shown in Figure ES-10, minority- and woman-owned businesses considered together did not show a disparity for prime contracts (disparity index of 138) but showed a substantial disparity for subcontracts (disparity index of 68). All individual minority groups showed substantial disparities for both prime contracts and subcontracts.

Figure ES-10.
Disparity analysis
results by contract role

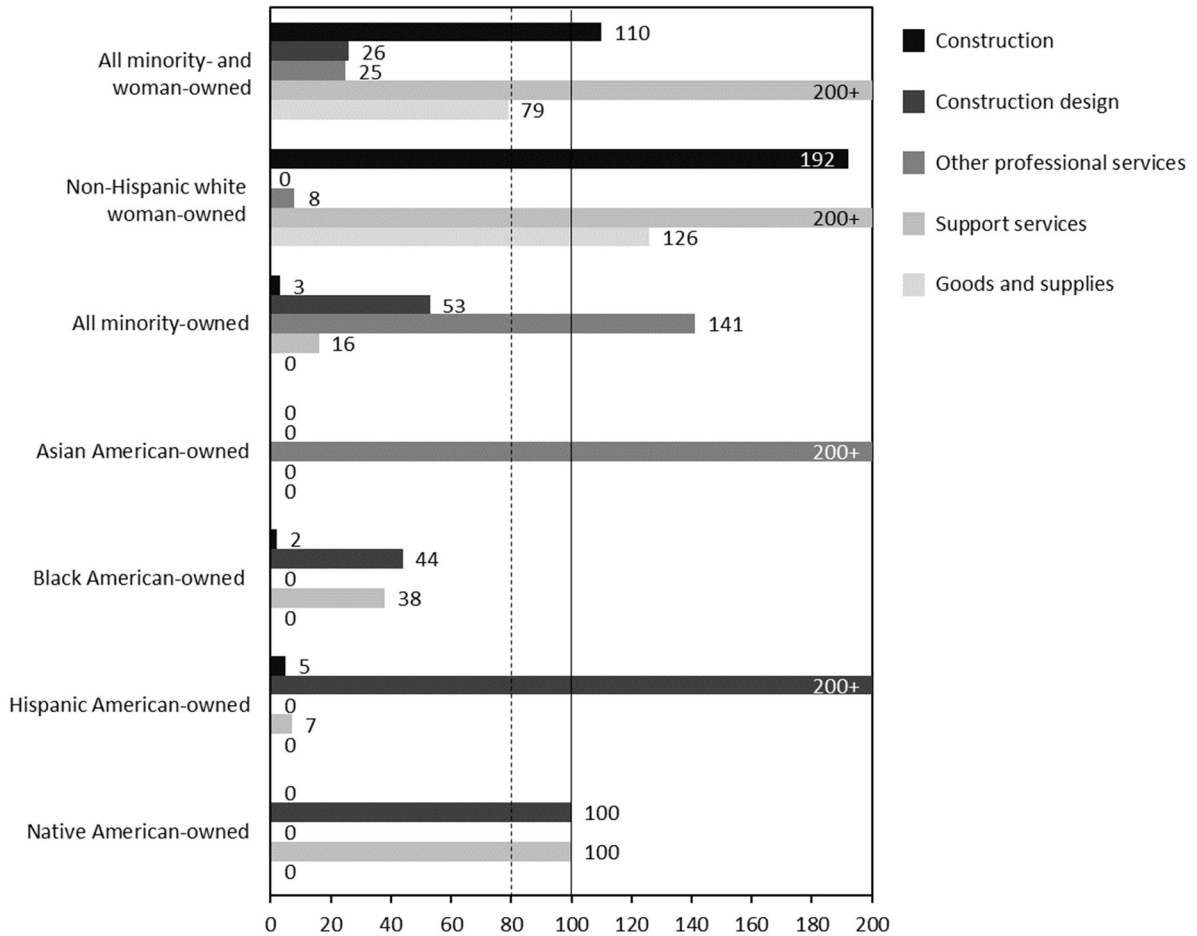
Note:
 Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
 For more detail and results by group, see Figure F-10 and F-11 in Appendix F.

Source:
 BBC Research & Consulting disparity analysis.



3. Industry. Figure ES-11 presents disparity analysis results separately for the BPDA’s construction, construction design, other professional services, support services, and goods and supplies contracts and procurements. As shown in Figure ES-11, minority- and woman-owned businesses considered together showed substantial disparities for construction design (disparity index of 26), other professional services (disparity index of 25), and goods and supplies (disparity index of 79) contracts. Outcomes for individual business groups varied by work type.

Figure ES-11.
Disparity analysis results by industry



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

For more detail and results by group, see F-5 – F-9 in Appendix F.

Source: BBC Research & Consulting disparity analysis.

4. Legal entity. BBC examined disparity analysis results separately BRA and EDIC contracts and procurements that were awarded during the study period. As shown in Figure ES-12, minority- and woman-owned businesses considered together showed a substantial disparity for BRA contracts (disparity index of 17) but not for EDIC contracts (disparity index of 200+).

Figure ES-12.
Disparity analysis
results by legal entity

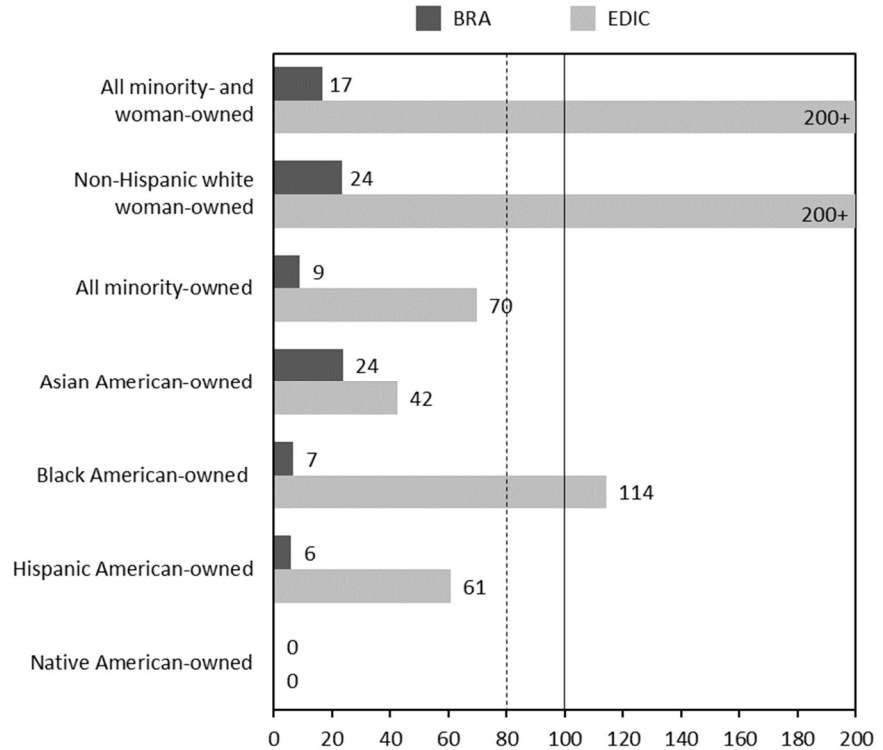
Note:

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-15 and F-16 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



E. Program Implementation

The BPDA should review study results and other relevant information in connection with making decisions concerning its policies and practices. Key considerations in making any refinements are discussed below. Additional considerations and details about program implementation are presented in Chapter 8. When making considerations, the BPDA should assess whether additional resources, changes in internal policy, or changes in local or state law may be required.

1. Overall aspirational goal. Results from the disparity study—particularly the availability analysis, analyses of marketplace conditions, and anecdotal evidence—can be helpful to the BPDA in establishing an overall aspirational goal for the participation of minority- and woman-owned businesses in its contracts and procurements. The availability analysis indicates that minority- and woman-owned businesses are potentially available to participate in 17.4 percent of the BPDA’s contracting and procurement dollars, which the agency could consider as its *base figure* for its overall aspirational goal. In addition, the disparity study provides information about factors that the BPDA should review in considering whether an adjustment to its base figure is warranted, particularly information about the volume of BPDA work in which minority- and woman-owned businesses have participated in the past; barriers in the Boston area related to employment, self-employment, education, training, and unions; barriers in Boston related to financing, bonding, and insurance; and other relevant information.

2. Contract-specific goals. Disparity analysis results indicate that relevant racial/ethnic and gender groups showed substantial disparities on key sets of contracts and procurements that the BPDA awarded during the study period. Because the BPDA uses race- and gender-neutral

measures to encourage the participation of minority- and woman-owned businesses in its contracting, and because those measures have not sufficiently addressed disparities for those businesses, it might consider using minority- and woman-owned business goals to award individual contracts in the future. To do so, the BPDA would set participation goals on individual contracts based on the availability of minority- and woman-owned businesses for the types of work involved with the project and other factors, and, as a condition of award, prime contractors would have to meet those goals by making subcontracting commitments with certified minority- and woman-owned businesses as part of their bids or by demonstrating sufficient good faith efforts to do so. The BPDA could consider setting participation goals on all relevant contracts and procurements or only on particular types of contracts (e.g., on construction contracts, which account for nearly one-half of BPDA spend). Because the use of such goals would be considered a race- and gender-conscious measure, the BPDA will need to ensure that the use of those measures meets the *strict scrutiny standard* of constitutional review.

3. Additional race- and gender-neutral measures. The disparity study highlighted several additional race- and gender-neutral measures that the BPDA could consider to further encourage the participation of minority- and woman-owned businesses in its contracts and procurements.

a. Small purchases. Small purchases are best suited for small businesses but are often difficult for those businesses to learn about. The BPDA has the authority to establish more detailed small purchase procurement policies than those prescribed in Chapter 30B and should consider doing so to further encourage small business participation in BPDA contracts and procurements.

b. Minimum solicitations of quotes. Chapter 30B requires that local government agencies solicit a minimum of three quotes for procurements worth at least \$10,000 and up to \$50,000. The BPDA could consider increasing the minimum number of quotes that BPDA staff must solicit for purchases of that size.

c. Advertising and outreach. Chapter 30B requires minimum levels of advertising for procurement opportunities, such as posting opportunities two weeks prior to bid opening dates. Beyond those requirements, the BPDA largely allows individual departments to determine what levels of outreach are appropriate for the goods and services they require. The BPDA could establish additional requirements for advertising and outreach for specific types of procurements.

d. Request for proposals (RFP) language. The BPDA should consider adding stronger language to RFP and contracting documents to more effectively articulate its commitment to promoting equity in its contracting.

e. Small business set asides. Disparity analysis results indicated substantial disparities for most relevant business groups on prime contracts that the BPDA awarded during the study period. To the extent permitted by state and local law, the BPDA might consider setting aside select small prime contracts for small business bidding to encourage the participation of minority- and woman-owned businesses as prime contractors.

f. Unbundling large contracts. The BPDA should consider making efforts to unbundle relatively large prime contracts, and even subcontracts, into several smaller contract pieces. Such efforts might increase contracting opportunities for all small businesses, including many minority- and woman-owned businesses.

g. Prompt payment. The BPDA should consider establishing prompt payment processes to ensure payment to the prime contractor within a specified maximum number of days after accepting an invoice. The BPDA should also consider including prompt payment requirements for subcontracting in all of its contracts.

h. Subcontracting minimums. Subcontracts often represent accessible opportunities for small businesses, including many minority- and woman-owned businesses, to become involved in an organization's contracting and procurement. However, subcontracting accounts for a relatively small percentage of the total contract and procurement dollars that the BPDA awards. The BPDA could consider implementing a program that requires prime contractors to subcontract a minimum amount of project work. If the BPDA were to implement such a program, it should include good faith efforts provisions that would require prime contractors to document their efforts to identify and include potential subcontractors in their bids or proposals.

i. Utilization of different businesses. The disparity study indicated that a substantial portion of BPDA contract and procurement dollars that was awarded to minority- and woman-owned businesses was largely concentrated with a relatively small number of businesses. The BPDA could consider encouraging departments to solicit vendors with which they have never worked, and use bid and contract language to encourage prime contractors to do the same with subcontractors.

j. Capacity building. Results from the disparity study indicated that there are many minority- and woman-owned businesses in the Boston area but that many of them have relatively low capacities for BPDA work. The BPDA should consider various technical assistance, business development, mentor-protégé, and joint venture programs to help businesses build the capacity required to compete for relatively large contracts and procurements.

k. Data collection. The BPDA should consider maintaining comprehensive information about all contracts and procurements it awards and all associated subcontracts, regardless of subcontractors' characteristics or whether they are certified minority- or woman-owned businesses for all relevant prime contracts. Collecting comprehensive prime contract and subcontract data will help ensure the BPDA monitors the participation of minority- and woman-owned businesses in its work as accurately as possible, identifies additional businesses that could become certified, and identifies future subcontracting opportunities for minority- and woman-owned businesses.

CHAPTER 1.

Introduction

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Introduction

The Boston Planning & Development Agency (BPDA) is the planning and economic development agency for the City of Boston (the City) but represents a separate legal entity that comprises two agencies: the Boston Redevelopment Authority (BRA) and the Economic Development and Industrial Corporation (EDIC). The BRA is a public body corporate and politic, organized and existing under Massachusetts General Laws Chapter 121B. The BRA's redevelopment stewardship includes the authority to buy and sell property, acquire property through eminent domain, and grant tax concessions to encourage commercial and residential development under Massachusetts General Laws Chapter 121A. The EDIC is a public body corporate and politic established under Chapter 1097 of the Acts of 1971, which leads local economic development activities at industrial and manufacturing properties in Boston—including the Raymond L. Flynn Marine Park and the Charlestown Navy Yard—in accordance with an economic development plan. The EDIC's work is designed to increase employment, eliminate decadent and blighted open areas, attract new industry, expand existing industry, and create jobs and business opportunity.

The BRA and EDIC were merged into a single citywide development agency by Mayor Menino in 1993. They began doing business as the BPDA on October 20, 2016 but continue to maintain their separate functions as established by the Massachusetts Legislature. The BPDA is charged with growing the City's tax base; cultivating the private jobs market; training the local workforce; and encouraging economic development, neighborhood and community planning, and sustainable development, among other tasks.

The BPDA retained BBC Research & Consulting (BBC) to conduct a disparity study to determine whether barriers exist for minority- and woman-owned businesses in competing for BPDA contracts and procurements and provide information to inform the BPDA's policies and program measures to further encourage minority- and woman-owned business participation in the agency's contracting. As part of the study, BBC examined whether there are any disparities between:

- The percentage of contract and procurement dollars that the BPDA awarded to minority- and woman-owned businesses between July 1, 2014 and June 30, 2019 (i.e., *utilization*); and
- The percentage of contract and procurement dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of BPDA prime contracts and subcontracts (i.e., *availability*).

BBC also assessed other quantitative and qualitative information related to:

- The legal framework related to the implementation of small business and minority- and woman-owned business programs;
- Local marketplace conditions for minority- and woman-owned businesses; and
- Contracting practices and business programs that the BPDA currently has in place.

There are several reasons why the disparity study will be useful to the BPDA:

- The disparity study provides information about how well minority- and woman-owned businesses fare in BPDA contracting relative to their availability for that work and whether certain groups are *substantially underutilized* on those contracts and procurements.
- The disparity study provides an evaluation of how effective the BPDA's current programs and policies are in improving outcomes for minority- and woman-owned businesses in the agency's contracts and procurements.
- The disparity study identifies barriers that minorities, women, and minority- and woman-owned businesses face in the local marketplace that might affect their ability to compete for BPDA contracts and procurements.
- The disparity study provides insights into how to refine contracting processes and program measures to better encourage the participation of minority- and woman-owned businesses in BPDA contracting and help address marketplace barriers.
- An independent review of the participation of minority- and woman-owned businesses in BPDA contracting is valuable to the agency and external groups that may be monitoring the BPDA's contracting practices.
- Government organizations that have successfully defended minority- and woman-owned business programs have typically relied on information from disparity studies.

BBC introduces the 2020 BPDA Disparity Study in three parts:

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

A. Background

The BPDA uses myriad *race- and gender-neutral* measures to encourage the participation of small businesses, including many minority- and woman-owned business, in its contracts and procurements. Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses, or all small businesses, in an organization's contracting, regardless of the race/ethnicity or gender of business owners. Examples of the race- and gender-neutral measures that the BPDA uses include:

- Focused marketing and outreach to City-certified businesses;
- Encouraging vendor participation in the City's technical assistance programs; and
- Internal data collection and reporting.

In contrast, *race- and gender-conscious* measures are measures that are designed to specifically encourage the participation of minority- and woman-owned businesses in an organization's contracting (e.g., using minority- or woman-owned business subcontracting goals on individual contracts). The BPDA does not currently use any race- or gender-conscious measures.

B. Study Scope

Information from the disparity study will help the BPDA continue to encourage the participation of small businesses and minority- and woman-owned businesses in its contracts and procurements and implement any future program measures effectively and in a legally defensible manner.

1. Relevant business groups. In general, BBC focused its analyses on whether barriers or discrimination based on race/ethnicity and gender affected the participation of businesses in BPDA contracts and procurements, regardless of whether those businesses were certified as minority- or woman-owned by the City, the Commonwealth of Massachusetts, or any other organization. Analyzing the participation and availability of businesses regardless of certification allowed BBC to assess whether such barriers affect business success independent of whether they decided to become certified. To interpret the core analyses presented in the disparity study, it is useful to understand how the study team defined the various groups of businesses that are the focus of the disparity study.

a. Minority- and woman-owned businesses. BBC analyzed business outcomes for minority- and woman-owned businesses, which were defined as businesses owned and controlled by Asian Americans, Black Americans, Hispanic Americans, Native Americans, or non-Hispanic white women. To avoid double-counting, BBC classified minority woman-owned businesses with their corresponding minority groups. (For example, Black American woman-owned businesses were classified with businesses owned by Black American men as Black American-owned businesses.) Thus, *woman-owned businesses* in this report refers specifically to non-Hispanic white woman-owned businesses.

b. Certified businesses. Certified businesses are minority- and woman businesses that are specifically certified as such through the City or the Commonwealth of Massachusetts. Businesses seeking City certification are required to submit an application to the City, either via mail or in person. The application is available online and requires businesses to submit various information, including business name, contact information, financial information, work specializations, and the race/ethnicity and gender of their owners. The City reviews each application for approval and may conduct site visits to confirm eligibility.

c. Majority-owned businesses. Majority-owned businesses are businesses that are owned by non-Hispanic white men.

2. Analyses in the disparity study. The primary focus of the disparity study was to examine whether there are any disparities between the participation and availability of minority- and woman-owned businesses for BPDA contracts and procurements. In addition, the disparity study includes:

- A review of legal issues related to the implementation of small business and minority- and woman-owned business programs;
- An analysis of local marketplace conditions for minorities, women, and minority- and woman-owned businesses;
- An assessment of the BPDA's contracting practices and business programs; and

- Other information for the BPDA to consider as it refines its programs and policies to further encourage the participation of minority- and woman-owned businesses in its contracts and procurements.

The study focused on construction, construction design, other professional services, support services, and goods and supplies contracts and procurements that the BPDA awarded between July 1, 2014 and June 30, 2019 (i.e., the *study period*). Information in the disparity study is organized as follows:

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

b. Marketplace conditions. BBC conducted quantitative analyses of the success of minorities, women, and minority- and woman-owned businesses in the local contracting and procurement industries. In addition, the study team collected qualitative information about potential barriers that minorities, women, and minority- and woman-owned businesses face in the Boston region through in-depth interviews, public meetings, focus groups, and surveys. Information about marketplace conditions is presented in **Chapter 3, Appendix C, and Appendix D**.

c. Data collection. BBC collected data on the prime contracts and subcontracts that the BPDA awarded during the study period as well as information on the businesses that participated in those contracts. The scope of BBC's data collection efforts is presented in **Chapter 4**.

d. Availability analysis. BBC assessed the degree to which minority- and woman-owned businesses are *ready, willing, and able* to perform work on BPDA prime contracts and subcontracts. That analysis was based on agency data and surveys that the study team conducted with hundreds of businesses located in the Boston region and that work in industries related to the types of contracts and procurements that the BPDA awards. Results from the availability analysis are presented in **Chapter 5 and Appendix E**.

e. Utilization analysis. BBC analyzed the degree to which minority- and woman-owned businesses participated in prime contracts and subcontracts that the BPDA awarded during the study period. Results from the utilization analysis are presented in **Chapter 6**.

f. Disparity analysis. BBC examined whether there were any disparities between the utilization and availability of minority- and woman-owned businesses on prime contracts and subcontracts that the BPDA awarded during the study period. The study team also assessed whether any observed disparities were statistically significant. Results from the disparity analysis are presented in **Chapter 7 and Appendix F**.

g. Program measures. BBC reviewed measures that the BPDA uses to encourage the participation of small businesses as well as minority- and woman-owned businesses in its contracting and provided guidance related to additional program options and changes to current contracting practices for the BPDA to consider. That information is presented in **Chapter 8**.

C. Study Team Members

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

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

2. Holland & Knight. Holland & Knight is a law firm with offices in Boston and throughout the country. The firm conducted the legal analysis that provided the basis for the study.

3. Nunnally and Associates. Nunnally and Associates is a Black American-owned diversity consulting firm based in Boston. The firm reviewed contracting policies and program measures as well as conducted in-depth interviews with businesses located in the Boston region as part of the study.

4. Kelly Chunn and Associates (KCA). KCA is a Black American woman-owned public relations and community engagement firm based in Boston. The firm conducted in-depth interviews with businesses located in the Boston region as part of the study.

5. Bevco Associates. Bevco is a Black American, woman-owned government and community relations firm based in Boston. The firm conducted in-depth interviews with businesses located in the Boston region as part of the study.

6. Customer Research International (CRI). CRI is a Subcontinent Asian American-owned survey firm based in San Marcos, Texas. The firm conducted telephone and online surveys with businesses as part of the availability analysis.

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

CHAPTER 2.

Legal Analysis

CHAPTER 2.

Legal Analysis

The Boston Planning & Development Agency (BPDA) uses various *race- and gender-neutral* efforts to help ensure that small businesses as well as minority- and woman-owned businesses have an equal opportunity to participate in its contracts and procurements. Race- and gender-neutral efforts are efforts designed to encourage the participation of small businesses in an organization's contracting regardless of the race/ethnicity or gender of businesses' owners. In contrast, *race- and gender-conscious* measures are designed to specifically encourage the participation of minority- and woman-owned businesses in an organization's contracting (e.g., participation goals for minority- and woman-owned business on individual contracts). Any use of race- and gender-conscious measures must meet the *strict scrutiny* standard of constitutional review, because it potentially impinges on the civil rights of businesses that are not minority- or woman-owned.¹ The strict scrutiny standard presents the highest threshold for evaluating the legality of race- and gender-conscious measures short of prohibiting them altogether. Under the strict scrutiny standard, a government organization must:

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

A government organization's use of race- and gender-conscious measures must meet both the compelling governmental interest and the narrow tailoring components of the strict scrutiny standard. A program that fails to meet either component is unconstitutional. Although the BPDA does not use any race- or gender-conscious measures, it is instructive to review legal standards surrounding their use, because the agency may determine that using such measures is appropriate in the future.

BBC Research & Consulting (BBC) summarizes the BPDA's use of the race- and gender-neutral measures as well as the legal standards to which the BPDA must adhere should it determine that using race- and gender-conscious measures is appropriate in the future. BBC presents that information in two parts:

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

A. Program Overview

The BPDA primarily uses focused marketing and outreach efforts to encourage the participation of minority- and woman-owned businesses in its contracts and procurements. The BPDA offers

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

outreach materials in multiple languages and works closely with the City of Boston (City) to advertise bid opportunities with vendors that have been certified with the City as minority-owned business enterprises (MBEs) and woman-owned business enterprises (WBEs). The BPDA also encouraging its vendors to participate in the City's technical assistance programs. Recently, the BPDA also implemented additional policies to further encourage minority- and woman-owned business participation in the agency's contracting, including policies to improve internal data collection and project planning to ensure BPDA bid opportunities are accessible to small businesses, including minority- and woman-owned businesses.

B. Legal Standards

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

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

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

- The 1989 decision in *City of Richmond v. J.A. Croson Company*, which established the strict scrutiny standard of review for race-conscious programs adopted by state and local governments;² and
- The 1995 decision in *Adarand Constructors, Inc. v. Peña*, which established the strict scrutiny standard of review for federal race-conscious programs.³

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

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

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

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

a. Compelling governmental interest. An organization that uses race- or gender-conscious measures as part of a business program has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. Organizations cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions. Rather, they must assess discrimination within their own relevant geographic market areas.⁴ It is not necessary for a government organization itself to have discriminated against minority- or woman-owned businesses for it to take remedial action. In *City of Richmond v. J.A. Croson Company*, the Supreme Court found, “if [the organization] could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry ... [i]t could take affirmative steps to dismantle such a system.”

b. Narrow tailoring. In addition to demonstrating a compelling governmental interest, a government agency must also demonstrate that its use of race- and gender-conscious measures is *narrowly tailored*. There are a number of factors that 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 suffer discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration, including the availability of waivers and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.⁵

c. Meeting the strict scrutiny standard. Many government organizations have used information from disparity studies as part of determining whether their contracting practices are affected by race- or gender-based discrimination and ensuring that their use of race- and gender-conscious measures is narrowly tailored. Specifically, organizations have assessed evidence of any disparities between the participation and availability of minority- and woman-owned businesses for their contracts and procurements. In *City of Richmond v. J.A. Croson Company*, the United States Supreme Court held that, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors,

⁴ See e.g., *Concrete Works, Inc. v. City and County of Denver* (“Concrete Works I”), 36 F.3d 1513, 1520 (10th Cir. 1994).

⁵ 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).

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.

CHAPTER 3.

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 produced substantial disparities for minorities and women, the effects of which are still apparent today. Those barriers limited opportunities for minorities in terms of both education and workplace experience.^{1, 2, 3, 4} Similarly, many women were restricted to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement.⁵ Minorities and women in Boston faced similar barriers. Black Americans were forced to live in racially-segregated neighborhoods and send their children to segregated schools. It was not until 1974 that the courts ordered the Boston School Committee to desegregate Boston schools after finding that “racial segregation permeates schools in all areas of the city, all grade levels, and all types of schools.”^{6, 7} Disparate treatment also extended into the labor market. Black Americans were concentrated in low wage work in domestic services and general labor with few opportunities for advancement.⁸

In the middle of the 20th century, many reforms opened up new opportunities for minorities and women nationwide. For example, *Brown v. Board of Education*, *The Equal Pay Act*, *The Civil Rights Act*, and *The Women’s Educational Equity Act* outlawed many forms of discrimination. Workplaces adopted personnel policies and implemented programs to diversify their staffs.⁹ Those reforms increased diversity in workplaces and reduced educational and employment disparities for minorities and women^{10, 11, 12, 13} 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.^{14, 15, 16, 17}

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

The study team conducted quantitative and qualitative analyses to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in the Boston construction, architecture and engineering, other professional services, goods, and other services industries. The study team also examined the potential effects that any such barriers have on the formation and success of businesses as well as their participation in and availability for contracts that the Boston Planning & Development Agency awards. The study team examined local marketplace conditions in four primary areas:

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

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

A. Human Capital

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

1. Education. Barriers associated with educational attainment may preclude entry or advancement in certain industries, because many occupations require at least a high school diploma, and some occupations—such as occupations in architecture and engineering or other 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.^{28, 29} Nationally, minorities lag behind non-Hispanic whites in terms of both educational attainment and the quality of education they receive.^{30, 31} Minorities are far more likely than non-Hispanic whites to attend schools that do not provide access to core classes in science and math.³² In addition, Black American students are more than three times more likely than non-Hispanic whites to be expelled or suspended from high school.³³ 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.³⁴

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

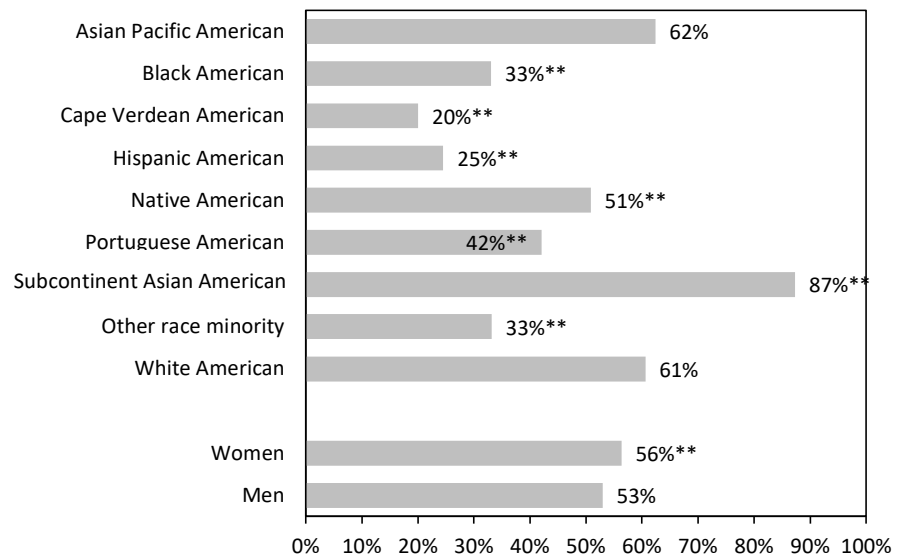
Figure 3-1.
Percentage of Boston workers 25 and older with at least a four-year college degree

Note:

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

Source:

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



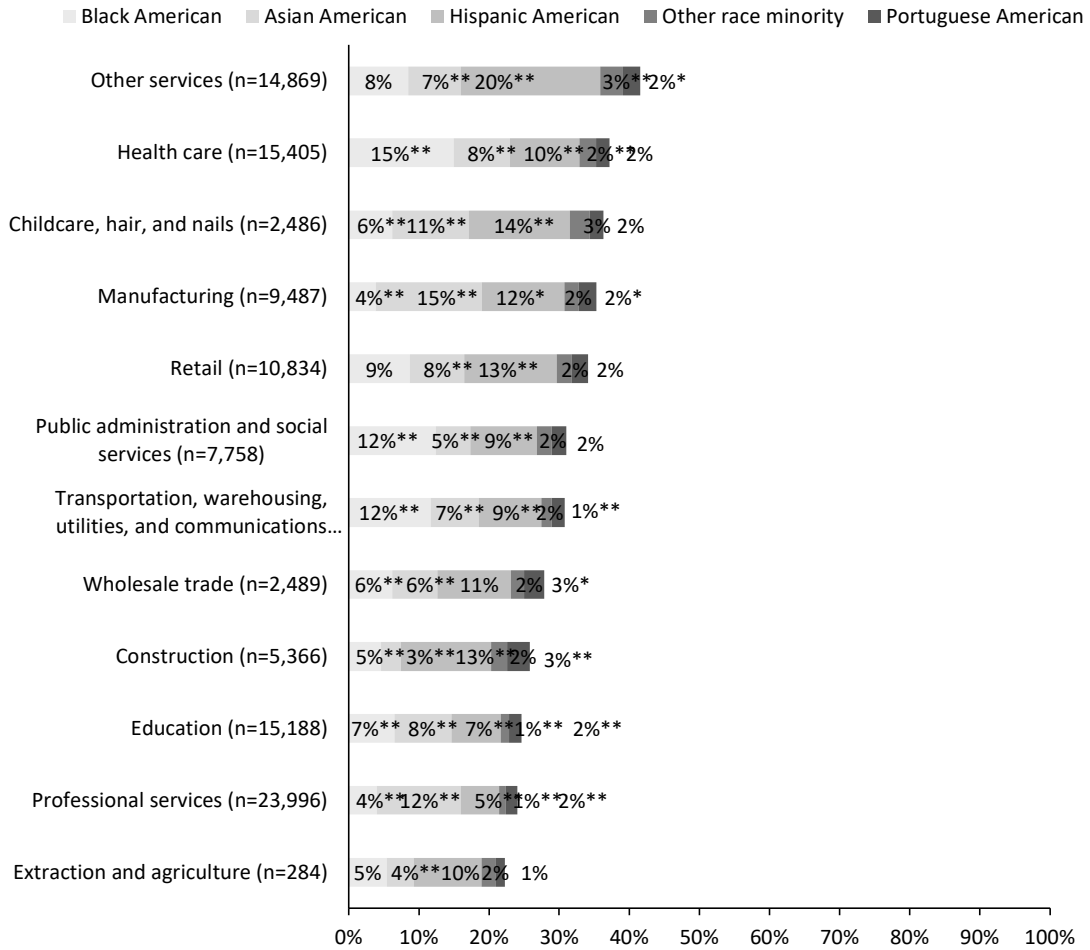
2. Employment and management experience. An important precursor to business ownership and success is acquiring direct experience in relevant industries. Any barriers that limit minorities and women from acquiring that experience could prevent them from starting and operating related businesses in the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

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

43, 44, 45, 46

The study team’s analyses of the labor force in Boston are largely consistent with national findings. Figures 3-2 presents the representation of minority workers in various Boston industries. As shown in Figure 3-2, the industries with the highest representations of minority workers are other services; healthcare; and childcare, hair, and nails. The Boston industries with the lowest representations of minority workers are education, professional services, and extraction and agriculture.

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



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

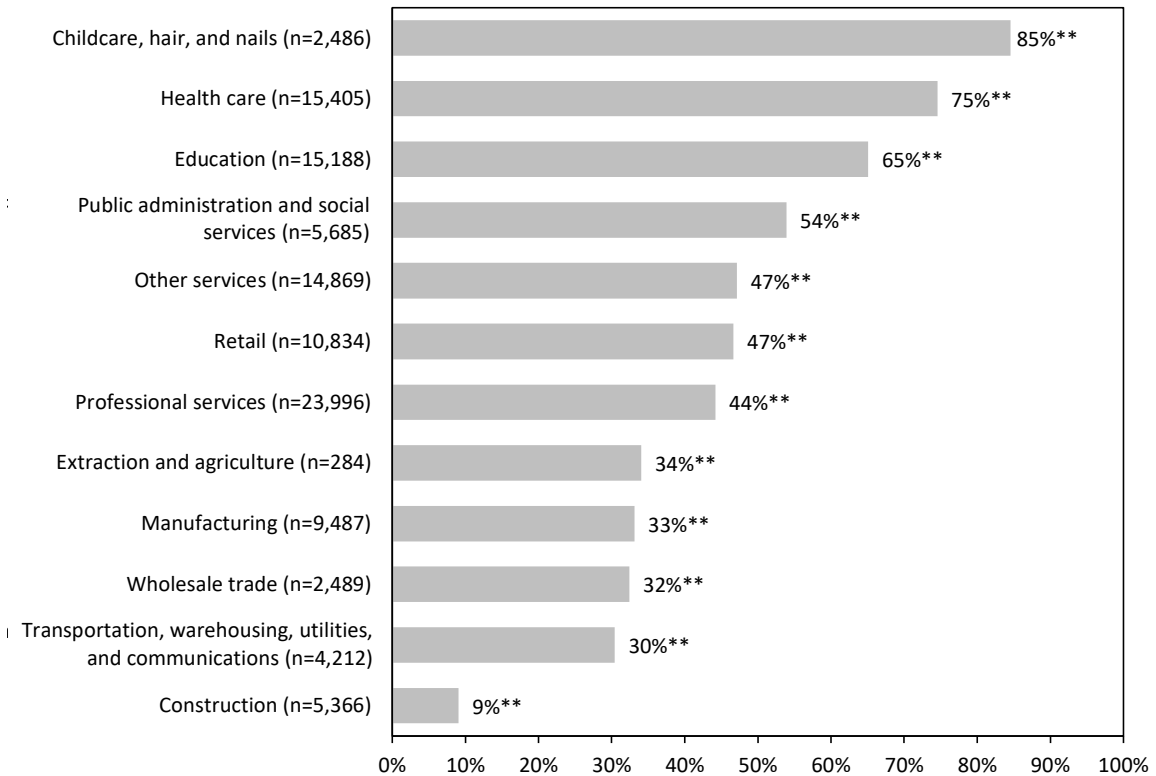
Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services; Workers in the rental and leasing, travel, investigation, waste remediation, 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.

"Other race minority" includes Native Americans, Cape Verdean Americans, and other races.

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

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

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



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

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

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

b. Management experience. Managerial experience is an essential predictor of business success, and discrimination remains a persistent obstacle to greater diversity in management positions.^{47, 48, 49} Nationally, minorities and women are far less likely than non-Hispanic white men to work in management positions.^{50, 51} Similar outcomes appear to exist for minorities and women in Boston. The study team examined the concentration of minorities and women in management positions in the Boston construction, architecture and engineering, other professional services, goods, and other services industries. As shown in Figure 3-4:

- Compared to non-Hispanic whites, smaller percentages of Asian Pacific Americans, Black Americans, Cape Verdean Americans, Hispanic Americans, and other race minorities work as managers in the construction industry.
- Compared to non-Hispanic whites, smaller percentages of Black Americans and Hispanic Americans work as managers in the architecture and engineering industry. In addition, compared to men, a smaller percentage of women work as managers in the architecture and engineering industry.

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

Figure 3-4.

Percentage of workers who worked as a manager in study-related industries in Boston

	Construction	Architecture and engineering	Other professional services	Goods	Other services
Race/ethnicity					
Asian Pacific American	3.6 % **	3.9 %	2.9 %	0.0 % **	1.3 %
Black American	4.5 % **	0.0 % **	5.9 %	0.4 % **	0.3 % **
Cape Verdean American	0.0 % **	0.0 % †	0.0 % †	0.0 % †	7.1 %
Hispanic American	4.8 % **	0.5 % **	3.2 %	2.8 %	0.3 % **
Native American	8.1 % †	0.0 % †	0.0 % †	0.0 % †	0.0 % †
Portuguese American	8.2 %	4.1 %	6.6 %	0.0 % *	1.9 %
Subcontinent Asian	3.8 % †	12.7 %	3.3 %	6.0 %	0.0 % †
Other race minority	2.8 % **	0.0 % †	0.0 % †	0.0 % †	0.0 %
White American	9.5 %	4.8 %	5.4 %	4.6 %	2.4 %
Gender					
Women	9.5 %	1.5 % **	4.4 %	1.6 % **	0.5 % **
Men	8.2 %	5.9 %	5.5 %	4.5 %	2.2 %
All individuals	8.3 %	4.5 %	5.0 %	3.6 %	1.6 %

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

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

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

B. Financial Capital

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

1. Wages and income. Wage and income gaps between minorities and non-Hispanic whites and between women and men are well-documented throughout the country, even when researchers have statistically controlled for various personal factors that are ostensibly unrelated to race and gender.^{57, 58, 59} 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.^{60, 61} Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 82 percent the median hourly wage of men.⁶² Such disparities make it difficult for minorities and women to use employment wages as a source of business capital.

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

- All relevant minority groups except Subcontinent Asian Americans earn substantially less in wages than non-Hispanic whites.
- Women earn substantially less than men.

Figure 3-5.
Mean annual wages in Boston

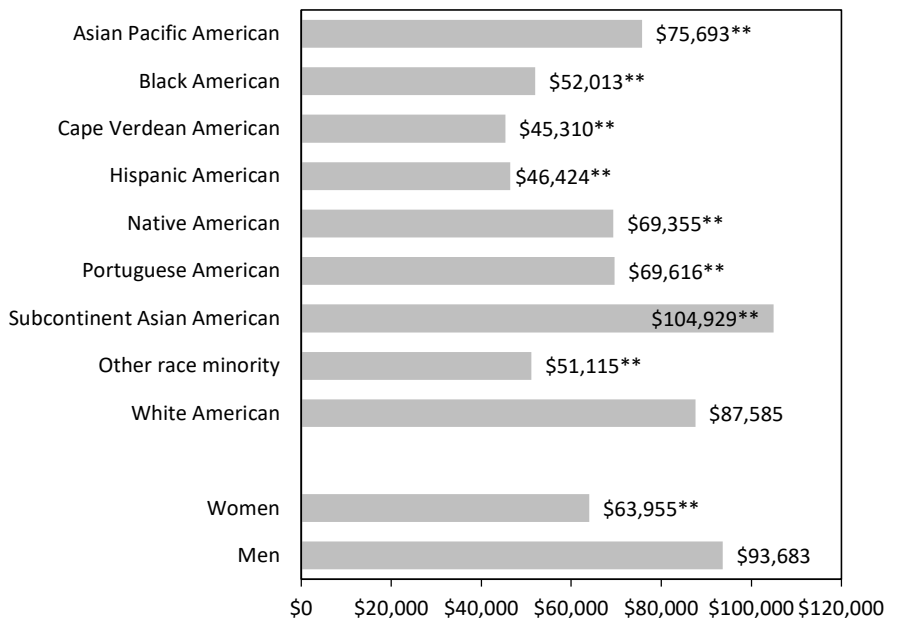
Note:

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) and from men (for women).

Source:

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



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

2. Personal wealth. Another important source of business capital is 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.^{63, 64} For example, in 2010, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 5 percent and 1 percent that of non-Hispanic whites, respectively. In addition, approximately one-out-of-five Black Americans and Hispanic Americans in the United States are living in poverty, about double the rate for non-Hispanic whites.⁶⁵ 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.⁶⁶

3. Homeownership. Homeownership and home equity have been shown to be key sources of business capital.^{67, 68} 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.⁶⁹ 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.^{70, 71} 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.^{72, 73} 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.^{74, 75}

Minorities appear to face homeownership barriers in Boston that are similar to those observed nationally. As shown in Figure 3-6, all relevant minority groups in Boston exhibit homeownership rates that are lower than that of non-Hispanic whites.

Figure 3-6.
Home ownership rates in Boston

Note:
The sample universe is all households.
** Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level.

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

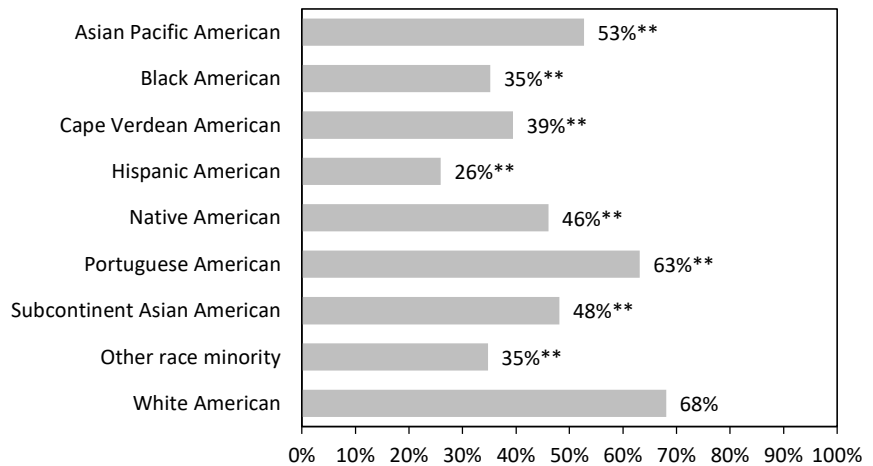


Figure 3-7 presents median home values among homeowners of different racial/ethnic groups in Boston. Consistent with national data, homeowners that identify with certain minority groups—Black Americans, Cape Verdean Americans, Hispanic Americans, Native Americans, Portuguese Americans, and other race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

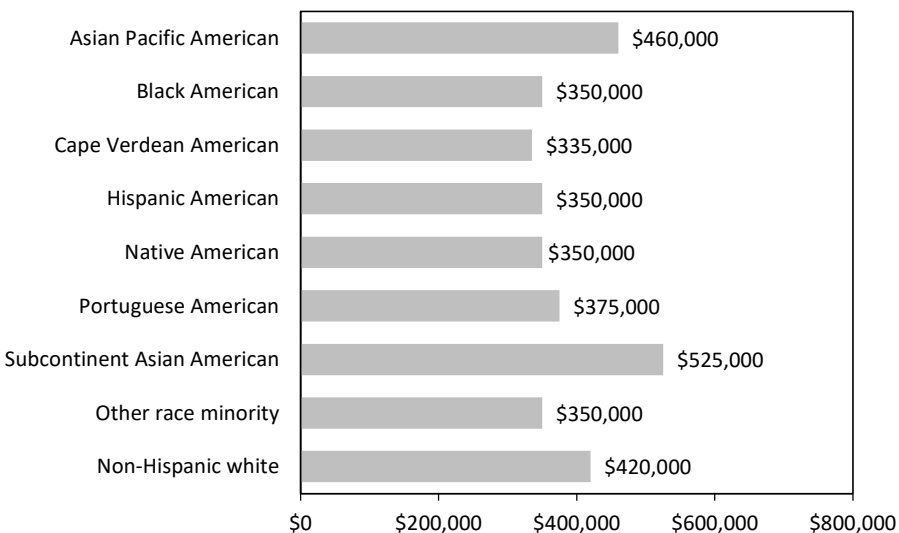
Figure 3-7.
Median home values in Boston

Note:

The sample universe is all owner-occupied housing units.

Source:

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



4. Access to financing. Minorities and women face many barriers in trying to access credit and financing, both for home purchases and for business capital. Researchers have often attributed those barriers to various forms of race- and gender-based discrimination that exist in credit markets.^{76, 77, 78, 79, 80, 81} The study team assessed difficulties that minorities and women face in home credit and business credit markets.

a. Home credit. Minorities and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of minorities and women during the pre-application phase and disproportionate targeting of minority and women borrowers for subprime home loans.^{82, 83, 84, 85, 86} Race- and gender-based barriers in home credit markets, as well as the foreclosure crisis, have led to decreases in homeownership among minorities and women and have eroded their levels of personal wealth.^{87, 88, 89, 90} To examine how minorities fare in the home credit market relative to non-Hispanic whites, the study team analyzed home loan denial rates for high-income households by race/ethnicity. The study team analyzed those data for Boston and the United States as a whole. As shown in Figure 3-8, Black Americans, Hispanic Americans, and Native Americans or Other Pacific Islanders in Boston were denied home loans at higher rates than non-Hispanic whites. In addition, the study team’s analyses indicate that certain minority groups in Boston are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure C-13 in Appendix C).

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

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

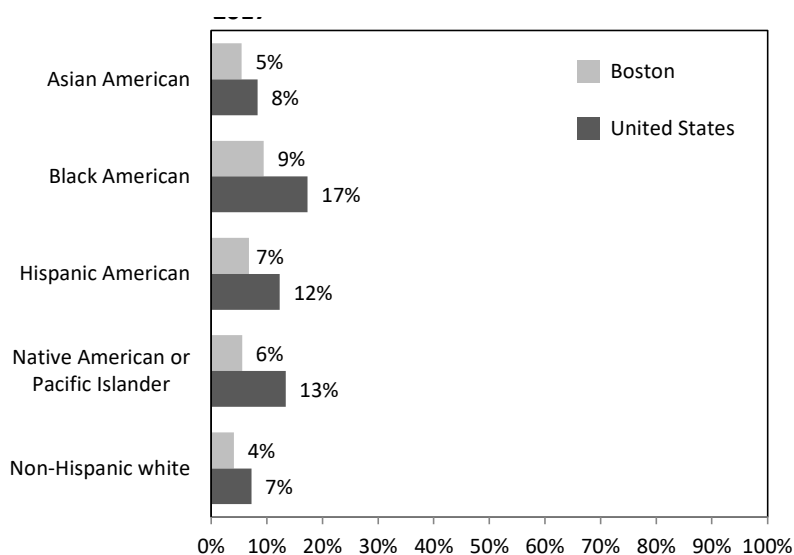
Note:

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

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

Source:

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



C. Business Ownership

Nationally, there has been substantial growth in the number of minority- and woman-owned businesses in recent years. For example, from 2007 to 2012, the number of woman-owned businesses increased by 27 percent, the number of Black American-owned businesses increased by 35 percent, and the number of Hispanic American-owned businesses increased by 46 percent.¹⁰¹ 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.^{102, 103, 104, 105} In addition, although rates of business ownership have increased among minorities and women, they have been unable to penetrate all industries evenly. Minorities and women disproportionately own businesses in industries that require less human and financial capital to be successful and already include large concentrations of minorities and women.

^{106, 107, 108}

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

- Hispanic Americans own construction businesses at a lower rate than non-Hispanic whites. In addition, women own construction businesses at a lower rate than men.
- Women own architecture and engineering businesses at a lower rate than men.
- Hispanic Americans, Portuguese Americans, and Subcontinent Asian Americans own other professional services businesses at a lower rate than non-Hispanic whites.
- Hispanic Americans own goods businesses at a lower rate than non-Hispanic whites. In addition, women own goods businesses at a lower rate than men.
- Asian Pacific Americans and Hispanic Americans own other services businesses at a lower rate than non-Hispanic whites.

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

Boston	Construction	Architecture & Engineering	Other Professional Services	Goods	Other Services
Race/ethnicity					
Asian Pacific American	19.9 %	4.5 %	24.8 %	3.5 %	11.1 % **
Black American	22.8 %	10.7 %	34.4 %	3.6 %	5.8 %
Cape Verdean American	21.0 %	0.0 % †	0.0 % †	0.0 % †	7.2 %
Hispanic American	14.9 % **	9.4 %	20.7 % *	1.9 % **	6.8 % *
Native American	10.7 % †	0.0 % †	10.9 % †	0.0 % †	0.0 % †
Portuguese American	22.5 %	8.5 %	14.7 % **	7.1 %	11.7 %
Subcontinent Asian American	34.8 % †	5.9 %	10.3 % **	2.1 %	0.0 % †
Other minority group	19.7 %	21.5 % †	4.2 % †	0.0 % †	27.0 % **
White American	25.6 %	11.6 %	28.5 %	4.7 %	18.8 %
Gender					
Women	12.0 % **	7.5 % **	27.3 %	2.3 % **	19.7 % **
Men	24.9 %	12.3 %	26.5 %	4.9 %	10.5 %
All individuals	23.7 %	10.8 %	26.9 %	4.1 %	13.5 %

Note: For each industry and group, business ownership rates were calculated by determining the proportion of total workers in the labor force and the number that are self-employed as either an incorporated or non-incorporated business. As shown in the figure, the business ownership rate for Black Americans in the other professional services industry is 34.4%, meaning that of all the Black Americans in the labor force in the other professional services industry in Boston, 34.4% own their businesses.

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

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

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

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

- Being Native American is associated with a lower likelihood of owning a construction business compared to being non-Hispanic white, and being a woman is associated with a lower likelihood of owning a construction business compared to being a man.
- Being Subcontinent Asian American is associated with a lower likelihood of owning an other professional services business compared to being non-Hispanic white.
- Being a woman is associated with a lower likelihood of owning a goods business compared to being a man.
- Being Asian Pacific American, Black American, or Hispanic American is associated with a lower likelihood of owning an other services business compared to being non-Hispanic white.

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

Note:

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

Source:

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

Industry and group	Coefficient
Construction	
Native American	-0.7676
Women	-0.5833
Other professional services	
Subcontinent Asian American	-0.4417
Goods	
Women	-0.2735
Other services	
Asian Pacific American	-0.3648
Black American	-0.6385
Hispanic American	-0.7210
Women	0.3985

D. Business Success

There is a great deal of research indicating that, nationally, minority- and woman-owned businesses fare worse than businesses owned by non-Hispanic white men. For example, Black Americans, Native Americans, Hispanic Americans, and women exhibit higher rates of business closures than non-Hispanic whites and men, respectively. In addition, minority- and woman-owned businesses have been shown to be less successful than businesses owned by non-Hispanic whites and men, respectively, using a number of different indicators such as profits and business size (but also see Robb and Watson 2012).^{109, 110, 111} BBC examined data on business closure, receipts, and business owner earnings to further explore business success in Boston.

Business closure. The study team examined the rates of closure among Massachusetts businesses by the race/ethnicity and gender of the owners. As shown in Figure 3-11, Black American- and Hispanic American-owned businesses in Massachusetts appear to close at higher rates than non-Hispanic white-owned businesses. In addition, woman-owned businesses appear to close at higher rates than businesses owned by men.

Figure 3-11.
Rates of business closure in Massachusetts

Note:

Data include only to non-publicly held businesses.

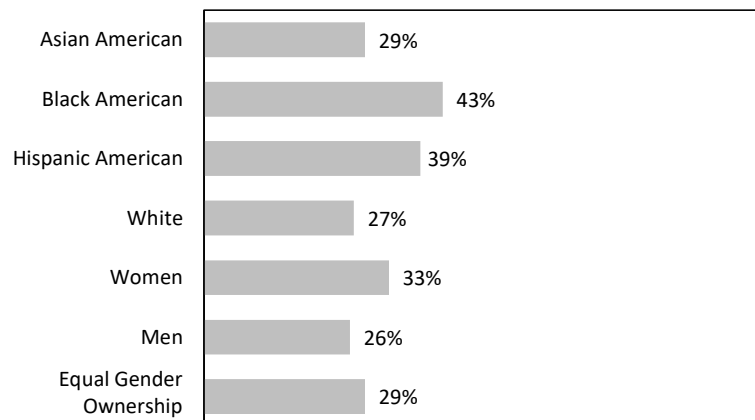
Equal Gender Ownership refers to those businesses for which ownership is split evenly between women and men.

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

Source:

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

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



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

Figure 3-12.
Mean annual business receipts (in thousands) in the Boston MSA

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.

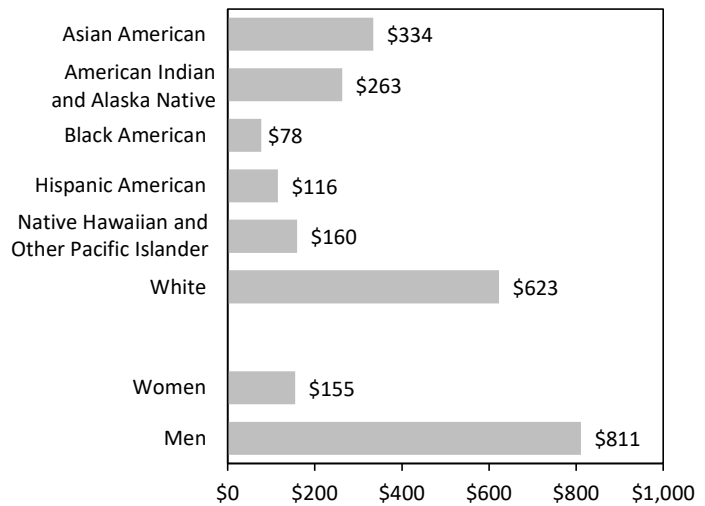


Figure 3-13.
Mean annual business owner earnings in Boston

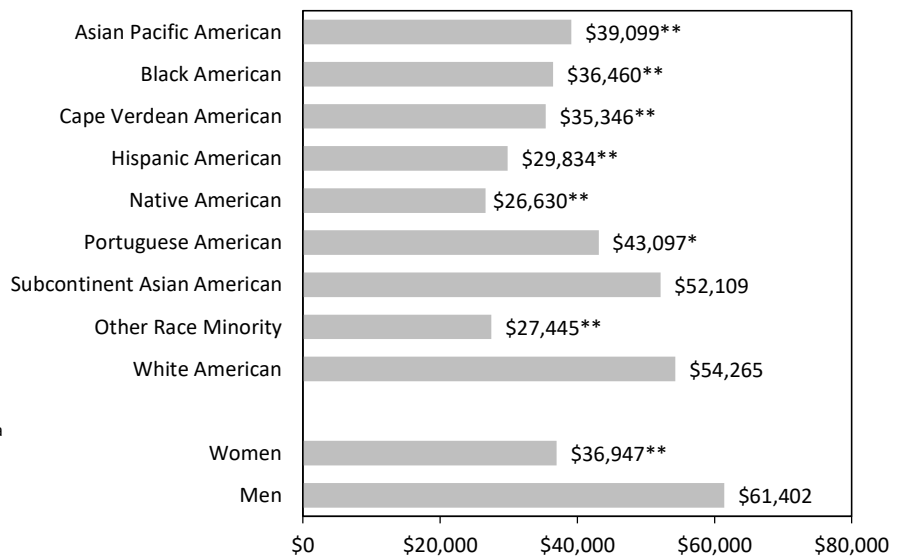
Note:

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

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

Source:

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



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

- Asian Pacific Americans, Black Americans, Cape Verdean Americans, Hispanic Americans, Native Americans, Portuguese Americans, and other race minorities earned less on average from their businesses than non-Hispanic whites earned from their businesses; and

- Women earned less from their businesses than men earned from their businesses.

BBC also conducted regression analyses to determine whether differences in business owner earnings exist even after statistically controlling for various personal factors such as age, education, and family status. The results of those analyses indicated that, compared to being non-Hispanic white, being Asian Pacific American was associated with substantially lower business owner earnings. Similarly, being a woman was associated with substantially lower business owner earnings than being a man (for details, see Figure C-30 in Appendix C).

E. Summary

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

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

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CHAPTER 4.

Collection and Analysis of Contract Data

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Collection and Analysis of Contract Data

Chapter 4 provides an overview of the policies that the Boston Planning & Development Agency (BPDA) uses to award contracts and procurements; the contracts and procurements that BBC Research & Consulting (BBC) analyzed as part of the disparity study; and the process that BBC used to collect relevant prime contract, 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

The Budget and Finance Department provides guidance to the BPDA to ensure consistency in procurement procedures and compliance with the Massachusetts General Law (MGL), City of Boston regulations, and administrative policies.¹ The BPDA has developed detailed guidelines for the procurement of goods, supplies, and services. The Budget and Finance Department is responsible for all BPDA purchases and contracts. It is also responsible for establishing and maintaining procurement policies and procedures and ensuring compliance with those policies. The BPDA has the authority to appoint a Chief Procurement Officer to carry out procurements in accordance with the governing laws and regulations.²

1. Procurement procedures. The BPDA uses various purchasing methods, depending on the estimated cost of the purchase; the required goods or services; and the needs of the using department. In general, the BPDA's purchasing procedures can be categorized into three types: small purchases, written quotes, and competitive public bids. Most BPDA purchases are procured using one of those three processes. In addition, the BPDA exercises specific processes for purchasing special procurements.

a. Small purchases. The BPDA follows small purchase procedures for all procurements worth less than \$10,000. To make small purchases, whenever possible, the BPDA uses blanket contracts that the Commonwealth of Massachusetts (the Commonwealth) Operational Services

¹ The Commonwealth of Massachusetts General Law (M.G.L.) Chapter 30B regulates all procurements made within the State.

² M.G.L. Chapter 30B

awards. When the BPDA cannot make small purchases through a state blanket contract, it encourages the using department to solicit three vendors for price quotes, and they must encourage and maximize opportunities for certified local businesses and minority- and woman-owned businesses.

b. Competitive quotes. The BPDA follows competitive written quote procedures to procure goods, non-professional services, and construction services worth at least \$10,000 but less than \$50,000. The Chief Procurement Officer administers competitive quote procedures. As part of competitive quote procedures, the BPDA must issue invitations to bid (ITBs) and seek a minimum of three written quotes by fax, email, telephone, or standard mail. The solicitations must be advertised for two weeks before bids are due in the Boston Herald, on the agency's website, and on the Commonwealth's Central Register of Goods and Services Bulletin. The solicitation may also be advertised on COMMBUYS, the Commonwealth's procurement website. The BPDA is also permitted to directly advertise the ITB directly to relevant vendors. The Budget and Finance Department opens and evaluates all competitive quotes and then awards the contract to the lowest responsive and responsible vendor. For construction services worth at least \$10,000 but less than \$50,000, the solicitation must also contain information on required Occupational Safety and Health Administration (OSHA) training and the relevant prevailing wages for the contract.^{3,4}

c. Competitive bids. As required by MGL Chapter 30B, the BPDA follows public bidding procedures—which require invitations for sealed bids—to award goods, non-professional services, and construction services contracts worth \$50,000 or more.⁵ The using department must submit a procurement memorandum to the Chief Procurement Officer detailing the required goods or services, the estimated value, and the funding source. The Chief Procurement Officer is then responsible for administering a competitive bidding process. Under public bidding procedures, the solicitation must be advertised on the 9th floor of City Hall; in the Boston Herald or another newspaper of general circulation; on the using departments website; in the Central Register of Goods and Services Bulletin; and via a legal notice at least 14 days prior to bid opening. Invitations for bids must include a description of the required goods or services; details about how bids will be evaluated; contractual terms and conditions; times and locations for bid openings; and other relevant information. The Budget and Finance Department must open the bids publicly at the time and location designated in the corresponding solicitation. After public opening, the Chief Procurement Officer evaluates each bid or proposal for responsiveness and completeness. They then award the contract to the lowest responsive and responsible bidder.

³ Massachusetts General Laws Chapter 149 §§44A-J ("Chapter 149") governs all contracts for the construction, reconstruction, installation, demolition, maintenance, or repair of a building, unless the work falls under one of the following exceptions: a sewer or water supply building, whose sole function is to house pumps and related equipment (instead subject to Chapter 30, §39M) or energy-saving improvements to public buildings (instead subject to Chapter 25A).

⁴ Massachusetts General Laws Chapter 30 §39M ("Chapter 30") governs all contracts for construction, reconstruction, alteration, remodeling, or repair that do not include work on a public building. This type of work is generally called "horizontal construction" and includes: construction and repair of roads, bridges, water mains and sewers, and improvement to public land such as public parks, outdoor swimming pools and parking lots.

⁵ MGL Chapter 149 Section §§A-C excludes the construction of a pump station integral to sewer or water construction from the competitive bid requirements.

i. Construction contracts worth at least \$50,000 but less than \$100,000. Construction contracts worth more than \$50,000 but less than \$100,000 must be procured through a competitive bidding process. In addition to a completed bid packet, vendors must also submit a 5 percent bid deposit and a 50 percent payment bond to be considered responsive.

ii. Construction contracts worth more than \$100,000 but less than \$10 million. Construction contracts worth more than \$100,000 but less than \$10 million carry additional bid requirements. Prime contractors must also apply for bidder certification through the Commonwealth's Division of Capital Asset Management and Maintenance (DCAMM)—and submit proof of certification with their bids—and submit documentation for any subcontractors to which they commit \$25,000 or more (i.e., sub-bids). Any subcontractors receiving more than \$25,000 worth of work are also required to submit DCAMM certification documents.⁶ All required sub-bids must be delivered at least four and a half business days before the bid opening.

iii. Construction contracts worth \$10 million or more. The BPDA also procures construction contracts worth \$10 million or more through a competitive bidding process but must first solicit potential vendors for statements of qualification.⁷ A request for qualifications (RFQ) must be advertised for a minimum of two weeks.⁸ In addition, per MGL Chapter 149 Section 44D, all prime contractors and subcontractors that propose on construction contracts worth \$10 million or more must first apply for prequalification and be evaluated by a prequalification committee that the BPDA establishes. Prequalification committees comprise one BPDA designer and three additional BPDA representatives. Vendors applying for prequalification must demonstrate that they have adequate experience, are competent and responsible, and have the necessary financial resources to comply with state code. Once prequalified, vendors are invited to bid on relevant contracts.

d. Design services. The BPDA typically procures design services according to written quote or request for proposals (RFPs) procedures. When design fees are worth less than \$30,000, the written quote process is encouraged but not required. When design fees are worth \$30,000 or more, the BPDA must award contracts through an RFQ process. RFQs must be publicly advertised in a newspaper circulated throughout the City of Boston, in local minority papers, and on department bulletin boards at least two weeks before proposal deadlines. The using department has the authority to enter negotiations with the highest scoring firm.

⁶ Filed sub-bids are required for sub-trade work exceeding a value of \$25,000 in the following categories: Masonry Work, Acoustical tile, Metal windows, Electrical work, Misc. and ornamental iron, Elevators, Painting, Fire protection sprinkler systems, Plumbing, Glass and glazing, Resilient floors, Heating, ventilating, AC, Roofing / flashing, Lathing / plastering, Terrazzo, Marble, Tile, Waterproofing, damp-proofing and caulking.

⁷ Prequalification for GC and subcontractors: For M.G.L. c. 149 building contracts estimated to cost \$10 million or more, general bidders and filed sub-bidders must be prequalified in accordance with the detailed prequalification procedures contained in M.G.L. c. 149

⁸ The BPDA is not required to issue an RFQ for construction contracts related to horizontal construction.

2. Special procurements. The BPDA can use special purchasing methods in situations provided under MGL Chapter 30B. The need for special procurements must qualify under one of the following criteria:

- Purchases where there is a single source for supply;⁹
- Purchases made under emergency conditions;
- Purchases for which the use of other purchasing methods resulted in no responsive offers;
- Purchases for which the use of other purchasing methods would seriously impair the functioning of the department;
- Purchases for which a deadline for action has been set by any court or federal agency that cannot be met using other selection procedures;
- Purchases made through intergovernmental agreements;
- Issuance of bonds, notes, or securities or contracts for the procurement thereof;
- Contracts with health care providers or organizations;
- Contracts for snow plowing services, towing services, or storage for motor vehicles by a government body;¹⁰
- Contracts to sell, lease, or acquire property; or
- Contracts for collection or disposal of solid waste, recyclable materials, or compostable materials.

The Budget and Finance Department requires as much competition as practical even when using special procurement practices. In addition, the originating department must provide written justification for why the use of a special procurement method was necessary.

B. Collection and Analysis of Contract and Procurement Data

BBC collected contracting and vendor data from the BPDA's Financial Edge system and directly from prime contractors to serve as the basis of key disparity study analyses, including the utilization, availability, and disparity analyses. The study team collected data on prime contracts and subcontracts that the BPDA awarded between July 1, 2014 and June 30, 2019. 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, construction design, other professional services, support services, and goods and supplies prime contracts and subcontracts.

1. Prime contract data collection. The BPDA provided BBC with the following information about each relevant prime contract that it awarded during the study period:

⁹ Single-source procurements worth more than \$35,000 are not allowed except when purchasing software maintenance services, library books, educational materials, or utilities.

¹⁰ M.G.L. c.30B, §1(b)(17).

- Contract or purchase order number;
- Description of work;
- Award date;
- Award amount (including change orders and amendments);
- Amount paid-to-date (as available);
- Whether the contract or procurement was part of a statewide or MassWorks contract;
- Prime contractor name; and
- Prime contractor identification number.

The BPDA advised BBC on how to interpret the provided data, including how to identify unique bid opportunities and, as needed, how to aggregate purchase order and related payment amounts.

2. Subcontract data collection. The BPDA does not collect comprehensive information about subcontracts associated with the prime contracts the agency awards. In order to gather data about BPDA subcontracts, BBC conducted surveys with prime contractors to collect information on subcontracts that were associated with the contracts on which they worked during the study period. BBC collected subcontract information about relevant construction and professional services contracts that the BPDA awarded during the study period. BBC sent out surveys via mail and email to request subcontract data associated with 96 prime contracts that the BPDA awarded during the study period, accounting for approximately \$57 million. BBC collected the following information about each relevant subcontract as part of the survey process:

- Associated prime contract number;
- Subcontract commitment amount;
- Amount paid on the subcontract as of June 30, 2019;
- Description of work;
- Subcontractor name; and
- Subcontractor contact information.

After the first round of surveys, BBC sent reminder letters and emails to unresponsive prime contractors and worked with the BPDA to contact remaining unresponsive prime contractors. Through the survey effort, BBC collected subcontract data associated with more than \$8 million worth of contracts and procurements that the BPDA awarded during the study period.

3. Contracts included in study analyses. BBC collected information on 755 relevant prime contract elements and 36 associated subcontracts that the BPDA awarded during the study period, accounting for approximately \$52 million of BPDA spend. Figure 4-1 presents the number of contract elements by relevant contracting area for the prime contracts and subcontracts that the study team included in its analyses.

Figure 4-1.
Number of BPDA and
agency contracts included
in the study

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

Contract type	Number	Dollars
Construction	275	\$28,464,952
Construction design	73	\$10,686,487
Other professional services	97	\$4,807,248
Support services	139	\$7,548,336
Goods and supplies	207	\$1,132,044
Total	791	\$52,639,066

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

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

C. Collection of Vendor Data

BBC compiled the following information on businesses that participated in relevant BPDA 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);
- Certification status;
- Primary lines of work;
- Business size; and
- Year of establishment.

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

- BPDA contract and vendor data;
- Commonwealth of Massachusetts Directory of Certified Businesses;
- Massachusetts Directory of Airport Concession Disadvantage Business Enterprises;
- Massachusetts DCAMM Certified Prime Contractors directory;
- Massachusetts DCAMM Certified Sub-Bidder Contractors directory;
- Massachusetts Division of DCAMM Contractors Denied Certification directory;
- Massachusetts Directory of Disadvantage Business Enterprises;

- Massachusetts Department of Transportation certification directory;
- Massachusetts Port Authority Diversity & Inclusion/Compliance certification directory;
- 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;
- 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 the BPDA 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 89 percent of relevant contracting dollars during the study period went to businesses with locations in Essex, Suffolk, Plymouth, Middlesex, and Norfolk counties in Massachusetts—indicating that those counties 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 those five counties.

E. Relevant Types of Work

For each prime contract and subcontract element, BBC determined the *subindustry* that best characterized the business’s primary line of work (e.g., building construction). BBC identified subindustries based on BPDA contract and vendor data, surveys that the study team 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, construction design, other professional services, support services, and goods and supplies subindustries that BBC included in its analyses.

The study team combined related subindustries that accounted for relatively small percentages of total contracting dollars into four “other” subindustries: “other construction services,” “other construction materials,” “other goods,” and “other services.” For example, the contracting dollars that BPDA awarded to contractors for “carpentry work” represented less than 1 percent of total BPDA dollars that BBC examined in the study. BBC combined “carpentry work” 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:

- The BPDA awarded to universities, government agencies, utility providers, hospitals, or other nonprofit organizations (\$62 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 the BPDA awarded the majority of contracting dollars to businesses located outside of the relevant geographic market area (\$3 million);¹¹
- Were classified in subindustries which often include property purchases, leases, or other pass-through dollars (e.g., real estate leases or banking services; \$15 million); or
- Were classified in subindustries not typically included in a disparity study and account for small proportions of BPDA contracting dollars (\$443,000).¹²

F. Agency Review Process

The BPDA reviewed BBC’s contracting and vendor data several times during the study process. BBC met with the BPDA to review the data collection process, information that the study team gathered, and preliminary results. BBC incorporated the BPDA’s feedback into the final contract and vendor data that the study team used as part of the disparity study.

¹¹ Examples of such industries include computer manufacturing and software.

¹² Examples of industries not typically included in a disparity study include subscription services and lodging.

Figure 4-2.
BPDA contract dollars
by subindustry

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

Source:
 BBC Research & Consulting from
 BPDA contract data.

Industry	Total
Construction	
Building construction	\$5,473,458
Heavy construction	\$5,166,462
Mechanical contracting services	\$4,804,468
Dam and marine construction	\$4,485,624
Concrete work	\$3,514,456
Landscape services	\$1,467,107
Electrical work	\$1,246,500
Other construction services	\$664,032
Street cleaning	\$572,937
Roofing, siding, and flooring contractors	\$467,118
Other construction materials	\$128,979
Electrical equipment and supplies	\$121,510
Painting, striping, and marking	\$112,050
Fencing, guardrails and signs	\$104,775
Insulation, drywall, masonry, and weatherproofing	\$82,557
Heavy construction equipment	\$14,097
Windows and doors	\$10,621
Excavation, wrecking, and land prep	\$9,100
Water, sewer, and utility lines	\$9,000
Plumbing and HVAC supplies	\$8,100
Concrete, asphalt, and related products	\$2,000
Total construction	\$28,464,952
Construction design	
Transportation planning services	\$4,719,420
Engineering	\$4,364,951
Architectural and design services	\$1,372,310
Environmental services	\$82,583
Other architecture and engineering	\$51,024
Construction management	\$49,288
Developers and operative builders	\$41,898
Testing and inspection	\$5,013
Total construction design	\$10,686,487
Other professional services	
Business and market research services	\$4,133,357
IT and data services	\$397,170
Other professional services	\$160,348
Human resources and job training services	\$115,324
Advertising, marketing and public relations	\$1,050
Total other professional services	\$4,807,248

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

Note:

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

Source:

BBC Research & Consulting from
BPDA contract data.

Industry	Total
Support services	
Equipment maintenance and repair	\$5,244,585
Cleaning and janitorial services	\$974,232
Other services	\$699,081
Waste and recycling services	\$398,094
Printing, copying, and mailing	\$110,661
Pest control	\$105,942
Vehicle maintenance and repair	\$7,993
Catering and restaurants	\$7,747
Total support services	\$7,548,336
Goods and supplies	
Office equipment and supplies	\$559,353
Furniture	\$272,793
Vehicle parts and supplies	\$68,046
Deicing chemicals	\$60,764
Cleaning and janitorial supplies	\$53,334
Engineering equipment and precision instruments	\$50,547
Industrial equipment and machinery	\$34,082
Computers and peripherals	\$15,619
Uniforms, apparels, and linen	\$7,229
Other goods	\$5,562
Petroleum and petroleum products	\$4,714
Engineering equipment and precision instruments	\$3,150
Total goods and supplies	\$1,135,194
GRAND TOTAL	\$52,642,216

CHAPTER 5.

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 prime contracts and subcontracts that the Boston Planning & Development Agency (BPDA) awards in the areas of construction, construction design, other professional services, support services, and goods and supplies.¹ Chapter 5 describes the availability analysis in five parts:

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

Appendix E provides supporting information related to the availability analysis.

A. Purpose of the Availability Analysis

BBC examined the availability of minority- and woman-owned businesses for BPDA prime contracts and subcontracts to use as benchmarks against which to compare the actual participation of minority- and woman-owned businesses in BPDA work. Comparisons between participation and availability allowed BBC to determine whether certain business groups were underutilized during the study period relative to their availability for BPDA contracts and procurements (for details, see Chapter 7).

B. Potentially Available Businesses

BBC's availability analysis focused on specific areas of work, or *subindustries*, related to the relevant types of contracts and procurements that the BPDA awarded during the study period, which served as a proxy for the contracts and procurements the organization will award in the future. BBC began the availability analysis by identifying the specific subindustries in which the BPDA spends the majority of its contracting dollars (for details, see Chapter 4) as well as geographic areas in which the majority of the businesses with which BPDA spends those contracting dollars are located (i.e., the *relevant geographic market area, or RGMA*).²

BBC then conducted surveys to develop a representative, unbiased, and statistically-valid database of potentially available businesses located in the RGMA that perform work within

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

² BBC identified the relevant geographic market area for the disparity study as Norfolk, Suffolk, Plymouth, Middlesex, and Essex counties in Massachusetts.

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

1. Overview of availability surveys. The study team conducted telephone and online surveys with business owners and managers to identify local businesses that are potentially available for BPDA prime contracts and subcontracts. BBC began the survey process by compiling a comprehensive and unbiased *phone book* of all types of businesses—regardless of ownership—that perform work in relevant industries and have a location within the RGMA. BBC developed that phone book based on information from Dun & Bradstreet (D&B) Marketplace. BBC collected information about all business establishments listed under 8-digit work specialization codes, as developed by D&B, that were most related to the contracts that the BPDA awarded during the study period. BBC obtained listings on 11,408 local businesses that do work related to those work specializations. BBC did not have working phone numbers for 1,952 of those businesses but attempted availability surveys with the remaining 9,456 business establishments.

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

- Status as a private business (as opposed to a public agency or nonprofit organization);
- Status as a subsidiary or branch of another company;
- Primary lines of work;
- Interest in performing work for local government organizations;
- Interest in performing work as a prime contractor or as a subcontractor;
- Largest prime contract or subcontract bid on or performed in the previous five years; and
- Race/ethnicity and gender of ownership.

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

- Being a private sector business (as opposed to a government or nonprofit organization);
- Having performed work relevant to BPDA contracting or procurement;

- Having bid on or performed relevant prime contracts or subcontracts in either the public or private sector in the Boston area in the past five years; and
- Being interested in work for local government organizations.³

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

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

C. Businesses in the Availability Database

After conducting availability surveys with Boston-area businesses, BBC developed a database of information about businesses that are potentially available for relevant BPDA contracts and procurements. Information from the database allowed BBC to identify businesses that are ready, willing, and able to perform work for the BPDA. Figure 5-1 presents the percentage of businesses in the *availability database* that were minority- or woman-owned. The analysis included 781 businesses that are potentially available for specific construction, construction design, other professional services, support services, and goods and supplies contracts and procurements that the BPDA awards, and as shown in Figure 5-1, 28.9 percent of those businesses 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	Percent
Non-Hispanic white woman-owned	14.2 %
Asian American-owned	3.2
Black American-owned	6.8
Hispanic American-owned	4.4
Native American-owned	0.4
Total minority-owned	14.7 %
Total minority- and woman-owned	28.9 %

The information in Figure 5-1 merely reflects a simple *head count* of businesses with no analysis of their availability for specific BPDA contracts or procurements. Thus, it represents only a first step toward analyzing the availability of minority- and woman-owned businesses for BPDA work. BBC used a custom census approach to calculate the availability of minority- and woman-owned businesses, because it accounts for specific business characteristics such as work type, relative business capacity, contractor role, and interest in relevant work.

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 BPDA work. Those estimates represent the percentage of associated contracting and procurement dollars that minority- and

³ That information was gathered separately for prime contract and subcontract work.

woman-owned businesses would be expected to receive based on their availability for specific types and sizes of BPDA prime contracts and subcontracts.

1. Steps to calculating availability. BBC used a 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 BPDA 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 and contract size. 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), and of that size. BBC identified the characteristics of each prime contract and subcontract included in the disparity study and then took the following steps to calculate availability for each contract element:

1. For each contract element, the study team identified businesses in the availability database that reported they:
 - Are interested in performing construction, construction design, other professional services, support services, or goods and supplies work in that particular role for that specific type of work for government organizations in the Boston area; and
 - Have bid on or performed work of that size in the past five years.
2. The study team then counted the number of minority-owned businesses, woman-owned businesses, and businesses owned by non-Hispanic white men (i.e., *majority-owned businesses*) 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 in the disparity study. BBC multiplied percentage availability for each contract element by the dollars associated with it, added results across all contract elements, and divided by the total dollars for all contract elements. The result was dollar-weighted estimates of the availability of minority- and woman-owned businesses overall and separately for each relevant group. Figure 5-2 provides an example of how BBC calculated availability for a specific subcontract associated with an architectural and design services prime contract that the BPDA awarded during the study period.

BBC’s availability calculations are based on prime contracts and subcontracts that the BPDA awarded between July 1, 2014 through June 30, 2019. A key assumption of the availability analysis is that the contracts and procurements that the BPDA awarded during the study period are representative of the contracts and procurements that the organization will award in the future. If the types and sizes of those contracts and procurements differ substantially from the ones they awarded in the past, then the BPDA should consider adjusting availability estimates accordingly.

E. Availability Results

BBC estimated the availability of minority- and woman-owned businesses for construction, construction design, other professional services, support services, and goods and supplies prime contracts and subcontracts that the BPDA awarded during the study period.

1. Overall. Figure 5-3 presents dollar-weighted availability estimates by relevant business group for BPDA contracts and procurements. Overall, the availability of minority- and woman-owned businesses for BPDA contracts and procurements is 17.4 percent, indicating that minority- and woman-owned businesses might be expected to receive 17.4 percent of the dollars that the BPDA awards in construction, construction design, other professional services, support services, and goods and supplies. Non-Hispanic white woman-owned businesses (9.9%) and Black American-owned businesses (3.3%) exhibited the highest availability among all groups.

Figure 5-3.
Overall availability estimates by racial/ethnic and gender group for BPDA work

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

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

On a contract that the BPDA awarded during the study period, the prime contractor awarded a subcontract worth \$59,580 for engineering services. To determine the overall availability of minority- and woman-owned businesses for the subcontract, BBC identified businesses in the availability database that:

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

BBC found 35 businesses in the availability database that met those criteria. Of those businesses, 12 were minority- or woman-owned businesses. Thus, the availability of minority- and woman-owned businesses for the subcontract was 34 percent (i.e., $12/35 \times 100 = 34$).

Business group	Availability %
Non-Hispanic white woman-owned	9.9 %
Asian American-owned	1.2
Black American-owned	3.3
Hispanic American-owned	2.8
Native American-owned	0.1
Total minority-owned	7.5 %
Total minority- and woman-owned	17.4 %

2. 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 BPDA prime contracts and subcontracts. 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 BPDA subcontracts (21.0%) than for prime contracts (17.2%). Among other factors, that result could be due to the fact that subcontracts tend to be much smaller in size than prime contracts and are thus often more accessible to minority- and woman-owned businesses.

Figure 5-4.
Availability estimates by contract role for BPDA work

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	10.0 %	6.3 %
Asian American-owned	1.2	2.9
Black American-owned	3.3	5.6
Hispanic American-owned	2.7	6.1
Native American-owned	0.1	0.2
Total minority-owned	7.2 %	14.7 %
Total minority- and woman-owned	17.2 %	21.0 %

3. Industry. BBC examined availability analysis results separately for BPDA construction, construction design, other professional services, support services, and goods and supplies contracts and procurements. As shown in Figure 5-5, the availability of minority- and woman-owned businesses considered together is highest for construction contracts (19.6%) and lowest for support services contracts (8.4%).

Figure 5-5.
Availability estimates by industry for BPDA work

Business group	Industry				
	Construction	Construction design	Other professional services	Support services	Goods and supplies
Non-Hispanic white woman-owned	11.0 %	9.7 %	13.3 %	3.8 %	6.9 %
Asian American-owned	1.1	2.2	0.5	0.8	0.4
Black American-owned	2.8	7.1	1.1	1.5	2.5
Hispanic American-owned	4.4	0.3	0.1	2.3	1.1
Native American-owned	0.2	0.0	0.2	0.0	0.1
Total minority-owned	8.5 %	9.5 %	2.0 %	4.6 %	4.1 %
Total minority- and woman-owned	19.6 %	19.2 %	15.2 %	8.4 %	10.9 %

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

For more detail and results by group, see Figures F-5 – F-9 in Appendix F.

Source: BBC Research & Consulting availability analysis.

4. Time period. BBC examined availability analysis results separately for contracts and procurements that the BPDA awarded in the early study period (i.e., July 1, 2014 – June 30, 2016) and the late study period (i.e., July 1, 2016 – June 30, 2019) to determine whether the types and sizes of contracts that the BPDA awarded across the study period changed over time, which in turn would affect availability. As shown in Figure 5-6, the availability of minority- and woman-owned businesses considered together is higher for the late study period (19.0%) than for the early study period (14.9%).

Figure 5-6.
Availability estimates by time period

Note:

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

For more detail, see Figures F-3 and F-4 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Time period	
	Early	Late
Non-Hispanic white woman-owned	8.4 %	10.8 %
Asian American-owned	1.2	1.3
Black American-owned	2.2	4.1
Hispanic American-owned	3.0	2.7
Native American-owned	0.1	0.1
Total minority-owned	6.5 %	8.2 %
Total minority- and woman-owned	14.9 %	19.0 %

5. Legal entity. The BPDA comprises two agencies—the Boston Redevelopment Authority (BRA) and the Economic Development and Industrial Corporation (EDIC)—that both do business as the BPDA but represent distinct legal entities and maintain separate functions. BBC examined availability analysis results separately for BRA and EDIC contracts and procurements that were awarded during the study period. As shown in Figure 5-7, the availability of minority- and woman-owned businesses considered together is higher for BRA contracts (22.4%) than for EDIC contracts (10.9%).

Figure 5-7.
Availability estimates by legal entity

Note:

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

For more detail, see Figures F-15 and F-16 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Legal entity	
	BRA	EDIC
Non-Hispanic white woman-owned	11.8 %	7.4 %
Asian American-owned	1.6	0.8
Black American-owned	5.0	1.0
Hispanic American-owned	3.9	1.5
Native American-owned	0.1	0.2
Total minority-owned	10.6 %	3.5 %
Total minority- and woman-owned	22.4 %	10.9 %

CHAPTER 6.

Utilization Analysis

CHAPTER 6.

Utilization Analysis

Chapter 6 presents information about the participation of minority- and woman-owned businesses in construction, construction design, other professional services, support services, and goods and supplies prime contracts and subcontracts that the Boston Planning & Development Agency (BPDA) awarded between July 1, 2014 through June 30, 2019 (i.e., the *study period*).¹ BBC Research & Consulting (BBC) measured the participation of minority- and woman-owned businesses in BPDA contracting and procurement in terms of *utilization*—the percentage of prime contract and subcontract dollars that the BPDA awarded to those businesses during the study period. For example, if 5 percent of BPDA prime contract and subcontract dollars went to woman-owned businesses on a particular set of contracts, utilization of woman-owned businesses for that set of contracts and procurements would be 5 percent. BBC measured the participation of minority- and woman-owned businesses in BPDA work regardless of whether they were certified as such with the City of Boston, the Commonwealth of Massachusetts, or any other organization.

A. All Contracts

Figure 6-1 presents the percentage of total dollars that minority- and woman-owned businesses received on relevant construction, construction design, other professional services, support services, and goods and supplies prime contracts and subcontracts that the BPDA awarded during the study period. As shown in Figure 6-1, minority- and woman-owned businesses considered together received 23.4 percent of the contract and procurement dollars that the BPDA awarded during the study period. The majority of those dollars—22.6 percent—went to minority- and woman-owned businesses that were certified as such. Non-Hispanic white woman-owned businesses accounted for the vast majority of participation on BPDA contracts and procurements (21.9%).

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

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Utilization %
Non-Hispanic white woman-owned	21.9 %
Asian American-owned	0.3
Black American-owned	0.7
Hispanic American-owned	0.5
Native American-owned	0.0
Total minority-owned	1.5 %
Total minority- and woman-owned	23.4 %

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

B. Contract Role

Many minority- and woman-owned businesses are small businesses, and thus, often work as subcontractors, so it is useful to examine utilization analysis results separately for prime contracts and subcontracts. Figure 6-2 presents those results. As shown in Figure 6-2, the participation of minority- and woman-owned businesses considered together was actually higher in prime contracts (23.8%) that the BPDA awarded during the study period than in subcontracts (14.4%). That result is largely driven by a small number of relatively large prime contracts that the BPDA awarded to woman-owned businesses during the study period.

Figure 6-2.
Utilization analysis results by contract role

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	22.2 %	14.2 %
Asian American-owned	0.3	0.0
Black American-owned	0.7	0.2
Hispanic American-owned	0.5	0.0
Native American-owned	0.0	0.0
Total minority-owned	1.6 %	0.2 %
Total minority- and woman-owned	23.8 %	14.4 %

C. Industry

BBC also examined utilization analysis results separately for the BPDA's construction, construction design, other professional services, support services, and goods and supplies contracts and procurements to determine whether the participation of minority- and woman-owned businesses in BPDA work differs by industry. As shown in Figure 6-3, the participation of minority- and woman-owned businesses considered together was highest for support services contracts (70.2%) and lowest for other professional services contracts (3.8%).

Figure 6-3.
Utilization analysis results by industry

Business group	Industry				
	Construction	Construction design	Other professional services	Support services	Goods and supplies
Non-Hispanic white woman-owned	21.2 %	0.0 %	1.0 %	69.4 %	8.7 %
Asian American-owned	0.0	0.0	2.8	0.0	0.0
Black American-owned	0.1	3.1	0.0	0.6	0.0
Hispanic American-owned	0.2	2.0	0.0	0.2	0.0
Native American-owned	0.0	0.0	0.0	0.0	0.0
Total minority-owned	0.3 %	5.1 %	2.8 %	0.8 %	0.0 %
Total minority- and woman-owned	21.5 %	5.1 %	3.8 %	70.2 %	8.7 %

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

For more detail and results by group, see Figures F-5 – F-9 in Appendix F.

D. Time Period

BBC examined utilization analysis results separately for contracts and procurements that the BPDA awarded in the early study period (i.e., July 1, 2014 – June 30, 2016) and the late study period (i.e., July 1, 2016 – June 30, 2019) to determine whether outcomes for minority- and woman-owned businesses changed over time. As shown in Figure 6-4, the participation of minority- and woman-owned businesses considered together was higher in the early study period (29.4%) than in the late study period (19.6%).

Figure 6-4.
Utilization analysis results by time period

Note:

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

For more detail, see Figures F-3 and F-4 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Time period	
	Early	Late
Non-Hispanic white woman-owned	28.1 %	18.0 %
Asian American-owned	0.4	0.3
Black American-owned	0.1	1.3
Hispanic American-owned	0.9	0.1
Native American-owned	0.0	0.0
Total minority-owned	1.3 %	1.7 %
Total minority- and woman-owned	29.4 %	19.6 %

E. Legal Entity

The BPDA comprises two agencies—the Boston Redevelopment Authority (BRA) and the Economic Development and Industrial Corporation (EDIC)—that both do business as the BPDA but represent distinct legal entities and maintain separate functions. BBC examined utilization analysis results separately for BRA and EDIC contracts and procurements that were awarded during the study period. As shown in Figure 6-5, the participation of minority- and woman-owned businesses considered together was higher for EDIC contracts (53.0%) than for BRA contracts (3.7%).

Figure 6-5.
Utilization analysis results by legal entity

Note:

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

For more detail, see Figures F-15 and F-16 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Legal entity	
	BRA	EDIC
Non-Hispanic white woman-owned	2.8 %	50.6 %
Asian American-owned	0.4	0.3
Black American-owned	0.3	1.2
Hispanic American-owned	0.2	0.9
Native American-owned	0.0	0.0
Total minority-owned	0.9 %	2.4 %
Total minority- and woman-owned	3.7 %	53.0 %

F. Concentration of Dollars

BBC analyzed whether the contracting dollars that the BPDA awarded to each relevant group of minority- and woman-owned businesses during the study period were spread across a relatively

large number of businesses or were concentrated with relatively few businesses. The study team assessed that question by calculating:

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

Figure 6-6 presents those results for each relevant business group. Most notably, although the BPDA awarded contracting dollars to 20 non-Hispanic white woman-owned businesses during the study period, three of them (or, 15%) accounted for 75 percent of those dollars. By itself, one non-Hispanic white woman-owned business accounted for 46 percent of the total dollars the BPDA awarded to non-Hispanic white woman-owned businesses during the study period.

Figure 6-6.
Concentration of BPDA
contracting dollars that went
to minority- and woman-
owned businesses

Source:
 BBC Research & Consulting utilization analysis.

Business group	Utilized businesses	Businesses accounting for 75% of dollars	
		Number	Percent
Non-Hispanic white woman-owned	20	3	15 %
Asian American-owned	1	1	100
Black American-owned	5	2	40
Hispanic American-owned	4	2	50
Native American-owned	0	0	0

CHAPTER 7.

Disparity Analysis

CHAPTER 7.

Disparity Analysis

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of minority- and woman-owned businesses in prime contracts and subcontracts that the Boston Planning & Development Agency (BPDA) awarded between July 1, 2014 through June 30, 2019 (i.e., the *study period*) with the percentage of contract dollars that those businesses might be expected to receive based on their *availability* for that work.¹ Results from the disparity analysis will inform the programs and policies that the BPDA uses to encourage the participation of minority- and woman-owned businesses in its contracts and procurements. The analysis focused on construction, construction design, other professional services, support services, and goods and supplies contracts and procurements that the BPDA awarded during the study period. Chapter 7 presents the disparity analysis in three parts:

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

A. Overview

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

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

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

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

groups, and they often serve as justification for organizations to use relatively aggressive measures—such as *race- and gender-conscious* measures—to address corresponding barriers.²

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

- Construction, construction design, other professional services, support services, and goods and supplies;
- Prime contracts and subcontracts; and
- Different time periods.

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

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

- “All businesses” in row (1) pertains to information about all businesses regardless of the race/ethnicity and gender of their owners.
- Row (2) presents results for all minority- and woman-owned businesses considered together, regardless of whether they were certified as such with the City of Boston (City), the Commonwealth (Commonwealth) of Massachusetts, or any other organization.
- Row (3) presents results for all non-Hispanic white woman-owned businesses, regardless of whether they were certified as such with the City, the Commonwealth, or any other organization.
- Row (4) presents results for all minority-owned businesses, regardless of whether they were certified as such with the City, the Commonwealth, or any other organization.
- Rows (5) through (9) present results for businesses of each relevant racial/ethnic group, regardless of whether they were certified as such with the City, the Commonwealth, or any other organization.
- Rows (10) through (17) present utilization analysis results for businesses of each relevant racial/ethnic and gender group that were certified as such with the City, the Commonwealth, or any other organization.

² For example, see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); and *Concrete Works of Colo., Inc. v. BPDA and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994).

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

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	636	\$52,083	\$52,083				
(2) Minority and woman-owned	113	\$12,191	\$12,191	23.4	17.4	6.0	134.7
(3) Non-Hispanic white woman-owned	73	\$11,388	\$11,388	21.9	9.9	12.0	200+
(4) Minority-owned	40	\$803	\$803	1.5	7.5	-6.0	20.5
(5) Asian American-owned	8	\$129	\$164	0.3	1.2	-0.9	25.7
(6) Black American-owned	19	\$287	\$367	0.7	3.3	-2.6	21.0
(7) Hispanic American-owned	11	\$213	\$272	0.5	2.8	-2.3	18.4
(8) Native American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(9) Unknown minority-owned	2	\$173					
(10) Minority and woman-owned (SLBE)	94	\$11,793	\$11,793	22.6			
(11) Non-Hispanic white woman-owned (SLBE)	59	\$11,050	\$11,050	21.2			
(12) Minority-owned (SLBE)	35	\$743	\$743	1.4			
(13) Asian American-owned (SLBE)	8	\$129	\$166	0.3			
(14) Black American-owned (SLBE)	19	\$287	\$372	0.7			
(15) Hispanic American-owned (SLBE)	7	\$158	\$205	0.4			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	1	\$169					

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

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

Source: BBC Research & Consulting disparity analysis.

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

- Column (a) presents the total number of prime contracts and subcontracts (i.e., *contract elements*) that BBC analyzed as part of the contract set. As shown in row (1) of column (a) of Figure 7-1, BBC analyzed 636 contract elements that the BPDA awarded during the study period.³ The value presented in column (a) for each business group represents the number of contract elements in which businesses of that particular group participated. For example, as shown in row (6) of column (a), Black American-owned businesses participated in 19 prime contracts and subcontracts that the agency awarded during the study period.
- Column (b) presents the dollars (in thousands) that were associated with the set of contract elements. As shown in row (1) of column (b) of Figure 7-1, BBC examined approximately \$52 million for the entire set of contract elements. The dollar totals include both prime contracts and subcontracts dollars. The value presented in column (b) for each individual business group represents the dollars that the businesses of that particular group received on the set of contract elements. For example, as shown in row (6) of column (b), Black American-owned businesses received approximately \$287,000 of the prime contracts and subcontracts that the BPDA awarded during the study period.
- Column (c) presents the dollars (in thousands) that were associated with the set of contract elements after adjusting those dollars for businesses that BBC identified as minority-owned but for which specific race/ethnicity information was not available. Unknown minority-owned businesses were allocated to minority subgroups proportional to the known total dollars of those groups.
- Column (d) presents the participation of each business group as a percentage of total dollars associated with the set of contract elements. BBC calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage. For example, for Black American-owned businesses, the study team divided \$367,000 by \$52 million and multiplied by 100 for a result 0.7 percent, as shown in row (6) of column (d).

2. Availability results. Column (e) of Figure 7-1 presents the availability of each relevant group for all contract elements that BBC analyzed as part of the contract set. Availability estimates, which are represented as percentages of the total contracting dollars associated with the set of contracts, serve as benchmarks against which to compare the participation of specific groups for specific sets of contracts. For example, as shown in row (6) of column (e), the availability of Black American-owned businesses for BPDA work is 3.3 percent.

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 for BPDA work was to subtract the participation percentage from the

³ BBC also analyzed 155 contract elements that BPDA awarded through the use of Commonwealth blanket contracts during the study period. Those contracts were analyzed separately, and results for those contracts are presented in F-14.

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 BPDA work. For example, as presented in row (6) of column (f) of Figure 7-1, the participation of Black American-owned businesses in BPDA contracts and procurements was lower than their availability for that work, with a difference of 2.6 percentage points.

4. Disparity indices. BBC also calculated a disparity index, or ratio, for each relevant racial/ethnic and gender group. Column (g) of Figure 7-1 presents the disparity index for each group. For example, as reported in row (6) of column (g), the disparity index for Black American-owned businesses was approximately 21, indicating that Black American-owned businesses actually received approximately \$0.21 for every dollar that they might be expected to receive based on their availability for the prime contracts and subcontracts that the BPDA awarded during the study period. For disparity indices exceeding 200, BBC reported an index of “200+.” When there was no participation or availability for a particular group for a particular set of contracts, BBC reported a disparity index of “100,” indicating parity.

B. Disparity Analysis Results

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

1. All contracts and procurements. Figure 7-2 presents disparity indices for all relevant prime contracts and subcontracts that the BPDA awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. Disparity indices of less than 100 indicate disparities between participation and availability (i.e., underutilization). For reference, a line is also drawn at a disparity index level of 80, indicating a substantial disparity. As shown in Figure 7-2, overall, the participation of minority- and woman-owned businesses in contracts and procurements that the BPDA awarded during the period was higher than one might expect based on the availability of those businesses for that work. The disparity index of 135 indicates that minority- and woman-owned businesses received approximately \$1.35 for every dollar that they might be expected to receive based on their availability for the relevant prime contracts and subcontracts that the BPDA awarded during the study period. However, that disparity index was driven by results for non-Hispanic white woman-owned businesses. Disparity analysis results by individual racial/ethnic and gender groups indicated that:

- All individual minority groups exhibited disparity indices substantially below parity: Asian American-owned businesses (disparity index of 26), Black American-owned businesses (disparity index of 21), Hispanic American-owned businesses (disparity index of 18), and Native American-owned businesses (disparity index of 0).
- Non-Hispanic white woman-owned businesses (disparity index of 200+) did not exhibit a disparity.

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

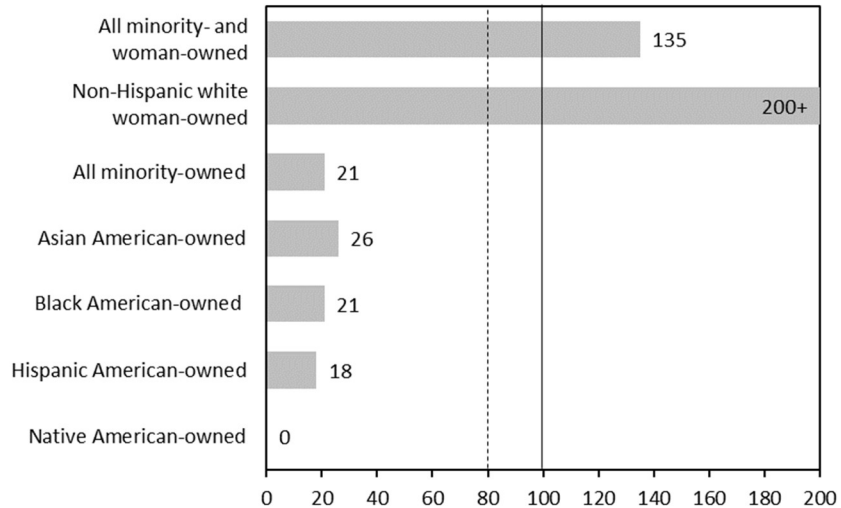
Note:

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

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

Source:

BBC Research & Consulting disparity analysis.



2. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors, so it is useful to examine disparity analysis results separately for prime contracts and subcontracts. As shown in Figure 7-3, minority- and woman-owned businesses considered together did not show a disparity for prime contracts (disparity index of 138) but showed a substantial disparity for subcontracts (disparity index of 68). Results for individual groups indicated that:

- All individual minority groups showed substantial disparities on prime contracts: Asian American-owned businesses (disparity index of 28), Black American-owned businesses (disparity index of 22), Hispanic American-owned businesses (disparity index of 20), and Native American-owned businesses (disparity index of 0).
- All individual minority groups also showed substantial disparities on subcontracts: Asian American-owned businesses (disparity index of 0), Black American-owned businesses (disparity index of 4), Hispanic American-owned businesses (disparity index of 0), and Native American-owned businesses (disparity index of 0).
- Non-Hispanic white woman-owned businesses did not exhibit a disparity for either prime contracts (disparity index of 200+) or subcontracts (disparity index of 200+).

Figure 7-3.
Disparity analysis
results by contract
role

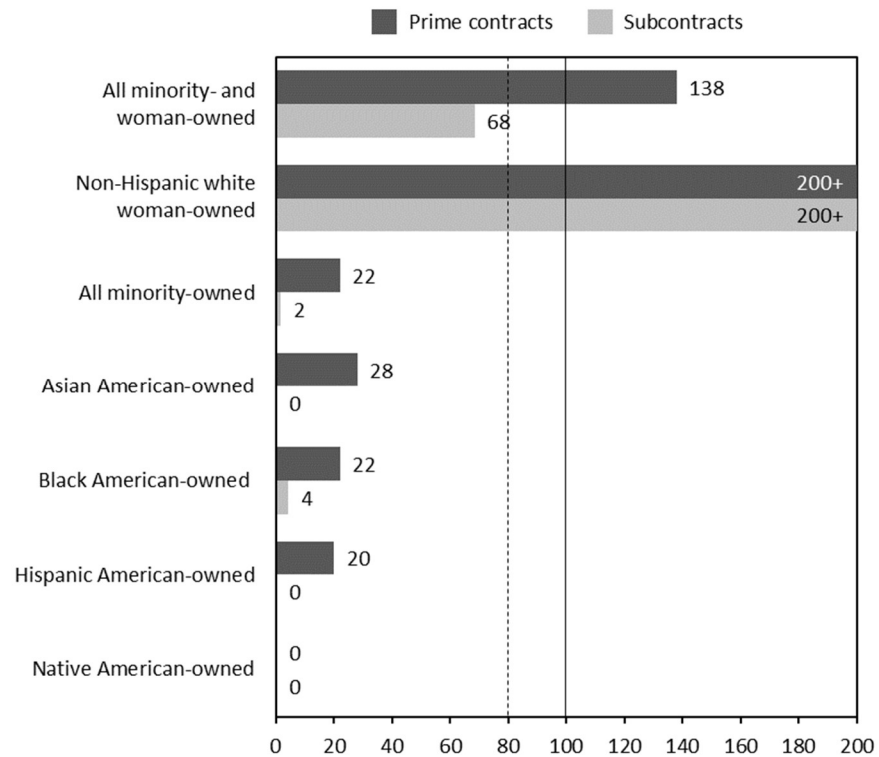
Note:

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

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

Source:

BBC Research & Consulting disparity analysis.



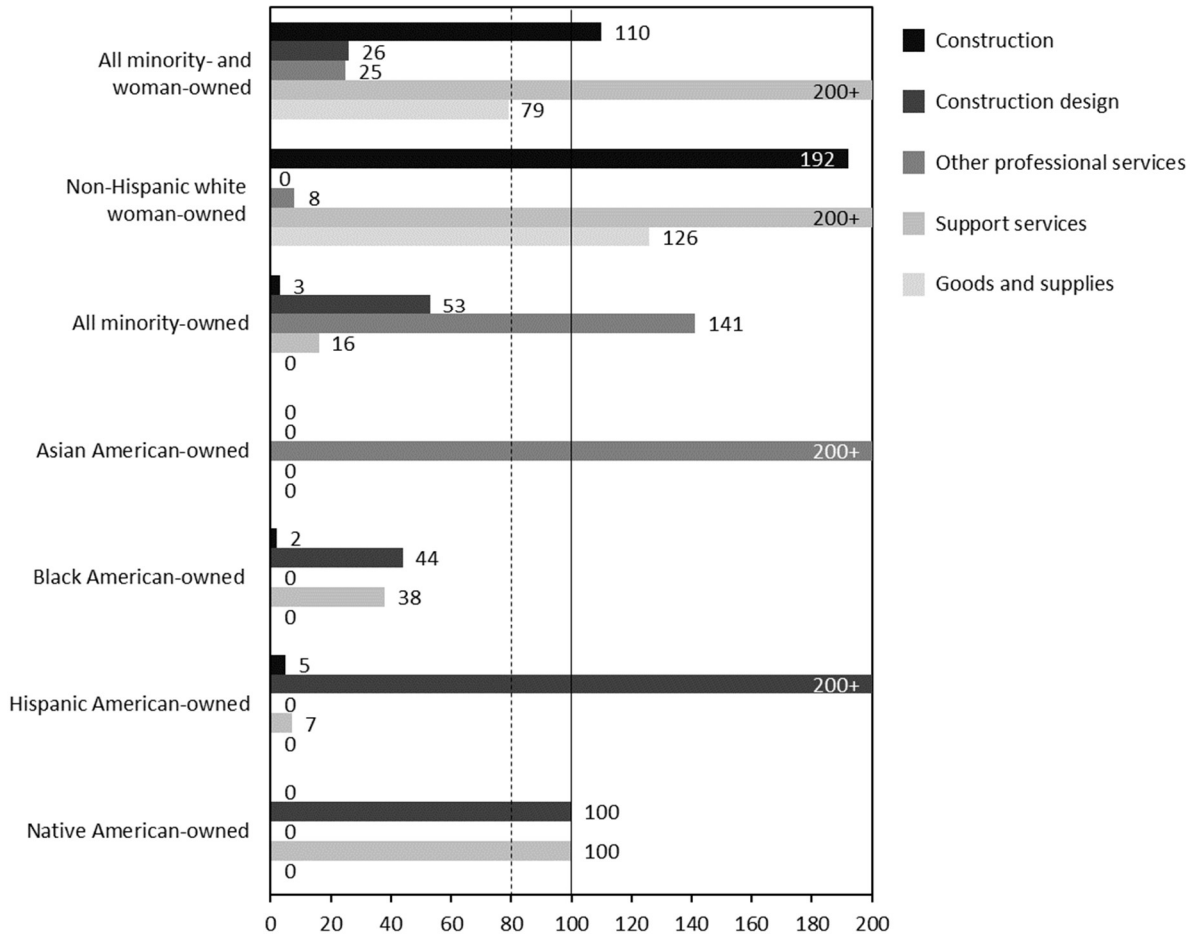
3. Industry. BBC also examined disparity analysis results separately for the BPDA’s construction, construction design, other professional services, support services, and goods and supplies contracts and procurements to determine whether disparities between participation and availability differ by work type. As shown in Figure 7-4, minority- and woman-owned businesses considered together showed substantial disparities for construction design (disparity index of 26), other professional services (disparity index of 25), and goods and supplies (disparity index of 79) contracts. Disparity analysis results differed by industry and group:

- All individual minority groups showed substantial disparities on construction contracts: Asian American-owned businesses (disparity index of 0), Black American-owned businesses (disparity index of 2), Hispanic American-owned businesses (disparity index of 5), and Native American-owned businesses (disparity index of 0).
- Three individual groups showed substantial disparities on construction design contracts: non-Hispanic white woman-owned businesses (disparity index of 0), Asian American-owned businesses (disparity index of 0), and Black American-owned businesses (disparity index of 44).
- Four individual groups showed substantial disparities on other professional services contracts: non-Hispanic white woman-owned businesses (disparity index of 8), Black American-owned businesses (disparity index of 0), Hispanic American owned businesses (disparity index of 0), and Native American-owned businesses (disparity index of 0).
- Three individual groups showed substantial disparities on support services contracts: Asian American-owned businesses (disparity index of 0), Black American-owned

businesses (disparity index of 38), and Hispanic American-owned businesses (disparity index of 7).

- All individual minority groups showed substantial disparities on goods and supplies contracts: Asian American-owned businesses (disparity index of 0), Black American-owned businesses (disparity index of 0), Hispanic American-owned businesses (disparity index of 0), and Native American-owned businesses (disparity index of 0).

Figure 7-4.
Disparity analysis results by industry



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

For more detail and results by group, see F-5 – F-9 in Appendix F.

Source: BBC Research & Consulting disparity analysis.

4. Time period. BBC examined disparity analysis results separately for contracts and procurements that the BPDA awarded in the early study period (i.e., July 1, 2014 – June 30, 2016 and the late study period (i.e., July 1, 2016 – June 30, 2019) to determine whether outcomes for minority- and woman-owned businesses changed over time. As shown in Figure 7-5, minority- and woman-owned businesses considered together did not show a disparity for either the early study period (disparity index of 198) or the late study period (disparity index of 104). Results for individual groups indicated that:

- All individual minority groups showed substantial disparities on early study period contracts: Asian American-owned businesses (disparity index of 30), Black American owned businesses (disparity index of 3), Hispanic American-owned businesses (disparity index of 31), and Native American owned businesses (disparity index of 0).
- All individual minority groups also showed substantial disparities on late study period contracts: Asian American-owned businesses (disparity index of 21), Black American-owned businesses (disparity index of 31), Hispanic American-owned businesses (disparity index of 5), and Native American-owned businesses (disparity index of 0).
- Non-Hispanic white woman-owned businesses did not exhibit a disparity for either early study period contracts (disparity index of 200+) or late study period contracts (disparity index of 167).

Figure 7-5.
Disparity analysis results by time period

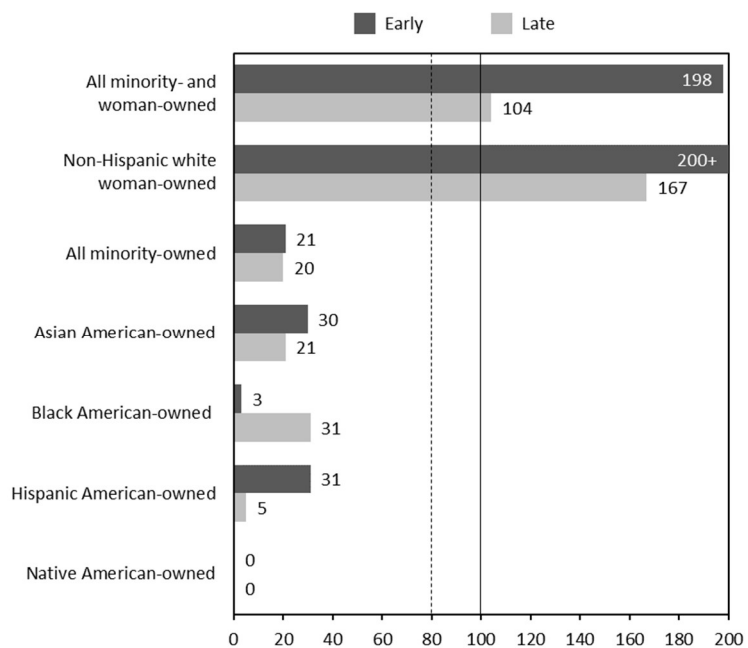
Note:

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

For more detail, see Figures F-3 and F-4 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



5. Legal entity. The BPDA comprises two agencies—the Boston Redevelopment Authority (BRA) and the Economic Development and Industrial Corporation (EDIC)—that both do business as the BPDA but represent distinct legal entities and maintain separate functions. BBC examined disparity analysis results separately for BRA and EDIC contracts and procurements that were awarded during the study period. As shown in Figure 7-6, minority- and woman-owned businesses considered together showed a substantial disparity for BRA contracts (disparity index of 17) but not for EDIC contracts (disparity index of 200+). Results for individual groups indicated that:

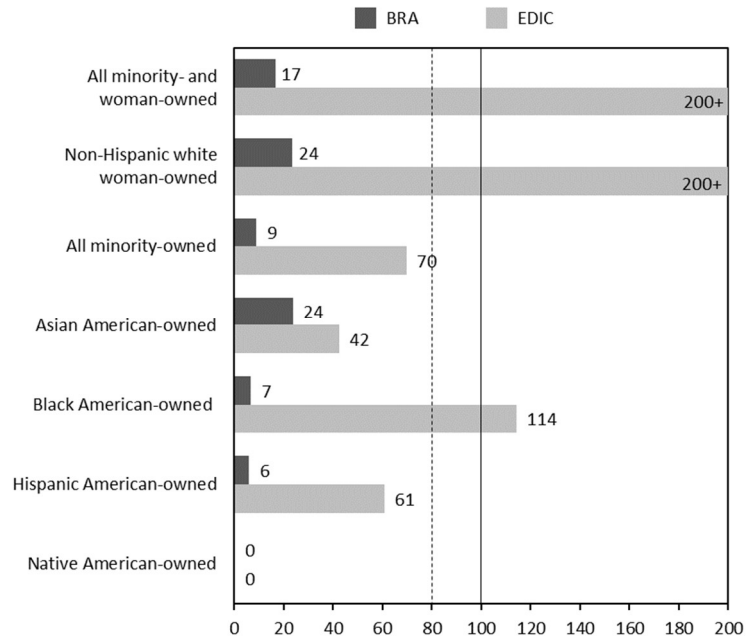
- All individual groups showed substantial disparities on BRA contracts: non-Hispanic white woman-owned businesses (disparity index of 24), Asian American-owned businesses (disparity index of 24), Black American owned businesses (disparity index of 7), Hispanic American-owned businesses (disparity index of 6), and Native American owned businesses (disparity index of 0).

- Three individual groups showed substantial disparities on EDIC contracts: Asian American-owned businesses (disparity index of 42), Hispanic American-owned businesses (disparity index of 61), and Native American-owned businesses (disparity index of 0).

Figure 7-6.
Disparity analysis results by legal entity

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

Source:
 BBC Research & Consulting disparity analysis.



C. Statistical Significance

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

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

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

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

2. Results. BBC ran Monte Carlo simulations on all BPDA contracts and procurements considered together and on BPDA construction contracts to assess whether the substantial disparities that relevant business groups exhibited for those contracts and procurements were statistically significant. As shown in Figure 7-7, results from the Monte Carlo analysis indicated that the disparity that minority-owned businesses considered together exhibited on all BPDA contracts and procurements was statistically significant at the 95 percent confidence level, as were the disparities that Black American-owned businesses and Hispanic American-owned businesses exhibited on all BPDA contracts and procurements. The disparity that Native American-owned businesses exhibited on all BPDA contracts and procurements was statistically significant at the 90 percent confidence level. The substantial disparity found for minority-owned businesses considered together on construction contracts was also statistically significant at the 95 percent confidence level, as were the disparities found for Asian American-owned businesses, Black American-owned businesses, and Hispanic American-owned businesses on construction contracts.

Figure 7-7
Monte Carlo simulation results for select BPDA contracts and procurements

Business Group	Disparity index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"
All contracts			
Minority-owned and woman-owned	135	N/A	N/A %
Non-Hispanic white woman-owned	200+	N/A	N/A %
Minority-owned	21	6	<0.1 %
Asian American-owned	26	168,019	16.8 %
Black American-owned	21	13,214	1.3 %
Hispanic American-owned	18	514	0.1 %
Native American-owned	0	42,539	4.3 %
Construction contracts			
Minority-owned and woman-owned	110	N/A	N/A %
Non-Hispanic white woman-owned	192	N/A	N/A %
Minority-owned	3	0	<0.1 %
Asian American-owned	0	272	<0.1 %
Black American-owned	2	561	0.1 %
Hispanic American-owned	5	108	<0.1 %
Native American-owned	0	81,768	8.2 %

Source: BBC Research & Consulting disparity analysis.

CHAPTER 8.

Program Implementation

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Program Implementation

BBC Research & Consulting (BBC) reviewed measures that the Boston Planning & Development Agency (BPDA) currently uses to encourage the participation of minority- and woman-owned businesses in its contracting and procurement. In addition, BBC presents several program considerations—including measures that other organizations in the region use—that the BPDA should review as the agency refines the policies and programs it uses to encourage minority- and woman-owned business participation in its contracting. BBC presents information about program implementation in three parts:

- A. Program overview;
- B. Program considerations; and
- C. Other organizations' measures.

A. Program Overview

The BPDA uses myriad *race- and gender-neutral* measures to encourage the participation of small businesses, including many minority- and woman-owned business, in its contracts and procurements. Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses, or all small businesses, in an organization's contracting, regardless of the race/ethnicity or gender of business owners. In contrast, *race- and gender-conscious* measures are measures that are designed to specifically encourage the participation of minority- and woman-owned businesses in an organization's contracting (e.g., using minority- or woman-owned business subcontracting goals on individual contracts). The BPDA does not currently use any race- or gender-conscious measures.

1. Race- and gender-neutral measures. As part of meeting the *narrow tailoring* requirement of the strict scrutiny standard of constitutional review, organizations that implement minority- and woman-owned business programs must meet the maximum feasible portion of overall aspirational minority- and woman-owned business participation goals through the use of race- and gender-neutral measures (for details, see Chapter 2 and Appendix B). If an organization cannot meet its overall annual minority- or woman-owned business goals through the use of race- and gender-neutral measures alone, then it can also consider using race- and gender-conscious measures. Examples of the race- and gender-neutral measures that the BPDA uses include:

- Focused marketing and outreach;
- Leveraging City of Boston (City) programs; and
- Internal policies.

a. Marketing and outreach. The BPDA uses targeted outreach methods to advertise bid opportunities to business that have been certified as small and minority- and woman-owned businesses by the City of Boston. BPDA also offers materials in multiple languages and attends procurement events hosted by other organizations to discuss upcoming BPDA projects and bid opportunities.

b. City programs. The BPDA promotes the City's technical assistance programs to its vendors and vendors seeking to do work with the BPDA. In particular, the BPDA has a close relationship with the City's Office of Economic Development, which works with consultants to help small businesses develop and maintain their website, use or create a sound bookkeeping system, and learn other essential aspects of owning and running a business. Some business owners are eligible to contract for free with an expert consultant regarding a variety of topics, including business coaching, marketing, and financial planning. The BPDA encourages vendors to participate in those and other City programs.

c. Internal policies. The BPDA recently began implementing internal policies to better track minority- and woman-owned business participation in its contracts and procurements and to make BPDA contracts more accessible to small businesses by assessing whether select contracts can be unbundled into multiple smaller contracting opportunities. However, such internal policies were implemented after the study period (i.e., July 1, 2014 and June 30, 2019) and would not have impacted disparity study results.

B. Program Considerations

The disparity study provides substantial information that the BPDA should examine as it considers potential refinements to the policies and program measures it uses to encourage the participation of minority- and woman-owned businesses in its contracts and procurements. BBC presents several key considerations the BPDA should make. In making those considerations, the agency should assess whether additional resources, new data systems, changes in internal policy, or changes in law might be required and whether it can leverage programs that the City and other local agencies have in place.

1. Overall aspirational goal. Many organizations establish overall numeric goals for the participation of minority- and woman-owned businesses in their contracts and procurements. Such goals help guide efforts to encourage the participation of minority- and woman-owned businesses and create a shared understanding of an organization's diversity objectives among internal and external stakeholders. Typically, organizations use various *race- and gender-neutral*, and if appropriate, *race- and gender conscious* measures to meet those goals each year. If they fail to meet their goals, organizations assess why they failed to do so and develop plans to meet their goals the following year.

The BPDA could consider following a two-step process to develop an overall aspirational goal for the participation of minority- and woman-owned businesses in its contracts and procurements, consisting of *establishing a base figure* and *considering an adjustment* to the base figure based on conditions in the local marketplace and other factors. BBC presents an example of a two-step process for setting an overall aspirational goal for minority- and woman-owned businesses based on disparity study results.

a. Establishing a base figure. The availability analysis provides information that the BPDA can use for establishing a base figure for its overall aspirational goal. The analysis indicates that minority- and woman-owned businesses are potentially available to participate in 17.4 percent of the BPDA’s contracting and procurement dollars, which the agency could consider as its base figure for its overall aspirational goal.

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

- i. Volume of work minority- and woman-owned businesses have performed in recent years;
- ii. Information related to employment, self-employment, education, training, and unions;
- iii. Information related to financing, bonding, and insurance; and
- iv. Other relevant data.

i. Volume of work minority- and woman-owned businesses have performed in recent years. The BPDA could consider making an adjustment to its base figure based on the degree to which minority- and woman-owned businesses have participated in its contracts and procurements in recent years. Figure 8-1 presents the percentage of contract and procurement dollars that the BPDA awarded to minority- and woman-owned businesses in each year of the study period. The median participation of minority- and woman-owned businesses in BPDA contracts and procurements during that time was 22.2 percent, which supports an upward adjustment to the base figure.

Figure 8-1.
Minority- and woman-owned business participation in BPDA work during the study period

Source:
 BBC Research & Consulting utilization analysis.

Fiscal year	Past participation
2015	13.4 %
2016	32.4
2017	26.6
2018	22.2
2019	1.9

ii. Information related to employment, self-employment, education, training, and unions. Chapter 3 summarizes information about conditions in the local marketplace for minorities, women, and minority- and woman-owned businesses. Additional information about quantitative and qualitative analyses of conditions in the local marketplace are presented in Appendices C and D. BBC’s analyses indicate that there are barriers that certain minority groups and women face related to human capital, financial capital, and business ownership in the local marketplace. For example, marketplace analyses indicated that Black, Hispanic, and Native Americans are far less

likely than non-Hispanic whites to earn college degrees in Boston; minorities and women are less likely to work as managers in various industries in Boston; and most minorities and women earn substantially less than non-Hispanic white men in Boston. Such barriers may decrease the availability of minority- and woman-owned businesses for BPDA contracts and procurements, which supports an upward adjustment to the base figure.

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

iv. Other factors. The BPDA should also examine other relevant factors when determining whether to adjust its overall aspirational goal. For example, there is quantitative evidence that businesses owned by minorities and women earn less than businesses owned by non-Hispanic white men and face greater barriers in the marketplace, even after accounting for race- and gender-neutral factors. Chapter 3 summarizes that evidence and Appendix C presents corresponding analyses. There is also qualitative evidence of barriers to the success of minority- and woman-owned businesses, as presented in Appendix D. Many businesses reported experiencing stereotyping, double standards, and business networks that are closed off to minority- and woman-owned businesses. Some of that information suggests that discrimination on the basis of race/ethnicity and gender adversely affects certain types of businesses in the local market.

c. Goal revisions. If it decides to establish an overall aspirational goal for minority- and woman-owned business participation, the BPDA should determine how frequently it will revise its goal. It should also consider any changes it plans on making to business development programs, procurement processes, staff resources, or other processes and programs that might affect its ability to support the growth of minority- and woman-owned businesses. The BPDA should assess how those changes might affect the availability and capacity of minority- and woman-owned businesses to perform work on BPDA contracts and procurements. It should also regularly review its goal-setting process to ensure that it provides adequate flexibility to respond to recent changes in marketplace conditions, anticipated contract and procurement opportunities, new statistical or anecdotal evidence, and other factors.

2. Contract-specific goals. Currently, the BPDA's programs and policies comprise only race- and gender-neutral measures, which are designed to encourage the participation of all small businesses in BPDA contracts and procurements, regardless of the race/ethnicity or gender of business owners. Disparity analysis results indicate that all relevant racial/ethnic and gender groups showed substantial disparities on key sets of contracts and procurements that the BPDA

awarded during the study period. Because the BPDA uses race- and gender-neutral measures to encourage the participation of minority- and woman-owned businesses in its contracting, and because those measures have not sufficiently addressed disparities for those businesses, it might consider using minority- and woman-owned business goals to award individual contracts in the future. To do so, the BPDA would set participation goals on individual contracts based on the availability of minority- and woman-owned businesses for the types of work involved with the project and other factors, and, as a condition of award, prime contractors would have to meet those goals by making subcontracting commitments with certified minority- and woman-owned businesses as part of their bids or by demonstrating sufficient good faith efforts to do so. The BPDA could consider setting participation goals on all relevant contracts and procurements or only on particular types of contracts (e.g., on construction contracts, which account for nearly one-half of BPDA spend).

Because the use of minority- and woman-owned business goals would be a race- and gender-conscious measure, the BPDA will need to ensure that the use of those goals meets the strict scrutiny standard of constitutional review, including showing a compelling governmental interest for their use and ensuring that their use is narrowly tailored (for details, see Chapter 2 and Appendix B). Prior to implementing contract-specific goals, the BPDA should consider whether it has fully implemented its existing race- and gender-neutral measures and whether it should implement additional race- and gender-neutral measures to further encourage the participation of minority- and woman-owned businesses in its contracts and procurements.

3. Additional race- and gender-neutral measures. The disparity study highlighted several additional race- and gender-neutral measures that the BPDA could consider to further encourage the participation of minority- and woman-owned businesses in its contracts and procurements.

a. Small purchases. As part of in-depth interviews and public meetings, several business owners indicated that it is difficult to learn about small projects that are not subject to public bidding and that those projects are best suited for small businesses. Chapter 30B requires that a local government body “use sound business practices” to procure goods and services worth less than \$10,000, and the BPDA has the authority to establish more detailed policies for contracts of that size. The BPDA encourages the using department to solicit multiple quotes for small purchases but could consider stronger policies to encourage small-business participation. For example, the BPDA could require that departments seek three or more written or oral quotes for purchases between \$5,000 and \$10,000, and even require that one of those businesses be a small business. Such a requirement might encourage BPDA staff to solicit quotes from small and diverse businesses for relatively small contracts and procurements.

b. Minimum solicitations of quotes. Chapter 30B requires that local government agencies solicit a minimum of three quotes for procurements worth at least \$10,000 and up to \$50,000. The BPDA should consider increasing the minimum number of quotes that BPDA staff must solicit for purchases of that size. The BPDA could also increase solicitation requirements for purchases worth more than a certain dollar amount within that range. For example, the BPDA could require that staff solicit a minimum of five quotes for purchases worth at least \$10,000 and up to \$25,000 and a minimum of seven quotes for purchases worth at least \$25,000 and up to \$50,000. In addition, the BPDA could require that some number of those businesses be small businesses.

c. Advertising and outreach. Chapter 30B requires minimum levels of advertising for procurement opportunities, such as posting opportunities two weeks prior to bid opening dates. Beyond those requirements, the BPDA largely allows individual departments to determine what levels of outreach are appropriate for the goods and services they require. The BPDA could establish additional requirements for advertising and outreach for specific types of contracts and procurements. For example, the BPDA might work with individual departments to host meet-and-greets or public meetings on a quarterly basis or well in advance of relatively large contract opportunities. Procurement staff could attend those meetings to help businesses understand what opportunities will be available and how to successfully compete for those opportunities. Such meetings could also help prime contractors and small businesses connect and build professional relationships. The BPDA could partner with other local agencies to host combined quarterly meetings to provide information about upcoming projects from each agency. In addition, the BPDA should consider ways it can better leverage technology to network with and provide information to businesses throughout the region. The BPDA could consider making use of online procurement fairs, webinars, pre-bid meetings, and other tools to provide outreach and assistance, particularly as the COVID-19 pandemic continues.

d. Request for proposals (RFP) language. Although the BPDA includes language in its RFPs related to equal opportunity, it should consider adding stronger language to RFP and contracting documents to more effectively articulate its commitment to promoting equity in its contracting. The BPDA could consider adding language to encourage bidders to submit supplier diversity plans with their proposal and bid packages. Such plans could require bidders to identify subcontracting commitments that they have made to small or local businesses. The BPDA could also include a link to the City's online certification directory to further encourage bidders to seek partnerships with small businesses and minority- and woman-owned businesses.

e. Small business set asides. Disparity analysis results indicated substantial disparities for most relevant business groups on prime contracts that the BPDA awarded during the study period. In addition, as part of in-depth interviews and public meetings, several business owners indicated that small business set asides would help businesses get their foot in the door and build capacity. To the extent permitted by state and local law, the BPDA might consider setting aside select small prime contracts for small business bidding to encourage the participation of minority- and woman-owned businesses as prime contractors. The City certifies businesses as small business enterprises, and the BPDA could limit bidding on eligible contracts to those businesses.

f. Unbundling large contracts. In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts that the BPDA awarded during the study period. To further encourage the participation of minority- and woman-owned businesses in its work, the BPDA should consider making efforts to unbundle relatively large prime contracts, and even subcontracts, into several smaller contract pieces. For example, the City of Charlotte, North Carolina encourages prime contractors to unbundle subcontracting opportunities into smaller contract pieces, making them more accessible to small businesses, and accepts such attempts as good faith efforts as part of its contracting goals program. Such efforts might increase contracting opportunities for all small businesses, including many minority- and woman-owned businesses, on BPDA contracts, including those subject to filed sub-bid requirements.

g. Prompt payment. As part of in-depth interviews and surveys, several businesses, including many minority- and woman-owned businesses, reported difficulties with receiving payment in a timely manner on public contracts, particularly when they work as subcontractors and suppliers. Many businesses also commented that having capital on hand is crucial to business success and often a challenge for small businesses. The BPDA should consider establishing prompt payment processes to ensure payment to the prime contractor within a specified maximum number of days after accepting an invoice. The BPDA should also consider including prompt payment requirements for subcontracting in all its contracts and enforcing those requirements. For example, the Indiana Department of Administration (IDOA) requires prime contractors to pay their subcontractors within 10 days of receiving payment from IDOA. Doing so might help ensure that subcontractors receive payment in a timely manner and have enough operating capital to remain competitive and successful.

h. Subcontracting minimums. Subcontracts often represent accessible opportunities for small businesses, including many minority- and woman-owned businesses, to become involved in an organization's contracting and procurement. However, subcontracting accounts for a relatively small percentage of the total contract and procurement dollars that the BPDA awards. To increase the number of subcontract opportunities, the BPDA could consider implementing a program that requires prime contractors to subcontract a minimum amount of project work. For specific types of contracts where potential subcontracting or partnership opportunities might exist, the BPDA could set a minimum percentage of work to be subcontracted. Prime contractors would then have to meet or exceed those thresholds in order for their bids or proposals to be considered responsive. If the BPDA were to implement such a program, it should include good faith efforts provisions that would require prime contractors to document their efforts to identify and include potential subcontractors in their bids or proposals.

i. Utilization of different businesses. The disparity study indicated that a substantial portion of BPDA contract and procurement dollars that was awarded to minority- and woman-owned businesses was largely concentrated with a relatively small number of businesses. The BPDA could consider encouraging departments to solicit vendors with which they have never worked, and use bid and contract language to encourage prime contractors to do the same with subcontractors. For example, as part of the bidding process, the BPDA might ask prime contractors to submit information about the efforts they made to identify and team with businesses with which they have not previously worked.

j. Capacity building. Results from the disparity study indicated that there are many minority- and woman-owned businesses in the Boston area but that many of them have relatively low capacities for BPDA work. The BPDA should consider various technical assistance, business development, mentor-protégé, and joint venture programs to help businesses build the capacity required to compete for relatively large contracts and procurements. Anecdotal evidence indicated that businesses find such programs—when implemented well—to be valuable in helping them grow and learn the necessary skills required to compete in their industries. In addition to considering programs that could be open to all small businesses, the BPDA could consider implementing a program to assist certain businesses with development and growth. As part of such a program, the BPDA could have an application and interview process to select businesses with which to work closely to provide specific support and resources necessary for

growth. The BPDA could consider maximizing resources across multiple organizations by partnering with other local organizations and agencies to implement any such capacity-building measures.

k. Data collection. The BPDA maintains information about the prime contracts and procurements it awards, but that information is limited depending on the type of contract or procurement. BPDA should consider maintaining comprehensive information about all of the contracts and procurements it awards including:

- Contract or procurement number;
- Vendor name, address, phone number, and email address;
- Type of associated work;
- Total contract or procurement amount;
- Any associated change orders or amendments;
- Paid-to-date amount;
- Ownership status; and
- Certification status.

The BPDA should also enter contract or procurement numbers into any associated records within its payment and general ledger system. That would allow the BPDA to connect general ledger information to contract and procurement information in a reliable manner.

The BPDA should also consider collecting comprehensive data on all subcontracts, regardless of subcontractors' characteristics or whether they are certified minority- or woman-owned businesses for *all* relevant prime contracts (e.g., construction, design, and large support services contracts). Collecting subcontract data on all relevant contracts will help ensure the BPDA can monitor the participation of minority- and woman-owned businesses in its work as accurately as possible, identify additional businesses that could become certified, and identify future subcontracting opportunities for minority- and woman-owned businesses. Collecting the following data on all subcontracts would be appropriate:

- Associated prime contract or procurement number;
- Subcontractor name, address, phone number, and email address;
- Type of associated work;
- Subcontract award amount inclusive of any change orders or amendments;
- Subcontract paid-to-date amount;
- Ownership status; and
- Certification status.

The BPDA should consider collecting those data as part of bids but also requiring prime contractors to submit payment data on subcontracts as part of the invoicing process for all

relevant contracts. The BPDA should train department staff to collect and enter subcontract data accurately and consistently.

C. Other Organizations’ Measures

In addition to the measures that the BPDA currently use to encourage the participation of minority- and woman-owned businesses in contracting and procurement and the considerations presented above, there are many program measures that other organizations in and around Boston use to encourage the participation of small businesses in their contracting that the BPDA could consider implementing in the future. Figure 8-2 provides examples of those measures.

Figure 8-2.
Examples of gender- and race-neutral measures used by other organizations in the region

Type	Examples in the local marketplace
<p>Capital and Finance</p>	<p>The United States Department of Transportation Bonding Education Program (BEP) partners with the Surety and Fidelity Association of America (SFAA) to help small businesses become bond-ready. The BEP is designed to address what businesses need to do to become bond-ready and includes one-on-one sessions with local surety bonding professionals to help in assembling the materials necessary for a complete bond application. The program is tailored to businesses competing for transportation-related contracts.</p> <p>The Small Business Administration guarantees bid, performance, and payment bonds issued by surety companies. Those guarantees encourage surety companies to bond small businesses that are having difficulty obtaining bonding on their own.</p> <p>The Boston Local Development Corporation Loan Fund - which falls under the Boston Planning & Development Agency - is available for existing businesses, new ventures, and businesses relocating to the City of Boston. Loans of \$25,000-\$150,000 may be used to support working capital needs as well as the purchase of new business property, equipment, machinery, and inventory.</p> <p>The Dorchester Bay Economic Development Corporation provides Quick Capital Loans of up to \$20,000 with rapid approvals and no application fees to businesses in the City of Boston. The organization also offers a Neighborhood Loan Fund of up to \$250,000 to support residents or businesses in Dorchester, Roxbury, Mattapan, Hyde Park, Roslindale, or Jamaica Plain to be used for working capital needs.</p> <p>The Massachusetts Growth Capital Corporation’s Microloan Program provides financing to existing Massachusetts small businesses to assist with working capital or to purchase furniture, fixtures, supplies, materials, and equipment.</p>
<p>Advocacy and Outreach</p>	<p>The Initiative for a Competitive Inner City (ICIC) advocates on behalf of small businesses in Massachusetts and around the country. The organization works to support the growth of business owners in under-resourced communities by providing training, working with local governments to get resources to disadvantaged businesses, and creating resource guides for small businesses.</p> <p>The Greater New England Minority Supplier Development Council is the regional affiliate of the NSMDC. The organization certifies minority-owned business enterprises (MBEs), assists in capacity building, and provides networking opportunities for relationship building between MBEs and prime contractors or agencies.</p> <p>The Boston Chamber of Commerce supports small businesses through its public policy initiatives, programs and events designed to connect small businesses in Boston to their peers and established business leaders, and its educational and professional development offerings for small business owners and their employees.</p>

Figure 8-2 (continued).
Examples of gender- and race-neutral measures used by other organizations in the region

Type	Examples in the local marketplace
<p>Mentor-Protégé Programs</p>	<p>Suffolk Construction began a "Trade Partnership Series" where participants can attend a series of classes on how to best serve as a subcontractor to the firm. Those who successfully complete all classes gain access to a mentor. The training sessions include information that is broadly helpful, such as how to secure capital and how to identify bid opportunities</p> <p>Gilbane Construction offers a Contractor Training Program, a six-week series which provides trade partners an opportunity to develop and broaden their industry skills and knowledge while also gaining first-hand insight into working with the firm. After the six sessions, which include topics like project management, networking, and legal review, "graduates" are paired with a mentor.</p> <p>The SBA 8(a) Business Development Mentor-Protégé Program pairs subcontractors with prime contractors to assist small businesses with management, financial, and technical issues. The program also helps small businesses explore joint ventures and subcontracting opportunities for federally-funded contracts.</p>
<p>Technical Assistance</p>	<p>The Business Equity Initiative (BEI) connects Black- and Latinx-owned businesses with established business leaders who have grown small businesses to provide expertise and support. In addition, BEI provides peer support via the Business Equity CEO Roundtable, allowing small business owners to share operating advice and hold each other accountable on progress towards their companies' visions.</p> <p>The goal of the Workforce Opportunity Resource Center is to engage a local, diverse workforce for all projects in the Boston area. Through the established community networks, the organization works to ensure benefits for workers and contractors both large and small. It focuses on providing small businesses with "One Stop Shopping" for resources and technical support promoting growth and success in careers or business.</p> <p>The Boston Service Corps of Retired Executives (SCORE) serves as a source of free small business advice for entrepreneurs. SCORE is a volunteer, non-profit organization whose mission is to promote the success of small businesses in Boston. SCORE mentors provide free and confidential business assistance to both prospective entrepreneurs and existing small business owners. The organization also conducts a variety of workshops that address many of the essential techniques necessary for establishing and managing a successful business.</p> <p>The Metro South Business Assistance Center is an innovative, high-tech, one-stop business resource center that helps small businesses thrive. The organization provides access to technology including computers and business software, offers informative and educational training videos, and share references and resources to small business owners who need them.</p> <p>Business Service Organizations (BSOs) provide assistance and support to small businesses, including offering training, providing mentorships, marketing, and connecting businesses to other resources. Over 250 BSOs exist in Boston, some private and some public.</p> <p>Boston Main Streets is a city-wide network with 20 neighborhood chapters. Each chapter works to boost small businesses in its respective area. Those efforts include providing training and resources, connecting local businesses to citywide and statewide resources, and offering technical assistance as needed. Boston Main Streets receives significant funding from the City of Boston.</p> <p>The Small Business Administration operates the 7(j) Management and Technical Assistance Program to provide specialized assistance to underserved markets. The assistance focuses on helping businesses succeed in federal, state, and local government markets for goods and services, and as subcontractors or prime contractors working in government contracting. The assistance addresses myriad topics including marketing, strategic and operational planning, financial analysis, opportunity development and capture, contract management, and compliance.</p>

Figure 8-2 (continued).

Examples of gender- and race-neutral measures used by other organizations in the region

Type	Examples in the local marketplace
COVID-19 Response	<p>Protect MA is an online marketplace that connects Massachusetts-based Black and Latinx designers, makers, and manufacturers of non-medical masks, cloth face covers, and other personal protective equipment (PPE) with potential buyers in the business and residential communities.</p> <p>The Boston Chapter of the Local Initiatives Support Corporation offers Small Business Relief Grants, flexibility in repayment terms of existing loans, and funds to community-based organizations such as community centers and development corporations.</p> <p>Opportunity Fund’s Small Business Relief Fund aims to raise support for small businesses impacted by the COVID-19 crisis and who may not qualify for traditional financing. Loans of up to \$250,000 may be used for working capital, equipment purchases, tenant improvements, commercial vehicle purchases (excluding ride share cars), debt refinancing (such as merchant cash advances and tax liens), opening a new location, purchasing another business, and more.</p>

APPENDIX A.

Definitions of Terms

APPENDIX A.

Definitions of Terms

Appendix A defines terms that are useful to understanding the City of Boston Disparity Study report.

Anecdotal Information

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

Availability Analysis

An availability analysis assesses the percentage of dollars that one might expect a specific group of businesses to receive on contracts or procurements that a particular organization awards. The availability analysis in this report is based on the match between various characteristics of potentially available businesses and prime contracts and subcontracts that the City of Boston, the Boston Housing Authority, the Boston Planning and Development Agency, and the Boston Water and Sewer Commission awarded during the study period.

Boston Equity and Inclusion Unit

The City of Boston Equity and Inclusion Unit implements the Small Local Business Enterprise (SLBE) Program to help ensure that small businesses as well as minority- and woman-owned businesses have an equal opportunity to participate in City contracts and procurements. In addition, the Equity and Inclusion Unit is responsible for certifying small businesses and minority- and woman-owned businesses.

Boston Housing Authority (BHA)

BHA is a public agency in Boston that provides affordable housing to nearly 60,000 residents in and around Boston. The agency provides nearly 10 percent of Boston residents with housing assistance through a combination of public housing and federal and state voucher subsidy. It is the largest public housing authority in New England. BHA was one of four agencies involved with the disparity study.

Boston Planning and Development Agency (BPDA)

BPDA is the planning and economic development agency for the City of Boston. It is charged with growing the tax base, cultivating the private jobs market, training the workforce, encouraging businesses to relocate to Boston, planning neighborhoods, identifying height and density limits, charting sustainable development and resilient building construction, advocating for multi modal transportation, responding to Boston's changing population, and producing research about growth in the city. BPDA was one of four agencies involved with the disparity study.

Boston Small Local Business Enterprise (SLBE) Program

The City of Boston implements the Small Local Business Enterprise (SLBE) Program to encourage the participation of small businesses as well as minority- and woman-owned businesses in City contracts and procurements. The plan comprises myriad *race- and gender-neutral* measures to encourage the participation of small businesses, including many minority- and woman-owned businesses, in City contracting. The plan does not include any *race- or gender-conscious* measures.

Boston Water and Sewer Commission (BWSC)

BWSC serves retail customers with water services in Boston. The agency owns and operates drinking water distribution, wastewater collection, and stormwater drainage systems throughout the region and is the largest retail water and wastewater utility in New England. BWSC was one of four agencies involved with the disparity study.

Business

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

Business Listing

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

City of Boston (City)

The City provides myriad services to the people who live and work in the Boston region, including police and fire protection, health and mental health services, road construction and maintenance, and a variety of other social and economic services. As part of providing those services, the City typically spends hundreds of millions of contract and procurement dollars each year to procure various goods and services related to construction, architecture and engineering, other professional services, and goods and services. The City was one of four agencies involved with the disparity study.

Compelling Governmental Interest

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

Consultant

A consultant is a business that performs professional services contracts.

Contract

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

Contract Element

A contract element is either a prime contract or subcontract.

Contractor

A contractor is a business that performs construction contracts.

Control

Control means exercising management and executive authority of a business.

Custom Census Availability Analysis

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

Disparity

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

Disparity Analysis

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

Disparity Index

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

Dun & Bradstreet (D&B)

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

Firm

See *business*.

Industry

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

Inferences of Discrimination

Inferences of discrimination are quantitative or qualitative evidence of discrimination in the marketplace against particular business groups. Government organizations often use inferences of discrimination as justification for the use of relatively strong measures to address barriers affecting those groups.

Local Marketplace

See *relevant geographic market area*.

Locally funded Contract

Locally funded contracts are contracts or projects that are wholly funded by local sources. That is, they do not include any federal funds.

Majority-owned Business

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

Minority

A minority is an individual who identifies with one of the following racial/ethnic groups: Asian Americans, Black Americans, Hispanic Americans, Native Americans, or other non-white race or ethnicity.

Minority-owned Business

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

Minority-owned Business Enterprise (MBE)

An MBE is a minority-owned business that is certified as such through the City or the Commonwealth of Massachusetts. Businesses seeking MBE certification through the City are required to submit an application to the Equity and Inclusion Unit. The application requires businesses to submit various information, including business name, contact information, financial information, work specializations, and the race/ethnicity and gender of the owners. The Equity and Inclusion Unit reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required information.

Narrow Tailoring

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

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

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.

Participation

See utilization.

Prime Consultant

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

Prime Contract

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

Prime Contractor

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

Procurement

See *contract*.

Project

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

Race- and Gender-conscious Measures

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

Race- and Gender-neutral Measures

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

The RGMA is the geographic area in which the businesses to which agencies award most of their contracting dollars are located. The RGMA is also referred to as the *local marketplace*. Case law related to contracting programs and disparity studies requires disparity study analyses to focus on the relevant geographic market area. The RGMA for the disparity study was Norfolk, Suffolk, Plymouth, Middlesex, and Essex counties in Massachusetts.

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 could correctly account for the difference).

Strict Scrutiny

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

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

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

Study Period

The study period is the time period on which the study team focused for the utilization, availability, and disparity analyses. Agencies had to have awarded a contract during the study period for the contract to be included in the study team's analyses. The study period for the disparity study was July 1, 2014 through June 30, 2019.

Subconsultant

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

Subcontract

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

Subcontractor

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

Subindustry

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

Substantial Disparity

A substantial disparity is a disparity index of 80 or less, indicating that actual participation of a specific business group is 80 percent or less of the group's estimated availability. Substantial disparities are considered *inferences of discrimination* in the marketplace against particular business groups. Government organizations often use substantial disparities as justification for the use of relatively strong measures to address barriers affecting those groups.

Utilization

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

Vendor

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

Woman-owned Business

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

Woman-owned Business Enterprise (WBE)

A WBE is a woman-owned business that is certified as such through the City or the Commonwealth of Massachusetts. Businesses seeking WBE certification through the City are required to submit an application to the Equity and Inclusion Unit. The application requires businesses to submit various information, including business name, contact information, financial information, work specializations, and the race/ethnicity and gender of the owners. The Equity and Inclusion Unit reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required information.

APPENDIX B.

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 involving local and state government minority and women-owned and disadvantaged-owned business enterprise (“MBE/WBE/DBE”) programs. The appendix also reviews recent cases, which are instructive to the study and MBE/WBE/DBE programs, regarding the Federal Disadvantaged Business Enterprise (“Federal DBE”) Program,¹ Congressional findings relating to the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program,² and the implementation of the Federal DBE and ACDBE Programs by local and state governments. The Federal DBE Program was continued and reauthorized by the Fixing America’s Surface Transportation Act (FAST Act)³, which set forth Congressional findings as to discrimination against minority-women-owned business enterprises and disadvantaged business enterprises, including from disparity studies and other evidence. Congress is currently at the time of this report considering legislation (H.R. 2, Section 1101, Moving Forward Act) again to reauthorize the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.

The appendix provides a summary of the legal framework for the disparity study as applicable to the City of Boston.

Appendix B begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.⁴ *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*,⁵ (“*Adarand I*”), which applied the strict scrutiny analysis set forth in *Croson* to federal programs that provide federal assistance to a recipient of federal funds. The Supreme Court’s decisions in *Adarand I* and *Croson*, and subsequent cases and authorities provide the basis for the legal analysis in connection with the study.

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study, MBE/WBE/DBE Programs, local and state governments implementing the Federal DBE Program instructive to the study, the strict scrutiny analysis, intermediate scrutiny analysis, rational basis standard, and related guidance and

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

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

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

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

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

authorities. This analysis reviews Commonwealth of Massachusetts cases and First Circuit Court of Appeals decisions involving MBE/WBE/DBE programs.

The analysis also reviews recent court decisions that involved challenges to MBE/WBE/DBE programs in other jurisdictions in Section E below, which are informative to the study, including, *H.B. Rowe v. NCDOT*,⁶ *Kossmann Contracting Co. v. City of Houston*,⁷ *Concrete Works of Colorado, Inc. v. City and County of Denver*,⁸ *In Re City of Memphis*,⁹ *Associated Gen. Contractors v. Drabik*, 214 F.3d 730 (6th Cir. 2000), *affirming* Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998), *W. H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999), *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9th Cir. 1997), *Eng'g Contractors Ass'n of S. Florida v. Metro Dade County*, 122 F.3d 895 (11th Cir. 1997), and *Contractor's Association of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586 (3d Cir. 1996).

In addition, the analysis reviews in Section F below other recent federal cases that have considered the validity of the Federal DBE Program and its implementation by a state or local government agency or a recipient of federal funds, which are instructive to the study, including: *Dunnet Bay Construction Co. v. Illinois DOT*,¹⁰ *Northern Contracting, Inc. v. Illinois DOT*,¹¹ *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,¹² *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.*,¹³ *Western States Paving Co. v. Washington State DOT*,¹⁴ *Mountain West Holding Co. v. Montana, Montana DOT, et al.*,¹⁵ *M.K. Weeden Construction v. Montana, Montana DOT, et al.*,¹⁶ *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads*,¹⁷ *Geyer Signal, Inc. v. Minnesota DOT*,¹⁸ *Geod Corporation v. New Jersey Transit Corporation*,¹⁹ and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.²⁰

⁶ *H.B. Rowe Co., Inc. v. W. Lyndo Tippet, NCDOT, et al.*, 615 F.3d 233 (4th Cir. 2010).

⁷ *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁸ *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), cert. denied, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari).

⁹ *In Re City of Memphis*, 293 F.3d 345 (6th Cir. 2002).

¹⁰ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir., 2015), cert. denied, 137 S. Ct. 31, 2016 WL 193809, (October 3, 2016), Docket No. 15-906; *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay*, 2015 WL 4934560 (7th Cir., 2015).

¹¹ *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

¹² *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016). Midwest Fence filed a Petition for a Writ of Certiorari with the U.S. Supreme Court, see 2017 WL 511931 (Feb. 2, 2017), which was denied, 2017 WL 497345 (June 26, 2017).

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

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

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

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

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

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

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

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

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

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.²¹ J.A. Croson Co. (“Croson”) challenged the City of Richmond’s minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more Minority Business Enterprises (“MBE”). In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

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

The Court determined that the plan neither served a “compelling governmental interest” nor offered a “narrowly tailored” remedy to past discrimination. The Court found no “compelling governmental interest” because the City had not provided “a strong basis in evidence for its conclusion that [race-based] remedial action was necessary.”²² 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.²³ 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.²⁴

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

²¹ 488 U.S. 469 (1989).

²² 488 U.S. at 500, 510.

²³ 488 U.S. at 480, 505.

²⁴ 488 U.S. at 507-510.

be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination” under Title VII.²⁵ 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.”²⁶

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.”²⁷ “Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.”²⁸

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.”²⁹ 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.”³⁰

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.”³¹ “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.”³²

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.”³³

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

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

²⁷ 488 U.S. at 502.

²⁸ *Id.*

²⁹ 488 U.S. at 509.

³⁰ *Id.*

³¹ 488 U.S. at 509.

³² *Id.*

³³ 488 U.S. at 492.

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 state and local government recipients of federal funds.

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

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

1. Strict scrutiny analysis

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.³⁴ The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.³⁵

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.³⁶ 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.³⁷ 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.³⁸

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

³⁴ *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Peña (Adarand I)*, 515 U.S. 200, 227 (1995); see, e.g., *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H.B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

³⁵ *Adarand I*, 515 U.S. 200, 227 (1995); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

³⁶ *Id.*

³⁷ *Id.*; see, e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

³⁸ See, e.g., *Concrete Works I*, 36 F.3d at 1520.

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.”³⁹ 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).⁴⁰ 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.⁴¹
- **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.⁴²
- **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.⁴³
- **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.⁴⁴

The Federal DBE Program Implemented By State and Local Governments

It is instructive to analyze the Federal DBE Program and its implementation by state and local governments because the Program on its face and as applied by state and local

³⁹ *Sherbrooke Turf*, 345 F.3d at 970, (citing *Adarand VII*, 228 F.3d at 1167 – 76 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992-93.

⁴⁰ *See, e.g., Adarand VII*, 228 F.3d at 1167– 76 (10th Cir. 2000); *see also Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁴¹ *Adarand VII*, 228 F.3d at 1168-70 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992; *see Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237.

⁴² *Adarand VII*, at 1170-72 (10th Cir. 2000); *see DynaLantic*, 885 F.Supp.2d 237.

⁴³ *Id.* at 1172-74 (10th Cir. 2000); *see DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁴⁴ *Adarand VII*, 228 F.3d at 1174-75 (10th Cir. 2000); *see, H. B. Rowe*, 615 F.3d 233, 247-258 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

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

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.⁴⁵ Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century (“TEA-21”), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 (“SAFETEA”). In July 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act (“MAP-21”).⁴⁶ In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).⁴⁷ Most recently, in October 2018, Congress passed the FAA Reauthorization Act⁴⁸. At the present time, pending in Congress is legislation (H.R. 2, Section 1101, Moving Forward Act) to reauthorize the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.

The Federal DBE Program provides requirements for state and local government federal aid recipients and how recipients of federal funds implement the Federal DBE Program for federally-assisted contracts. The federal government and Congress have 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 local and state government 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.⁴⁹

The Federal DBE Program established responsibility for implementing the DBE Program to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE goal specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The Federal DBE Program outlines certain steps a state or local government recipient can follow in establishing a goal, and USDOT considers and must approve the goal and the

⁴⁵ *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*.

⁴⁶ *Pub L. 112-141, H.R. 4348, § 1101(b)*, July 6, 2012, 126 Stat 405.

⁴⁷ *Pub. L. 114-94, H.R. 22, § 1101(b)*, December 4, 2015, 129 Stat. 1312.

⁴⁸ *Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.*

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

recipient's DBE programs. The implementation of the Federal DBE Program is substantially in the hands of the state or local government recipient and is set forth in detail in the federal regulations, including 49 CFR Part 26 and section 26.45.

Provided in 49 CFR § 26.45 are regulations regarding how local and state governments as recipients of federal funds should set the overall goals for their DBE programs, which are instructive to local and state government MBE/WBW/DBE programs. In summary, the state or local government establishes a base figure for relative availability of DBEs.⁵⁰ This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market.⁵¹ Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.⁵² There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d). These include, among other types, the current capacity of DBEs to perform work on the recipient's contracts as measured by the volume of work DBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.⁵³ This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE participation one would expect absent the effects of discrimination.⁵⁴

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goals can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.⁵⁵ A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.⁵⁶

State and local governments are to certify DBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.⁵⁷

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

F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21. In October 2018, December 2015 and in July 2012, Congress passed the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made "Findings" that "discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do

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

⁵¹ *Id.*

⁵² *Id.* at § 26.45(d); *Id.* at § 23.51(d).

⁵³ *Id.*

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

⁵⁵ 49 CFR § 26.51; 49 CFR § 23.51(a).

⁵⁶ 49 CFR § 26.51(b); 49 CFR § 23.25.

⁵⁷ 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.⁵⁸ 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.⁵⁹

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

SEC. 157 MINORITY AND DISADVANTAGED BUSINESS PARTICIPATION.

(a) Findings. Congress finds the following:

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

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

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

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

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

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

⁵⁸ 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.

⁵⁹ *Id.* at Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, § 1101(b)(1) (2015).

SEC. 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.⁶⁰

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

MAP-21 (July 2012).

In the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress provided “Findings” that “discrimination and related barriers” “merit the continuation of the” Federal DBE Program.⁶¹ 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.”⁶²

Thus, Congress in MAP-21 and the subsequent Acts noted above determined based on testimony and documentation of race and gender discrimination that there was “a compelling need for the continuation of the” Federal DBE Program.⁶³

Burden of proof to establish the strict scrutiny standard. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.⁶⁴ If the government makes its initial showing, the burden shifts to the

⁶¹ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁶² Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁶³ *Id.*

⁶⁴ See *AGC, SDC v. Caltrans*, 713 F.3rd at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242, 247-258 (4th Cir. 2010); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater (“Adarand VII”)*, 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir.

challenger to rebut that showing.⁶⁵ The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."⁶⁶

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.⁶⁷ It is well established that "remediating the effects of past or present racial discrimination" is a compelling interest.⁶⁸ In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."⁶⁹

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."⁷⁰ "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.'"⁷¹ Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.⁷²

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).

⁶⁵ *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.

⁶⁶ 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.

⁶⁷ *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.

⁶⁸ *Shaw 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).

⁶⁹ *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.

⁷⁰ *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).

⁷¹ 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).

⁷² *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).

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.⁷³ 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.⁷⁴ 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.⁷⁵

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.⁷⁶ 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.⁷⁷ Conjecture and unsupported criticisms of the government’s methodology are insufficient.⁷⁸ 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.⁷⁹

The courts have stated that “it is insufficient to show that ‘data was susceptible to multiple interpretations,’ instead, plaintiffs must ‘present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.’”⁸⁰ The courts hold that in assessing the evidence offered in support of a finding of discrimination, it considers “both direct and

⁷³ *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).

⁷⁴ *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).

⁷⁵ *Id.*; *Adarand VII*, 228 F.3d at 1166 (10th Cir. 2000).

⁷⁶ 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.

⁷⁷ 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).

⁷⁸ *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.

⁷⁹ *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).

⁸⁰ *Geyer Signal, Inc.*, 2014 WL 1309092, quoting *Sherbrooke Turf*, 345 F.3d at 970.

circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself.”⁸¹

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.”⁸² 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.⁸³ 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.⁸⁴ 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.⁸⁵

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.”⁸⁶ In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.”⁸⁷

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.⁸⁸

Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state recipient level.⁸⁹ “Where gross statistical disparities can be

⁸¹ *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).

⁸² *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).

⁸³ *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).

⁸⁴ *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).

⁸⁵ *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).

⁸⁶ 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.

⁸⁷ 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).

⁸⁸ 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).

⁸⁹ 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

shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”⁹⁰

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.⁹¹ 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.⁹² However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.⁹³

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.⁹⁴ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,⁹⁵ “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”⁹⁶

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

⁹⁰ *Crosen*, 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).

⁹¹ *Crosen*, 448 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver (“Concrete Works II”)*, 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁹² See, e.g., *Crosen*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

⁹³ *Western States Paving*, 407 F.3d at 1001.

⁹⁴ See, e.g., *Crosen*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁹⁵ *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 *Crosen*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

⁹⁶ *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 *Crosen*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.⁹⁷
- **Disparity index.** An important component of statistical evidence is the “disparity index.”⁹⁸ 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.”⁹⁹
- **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.¹⁰⁰

In terms of statistical evidence, the courts have held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence”, but rather it may rely on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.¹⁰¹

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.¹⁰² 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*.¹⁰³ 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.”¹⁰⁴ In *Concrete Works II*, the court

⁹⁷ 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.

⁹⁸ *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).

⁹⁹ 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.

¹⁰⁰ 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.

¹⁰¹ *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, 1005-1008 (3d Cir. 1993); see also Western States Paving, 407 F.3d at 1001; Kossman Contracting, 2016 WL 1104363 (S.D. Tex. 2016).*

¹⁰² *Id.* at 973.

¹⁰³ *Id.*

¹⁰⁴ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added).

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.”¹⁰⁵

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.¹⁰⁶ Thus, the local government was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden.¹⁰⁷

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.¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰ 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.¹¹¹

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.¹¹² (“[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.*”¹¹³ 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.”¹¹⁴ 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.¹¹⁵

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

¹⁰⁵ *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), quoting *Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

¹⁰⁶ *Id.* at 973.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 974.

¹¹¹ *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

¹¹² *Concrete Works*, 321 F.3d at 976, citing *Adarand VII*, 228 F.3d at 1166-67.

¹¹³ *Id.* (emphasis added).

¹¹⁴ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

¹¹⁵ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

other private portions of their business.”¹¹⁶ 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.¹¹⁷

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.”¹¹⁸

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.¹¹⁹

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.”¹²⁰

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.¹²¹

Anecdotal evidence. Anecdotal evidence includes personal accounts of incidents, including of discrimination, told from the witness’ perspective. Anecdotal evidence of discrimination, standing alone, generally is insufficient to show a systematic pattern of discrimination.¹²² But personal accounts of actual discrimination may complement empirical evidence and play an

¹¹⁶ *Id.*

¹¹⁷ *Concrete Works*, 321 F.3d at 976, quoting *Croson*, 488 U.S. at 492.

¹¹⁸ *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68.

¹¹⁹ *Id.* at 977.

¹²⁰ *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

¹²¹ *Id.* at 979-80.

¹²² 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).

important role in bolstering statistical evidence.¹²³ 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.”¹²⁴

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.¹²⁵

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.¹²⁶

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 analyze several criteria or factors in determining whether a program or legislation satisfies this requirement including:

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;

¹²³ 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).

¹²⁴ *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).

¹²⁵ 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).

¹²⁶ 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 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.¹²⁷

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.¹²⁸

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.”¹²⁹ 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.”¹³⁰

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik* (“*Drabik II*”), stated: “*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting ... or whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”¹³¹

¹²⁷ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d Cir. 1993); see also *Geyer Signal, Inc.*, 2014 WL 1309092.

¹²⁸ 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.

¹²⁹ *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).

¹³⁰ 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.

¹³¹ *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*¹³² 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.”¹³³ The Court found that the District failed to show it seriously considered race-neutral measures.

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.¹³⁴ Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.¹³⁵

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.¹³⁶

The “narrowly tailored” analysis is instructive in terms of addressing the constitutionality of MBE/WBE/DBE programs, developing any potential legislation or programs that involve MBE/WBE/DBEs, or in connection with determining appropriate remedial measures to achieve legislative objectives.

In *Northern Contracting* decision (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold “that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT’s program.”¹³⁷ 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.¹³⁸ The Seventh Circuit Court of Appeals analyzed IDOT’s compliance with the federal regulations regarding calculation of

¹³² 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007).

¹³³ 551 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).

¹³⁴ *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹³⁵ *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.

¹³⁶ 407 F.3d at 996-1000; See *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹³⁷ 473 F.3d at 722.

¹³⁸ *Id.* at 722.

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.¹³⁹ The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).¹⁴⁰ Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.¹⁴¹

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.¹⁴² 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.¹⁴³ The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.¹⁴⁴ 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.¹⁴⁵

Race-, ethnicity-, and gender-neutral measures. To the extent a “strong basis in evidence” exists concerning discrimination in a local or state government's relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a state's implementation of a race- or ethnicity-conscious program is necessary and thus narrowly tailored to achieve remedying identified discrimination. One of the key factors discussed above is consideration of race-, ethnicity- and gender-neutral measures.

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.¹⁴⁶ 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.¹⁴⁷

¹³⁹ *Id.* at 723-24.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*; *See, e.g., Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932 (7th Cir. 2016); *Geod Corp. v. New Jersey Transit Corp., et al.*, 746 F.Supp 2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

¹⁴² *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F. 3d 676, 2015 WL 4934560 at **18-22 (7th Cir. 2015).

¹⁴³ *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at **18-22.

¹⁴⁴ *Id.*

¹⁴⁵ 840 F.3d 932 (7th Cir. 2016).

¹⁴⁶ *See, e.g., Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179 (10th Cir. 2000); *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Contractors Ass'n of E. Pa. v. City of Philadelphia* (CAEP II), 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n* (CAEP I), 6 F.3d at 1008-1009 (3d. Cir. 1993); *Coral Constr.*, 941 F.2d at 923.

¹⁴⁷ *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).

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.”¹⁴⁸

Examples of race-, ethnicity-, and gender-neutral alternatives include, but are not limited to, the following:

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.¹⁴⁹

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

¹⁴⁸ *Croson*, 488 U.S. at 509-510.

¹⁴⁹ See, e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179 (10th Cir. 2000); 49 CFR § 26.51(b); see also, *Eng'g Contractors Ass'n*, 122 F.3d at 927-29; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”¹⁵⁰

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.¹⁵¹ For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;¹⁵² (2) good faith efforts provisions;¹⁵³ (3) waiver provisions;¹⁵⁴ (4) a rational basis for goals;¹⁵⁵ (5) graduation provisions;¹⁵⁶ (6) remedies only for groups for which there were findings of discrimination;¹⁵⁷ (7) sunset provisions;¹⁵⁸ and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.¹⁵⁹

Several federal court decisions have upheld the constitutionality of the Federal DBE Program and its implementation by state and local government recipients of federal funds, including satisfying the narrow tailoring factors.¹⁶⁰

¹⁵⁰ *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.

¹⁵¹ 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).

¹⁵² *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).

¹⁵³ *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.

¹⁵⁴ *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).

¹⁵⁵ *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).

¹⁵⁶ *Id.*

¹⁵⁷ 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.

¹⁵⁸ 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).

¹⁵⁹ *Coral Constr.*, 941 F.2d at 925.

¹⁶⁰ See, e.g., *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017); *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, 2016 WL 193809 (2016); *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006); *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. May 16, 2017); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”); *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), affirmed by *Dunnet Bay*, 2015 WL 4934560 (7th Cir. 2015); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 WL 1309092 (D. Minn. 2014); *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

2. Intermediate scrutiny analysis

Certain Federal Courts of Appeal, including the First Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.¹⁶¹ Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.¹⁶²

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.¹⁶³

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard requires the state actor to present “sufficient probative” evidence in support of its stated rationale for the program.¹⁶⁴

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.¹⁶⁵ 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

¹⁶¹ *AGC, SDC v. Caltrans*, 713 F.3d at 1195 (9th Cir. 2013); *Massachusetts v. U.S. Dept. of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012); *Western States Paving*, 407 F.3d at 990 n. 6; *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *See generally, Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Geyer Signal*, 2014 WL 1309092.

¹⁶² *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Massachusetts v. U.S. Dept. of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012); *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see, also Serv. Emp. Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993).

¹⁶³ *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Massachusetts v. U.S. Dept. of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996); *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *see, e.g., Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”).

¹⁶⁴ *Id.*

¹⁶⁵ *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Massachusetts v. U.S. Dept. of Health and Human Services*, 682 F.3d 1 (1st Cir. 2012); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996); *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.”)

showing of government involvement, active or passive, in the discrimination it seeks to remedy.¹⁶⁶

The First Circuit Court of Appeals stated in *Cohen v. Brown University* in 1996, that for the last twenty years, the Supreme Court has applied intermediate scrutiny to all cases raising equal protection challenges to gender-based classifications.¹⁶⁷ Under intermediate scrutiny, the burden of demonstrating an exceedingly persuasive justification for a government-imposed, gender-conscious classification is met by showing that the classification serves important governmental objectives, and that the means employed are substantially related to the achievement of those objectives.¹⁶⁸ Intermediate scrutiny does not require that there be no other way to accomplish the objectives.¹⁶⁹

The Seventh Circuit Court of Appeals, however, in *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, did not hold there is a different level of scrutiny for gender discrimination or gender based programs in connection with a challenge to the MBE Program involved in that case¹⁷⁰. The Court in *Builders Ass'n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

The Tenth Circuit in *Concrete Works*, stated with regard evidence as to woman-owned business enterprises as follows:

“We do not have the benefit of relevant authority with which to compare Denver’s disparity indices for WBEs. See *Contractors Ass’n*, 6 F.3d at 1009–11 (reviewing case law and noting that “it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary”). Nevertheless, Denver’s data indicates significant WBE underutilization such that the Ordinance’s gender classification arises from “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Mississippi Univ. of Women*, 458 U.S. at 726, 102 S.Ct. at 3337 (striking down, under the intermediate scrutiny standard, a state statute that excluded males from enrolling in a state-supported professional nursing school).”

The Fourth Circuit cites with approval the guidance from the Eleventh Circuit that has held “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”¹⁷¹

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

¹⁶⁶ *Coral Constr. Co.*, 941 F.2d at 931-932; see *Eng’g Contractors Ass’n*, 122 F.3d at 910.

¹⁶⁷ *Cohen v. Brown University*, 101 F.3d 155,183-184 (1st Cir. 1996)

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ 256 F.3d 642, 644-45 (7th Cir. 2001). But, see, *Hines v. Caston School Corp.* 651 N.E. 2d 330, 335-336 (Indiana App. 1995) (Indiana court recognized intermediate scrutiny for gender based classifications); *Thomas v. Greencastle Community School Corp.*, 603 N.E. 2d 190, 192 (Indiana App. 1992).

¹⁷¹ 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

reaction based on habit.”¹⁷² 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.¹⁷³ The Court in *Contractors Ass’n of E. Pa. (CAEP I)* held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.¹⁷⁴

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.¹⁷⁵ 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.¹⁷⁶ But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹ 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.¹⁸⁰

¹⁷² *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d Cir. 1993).

¹⁷³ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d Cir. 1993).

¹⁷⁴ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d Cir. 1993).

¹⁷⁵ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d Cir. 1993).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Massachusetts v. U.S. Dept. of Health and Human Services*, 682 F.3d 1, 8-11 (1st Cir. 2012); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *U.S. v. Brucker*, 646 F.3d 1012, 1017 (7th Cir. 2010); *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006); *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004); *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47-50 (1st Cir. 2003); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Doe v. Secretary of Education*, 479 Mass. 375, 95 N.E. 3d 241 (2018); *Gillespie v. City of Northampton*, 460 Mass. 148, 950 N.E. 2d 377 (2011); *Com. V. Francis*, 450 Mass. 132, 876 N.E. 2d 862 (2007).

¹⁸⁰ See, *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Massachusetts v. U.S. Dept. of Health and Human Services*, 682 F.3d 1, 8-11 (1st Cir. 2012); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004); *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47-50 (1st Cir. 2003); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Ass’n of E. Pa.*, 6 F.3d at 1011 (3d Cir. 1993); see, e.g., *Doe v.*

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.”¹⁸¹ So long as a government legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.¹⁸²

“[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.”¹⁸³ 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.”¹⁸⁴

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.”¹⁸⁵ Because all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”¹⁸⁶

A federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals, including veteran preference goals) in a procurement under the Federal Acquisition Regulations (“FAR”)¹⁸⁷.

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

Secretary of Education, 479 Mass. 375, 95 N.E. 3d 241 (2018); *Gillespie v. City of Northampton*, 460 Mass. 148, 950 N.E. 2d 377 (2011); *Com. V. Francis*, 450 Mass. 132, 876 N.E. 2d 862 (2007).

¹⁸¹ See, e.g., *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Massachusetts v. U.S. Dept. of Health and Human Services*, 682 F.3d 1, 8-11 (1st Cir. 2012); *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004); *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47-50 (1st Cir. 2003); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998) see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); see, e.g., *Doe v. Secretary of Education*, 479 Mass. 375, 95 N.E. 3d 241 (2018); *Gillespie v. City of Northampton*, 460 Mass. 148, 950 N.E. 2d 377 (2011); *Com. V. Francis*, 450 Mass. 132, 876 N.E. 2d 862 (2007).

¹⁸² *Id.*; *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013), (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)); see, e.g., *Doe v. Secretary of Education*, 479 Mass. 375, 95 N.E. 3d 241 (2018); *Gillespie v. City of Northampton*, 460 Mass. 148, 950 N.E. 2d 377 (2011); *Com. V. Francis*, 450 Mass. 132, 876 N.E. 2d 862 (2007).

¹⁸³ *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), cert. denied, 133 S. Ct. 189 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted); see, e.g., *Massachusetts v. U.S. Dept. of Health and Human Services*, 682 F.3d 1, 8-11 (1st Cir. 2012); *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004); *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47-50 (1st Cir. 2003); *Doe v. Secretary of Education*, 479 Mass. 375, 95 N.E. 3d 241 (2018); *Gillespie v. City of Northampton*, 460 Mass. 148, 950 N.E. 2d 377 (2011); *Com. V. Francis*, 450 Mass. 132, 876 N.E. 2d 862 (2007).

¹⁸⁴ *Heller v. Doe*, 509 U.S. 312, 321 (1993).

¹⁸⁵ *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); see, e.g., *Massachusetts v. U.S. Dept. of Health and Human Services*, 682 F.3d 1, 8-11 (1st Cir. 2012); *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004); *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47-50 (1st Cir. 2003); *Doe v. Secretary of Education*, 479 Mass. 375, 95 N.E. 3d 241 (2018); *Gillespie v. City of Northampton*, 460 Mass. 148, 950 N.E. 2d 377 (2011); *Com. V. Francis*, 450 Mass. 132, 876 N.E. 2d 862 (2007).

¹⁸⁶ *Id.*

¹⁸⁷ 2012 WL 5939228 (Fed. Cl. 2012).

“[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.”¹⁸⁸

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.¹⁸⁹ The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”¹⁹⁰

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.¹⁹¹ 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....”¹⁹²

4. First Circuit Court of Appeals and Commonwealth of Massachusetts MBE/WBE/DBE cases

There are several cases in the First Circuit and the Commonwealth of Massachusetts that involve, but do not specifically address the validity or constitutionality of MBE/WBE programs.¹⁹³ In one case, MBE/WBE related issues were raised in the context of fraud. In *United States v. Barker Steel Co.*, the government appealed the dismissal of charges against defendant Barker Steel Co.¹⁹⁴ The defendant was charged with conspiracy to defraud the United States in violation of 18 U.S.C. § 371.¹⁹⁵ The government accused the defendant of fraudulently obtaining MBE/WBE set aside contracts.¹⁹⁶ The First Circuit Court of Appeals reversed the lower court decision and remanded for trial.¹⁹⁷ After the case was remanded, the defendant pled guilty and was issued a fine. It is noteworthy that the court pointed out in a footnote that the defendants did not challenge the validity of the MBE program, and that it was incontroverted in this case the MBE program is a lawful function of government.¹⁹⁸

Another case in the same year as the *Croson* decision involved the compliance of MBE/WBE regulations. In *Peabody Construction Co. Inc. v. City of Boston*, Peabody Construction sued the City of Boston seeking declaratory and injunctive relief when their bid to renovate the

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See *Crown Elec. Supply Co. v. State Office of Minority & Women Bus. Assistance Appeal Bd.*, 51 Mass. App. Ct. 753 (2001); *Joyce Sturdy & Another v. State Office of Minority and Women Business Assistance*, 409 Mass. 587 (1991); *Kelley Marine Transp. Corp. v. Boston Sand & Gravel*, 1994 Mass. Super. LEXIS 714, *1, 2 Mass. L. Rep. 545; *Brait Builders Corp. v. Town of Hingham*, 28 Mass.L.Rptr.445, 2010 WL 26920566.

¹⁹⁴ *United States v. Barker Steel, Co. Inc.*, 985 F.2d 1123, 1123 (1st Cir. 1993).

¹⁹⁵ *Id.* at 1125.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1136.

¹⁹⁸ *Id.* At 1134.

Boston Latin Academy was rejected.¹⁹⁹ Peabody argued that as the lowest bidder conforming with all the statutory requirements, it should have received the contract.²⁰⁰ However, the Commonwealth stated the company did not comply with all the Commonwealth's requirements (under M.G.L.A. ch. 149 §§ 44A-44J) regarding the MBE/WBE regulations because the MBE Peabody selected was not certified as a MBE.²⁰¹ The Massachusetts Appeals Court affirmed the Superior Court's order denying injunctive relief stating that whether to accept or reject the bid was within the City's discretionary rights.²⁰² The court did not address the validity of the MBE/WBE regulations.

A recent 2018 case addressed the definition of MBE. In *Federal Concrete, Inc. v. Executive Office for Administration and Finance*, Federal Concrete in 2016 sought an injunction to remove a Portuguese company from receiving an affirmative market program and being classified as a certified MBE.²⁰³ The Suffolk County Superior court agreed that Portuguese companies were not considered MBEs, and did not qualify as Hispanics.²⁰⁴ The Commonwealth issued a memorandum in 2016 indicating that Portuguese-owned businesses will not be considered MBEs under the applicable Supplier Diversity Office regulations, and that as per 425 C.M.R. §2.02, Portuguese-owned business "shall be eligible for participation in programs funded by state transportation bond statutes where such statutes include Portuguese businesses as eligible participants."²⁰⁵

The Legislature established the Supplier Diversity Office of the Operational Services Division of the Executive Office for Administration and Finance (SDO) (then known as the State Office of Minority Business Assistance) in 1978. In 1980, it established an affirmative marketing set-aside program for state building projects to be administered by the Division of Capital Planning and Operations (now the Division of Capital Asset Management and Maintenance ("DCAMM")). It required DCAMM to reserve a portion of state building contracts for firms owned by "minority" persons, defined as a person "with permanent residence in the United States who is American Indian, Black, Cape Verdean, or Western Hemisphere Hispanic." In 1984, it expanded the definition of "minority" to include "Eskimo, Aleut [and] Asian" persons. The statute, now codified at *G.L.c. 7C, § 6(c)*, retains the same definition of "minority": "American Indian, Black, Cape Verdean, Western Hemisphere Hispanic, Aleut, Eskimo, or Asian."²⁰⁶

At least through the briefing on summary judgment in this case (February 10, 2017), the court noted that the defendants had no evidence of discrimination against persons of Portuguese origin in the construction, contracting or design industries in Massachusetts, no evidence of statistical disparities supporting an inference of such discrimination and no anecdotal or other evidence of such discrimination.²⁰⁷ A 2017 disparity study, which was expanded to consider Portuguese businesses, provided findings during the pendency of the

¹⁹⁹ *Peabody Construction Co. Inc. v. City of Boston*, 28 Mass. App. Ct. 100, 100-01 (1989).

²⁰⁰ *Id.* at 102-03.

²⁰¹ *Id.*

²⁰² *Id.* at 104.

²⁰³ *Federal Concrete, Inc. v. Executive Office*, 34 Mass.L.Rptr. 652, 2018 WL 1995551, *6 (2018).

²⁰⁴ *Id.*

²⁰⁵ *Changes to MBE Certification Status of Portuguese-Owned Business, Commonwealth of Massachusetts*, <http://www.mass.gov/anf/property-mgmt-and-construction/design-and-construction-of-public-bldgs/contract-compliance/changes-to-mbe-certification-status-of-portugese-owned-.html>.

²⁰⁶ *Federal Concrete, Inc. v. Executive Office*, 34 Mass.L.Rptr. 652, 2018 WL 1995551, *1 (2018).

²⁰⁷ *Id.* at *3.

Federal Concrete case that indicated Portuguese business enterprises faced discrimination in accessing projects.

The court held the defendants were permanently enjoined from certifying Portuguese-owned businesses as MBEs unless and until (1) they determine that a disparity study demonstrates a “strong basis in evidence” of past discrimination against Portuguese-owned businesses that would support certifying such businesses as MBEs, (2) SDO amends its regulation, through a public notice-and-comment process, to permit certification of Portuguese-owned businesses as MBEs on that basis, (3) SDO allows at least 10 business days between promulgation of any such regulation and the effective date, gives notice to the plaintiff of such promulgation, and cooperates in expeditious litigation of any lawsuit brought to challenge any such regulation.²⁰⁸

The court also held that the judgment in this case was without prejudice to any claims that may arise based upon new regulations that permit certification of Portuguese-owned businesses as MBEs.²⁰⁹

In *Commonwealth of Massachusetts v. CTA Construction Company, Inc., MDR Construction Company, Inc., and Margen, Inc.* (2015), a Massachusetts Superior Court case, the Commonwealth alleged that CTA Construction Company, Inc., MDR Construction Company, Inc., and Margen, Inc. committed fraud. Compl. ¶ 1. All three construction companies signed contracts with the Commonwealth for various projects. Compl. ¶ 15. As part of their contracts, the companies were obligated to sub-contract certain portions of the work to M/WBE. Compl. ¶ 18. The companies did not do as agreed. Compl. ¶ 20-21. Although the case settled out of court, the complaint is instructive regarding the Commonwealth’s consideration of MBE/WBE participation in contracts. More specifically, the complaint provided:

In general, the Complaint alleged that public construction contracts contain provisions requiring that not less than a certain percentage of the contract be performed by M/WBE contractors. The Complaint alleged that this percentage, also called “participation goals,” is specified in the contract terms, and public contracts often include detailed provisions explaining what qualifies as an eligible MBE or WBE, and what work counts toward the participation goal. Although termed “participation goals” in contract documents, the Complaint asserted, they are more accurately described as participation requirements in the sense that bidders must expressly agree to meet them as a pre-condition of receiving a contract, and the contracts themselves often include penalties and liquidated damages for failure to comply with M/WBE requirements.” Compl. ¶ 12.

The three companies settled with the Commonwealth by agreeing to pay a penalty of 1.4 million dollars.²¹⁰

In *Brait Builders Corp. v. Town of Hingham*, the court held that the Town of Hingham was entitled to summary judgment against the Plaintiff contractor who was the second lowest

²⁰⁸ *Id.* at *6.

²⁰⁹ *Id.* at *6.

²¹⁰ Jack Newsham, *Construction Firms to Pay \$1.4 Million Over False Claims*, *THE BOSTON GLOBE*, Aug. 20, 2015, <https://www.bostonglobe.com/business/2015/08/20/construction-firms-pay-million-over-false-claims/Ua1eSV3Gj4rZe6NpGjc6UP/story.html>.

bidder on a construction contract.²¹¹ Plaintiff initially sought an injunction to prohibit Hingham from awarding the contract to CTA Construction Co., Inc., and then sought monetary damages.

The Plaintiff claims Hingham violated public bidding laws, the minority and women business (MWBE) participation requirements under Massachusetts laws and the Municipalities General Guidelines of the State Office of Minority and Women Business Assistance (“SOMWBA”). Brait’s specific violation-of-law argument is that Hingham allowed an untimely request by CTA for a reduction of the minority and women business participation goals.

The court found there was no violation of a statutory requirement. The five-day waiver deadline for the MWBE requirements that Hingham did not enforce was an interim “General Guideline” for municipalities of the State Office of Minority and Women Business Assistance.²¹² The statute relied on by Plaintiff explicitly preserved the right of the authority to “adjust the participation goals” for an individual project. The goals may be adjusted based upon “the actual availability” of minority-owned businesses and women-owned businesses and other relevant factors.²¹³ The statute directs the commissioner to develop a “written, good faith efforts waiver procedure” by which a public agency “may determine,” at any time before the award of the contract, “that compliance with the goals is not feasible.”²¹⁴ If the awarding authority determines that compliance with the goals is not feasible, it “may reduce or waive the goals” for an individual contract.²¹⁵ The court held this was precisely what Hingham did in this case.

The court found the purpose of the minority and women owned business goals statute is to serve the “compelling interest in promoting the use of minority owned businesses and women owned businesses through the use of the available and qualified pool of minority and women owned businesses.”²¹⁶ The court stated there was no evidence of an attempt to thwart the compelling statutory interest in promoting minority and women business participation in public contracts through the use of available and qualified minority and women businesses.²¹⁷

The court concluded Hingham made the award to CTA only after an extensive review of CTA’s request to reduce the minority and women business goals. Hingham allowed CTA’s goals reduction request based in part on the general bidders’ lack of control over the selection of subbidders on a substantial portion of the contract. Hingham also based its decision on the evidence of CTA’s outreach to hundreds of minority and women subcontractors and the small number of minority and women subcontractors who expressed interest in the project. Hingham thus lawfully considered “the actual availability” of minority-owned and women-owned businesses who were available and interested in participating in this project.²¹⁸

²¹¹ *Brait Builders Corp. v. Town of Hingham*, 28 Mass.L.Rptr 445 (Dec. 6, 2010), Superior Court of Mass., Plymouth County.

²¹² *Id.* at *6.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at *6

²¹⁷ *Id.* at *7

²¹⁸ *Id.* at *7

In *Crown Electric Supply Co. v. State Office of Minority and Women Business Assistance Appeal Board*, the Plaintiff challenged the denial of its application for status as “women-owned business” (WBEs) by SOMWBA.²¹⁹ The court of appeals held that SOMWBA had the statutory authority to promulgate regulations; the regulation requiring that 51% of “investment” in WBEs must come from women was invalid; the regulation requiring that WBEs be independent was valid; and that the evidence supported a finding that the Plaintiff company was not independent and that SOMWBA’s decision to deny certification was based on substantial evidence.

The court found that SOMWBA had the authority under the Massachusetts statute establishing SOMWBA to promulgate regulations relating to the certification of a WBE. As to the validity of the regulations, the court concluded there is no specific requirement that a women owner have “invested” in the business to be certified, stating that there is a distinction between “ownership,” which is required and “investment.” The court thus determined the regulations that require an investment are void. Finally, the court held the regulation that required that a WBE be independent is valid, and found that Plaintiff did not satisfy the independence requirement of the regulations. The court, after reviewing the evidence, concluded SOMWBA’s decision to deny certification was based on substantial evidence and granted judgment in favor of SOMWBA.²²⁰

2019 MA H.B. 4511 (NS), 2019 Massachusetts House Bill No. 4511, The 191st General Court of the Commonwealth of Massachusetts.

It is noteworthy that currently pending in the legislature of the Commonwealth of Massachusetts is the 2019 MA H.B. 4511 (NS), 2019 Massachusetts House Bill No. 4511, “An Act To Expand Opportunities for Minority and Women Business Enterprises in Public Construction Projects.” The legislation was initiated by the Governor Baker on February 27, 2020, and in a letter to the Senate and House of Representatives, the Governor stated the legislation “is critical to the continuing effectiveness of the Commonwealth’s Affirmative Marketing Program, a program that ensures minority-owned businesses (“MBE”) and woman-owned businesses (“WBE”) providing construction and design related services have full and fair opportunities to work on public building projects. “

The Bill was referred to the Committee on State Administration and Regulatory Oversight in March 2020, reported favorably by Committee, and referred most recently to the Committee on House Ways and Means on July 29, 2020. There also was a Joint Hearing scheduled for June 25, 2020 in Virtual Hearing. The Senate has concurred.

²¹⁹ *Crown Electric Supply Co. v. State Office of Minority and Women Business Assistance Appeal Board*, 51 Mass. App. Ct. 753, 748 N.E.2d 995 (2001)

²²⁰ 51 Mass.App.Ct. at 754-762, 748 N.E.2d at 997-1002.

5. Pending cases (at the time of this report)

There are pending cases in the federal courts at the time of this report involving challenges to MBE/WBE/DBE Programs and that may potentially impact and be instructive to the study, including the following:

- **Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.**, U.S. District Court for Western District of Tennessee, Western Division, Case 2:19-cv-02407-SHL-tmp, filed on January 17, 2019. This is a challenge to the Shelby County, Tennessee “MWBE” Program. In *Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.*, the Plaintiffs are suing Shelby County for damages and to enjoin the County from the alleged unconstitutional and unlawful use of race-based preferences in awarding government construction contracts. The Plaintiffs assert violations of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. Sections 1981, 1983, and 2000(d), and Tenn. Code Ann. § 5-14-108 that requires competitive bidding.

The Plaintiffs claim the County MWBE Program is unconstitutional and unlawful for both prime and subcontractors. Plaintiffs ask the Court to declare it as such, and to enjoin the County from further implementing or operating under it with respect to awarding government construction contracts.

The parties are engaged in discovery.

In addition, Plaintiffs on February 17, 2020 filed with the District Court in Tennessee a Motion to Exclude Proof from Mason Tillman Associates (MTA), the disparity study consultant to the County. A federal District Court in California (Northern District), issued an Order granting a Motion to Compel against Mason Tillman Associates on February 17, 2020, compelling production of documents pursuant to a subpoena served on it by the Plaintiffs. MTA appealed the Order to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals has recently dismissed the appeal by MTA, and sent the case back to the federal district court in California. The federal district court in Tennessee issued an Order on April 9, 2020 in which it denied *without prejudice* the Motion to Exclude Proof based on the lack of authority to limit the County’s ability to present proof at trial due to the non-party MTA’s failure to meet its discovery obligations, that nothing in the record attributes MTA’s failure to meet its discovery obligations to the County, and that MTA’s efforts to avoid disclosure is coming to an end based on the recent dismissal of MTA’s appeal to the Ninth Circuit. The district court in Tennessee stated in a footnote: “Now that the Ninth Circuit has dismissed MTA’s appeal, Plaintiff is free to again ask the California district court to compel MTA (or sanction it for failing) to produce any documents which it is obligated to disclose.”

On August 17, 2020, the district court in California entered an Order of Conditional Dismissal of that case in California dealing only with the subpoena served on MTA for documents, which is pending the approval of a settlement by the parties in September. The case in federal court in Tennessee remains pending.

- **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 is pending. The Court issued an order to defer the Motion to Dismiss and directing MTA to deliver the records to the court for in-camera inspection. The Court also has denied a motion by AGC to be elevated to party status and to conduct discovery.

At the time of this report, the court held a Case Management Conference on August 17, 2020, and ordered that MTA's Motion to Dismiss shall be scheduled for a hearing at a date mutually agreeable to the parties.

- **CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., Global Environmental, Inc., Premier Demolition, Inc., v. City of St. Louis, St. Louis Airport Authority, et al.**; U.S. District Court for the Eastern District of Missouri, Eastern Division; Case No: 4:19-cv-03099 (Complaint filed on November 14, 2019).

Plaintiffs allege this case arises from Defendant's MWBE Program Certification and Compliance Rules that require Native Americans to show at least one-quarter descent from a tribe recognized by the Federal Bureau of Indian Affairs. Plaintiffs claim that African Americans, Hispanic Americans, and Asian Americans are only required to "have origins" in any groups or peoples from certain parts of the world. This action alleges violations of Title VI of the Civil Rights Act of 1964, and the denial of equal protection of the laws under the

Fourteenth Amendment to the U.S. Constitution based on these definitions constituting per se discrimination. Plaintiffs seek injunctive relief and damages.

Plaintiffs are businesses that are certified as MBEs through the City of St. Louis. Plaintiffs allege they are a Minority Group Members because their owners are members of the American Indian tribe known as Northern Cherokee Nation. Plaintiffs allege the City defines Minority Group Members differently depending on one's racial classification. The City's rules allow African Americans, Hispanic Americans and Asian Americans to meet the definition of a Minority Group Member by simply having "origins" within a group of peoples, whereas Native Americans are restricted to those persons who have cultural identification and can demonstrate membership in a tribe recognized by the Federal Bureau of Indian Affairs.

In 2019 Plaintiffs sought to renew their MBE certification with the City, which was denied. Plaintiffs allege the City decided to decertify the MBE status for each Plaintiff because their membership in the Northern Cherokee Nation disqualifies each company from Minority Group Membership because the Northern Cherokee Nation is not a federally recognized tribe by the Bureau of Indian Affairs. The Plaintiffs filed an administrative appeal, and the Administrative Review Officer upheld the decision to decertify Plaintiffs firms.

Plaintiffs allege the City's policy, on its face, treats Native Americans differently than African Americans, Hispanic Americans and Asian Americans on the basis of race because it allows those groups to simply claim an origin from one of those groups of people to qualify as a Minority Group Member, but does not allow Native Americans to qualify in the same way. Plaintiffs claim this is per se intentional discrimination by the City in violation of Title VI and the Fourteenth Amendment.

Plaintiffs also allege that Defendants subjected Plaintiffs to violations of their rights as other minority contractors in the determination of their minority status by using a different standard to determine whether they should qualify as a Minority Group Member under the City's MBE Certification Rules. Plaintiffs claim the City's policy and practice constitute disparate treatment of Native Americans.

Plaintiffs request judgment against the City and other Defendants for compensatory damages for business losses, loss of standing in their community, and damage to their reputation. Plaintiffs also seek punitive damages and injunctive relief requiring the City to strike its definition of a Minority Group Member and rewrite it in a non-discriminatory manner, reinstate the MBE certification of each Plaintiff, and for attorney fees under Title VI and 42 U.S.C Section 1988.

The Complaint was filed on November 14, 2019, followed by a First Amended Complaint. Plaintiffs filed on February 11, 2020, a Motion for Preliminary

Injunction seeking to have a hearing on their Complaint, and to order the City to reinstate the application or MBE certification of the Plaintiffs.

At the time of this report, the court has issued a Memorandum and Order, dated July 27, 2020, which provides the the Motion for Preliminary Injunction is denied as withdrawn by the Plaintiff and the Joint Motion to Amend a Case Management Order is Granted. The parties are scheduled to file cross-motions for summary judgment in August 2020 and reply briefs in September 2020.

■ **Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.**, U.S. District Court, E.D. Tennessee, 2:20-cv-00041-DCLC-CRW.

Plaintiff, a small business contractor, recently filed this Complaint in federal district court in Tennessee against the US Dep't of Agriculture (USDA), US SBA, et. al. challenging the federal Section 8(a) program, and it appears as applied to a particular industry that provide administrative and/or technical support to USDA offices that implement the Natural Resources Conservation Service (NRCS), an agency of the USDA.

Plaintiff, a non-qualified Section 8(a) Program contractor, alleges the contracts it used to bid on have been set aside for a Section 8(a) contractor. Plaintiff thus claims it is not able to compete for contracts that it could in the past.

Plaintiff alleges that neither the SBA or the USDA has evidence that any racial or ethnic group is underrepresented in the administrative and/or technical support service industry in which it competes., and there is no evidence that any underrepresentation was a consequence of discrimination by the federal government or that the government was a passive participant in discrimination.

Plaintiff claims that the Section 8(a) Program discriminates on the basis of race, and that the SBA and USDA do not have a compelling governmental interest to support the discrimination in the operation of the Section 8(a) Program. In addition, Plaintiff asserts that even if defendants had a compelling governmental interest, the Section 8(a) Program as operated by defendants is not narrowly tailored to meet any such interest.

Thus, Plaintiffs allege defendants' race discrimination in the Section 8(a) Program violates the Fifth Amendment to the U.S. Constitution. Plaintiff seeks a declaratory judgment that defendants are violating the Fifth Amendment, 42 U.S.C. Section 1981, injunctive relief precluding defendants from reserving certain NRCS contracts for the Section 8(a) Program, monetary damages, and other relief.

The defendants have filed a Motion to Dismiss asserting *inter alia* that the court does not have jurisdiction, which is pending. The parties are to complete filing briefs by September 2020. Plaintiff has filed written discovery, which is

pending, as defendants have filed a motion to stay discovery pending the outcome of the Motion to Dismiss.

- **Pharmacann Ohio, LLC v. Ohio Dept. Commerce Director Jacqueline T. Williams**, In the Court of Common Pleas, Franklin County, Ohio, Case No. 17-CV-10962, November 15, 2018, appeal pending, in the Court of Appeals of Ohio, Tenth Appellate District, Case No. 18-AP-000954.

This is a state court case that is instructive to the study as it discusses and analyzes the evidence presented by the state government to justify its legislation providing a preference to MBEs, and applies the strict scrutiny test to determine if the state had sufficient evidence to establish a race conscious preference program to MBEs.

In 2016, the Ohio legislature codified R.C. Chapter 3796, legalizing medical marijuana. The legislature instructed Defendant Ohio Department of Commerce to issue certain licenses to medical marijuana cultivators, processors, and testing laboratories. The Department was instructed to award fifteen percent of said licenses to economically disadvantaged groups, defined as African Americans, American Indians, Hispanics, and Asians.

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

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

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

Defendants assert the State had a compelling government interest in redressing past and present effects of racial discrimination within its jurisdiction where the State itself was involved. In support, Defendants put forth evidence of prior discrimination in bidding for Ohio government contracts, other states' marijuana licensing related programs, marijuana related arrests, and evidence

of the legislature's desire to include a provision in R.C. §3796.09 similar to Ohio's MBE program.

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

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

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

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

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

The only evidence referenced in the materials provided by the Defendants to show the General Assembly considered Ohio's MBE and EDGE history are three emails between a congressional staff member and an employee of the Legislative Service Commission requesting a set aside like the one included in R.C. §125.081 and R.C. §123.125. There is no reference to the legislative history and evidence from the original review in between 1978 and 1980. The legislators who reviewed the evidence in 1980 clearly were not members of the

legislature in 2016 when R.C. §2796.09(C) passed. Even if a few legislators might have seen the MBE evidence, the court stated it cannot find it was considered by the General Assembly as evidence supporting remedial action.

Additionally, even if the court could have found this evidence was considered by the legislature in support of R.C. §3796.09(C), the materials from R.C. §125.081 pertain to *government procurement contracts* only. The court held the law requires that evidence considered by the legislature must be directly related to discrimination in that particular industry. Defendants argued the fact that the medical marijuana industry is new, but the court said such newness necessarily demonstrates there is no history of discrimination in this particular industry, i.e. legal cultivation of medical marijuana.

Finally, Defendants' remaining evidence, the court said, is post-enactment. The court stated it would be given a lesser weight than that of pre-enactment evidence. Considering all the evidence put forth, the court found there is not a strong basis in evidence supporting the legislature's conclusion that remedial action is necessary to correct discrimination within the medical marijuana industry. Accordingly, it held a compelling government interest does not exist.

The court also found R.C. §3796.09(C) is not narrowly tailored to the legislature's alleged compelling interest. Under Ohio law, the legislature must engage in an analysis of alternative remedies and prior efforts *before* enacting race-conscious remedies. Neither party directed the court to sufficient evidence of alternative remedies proposed or analyzed by the legislature during their review of R.C. §3796.09(C). The evidence of prior alternative remedies pertains to the government contracting market. Neither of the studies Defendant cites relate to the medical marijuana industry. The Defendants did not show evidence of any alternative remedies considered by the legislature before enacting R.C. §3796.09(C).

The court believed alternative remedies could have been available to the legislature to alleviate the discrimination the legislature stated it sought to correct. If the legislature sought to rectify the elevated arrest rates for African Americans and Latinos/Hispanics possessing marijuana, the correction should have been giving preference to those companies owned by former arrestees and convicts, not a range of economically disadvantaged individuals, including preferences for unrelated races like Native Americans and Asians.

R.C. §3796.09(C) appears to be somewhat flexible, the court stated, in that it includes a waiver provision. The court found the entire statute itself is not flexible, being that it is a strict percentage, unrelated to the particular industry it is intended for, medical marijuana. R.C. §3796.09(C) requires fifteen percent of cultivator licenses are issued to economically disadvantaged group members. This is not an estimated goal, but a specific requirement. Additionally, R.C. §3796.09(C) does not include a proposed duration. Accordingly, the court found R.C. §3796.09(C) is not flexible.

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

Regarding the statistics the legislature did not review prior to enacting R.C. §3796.09(C), the cited statistics pertaining to the arrest rates of minorities, the court found, are not directly related to the values listed within the statute. Much of the statistics referenced are based on general rates throughout the United States, or findings on discrimination pertaining to all drug related arrests. But these other statistics do not demonstrate the racial disparities pertaining to specifically marijuana throughout the state of Ohio. The statistics cited in the materials, the court said, is not reflected in the amount chosen to remediate the discrimination R.C. §3796.09(C), fifteen percent. This percentage is not based on the evidence demonstrating racial discrimination in marijuana related arrest in Ohio. Therefore, the court concluded the numerical value was selected at random by the legislature, and not based on the evidence provided.

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

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

Upon review of all factors together, the court found failure of the legislature to evaluate or employ race-neutral alternative remedies; plus, the inflexible and unlimited nature of the statute; combined with the lac of relationship between the numerical goals and the relevant labor market; and the large impact of the relief on the rights of third parties, shows the legislature failed to narrowly-tailor R.C. §3796.09(C).

As the ultimate burden remains with Plaintiff to demonstrate the unconstitutionality of R.C. §3796.09(C), the court found Plaintiff met its burden by showing the legislature failed to compile and review enough evidence related to the medical marijuana industry to support the finding of a strong basis in evidence for a compelling government interest to exist. Additionally, the legislature did not narrowly tailor R.C. §3796.09(C). Therefore, the Court finds R.C. §3796.09(C) is unconstitutional on its face pursuant to 42 U.S.C. §1983 and Article I, Section 2 of the Ohio Constitution.

The case at the time of this report is on appeal in the Court of Appeals of the Ohio Tenth Appellate District, Case No. 18-AP-000954.

This list of pending cases is not exhaustive, but in addition to the cases cited previously may potentially have an impact on the study and implementation of MBE/WBE/DBE Programs.

Ongoing review. The above represents a summary of the legal framework pertinent to the study and implementation of DBE/MBE/WBE, or race-, ethnicity-, or gender-neutral programs, disparity studies, the Federal DBE Program and the implementation of the Federal DBE Program by state and local government recipients of federal funds, which are instructive to the study. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

SUMMARIES OF RECENT DECISIONS

D. Recent Decision Involving State or Local Government MBE/WBE/DBE Programs in Massachusetts and the First Circuit Court of Appeals

1. Converse Construction Company, Inc., v. Massachusetts Bay Transportation Authority, 899 F.Supp 753 (D. Mass. 1995)

Converse Construction Company was a steel contractor who claimed to be a minority-owned business owned and controlled by an African American. Until 1993, SOMWBA had certified Converse as a Disadvantage Business Enterprise ("DBE") under federal law and as a Minority Business Enterprise ("MBE") under state law. While it was a beneficiary of these programs, Converse received public contracts and sub-contracts worth many millions of dollars. 899 F.Supp. at 756.

The Massachusetts Highway Department relied on SOMWBA to determine which entities qualified as DBEs under federal and as MBEs under state law. In 1993, SOMWBA determined that Converse was not truly owned and controlled by an African American. Rather, SOMWBA decided that the owner of Converse was merely a "straw" or a "front" for white male investors. 899 F.Supp 757. SOMWBA subsequently decertified Converse as an MBE and as a DBE.

In 1995, Converse filed a complaint against the MBTA and the United States Department of Transportation alleging that the United State Supreme Court decision in *Adarand Constructors, Inc. v. Pena*, rendered the federal and state set-aside programs unconstitutional that were being implemented and applied by the MBTA, and asked for a preliminary injunction restraining the MBTA from opening bids on projects it bid on. In an amended complaint, Converse added four more Massachusetts agencies or authorities as defendants and requested that the court enjoin the opening or award a contracts using federal or state "affirmative action set-aside" programs. 899 F.Supp. 758. The complaint requested a declaratory judgment that federal and state programs, including SOMWBA, violated Converse's constitutional right to equal protection. The court found that Converse seeks to prevent others from benefiting from programs which profited Converse until it was decertified for serving as a "front" for white investors. *Id.*

The two Massachusetts Highway Department contracts at issue were substantially federally funded under the Federal DBE program. Converse later changed its position and no longer challenged the constitutionality of the federal statute or regulation, but challenged only the Commonwealth of Massachusetts' MBE statutes, regulations and rules. 899 F.Supp. at 759. Thus, Converse represented that it was not challenging the constitutionality of the federal program, but stated that it was only requesting the award of the DBE portion of the contracts at issue be enjoined. *Id.* Converse subsequently again changed its position requesting a preliminary injunction ordering that contracts at issue be awarded without the use of any "set-aside" program until the case was resolved.

The court permitted intervenors in the case that were DBEs, MBEs and WBEs eligible to participate and benefit from the "set-aside" program.

The court cited to the United States Court of Appeals for the Seventh Circuit decision in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419, 423 (7th Circuit 1991), in which the court stated: "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". 899 F.Supp. at 761, *quoting Milwaukee County Papers Association v. Fiedler*, 922 F.2d at 423. The court noted that the Second, Sixth and Tenth Federal Circuit Courts of Appeal reached the same conclusion. *Id.* (citations omitted).

The court found the Seventh Circuit's analysis persuasive and "concluded that if the state agency at issue does what federal law requires, its conduct is constitutional, at least where, as here, the constitutionality of the federal program is not challenged." 899 F.Supp. at 761. The court said that the state's actions could be challenged if state agencies depart from the federal standards; that is, the federal program involved in this case could be found unconstitutional as applied by the Massachusetts Highway Department. 899 F.Supp. at 761. However, the court found the evidence presented indicated Converse is not reasonably likely to prove that the Massachusetts Highway Department has deviated from the valid federal regulations. *Id.*

The court found that Converse had offered no credible evidence that the Massachusetts Highway Department was not properly applying the federal standards and procedures concerning the two contracts at issue, and there was no evidence that the United States DOT had ever criticized the Massachusetts Highway Department's conduct generally or had found deficiencies concerning the contracts at issue or any others. *Id.* at 762.

Therefore, the court held that Converse had not shown it was reasonably likely to prove the federal program was unconstitutional as it was being applied by the Massachusetts Highway Department to the contracts at issue. *Id.* at 762. In finding that Converse had not shown the requisite requirements to obtain equitable relief for a preliminary injunction, the court considered the fact that as long as these programs benefited Converse, it did not consider a problem with the programs and took full advantage of the "set-aside" programs when it was eligible to do so. *Id.* at 763. The court also found that Converse's primary motive in bringing this action was not to establish and vindicate an important constitutional principle, but rather it was seeking to prevent those who remain eligible for the "set-aside" programs from receiving the benefits Converse long enjoyed in a hope that Converse would obtain more subcontracts. *Id.* at 763-764.

Converse requested a preliminary injunction requiring the suspension of the DBE, MBE, and WBE programs pending the outcome of this case. The court held that a suspension of the "set-aside" programs would likely cause a diminution in the subcontracts given to DBEs, result in significant layoffs, and likely cause some of the DBEs to go out of business. *Id.* at 764. The court found that Massachusetts Highway Department and the Intervenor would be irreparable harmed if a preliminary injunction were issued and based on the record predicted the plaintiff would not ultimately prevail on the merits. *Id.* The court concluded it would be adverse to the public interest to deny the benefit of the DBE program to the DBEs that would be affected during the pendency of this case against the Massachusetts Highway Department. *Id.*

The court also pointed out that it appeared the Commonwealth of Massachusetts may not have satisfied its responsibility in responding to the United States Supreme Court decision in *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989). *Id.* at 765. The court noted that it expected to find that the Commonwealth of Massachusetts had properly done a disparity study and addressed its findings, in order to decide whether, as *Croson* requires, there was demonstrated discrimination or its lingering effects in Massachusetts, and what remedy, if any, was necessary to eliminate the effects of any such discrimination. *Id.* The court found that it was not clear what the Executive and Legislative branches of the Commonwealth of Massachusetts have done since Croson to decide the constitutionality of the state "set-aside" programs. *Id.* 767. But, the

court pointed out that it had not been required to address this question in deciding the present motion for a preliminary injunction.

The court stated, however, that if it turned out that six years after *Croson* was decided in 1989, while a disparity study has been completed, the politically accountable officials of the Commonwealth had not decided whether there is a proper basis for "set-aside" programs, and whether the present statutes and executive orders were narrowly tailored only to remedy proven discrimination, that failure "would be disappointing and disturbing to the court." *Id.* 767.

The court denied Converse's motion for a preliminary injunction concerning the Massachusetts Highway Department contracts. *Id.* 767.

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

Recent Decisions in Federal Circuit Courts of Appeal

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

The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.) The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with the North Carolina Department of Transportation ("NCDOT"). Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F.3d 233 at 236. The Court of Appeals held that the State did not meet its burden of proof in all respects to uphold the validity of the state legislation. But, the Court agreed with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the legislative scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. The Court thus affirmed the decision of the district court in part, reversed it in part and remanded for further proceedings consistent with the opinion. *Id.*

The Court found that the North Carolina statutory scheme "largely mirrored the federal Disadvantaged Business Enterprise ("DBE") program, with which every state must comply in awarding highway construction contracts that utilize federal funds." 615 F.3d 233 at 236. The Court also noted that federal courts of appeal "have uniformly upheld the Federal DBE Program against equal-protection challenges." *Id.*, at footnote 1, citing, *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina's highway construction industry. The study, according to the

Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to “establish annual aspirational goals, not mandatory goals, ... for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses ... [that] shall not be applied rigidly on specific contracts or projects.” *Id.* at 239, *quoting*, N.C. Gen.Stat. § 136-28.4(b)(2010). The statute further mandates that the NCDOT set “contract-specific goals or project-specific goals ... for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization” based on availability, as determined by the study. *Id.*

Third, the amended statute narrowed the definition of “minority” to encompass only those groups that have suffered discrimination. *Id.* at 239. The amended statute replaced a list of defined minorities to any certain groups by defining “minority” as “only those racial or ethnicity classifications identified by [the study] ... that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department.” *Id.* at 239 *quoting* section 136-28.4(c)(2)(2010).

Fourth, the amended statute required the NCDOT to reevaluate the Program over time and respond to changing conditions. 615 F.3d 233 at 239. Accordingly, the NCDOT must conduct a study similar to the 2004 study at least every five years. *Id.* § 136-28.4(b). Finally, the amended statute contained a sunset provision which was set to expire on August 31, 2009, but the General Assembly subsequently extended the sunset provision to August 31, 2010. *Id.* Section 136-28.4(e) (2010).

The Court also noted that the statute required only good faith efforts by the prime contractors to utilize subcontractors, and that the good faith requirement, the Court found, proved permissive in practice: prime contractors satisfied the requirement in 98.5 percent of cases, failing to do so in only 13 of 878 attempts. 615 F.3d 233 at 239.

Strict scrutiny. The Court stated the strict scrutiny standard was applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.” 615 F.3d 233 at 241. The Court pointed out that “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Id.* at 241 *quoting* *Alexander v. Estep*, 95 F.3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.” *Id.*, *quoting* *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 *quoting*,

Croson, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion).

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

The Court held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F.3d 233 at 241, *citing Concrete Works*, 321 F.3d at 958. “Instead, a state may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *Id.* at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion). The Court stated that we “further require that such evidence be ‘corroborated by significant anecdotal evidence of racial discrimination.’” *Id.* at 241, *quoting Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993).

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

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

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

In defining what constitutes “something less” than a ‘strong basis in evidence,’ the courts, ... also agree that the party defending the statute must ‘present [] sufficient probative

evidence in support of its stated rationale for enacting a gender preference, *i.e.*,...the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations.” 615 F.3d 233 at 242 *quoting Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on “reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 242 *quoting Hogan*, 458 U.S. at 726.

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

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

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

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

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

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

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

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

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

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

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

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had

the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id.* These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id.*

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than “vendor data.” 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id.* The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence,” and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, citing *Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

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

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

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – “surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors' reduced utilization of these

groups during the suspension.” *Id.* at 248, *citing Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued “strongly supports the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.”) The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id.* at 248.

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

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

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

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

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

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

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

Thus, the Court held the State’s evidence showing a gross statistical disparity between the availability of qualified 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. Virdi v. DeKalb County School District, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion)

Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down a MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the “District”) to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the “Board”) and the Superintendent (both individually and in his official capacity) (collectively “defendants”) pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district’s Minority Vendor Involvement Program was facially unconstitutional. *Id.*

The district court initially granted the defendants’ Motions for Summary Judgment on all of Virdi’s claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id.* On remand, the district court granted the defendants’ Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants’ motion for a judgment as a matter of law on the remaining claims at the close of Virdi’s case. *Id.*

In 1989, the Board appointed the Tillman Committee (the “Committee”) to study participation of female- and minority-owned businesses with the District. *Id.* The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id.* Based upon a “general feeling” that minorities were under-represented, the Committee issued the Tillman Report (the “Report”) stating “the Committee’s impression that ‘[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community.’” *Id.* The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id.*

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a “how to” booklet to be made available to any business interested in doing business with the District.

Id. The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id.* The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id.*

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the “how to” booklet. *Id.* The Board also implemented the Minority Vendor Involvement Program (the “MVP”) which adopted the participation goals set forth in the Report. *Id.* at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id.* Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id.* Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id.* In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id.* In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the “District was only looking for ‘black-owned firms.’” *Id.* Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id.*

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id.* at 267. The court first questioned whether the identified government interest was compelling. *Id.* at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id.*

The court held the MVP was not narrowly tailored for two reasons. *Id.* First, because no evidence existed that the District considered race-neutral alternatives to “avoid unwitting discrimination.” The court found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id.* at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id.* at 268.

Second, the court held that the unlimited duration of the MVP’s racial goals negated a finding of narrow tailoring. *Id.* “[R]ace conscious ... policies must be limited in time.” *Id.*, citing *Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id.* at 268.

With respect to Virdi’s claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. *Id.* Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court’s grant of

judgment on that issue. *Id.* at 269. Similarly, the court found that Viridi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Viridi. *Id.* at 270.

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

This case is instructive to the disparity study because it is a recent decision that upheld the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

In *Concrete Works* the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In *Concrete Works*, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

Case history. Plaintiff, Concrete Works of Colorado, Inc. ("CWC") challenged the constitutionality of an "affirmative action" ordinance enacted by the City and County of Denver (hereinafter the "City" or "Denver"). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 ("1990 Ordinance") containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id.* at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using "good faith efforts." *Id.* In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the "1996 Ordinance"). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id.* at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the “1998 Ordinance”). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. *Id.* at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. *Id.* The district court conducted a bench trial on the constitutionality of the three ordinances. *Id.* The district court ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. *Id.* The City then appealed to the Tenth Circuit Court of Appeals. *Id.* The Court of Appeals reversed and remanded. *Id.* at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.” 488 U.S. 469, 492 (1989) (plurality opinion). Because “an effort to alleviate the effects of *societal* discrimination is not a compelling interest,” the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination “with some specificity,” and (2) demonstrated that a “strong basis in evidence” supports its conclusion that remedial action is necessary. *Id.* at 958, quoting *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. *Id.* Rather, Denver could rely on “empirical evidence that demonstrates ‘a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.’” *Id.*, quoting *Croson*, 488 U.S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. *Id.*

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. *Id.* The Court of Appeals held that once Denver met its burden, CWC had to introduce “credible, particularized evidence to rebut [Denver’s] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that CWC could also rebut Denver’s statistical evidence “by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. *Id.* at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.*, quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

The studies. Denver presented historical, statistical and anecdotal evidence in support of its MBE/WBE programs. Denver commissioned a number of studies to assess its MBE/WBE programs. *Id.* at 962. The consulting firm hired by Denver utilized disparity indices in part. *Id.* at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. *Id.* at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. *Id.* Based on this information, the 1990 Study concluded that, despite Denver's efforts to increase MBE and WBE participation in Denver Public Works projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. *Id.* After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. *Id.*

After the Tenth Circuit decided Concrete Works II, Denver commissioned another study (the "1995 Study"). *Id.* at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. *Id.* The 1995 Study concluded that MBEs and WBEs were more likely to be one-person or family-run businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than white-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than white- or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the Census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. *Id.* at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id.* at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, *inter alia*, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the “1997 Study”). *Id.* at 966. The 1997 Study used geographic and specialization information to calculate MBE/WBE availability. Availability was defined as “the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City’s contracts.” *Id.*

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. *Id.* The statewide market was used because necessary information was unavailable for the Denver MSA. *Id.* at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 41 for African American firms, 40 for Hispanic firms, 14 for Asian and other minorities, and 74 for women-owned firms. *Id.*

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed than similarly situated whites. *Id.* Using data from the Public Use Microdata Samples (“PUMS”) of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id.* Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id.* at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. *Id.*

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: “How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements ... also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?” Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were “seldom or never” used on non-goals projects. *Id.*

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification

requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm's size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. *Id.* at 968-69.

After the 1997 Study was completed, the City enacted the 1998 Ordinance. The 1998 Ordinance reduced the annual goals to 10 percent for both MBEs and WBEs and eliminated a provision which previously allowed MBE/WBEs to count their own work toward project goals. *Id.* at 969.

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects but their applications were denied even though they met the prequalification requirements. *Id.*

Other MBE/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that they were required to do additional work not part of the subcontracting arrangement; and that they found it difficult to join unions and trade associations. *Id.* There was testimony detailing the difficulties MBE/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. *Id.*

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. *Id.* at 969-70.

The legal framework applied by the court. The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether

Denver's evidence showed that there is pervasive discrimination. *Id.* at 970. The court, quoting *Concrete Works II*, stated that "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." *Id.* at 970, quoting *Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a prima facie case of a constitutional or statutory violation," not irrefutable or definitive proof of discrimination. *Id.* at 97, quoting *Croson*, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.*, quoting *Adarand VII*, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson*. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a "city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market." *Id.* at 971, quoting *Croson*, 488 U.S. 503. Thus, the Court held Denver's burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. *Id.*, citing *Croson*, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. *Id.* at 972.

The court found Denver's statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver's evidence on that basis. *Id.*

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id.* at 973. The court rejected the district court's erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson*. *Id.* The court held it previously recognized in this case that "a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area." *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added). In *Concrete Works II*, the court stated that "we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination." *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. *Id.* at 973. Thus, Denver was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden. *Id.*

Additionally, the court had previously concluded that Denver’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination. *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529. Thus, the court held Denver’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id.*

The Court’s rejection of CWC’s arguments and the district court findings.

Use of marketplace data. The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court’s conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt*. *Id.* at 975. In *Shaw*, a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity’s “interest in remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions.” *Id.*, quoting *Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” *Id.* at 976, quoting *Shaw*, 517 U.S. at 910. The City can satisfy this condition by identifying the discrimination, “‘public or private, with some specificity.’” *Id.* at 976, citing *Shaw*, 517 U.S. at 910, quoting *Croson*, 488 U.S. at 504 (emphasis added). The governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.” *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality’s burden of producing strong evidence. *Id.* at 976.

In *Adarand VII*, the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67 (“[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*” (emphasis added)). Further, the court pointed out in this case it earlier rejected the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to “the Denver MSA evidence of industry-wide discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to Denver’s burden of producing strong evidence. *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

Consistent with the court’s mandate in *Concrete Works II*, the City attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.” *Id.* The City can demonstrate that it is a “passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, quoting *Crosby*, 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.

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

This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis’ MBE/WBE Program. *Id.* The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.

The district court had ruled that the City could not introduce a post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. *Id.* at 350-351. The Sixth

Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue. *Id.* at 350-351.

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id.* This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id.* The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (6th Cir. 2000), which held that under *Croson* a State must have sufficient evidentiary justification for a racially-conscious statute in advance of its enactment, and that governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Memphis*, 293 F.3d at 350-351, *citing Drabik*, 214 F.3d at 738.

The Court in *Memphis* said that although *Drabik* did not directly address the admissibility of post-enactment evidence, it held a governmental entity must have pre-enactment evidence sufficient to justify a racially-conscious statute. 293 R.3d at 351. The court concluded *Drabik* indicates the Sixth Circuit would not favor using post-enactment evidence to make that showing. *Id.* at 351. Under *Drabik*, the Court in *Memphis* held the City must present pre-enactment evidence to show a compelling state interest. *Id.* at 351.

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

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contacts discriminated against any of the groups "favored" by the Program. The court also found that the Program was not "narrowly tailored" to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* ("*VMI*"), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become "vanishingly small." *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive' justification for that action ..." and, realistically, the law can ask no more of race-based remedies either." 256 F.3d at 644, *quoting in part VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir.

1997) decision created the “paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes.” 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women’s “set aside programs,” the women’s program the court determined must clear the same “hurdles” as the minority program.” 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is “to be expected that there would be more soliciting of these contractors on public than on private projects.” *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County “conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance.” 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a “public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.” 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry “tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County.” 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that “[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit ... to be entitled to take remedial action.” *Id.* But, the court found “of that there is no evidence either.” *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found “puzzling” to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would “flunk the constitutional test” by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* “Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons.” *Id.* The court, therefore, held that the ordinance was not “narrowly tailored” to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of “favored minorities” included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to “presume” discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—“that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project.” 256 F.3d at 647-648.

7. *Associated Gen. Contractors v. Drabik*, 214 F.3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998)

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a “set-aside” contract based on the State of Ohio’s MBE program with the award of construction contracts.

The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court concluded the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court said the statute failed the narrow tailoring test, including because there was no evidence that the State had considered race-neutral remedies.

This case involves a suit by the Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio, representing Ohio building contractors to stop the award of a construction contract for the Toledo Correctional Facility to a minority-owned business (“MBE”), in a bidding process from which non-minority-owned firms were statutorily excluded from participating under Ohio’s state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act (“MBEA”) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court’s Order. *Id.* at 733. The Sixth Circuit Court of Appeals affirmed the Order of the district court, holding unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. *Id.*

Ohio passed the MBEA in 1980. *Id.* at 733. This legislation “set aside” 5%, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id.* Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility’s Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id.*

The Court noted it ruled in 1983 that the MBEA was constitutional, see *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167 (6th Cir. 1983). *Id.* Subsequently, the United States Supreme Court in two landmark decisions applied the criteria of strict scrutiny under which such “racially preferential set-asides” were to be evaluated. *Id.* (see *City of Richmond v. J.A. Croson Co.* (1989) and *Adarand Constructors, Inc. v. Peña* (1995), citation omitted.) The Court noted that the decision in *Keip* was

a more relaxed treatment accorded to equal protection challenges to state contracting disputes prior to *Croson*. *Id.* at 733-734.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id.* at 738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id.* at 739.

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

8. *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.

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

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term "goals" as opposed to "quotas," the Ninth Circuit rejected such a distinction, holding "[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." The case also is instructive because it found the use of "goals" and the application of "good faith efforts" in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the “plaintiff”) submitted the low bid for a construction project for the California Polytechnic State University (the “University”). 125 F.3d 702, 704 (9th Cir. 1994). The University rejected the plaintiff’s bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

Importantly, the University did not conduct a disparity study, and instead argued that because “the ‘goal requirements’ of the scheme ‘[did] not involve racial or gender quotas, set-asides or preferences,’” the University did not need a disparity study. *Id.* at 705. The plaintiff protested the contract award and sued the University’s trustees, and a number of other individuals (collectively the “defendants”) alleging the state law was violative of the Equal Protection Clause. *Id.* The district court denied the plaintiff’s motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. *Id.* at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. *Id.* at 709. The court held that contrary to the district court’s finding, such a difference was not *de minimis*. *Id.*

The defendant’s also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id.* at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, “they are rigid in requiring precisely described and monitored efforts to attain those goals.” *Id.* The court cited its own earlier precedent to hold that “the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas ... [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” *Id.* at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited *Concrete Works of Colorado v. Denver*, 36 F.3d 1512 (10th Cir. 1994), as analogous support for the proposition. *Id.* at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although “worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness.” *Id.* The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (*e.g.*, advertising) to MBE/WBE firms. *Id.* at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id.* at 712-13. The court found the University presented “no evidence” to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id.* at 713. The court found that the statute was not narrowly tailored because the definition of “minority” was overbroad (*e.g.*, inclusion of Aleuts). *Id.* at 714, citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found “[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive

constitutional scrutiny.” *Id.* at 714, citing *Hopwood v. State of Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

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 (11th Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program (“BBE”), the Hispanic Business Enterprise program (“HBE”), and the Woman Business Enterprise program, (“WBE”), (collectively “MWBE” programs). *Id.* The plaintiffs challenged the application of the program to County construction contracts. *Id.*

For certain classes of construction contracts valued over \$25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. *Id.* at 901. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County Commission would make the final determination and its decision was appealable to the County Manager. *Id.* The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id.*

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite “strong basis in evidence” to support the race- and ethnicity-conscious measures. *Id.* at 902. The district court applied intermediate scrutiny to the WBE program and found that the “County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference.” *Id.* Therefore, the County had failed to demonstrate a “compelling interest” necessary to support the BBE and HBE programs, and failed to demonstrate an “important interest” necessary to support the WBE program. *Id.* The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id.* The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id.* at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];

2. Whether the district court erred in finding the County lacked a “strong basis in evidence” to justify the existence of the BBE and HBE programs;
3. Whether the district court erred in finding the County lacked a “sufficient probative basis in evidence” to justify the existence of the WBE program; and
4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve.

Id. at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* at 906. Under this standard, “an affirmative action program must be based upon a ‘compelling government interest’ and must be ‘narrowly tailored’ to achieve that interest.” *Id.* The Eleventh Circuit further noted:

“In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government’s interest, but rather the adequacy of the evidence of discrimination offered to show that interest.”

Id. (internal citations omitted).

Therefore, strict scrutiny requires a finding of a “‘strong basis in evidence’ to support the conclusion that remedial action is necessary.” *Id.*, citing *Croson*, 488 U.S. at 500). The requisite “‘strong basis in evidence’ cannot rest on ‘an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.’” *Id.* at 907, citing *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) (citing and applying *Croson*). However, the Eleventh Circuit found that a governmental entity can “justify affirmative action by demonstrating ‘gross statistical disparities’ between the proportion of minorities hired ... and the proportion of minorities willing and able to do the work ... Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.” *Id.* (internal citations omitted).

Notwithstanding the “exceedingly persuasive justification” language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id.* at 908. Under this standard, the government must provide “sufficient probative evidence” of discrimination, which is a lesser standard than the “strong basis in evidence” under strict scrutiny. *Id.* at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical “anecdotal” evidence. *Id.* at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially “post-enactment” evidence (*i.e.*, evidence based on data related to years following the initial enactment of the BBE program). *Id.* However, “such evidence carries with it the hazard that the program at issue may itself be masking

discrimination that might otherwise be occurring in the relevant market.” *Id.* at 912. A district court should not “speculate about what the data *might* have shown had the BBE program never been enacted.” *Id.*

The statistical evidence. The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County’s statistical evidence (described more fully below) was subject to more than one interpretation. *Id.* at 924. The district court found that the evidence was “insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County’s stated rationale for imposing a gender preference.” *Id.* The district court’s view of the evidence was a permissible one. *Id.*

County contracting statistics. The County presented a study comparing three factors for County non-procurement construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no “consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate ‘share’ ... when the bidder percentages are used as the baseline.” *Id.* at 913. For the WBE statistics, the bidder/awardee statistics were “decidedly mixed” as across the range of County construction contracts. *Id.*

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating “disparity indices” for each program and classification of construction contract. The Eleventh Circuit explained:

“[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group’s bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group’s contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent.”

Id. at 914. “The utility of disparity indices or similar measures ... has been recognized by a number of federal circuit courts.” *Id.*

The Eleventh Circuit found that “[i]n general ... disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination.” *Id.* The Eleventh Circuit noted that “the EEOC’s disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination.” *Id.*, citing 29 CFR § 1607.4D. In addition, no circuit that has “explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination.” *Id.*, citing *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994) (crediting disparity indices ranging from 0 % to 3.8%); *Contractors Ass’n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id.* at 914. “The standard deviation figure describes the probability that the measured disparity is the result of mere chance.” *Id.* The Eleventh Circuit had previously recognized “[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance.” *Id.*

The statistics presented by the County indicated “statistically significant underutilization of BBEs in County construction contracting.” *Id.* at 916. The results were “less dramatic” for HBEs and mixed as between favorable and unfavorable for WBEs. *Id.*

The Eleventh Circuit then explained the burden of proof:

“[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant’s] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently ‘narrowly tailored.’”

Id. (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a “neutral explanation” by: “(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced “sufficient evidence to establish a neutral explanation for the disparities.” *Id.*

The plaintiffs alleged that the disparities were “better explained by firm size than by discrimination ... [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts.” *Id.* at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id.* at 917. The Eleventh Circuit found that the plaintiff’s explanation of the disparities was a “plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms.” *Id.*

Additionally, the Eleventh Circuit noted that the County’s own expert admitted that “firm size plays a significant role in determining which firms win contracts.” *Id.* The expert stated:

The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. *Id.*

The Eleventh Circuit then summarized:

Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. *Id.*

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is “a statistical procedure for determining the relationship between a dependent and independent variable, *e.g.*, the dollar value of a contract award and firm size.” *Id.* (internal citations omitted). The purpose of the regression analysis is “to determine whether the relationship between the two variables is statistically meaningful.” *Id.*

The County’s regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (*i.e.*, most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite “strong basis in evidence” of discrimination of BBEs and HBEs. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. *Id.* However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. *Id.* The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this evidence was not “sufficiently probative of discrimination.” *Id.*

The County argued that the district court erroneously relied on the disaggregated data (*i.e.*, broken down by contract type) as opposed to the consolidated statistics. *Id.* at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) “the County’s own expert testified as to the utility of examining the disaggregated data ‘insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another.’” *Id.*

Additionally, the district court noted, and the Eleventh Circuit found that “the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as ‘Simpson’s Paradox,’ which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated.” *Id.* at 919, n. 4 (internal citations omitted). “Under those circumstances,” the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a “strong basis in evidence” of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

County subcontracting statistics. The County performed a subcontracting study to measure MBE/WBE participation in the County’s subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), “the study compared the proportion of the designated group that filed a subcontractor’s release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period.” *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor’s release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor’s release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation.

Id. The County’s argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court’s decision to fail to credit the study erroneous. *Id.*

Marketplace data statistics. The County conducted another statistical study “to see what the differences are in the marketplace and what the relationships are in the marketplace.” *Id.* The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a “certificate of competency” with Dade County as of January 1995. *Id.* The selected

firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm's owner, and asked for information on the firm's total sales and receipts from all sources. *Id.* The County's expert then studied the data to determine "whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. *Id.* The expert's hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id.*

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, quoting *Croson*, 488 U.S. at 501, quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id.* Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id.*

The Wainwright Study. The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing "the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database" (derived from the decennial census). *Id.* The study "(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners." *Id.* "The study concluded that blacks, Hispanics, and women are less likely to own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males." *Id.*

With respect to the first conclusion, Wainwright controlled for "human capital" variables (education, years of labor market experience, marital status, and English proficiency) and "financial capital" variables (interest and dividend income, and home ownership). *Id.* The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id.* The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id.* at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id.*

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id.* The Eleventh Circuit quoted *Croson*, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: "There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial

choices. Blacks may be disproportionately attracted to industries other than construction.” Id., quoting Croson, 488 U.S. at 503. Following the Supreme Court in Croson, the Eleventh Circuit held “the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason.” Id., quoting Croson, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. Id. at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id.* at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed supra, which did regress for firm size. *Id.*

The Brimmer Study. The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id.* The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau’s Survey of Minority- and Women-Owned Businesses, produced every five years. *Id.* The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id.*

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id.* The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id.* However, the study made no attempt to filter for the Metrorail project and “complete[ly] fail[ed]” to account for firm size. *Id.* Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id.* at 924.

Anecdotal evidence. In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBes, a small amount of similar anecdotal evidence pertaining to WBes, and no anecdotal evidence pertaining to HBes. *Id.* The County presented three basic forms of anecdotal evidence: “(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms.” *Id.*

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id.* They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than their non-MBE/WBE counterparts. *Id.* They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id.*

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was “shopped” to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a “letter of unavailability” for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project.

Id. at 924-25.

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id.* at 925. The interviewees reported similar instances of perceived discrimination, including: “difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms.” *Id.*

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County’s construction contracting process. *Id.* However, such anecdotal evidence is helpful “only when it [is] combined with and reinforced by sufficiently probative statistical evidence.” *Id.* In her plurality opinion in *Croson*, Justice O’Connor found that “evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.” *Id.*, quoting *Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that “anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a “constitutionally sufficient evidentiary foundation.” *Id.*

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, *i.e.*, “remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market.” *Id.*

Narrow tailoring. “The essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences ... must only be a ‘last resort’ option.” *Id.*, quoting *Hayes v. North Side Law Enforcement Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993) and citing *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) (“[T]he strict

scrutiny standard ... forbids the use of even narrowly drawn racial classifications except as a last resort.”).

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) “the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties.” *Id.* at 927, citing *Ensley Branch*, 31 F.3d at 1569. The four factors provide “a useful analytical structure.” *Id.* at 927. The Eleventh Circuit focused only on the first factor in the present case “because that is where the County’s MBE/WBE programs are most problematic.” *Id.*

The Eleventh Circuit

flatly reject[ed] the County’s assertion that ‘given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.’ That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, citing *Croson*, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where “there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting”) ... Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment.

Id. at 927.

The Eleventh Circuit held that the County “clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures.” *Id.* Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an “equally conclusory analysis” in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id.*

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County’s own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County’s own processes and procedures, including: “the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information.” *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were “institutional barriers” to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the “institutional youth” of black- and Hispanic-owned construction firms. *Id.* “It follows that

those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part.” *Id.*

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O’Connor in *Croson*:

[T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect ... The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks.

Id., quoting *Croson*, 488 U.S. at 509-10. The Eleventh Circuit found that except for some “half-hearted programs” consisting of “limited technical and financial aid that might benefit BBEs and HBEs,” the County had not “seriously considered” or tried most of the race- and ethnicity-neutral alternatives available. *Id.* at 928. “Most notably ... the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County’s own contracting process.” *Id.*

The Eleventh Circuit found that the County had taken no steps to “inform, educate, discipline, or penalize” discriminatory misconduct by its own employees. *Id.* at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. *Id.* “Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort.” Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. *Id.*

Substantial relationship. The Eleventh Circuit held that due to the relaxed “substantial relationship” standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. *Id.* However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. *Id.*

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

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

The court considered whether the City and County of Denver’s race- and gender-conscious public contract award program complied with the Fourteenth Amendment’s guarantee of equal protection of the laws. Plaintiff-Appellant Concrete Works of Colorado, Inc. (“Concrete Works”) appealed the district court’s summary judgment order upholding the constitutionality of Denver’s public contract program. The court concluded that genuine issues of material fact exist with regard to the evidentiary support that Denver presents to demonstrate that its program satisfies the requirements of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Accordingly, the court reversed and remanded. 36 F.3d 1513 (10th Cir. 1994).

Background. In, 1990, the Denver City Council enacted Ordinance (“Ordinance”) to enable certified racial minority business enterprises (“MBEs”)¹ and women-owned business enterprises (“WBEs”) to participate in public works projects “to an extent approximating the level of [their] availability and capacity.” *Id.* at 1515. This Ordinance was the most recent in a series of provisions that the Denver City Council has adopted since 1983 to remedy perceived race and gender discrimination in the distribution of public and private construction contracts. *Id.* at 1516.

In 1992, Concrete Works, a nonminority and male-owned construction firm, filed this Equal Protection Clause challenge to the Ordinance. *Id.* Concrete Works alleged that the Ordinance caused it to lose three construction contracts for failure to comply with either the stated MBE and WBE participation goals or the good-faith requirements. Rather than pursuing administrative or state court review of the OCC’s findings, Concrete Works initiated this action, seeking a permanent injunction against enforcement of the Ordinance and damages for lost contracts. *Id.*

In 1993, and after extensive discovery, the district court granted Denver’s summary judgment motion. *Concrete Works, Inc. v. City and County of Denver*, 823 F.Supp. 821 (D.Colo.1993). The court concluded that Concrete Works had standing to bring this claim. *Id.* With respect to the merits, the court held that Denver’s program satisfied the strict scrutiny standard embraced by a majority of the Supreme Court in *Croson* because it was narrowly tailored to achieve a compelling government interest. *Id.*

Standing. At the outset, the Tenth Circuit on appeal considered Denver’s contention that Concrete Works fails to satisfy its burden of establishing standing to challenge the Ordinance’s constitutionality. *Id.* at 1518. The court concluded that Concrete Works demonstrated “injury in fact” because it submitted bids on three projects and the Ordinance prevented it from competing on an equal basis with minority and women-owned prime contractors. *Id.*

Specifically, the unequal nature of the bidding process lied in the Ordinance’s requirement that a nonminority prime contractor must meet MBE and WBE participation goals by entering into joint ventures with MBEs and WBEs or hiring them as subcontractors (or satisfying the ten-step good faith requirement). *Id.* In contrast, minority and women-owned

prime contractors could use their own work to satisfy MBE and WBE participation goals. *Id.* Thus, the extra requirements, the court found imposed costs and burdens on nonminority firms that precluded them from competing with MBEs and WBEs on an equal basis. *Id.* at 1519.

In addition to demonstrating “injury in fact,” Concrete Works, the court held, also satisfied the two remaining elements to establish standing: (1) a causal relationship between the injury and the challenged conduct; and (2) a likelihood that the injury will be redressed by a favorable ruling. Thus, the court concluded that Concrete Works had standing to challenge the constitutionality of Denver’s race- and gender-conscious contract program. *Id.*

Equal Protection Clause Standards. The court determined the appropriate standard of equal protection review by examining the nature of the classifications embodied in the statute. The court applied strict scrutiny to the Ordinance’s race-based preference scheme, and thus inquired whether the statute was narrowly tailored to achieve a compelling government interest. *Id.* Gender-based classifications, in contrast, the court concluded are evaluated under the intermediate scrutiny rubric, which provides that the law must be substantially related to an important government objective. *Id.*

Permissible Evidence and Burdens of Proof. In *Croson*, a plurality of the Court concluded that state and local governments have a compelling interest in remedying identified past and present discrimination within their borders. *Id. citing, Croson*, 488 U.S. at 492, 509. The plurality explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a “ ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by allowing tax dollars “to finance the evil of private prejudice.” *Id. citing, Croson* at 492.

A. Geographic Scope of the Data. Concrete Works contended that *Croson* precluded the court from considering empirical evidence of discrimination in the six-county Denver Metropolitan Statistical Area (MSA). Instead, it argued *Croson* would allow Denver only to use data describing discrimination within the City and County of Denver. *Id.* at 1520.

The court stated that a majority in *Croson* observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the construction industry to draw conclusions about prevailing market conditions in their own regions. *Id.* at 1520, *citing Croson* at 504. The relevant area in which to measure discrimination, then, is the local construction market, but that is not necessarily confined by jurisdictional boundaries. *Id.*

The court said that *Croson* supported its consideration of data from the Denver MSA because this data was sufficiently geographically targeted to the relevant market area. *Id.* The record revealed that over 80 percent of Denver Department of Public Works (“DPW”) construction and design contracts were awarded to firms located within the Denver MSA. *Id.* at 1520. To confine the permissible data to a governmental body’s strict geographical boundaries, the court found, would ignore the economic reality that contracts are often awarded to firms situated in adjacent areas. *Id.*

The court said that it is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program is scrutinized, but here Denver’s contracting activity, insofar as construction work was concerned, was closely related to the Denver

MSA. *Id.* at 1520. Therefore, the court held that data from the Denver MSA was adequately particularized for strict scrutiny purposes. *Id.*

B. Anecdotal Evidence. Concrete Works argued that the district court committed reversible error by considering such non-empirical evidence of discrimination as testimony from minority and women-owned firms delivered during public hearings, affidavits from MBEs and WBEs, summaries of telephone interviews that Denver officials conducted with MBEs and WBEs, and reports generated during Office of Affirmative Action compliance investigations. *Id.*

The court stated that selective anecdotal evidence about minority contractors' experiences, without more, would not provide a strong basis in evidence to demonstrate public or private discrimination in Denver's construction industry sufficient to pass constitutional muster under *Croson*. *Id.* at 1520.

Personal accounts of actual discrimination or the effects of discriminatory practices may, according to the court, however, vividly complement empirical evidence. *Id.* The court concluded that anecdotal evidence of a municipality's institutional practices that exacerbate discriminatory market conditions are often particularly probative. *Id.* Therefore, the government may include anecdotal evidence in its evidentiary mosaic of past or present discrimination. *Id.*

The court pointed out that in the context of employment discrimination suits arising under Title VII of the Civil Rights Act of 1964, the Supreme Court has stated that anecdotal evidence may bring "cold numbers convincingly to life." *Id.* at 1520, quoting, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). In fact, the court found, the majority in *Croson* impliedly endorsed the inclusion of personal accounts of discrimination. *Id.* at 1521. The court thus deemed anecdotal evidence of public and private race and gender discrimination appropriate supplementary evidence in the strict scrutiny calculus. *Id.*

C. Post-Enactment Evidence. Concrete Works argued that the court should consider only evidence of discrimination that existed prior to Denver's enactment of the Ordinance. *Id.* In *Croson*, the court noted that the Supreme Court underscored that a municipality "must identify [the] discrimination ... with some specificity *before* [it] may use race-conscious relief." *Id.* at 1521, quoting, *Croson*, 488 U.S. at 504 (emphasis added). Absent any pre-enactment evidence of discrimination, the court said a municipality would be unable to satisfy *Croson*. *Id.*

However, the court did not read *Croson's* evidentiary requirement as foreclosing the consideration of post-enactment evidence. *Id.* at 1521. Post-enactment evidence, if carefully scrutinized for its accuracy, the court found would often prove quite useful in evaluating the remedial effects or shortcomings of the race-conscious program. *Id.* This, the court noted was especially true in this case, where Denver first implemented a limited affirmative action program in 1983 and has since modified and expanded its scope. *Id.*

The court held the strong weight of authority endorses the admissibility of post-enactment evidence to determine whether an affirmative action contract program complies with *Croson*. *Id.* at 1521. The court agreed that post-enactment evidence may prove useful for a court's determination of whether an ordinance's deviation from the norm of equal

treatment is necessary. *Id.* Thus, evidence of discrimination existing subsequent to enactment of the 1990 Ordinance, the court concluded was properly before it. *Id.*

D. Burdens of Production and Proof. The court stated that the Supreme Court in *Croson* struck down the City of Richmond’s minority set-aside program because the City failed to provide an adequate evidentiary showing of past or present discrimination. *Id.* at 1521, *citing, Croson*, 488 U.S. at 498–506. The court pointed out that because the Fourteenth Amendment only tolerates race-conscious programs that narrowly seek to remedy identified discrimination, the Supreme Court in *Croson* explained that state and local governments “must identify that discrimination ... with some specificity before they may use race-conscious relief.” *Id.*, *citing Croson*, at 504. The court said that the Supreme Court’s benchmark for judging the adequacy of the government’s factual predicate for affirmative action legislation was whether there exists a “*strong basis in evidence* for [the government’s] conclusion that remedial action was necessary.” *Id.*, *quoting, Croson*, at 500.

Although *Croson* places the burden of production on the municipality to demonstrate a “strong basis in evidence” that its race- and gender-conscious contract program aims to remedy specifically identified past or present discrimination, the court held the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before a municipality may take affirmative steps to eradicate discrimination. *Id.* at 1521, *citing, Wygant*, 476 U.S. at 292 (O’Connor, J., concurring in part and concurring in the judgment). An affirmative action response to discrimination is sustainable against an equal protection challenge so long as it is predicated upon strong evidence of discrimination. *Id.* at 1522, *citing, Croson*, 488 U.S. at 504.

An inference of discrimination, the court found, may be made with empirical evidence that demonstrates “a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” *Id.* at 1522, *quoting, Croson* at 509 (plurality). The court concluded that it did not read *Croson* to require an attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* “strong basis in evidence” benchmark. *Id.* That, the court stated, must be evaluated on a case-by-case basis. *Id.*

The court said that the adequacy of a municipality’s showing of discrimination must be evaluated in the context of the breadth of the remedial program advanced by the municipality. *Id.* at 1522, *citing, Croson* at 498. Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, the court found is a question of law. *Id.* Underlying that legal conclusion, however, the court noted are factual determinations about the accuracy and validity of a municipality’s evidentiary support for its program. *Id.*

Notwithstanding the burden of initial production that rests with the municipality, “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* at 1522, *quoting, Wygant*, 476 U.S. at 277–78(plurality). Thus, the court stated that once Denver presented adequate statistical evidence of precisely defined discrimination in the Denver area construction market, it became incumbent upon Concrete Works either to establish that Denver’s evidence did not constitute strong evidence of such discrimination or that the remedial statute was not

narrowly drawn. *Id.* at 1523. Absent such a showing by Concrete Works, the court said, summary judgment upholding Denver’s Ordinance would be appropriate. *Id.*

E. Evidentiary Predicate Underlying Denver’s Ordinance. The evidence of discrimination that Denver presents to demonstrate a compelling government interest in enacting the Ordinance consisted of three categories: (1) evidence of discrimination in city contracting from the mid-1970s to 1990; (2) data about MBE and WBE utilization in the overall Denver MSA construction market between 1977 and 1992; and (3) anecdotal evidence that included personal accounts by MBEs and WBEs who have experienced both public and private discrimination and testimony from city officials who describe institutional governmental practices that perpetuate public discrimination. *Id.* at 1523.

1. Discrimination in the Award of Public Contracts. The court considered the evidence that Denver presented to demonstrate underutilization of MBEs and WBEs in the award of city contracts from the mid 1970s to 1990. The court found that Denver offered persuasive pieces of evidence that, considered in the abstract, could give rise to an inference of race- and gender-based public discrimination on isolated public works projects. *Id.* at 1523. However, the court also found the record showed that MBE and WBE utilization on public contracts as a whole during this period was strong in comparison to the total number of MBEs and WBEs within the local construction industry. *Id.* at 1524. Denver offered a rebuttal to this more general evidence, but the court stated it was clear that the weight to be given both to the general evidence and to the specific evidence relating to individual contracts presented genuine disputes of material facts.

The court then engaged in an analysis of the factual record and an identification of the genuine material issues of fact arising from the parties’ competing evidence.

(a) Federal Agency Reports of Discrimination in Denver. Denver submitted federal agency reports of discrimination in Denver public contract awards. *Id.* at 1524. The record contained a summary of a 1978 study by the United States General Accounting Office (“GAO”), which showed that between 1975 and 1977 minority businesses were significantly underrepresented in the performance of Denver public contracts that were financed in whole or in part by federal grants. *Id.*

Concrete Works argued that a material fact issue arose about the validity of this evidence because “the 1978 GAO Report was nothing more than a listing of the problems faced by all small firms, first starting out in business.” *Id.* at 1524. The court pointed out, however, Concrete Works ignored the GAO Report’s empirical data, which quantified the actual disparity between the utilization of minority contractors and their representation in the local construction industry. *Id.* In addition, the court noted that the GAO Report reflected the findings of an objective third party. *Id.* Because this data remained uncontested, notwithstanding Concrete Works’ conclusory allegations to the contrary, the court found the 1978 GAO Report provided evidence to support Denver’s showing of discrimination. *Id.*

Added to the GAO findings was a 1979 letter from the United States Department of Transportation (“US DOT”) to the Mayor of the City of Denver, describing the US DOT Office of Civil Rights’ study of Denver’s discriminatory contracting practices at Stapleton International Airport. *Id.* at 1524. US DOT threatened to withhold additional federal funding for Stapleton because Denver had “denied minority contractors the benefits of, excluded them from, or otherwise discriminated against them concerning contracting

opportunities at Stapleton,” in violation of Title VI of the Civil Rights Act of 1964 and other federal laws. *Id.*

The court discussed the following data as reflected of the low level of MBE and WBE utilization on Stapleton contracts prior to Denver’s adoption of an MBE and WBE goals program at Stapleton in 1981: for the years 1977 to 1980, respectively, MBE utilization was 0 percent, 3.8 percent, .7 percent, and 2.1 percent; data on WBE utilization was unknown for the years 1977 to 1979, and it was .05 percent for 1980. *Id.* at 1524.

The court stated that like its unconvincing attempt to discredit the GAO Report, Concrete Works presented no evidence to challenge the validity of US DOT’s allegations. *Id.* Concrete Works, the court said, failed to introduce evidence refuting the substance of US DOT’s information, attacking its methodology, or challenging the low utilization figures for MBEs at Stapleton before 1981. *Id.* at 1525. Thus, according to the court, Concrete Works failed to create a genuine issue of fact about the conclusions in the US DOT’s report. *Id.* In sum, the court found the federal agency reports of discrimination in Denver’s contract awards supported Denver’s contention that race and gender discrimination existed prior to the enactment of the challenged Ordinance. *Id.*

(b) Denver’s Reports of Discrimination. Denver pointed to evidence of public discrimination prior to 1983, the year that the first Denver ordinance was enacted. *Id.* at 1525. A 1979 DPW “Major Bond Projects Final Report,” which reviewed MBE and WBE utilization on projects funded by the 1972 and 1974 bond referenda and the 1975 and 1976 revenue bonds, the court said, showed strong evidence of underutilization of MBEs and WBEs. *Id.* Based on this Report’s description of the approximately \$85 million in contract awards, there was 0 percent MBE and WBE utilization for professional design and construction management projects, and less than 1 percent utilization for construction. *Id.* The Report concluded that if MBEs and WBEs had been utilized in the same proportion as found in the construction industry, 5 percent of the contract dollars would have been awarded to MBEs and WBEs. *Id.*

To undermine this data, Concrete Works alleged that the DPW Report contained “no information about the number of minority or women owned firms that were used” on these bond projects. *Id.* at 1525. However, the court concluded the Report’s description of MBE and WBE utilization in terms of contract dollars provided a more accurate depiction of total utilization than would the mere number of MBE and WBE firms participating in these projects. *Id.* Thus, the court said this line of attack by Concrete Works was unavailing. *Id.*

Concrete Works also advanced expert testimony that Denver’s data demonstrated strong MBE and WBE utilization on the total DPW contracts awarded between 1978 and 1982. *Id.* Denver responded by pointing out that because federal and city affirmative action programs were in place from the mid-1970s to the present, this overall DPW data reflected the intended remedial effect on MBE and WBE utilization of these programs. *Id.* at 1526. Based on its contention that the overall DPW data was therefore “tainted” and distorted by these pre-existing affirmative action goals programs, Denver asked the court to focus instead on the data generated from specific public contract programs that were, for one reason or another, insulated from federal and local affirmative action goals programs, i.e. “non-goals public projects.” *Id.*

Given that the same local construction industry performed both goals and non-goals public contracts, Denver argued that data generated on non-goals public projects offered a control

group with which the court could compare MBE and WBE utilization on public contracts governed by a goals program and those insulated from such goal requirements. *Id.* Denver argued that the utilization of MBEs and WBEs on non-goals projects was the better test of whether there had been discrimination historically in Denver contracting practices. *Id.* at 1526.

DGS data. The first set of data from non-goals public projects that Denver identified were MBE and WBE disparity indices on Denver Department of General Services (“DGS”) contracts, which represented one-third of all city construction funding and which, prior to the enactment of the 1990 Ordinance, were not subject to the goals program instituted in the earlier ordinances for DPW contracts. *Id.* at 1526. The DGS data, the court found, revealed extremely low MBE and WBE utilization. *Id.* For MBEs, the DGS data showed a .14 disparity index in 1989 and a .19 disparity index in 1990—evidence the court stated was of significant underutilization. *Id.* For WBEs, the disparity index was .47 in 1989 and 1.36 in 1990—the latter, the court said showed greater than full participation and the former demonstrating underutilization. *Id.*

The court noted that it did not have the benefit of relevant authority with which to compare Denver’s disparity indices for WBEs. Nevertheless, the court concluded Denver’s data indicated significant WBE underutilization such that the Ordinance’s gender classification arose from “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 1526, n.19, quoting, *Mississippi Univ. of Women*, 458 U.S. at 726.

DPW data. The second set of data presented by Denver, the court said, reflected distinct MBE and WBE underutilization on non-goals public projects consisting of separate DPW projects on which no goals program was imposed. *Id.* at 1527. Concrete Works, according to the court, attempted to trivialize the significance of this data by contending that the projects, in dollar terms, reflected a small fraction of the total Denver MSA construction market. *Id.* But, the court noted that Concrete Works missed the point because the data was not intended to reflect conditions in the overall market. *Id.* Instead the data dealt solely with the utilization levels for city-funded projects on which no MBE and WBE goals were imposed. *Id.* The court found that it was particularly telling that the disparity index significantly deteriorated on projects for which the city did not establish minority and gender participation goals. *Id.* Insofar as Concrete Works did not attack the data on any other grounds, the court considered it was persuasive evidence of underlying discrimination in the Denver construction market. *Id.*

Empirical data. The third evidentiary item supporting Denver’s contention that public discrimination existed prior to enactment of the challenged Ordinance was empirical data from 1989, generated after Denver modified its race- and gender-conscious program. *Id.* at 1527. In the wake of *Croson*, Denver amended its program by eliminating the minimum annual goals program for MBE and WBE participation and by requiring MBEs and WBEs to demonstrate that they had suffered from past discrimination. *Id.*

This modification, the court said, resulted in a noticeable decline in the share of DPW construction dollars awarded to MBEs. *Id.* From 1985 to 1988 (prior to the 1989 modification of Denver’s program), DPW construction dollars awarded to MBEs ranged from 17 to nearly 20 percent of total dollars. *Id.* However, the court noted the figure dropped to 10.4 percent in 1989, after the program modifications took effect. *Id.* at 1527. Like the DGS and non-goals DPW projects, this 1989 data, the court concluded, further

supported the inference that MBE and WBE utilization significantly declined after deletion of a goals program or relaxation of the minimum MBE and WBE utilization goal requirements. *Id.*

Nonetheless, the court stated it must consider Denver's empirical support for its contention that public discrimination existed prior to the enactment of the Ordinance in the context of the overall DPW data, which showed consistently strong MBE and WBE utilization from 1978 to the present. *Id.* at 1528. The court noted that although Denver's argument may prove persuasive at trial that the non-goals projects were the most reliable indicia of discrimination, the record on summary judgment contained two sets of data, one that gave rise to an inference of discrimination and the other that undermined such an inference. *Id.* This discrepancy, the court found, highlighted why summary judgment was inappropriate on this record. *Id.*

Availability data. The court concluded that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.* at 1528. Although Denver's data used as its baseline the percentage of firms in the local construction market that were MBEs and WBEs, Concrete Works argued that a more accurate indicator would consider the capacity of local MBEs and WBEs to undertake the work. *Id.* The court said that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.*

The court agreed with the other circuits which had at that time interpreted Croson impliedly to permit a municipality to rely, as did Denver, on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion or request for a preliminary injunction. *Id.* at 1527 *citing, Contractors Ass'n*, 6 F.3d at 1005 (comparing MBE participation in city contracts with the "percentage of [MBE] availability or composition in the 'population' of Philadelphia area construction firms"); *Associated Gen. Contractors*, 950 F.2d at 1414 (relying on availability data to conclude that city presented "detailed findings of prior discrimination"); *Cone Corp.*, 908 F.2d at 916 (statistical disparity between "the total percentage of minorities involved in construction and the work going to minorities" shows that "the racial classification in the County plan [was] necessary").

But, the court found Concrete Works had identified a legitimate factual dispute about the accuracy of Denver's data and questioned whether Denver's reliance on the percentage of MBEs and WBEs available in the marketplace overstated "the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than nonminority-owned firms." *Id.* at 1528. In other words, the court said, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs. *Id.*

The court stated that it was not implying that availability was not an appropriate barometer to calculate MBE and WBE utilization, nor did it cast aspersions on data that simply used raw numbers of MBEs and WBEs compared to numbers of total firms in the market. *Id.* The court concluded, however, once credible information about the size or capacity of the firms was introduced in the record, it became a factor that the court should consider. *Id.*

Denver presented several responses. *Id.* at 1528. It argued that a construction firm's precise "capacity" at a given moment in time belied quantification due to the industry's highly elastic nature. *Id.* DPW contracts represented less than 4 percent of total MBE revenues and less than 2 percent of WBE revenues in 1989, thereby the court said, strongly implied that MBE and WBE participation in DPW contracts did not render these firms incapable of concurrently undertaking additional work. *Id.* at 1529. Denver presented evidence that most MBEs and WBEs had never participated in city contracts, "although almost all firms contacted indicated that they were interested in City work." *Id.* Of those MBEs and WBEs who have received work from DPW, available data showed that less than 10 percent of their total revenues were from DPW contracts. *Id.*

The court held all of the back and forth arguments highlighted that there were genuine and material factual disputes in the record, and that such disputes about the accuracy of Denver's data should not be resolved at summary judgment. *Id.* at 1529.

(c) Evidence of Private Discrimination in the Denver MSA. In recognition that a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area, the court also considered data about conditions in the overall Denver MSA construction industry between 1977 and 1992. *Id.* at 1529. The court stated that given DPW and DGS construction contracts represented approximately 2 percent of all construction in the Denver MSA, Denver MSA industry data sharpened the picture of local market conditions for MBEs and WBEs. *Id.*

According to Denver's expert affidavits, the MBE disparity index in the Denver MSA was .44 in 1977, .26 in 1982, and .43 in 1990. *Id.* The corresponding WBE disparity indices were .46 in 1977, .30 in 1982, and .42 in 1989. *Id.* This pre-enactment evidence of the overall Denver MSA construction market—i.e. combined public and private sector utilization of MBEs and WBEs—the court found gave rise to an inference that local prime contractors discriminated on the basis of race and gender. *Id.*

The court pointed out that rather than offering any evidence in rebuttal, Concrete Works merely stated that this empirical evidence did not prove that the Denver government itself discriminated against MBEs and WBEs. *Id.* at 1529. Concrete Works asked the court to define the appropriate market as limited to contracts with the City and County of Denver. *Id.* But, the court said that such a request ignored the lesson of *Croson* that a municipality may design programs to prevent tax dollars from "financ[ing] the evil of private prejudice." *Id.*, quoting, *Croson*, 488 U.S. at 492.

The court found that what the Denver MSA data did not indicate, however, was whether there was any linkage between Denver's award of public contracts and the Denver MSA evidence of industry-wide discrimination. *Id.* at 1529. The court said it could not tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. *Id.*

Neither *Croson* nor its progeny, the court pointed out, clearly stated whether private discrimination that was in no way funded with public tax dollars could, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. *Id.* The court said a plurality in *Croson* suggested that remedial measures could be justified upon a municipality's showing that "it had essentially become a 'passive

participant' in a system of racial exclusion practiced by elements of the local construction industry." *Id.* at 1529, quoting, *Croson*, 488 U.S. at 492.

The court concluded that *Croson* did not require the municipality to identify an exact linkage between its award of public contracts and private discrimination, but such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program. *Id.* at 1529. The record before the court did not explain the Denver government's role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and the court stated that this may be a fruitful issue to explore at trial. *Id.* at 1530.

(d). Anecdotal Evidence. The record, according to the court, contained numerous personal accounts by MBEs and WBEs, as well as prime contractors and city officials, describing discriminatory practices in the Denver construction industry. *Id.* at 1530. Such anecdotal evidence was collected during public hearings in 1983 and 1988, interviews, the submission of affidavits, and case studies performed by a consulting firm that Denver employed to investigate public and private market conditions in 1990, prior to the enactment of the 1990 Ordinance. *Id.*

The court indicated again that anecdotal evidence about minority- and women-owned contractors' experiences could bolster empirical data that gave rise to an inference of discrimination. *Id.* at 1530. While a factfinder, the court stated, should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carry more weight due to the systemic impact that such institutional practices have on market conditions. *Id.*

The court noted that in addition to the individual accounts of discrimination that MBEs and WBEs had encountered in the Denver MSA, City affirmative action officials explained that change orders offered a convenient means of skirting project goals by permitting what would otherwise be a new construction project (and thus subject to the MBE and WBE participation requirements) to be characterized as an extension of an existing project and thus within DGS's bailiwick. *Id.* at 1530. An assistant city attorney, the court said, also revealed that projects have been labelled "remodeling," as opposed to "reconstruction," because the former fall within DGS, and thus were not subject to MBE and WBE goals prior to the enactment of the 1990 Ordinance. *Id.* at 1530. The court concluded over the object of Concrete Works that this anecdotal evidence could be considered in conjunction with Denver's statistical analysis. *Id.*

2. Summary. The court summarized its ruling by indicating Denver had compiled substantial evidence to support its contention that the Ordinance was enacted to remedy past race- and gender-based discrimination. *Id.* at 1530. The court found in contrast to the predicate facts on which Richmond unsuccessfully relied in *Croson*, that Denver's evidence of discrimination both in the award of public contracts and within the overall Denver MSA was particularized and geographically targeted. *Id.* The court emphasized that Denver need not negate all evidence of non-discrimination, nor was it Denver's burden to prove judicially that discrimination did exist. *Id.* Rather, the court held, Denver need only come forward with a "strong basis in evidence" that its Ordinance was a narrowly-tailored response to specifically identified discrimination. *Id.* Then, the court said it became Concrete Works' burden to show that there was no such strong basis in evidence to support Denver's affirmative action legislation. *Id.*

The court also stated that Concrete Works had specifically identified potential flaws in Denver’s data and had put forth evidence that Denver’s data failed to support an inference of either public or private discrimination. *Id.* at 1530. With respect to Denver’s evidence of public discrimination, for example, the court found overall DPW data demonstrated strong MBE and WBE utilization, yet data for isolated DPW projects and DGS contract awards suggested to the contrary. *Id.* The parties offered conflicting rationales for this disparate data, and the court concluded the record did not provide a clear explanation. *Id.* In addition, the court said that Concrete Works presented a legitimate contention that Denver’s disparity indices failed to consider the relatively small size of MBEs and WBEs, which the court noted further impeded its ability to draw conclusions from the existing record. *Id.* at 1531.

Significantly, the court pointed out that because Concrete Works did not challenge the district court’s conclusion with respect to the second prong of Croson’s strict scrutiny standard—i.e. that the Ordinance was narrowly tailored to remedy past and present discrimination—the court need not and did not address this issue. *Id.* at 1531.

On remand, the court stated the parties should be permitted to develop a factual record to support their competing interpretations of the empirical data. *Id.* at 1531. Accordingly, the court reversed the district court ruling granting summary judgment and remanded the case for further proceedings. See *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

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

An association of construction contractors filed suit challenging, on equal protection grounds, a city of Philadelphia ordinance that established a set-aside program for “disadvantaged business enterprises” owned by minorities, women, and handicapped persons. 6 F.3d. at 993. The United States District Court for the Eastern District of Pennsylvania, [735 F.Supp. 1274 \(E.D. Phila. 1990\)](#), granted summary judgment for the contractors [739 F.Supp. 227](#), and denied the City’s motion to stay the injunctive relief. Appeal was taken. The Third Circuit Court of Appeals, [945 F.2d 1260 \(3d Cir. 1991\)](#), affirmed in part and vacated in part the district court’s decision. *Id.* On remand, the district court again granted summary judgment for the contractors. The City appealed. The Third Circuit Court of Appeals, held that: (1) the contractors association had standing, but only to challenge the portions of the ordinance that applied to construction contracts; (2) the City presented sufficient evidence to withstand summary judgment with respect to the race and gender preferences; and (3) the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection. *Id.*

Procedural history. Nine associations of construction contractors challenged on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. *Id.* at 993. The district court granted summary judgment to the Contractors, holding they had standing to bring this lawsuit and invalidating the Ordinance in all respects. [Contractors Association v. City of Philadelphia, 735 F.Supp. 1274 \(E.D.Pa.1990\)](#). In an earlier opinion, the Third Circuit affirmed the district court’s ruling on standing, but vacated summary judgment on the merits because the City had outstanding discovery requests. [Contractors Association v. City of Philadelphia, 945 F.2d 1260 \(3d Cir.1991\)](#). On remand after discovery,

the district court again entered summary judgment for the Contractors. The Third Circuit in this case affirmed in part, vacated in part, and reversed in part. 6 F.3d 990, 993.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and women-owned businesses. Phila.Code § 17-500. *Id.* The Ordinance established “goals” for the participation of “disadvantaged business enterprises.” § 17-503. “Disadvantaged business enterprises” (DBEs) were defined as those enterprises at least 51 percent owned by “socially and economically disadvantaged individuals,” defined in turn as: those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* at 994. The Ordinance further provided that racial minorities and women are rebuttably presumed to be socially and economically disadvantaged individuals, § 17-501(11)(a), but that a business which has received more than \$5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17-501(10). *Id.* at 994.

The Ordinance set goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for women-owned businesses, and 2 percent for businesses owned by handicapped persons. § 17-503(1). *Id.* at 994. The Ordinance applied to all City contracts, which are divided into three types—vending, construction, and personal and professional services. § 17-501(6). The percentage goals related to the total dollar amounts of City contracts and are calculated separately for each category of contracts and each City agency. *Id.* at 994.

In 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 994. After the City moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the merits. The district court granted the Contractors’ motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. *Id.* at 995 *citing*, [735 F.Supp. at 1283 & n. 3](#).

Turning to the merits of the Contractors’ equal protection claim, the district court held that [City of Richmond v. J.A. Croson Co.](#), 488 U.S. 469 (1989), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. *Id.* Under that standard, the Third Circuit held a law will be invalidated if it is not “narrowly tailored” to a “compelling government interest.” *Id.* at 995.

Applying *Croson*, the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a “compelling government interest.” *Id.* at 995, *quoting*, [735 F.Supp. at 1295-98](#). The court also held the Ordinance was not “narrowly tailored,” emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id.* at 995; [735 F.Supp. at 1298-99](#). The court held the Ordinance’s preferences for businesses owned by women and

handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id.* at 995 *citing*, 735 F.Supp. [at 1299–1309](#).

On appeal, the Third Circuit in 1991 affirmed the district court’s ruling on standing, but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. [945 F.2d 1260 \(3d Cir.1991\)](#). The Court remanded so discovery could be completed and explicitly reserved judgment on the merits. [Id. at 1268](#). On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the Philadelphia construction industry against businesses owned by racial minorities, women, and handicapped persons to withstand summary judgment. The City and United Minority Enterprise Associates, Inc. (UMEA), which had intervened filed an appeal. *Id.*

This appeal, the Court said, presented three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. *Id.* at 995.

Standing. The Supreme Court has confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are “able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis.” *Id.* at 995. Because the affidavits submitted to the district court established the Contractors were able and ready to bid on construction contracts, but could not do so for failure to meet the DBE percentage requirements, the court held they had standing to challenge the sections of the Ordinance covering construction contracts. *Id.* at 996.

Standards of equal protection review. The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons. In analyzing these classifications separately, the Court first considered which standard of equal protection review applies to each classification. *Id.* at 999.

Race, ethnicity, and gender. The Court found that choice of the appropriate standard of review turns on the nature of the classification. *Id.* at 999. Because under equal protection analysis classifications based on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *Id.* Accordingly, the Court determined whether the Ordinance contains race- or gender-based classifications. The Ordinance’s classification scheme is spelled out in its definition of “socially and economically disadvantaged. *Id.* The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition’s economic criteria as in addition to rather than in lieu of race, ethnicity, gender, and handicap. *Id.* Therefore, it applied strict scrutiny to the racial preference under *Croson* and intermediate scrutiny to the gender preference under [Mississippi University for Women v. Hogan, 458 U.S. 718, 724 \(1982\)](#). *Id.* at 999.

A. Strict scrutiny. Under strict scrutiny, a law may only stand if it is “narrowly tailored” to a “compelling government interest.” *Id.* at 999. Under intermediate scrutiny, a law must be “substantially related” to the achievement of “important government objectives.” *Id.*

The Court agreed with the district court that the definition of “socially and economically disadvantaged individuals” included only individuals who are both victims of prejudice based on status and economically deprived. *Id.* at 999. Additionally, the last clause of the definition described economically disadvantaged individuals as those “whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged.” *Id.* This clause, the Court found, demonstrated the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. *Id.* The Court said the plain language of the Ordinance foreclosed the City’s argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage. *Id.* at 1000.

B. Intermediate scrutiny. The Court considered the proper standard of review for the Ordinance’s gender preference. The Court held a gender-based classification favoring women merited intermediate scrutiny. *Id.* at 1000, citing, [Hogan 458 U.S. at 728](#). The Ordinance, the Court stated, is such a program. *Id.* Several federal courts, the Court noted, have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Id.* at 1001, citing, [Coral Constr. Co. v. King County, 941 F.2d 910, 930 \(9th Cir.1991\)](#), cert. denied, [502 U.S. 1033 \(1992\)](#); [Michigan Road Builders Ass’n, Inc. v. Milliken, 834 F.2d 583, 595 \(6th Cir.1987\)](#), aff’d mem., [489 U.S. 1061\(1989\)](#); [Associated General Contractors of Cal. v. City and County of San Francisco, 813 F.2d 922, 942 \(9th Cir.1987\)](#); [Main Line Paving Co. v. Board of Educ., 725 F.Supp. 1349, 1362 \(E.D.Pa.1989\)](#).

Application of intermediate scrutiny to the Ordinance’s gender preference, the Court said, also follows logically from *Croson*, which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. *Id.* For these reasons, the Third Circuit rejected, as did the district court, those cases applying strict scrutiny to gender-based classifications. [Cone Corp. v. Hillsborough County, 908 F.2d 908 \(11th Cir.\)](#), cert. denied, [498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 \(1990\)](#). *Id.* at 1000-1001. The Court agreed with the district court’s choice of intermediate scrutiny to review the Ordinance’s gender preference. *Id.*

Handicap. The district court reviewed the preference for handicapped business owners under the rational basis test. *Id.* at 1000, citing [735 F.Supp. at 1307](#). That standard validates the classification if it is “rationally related to a legitimate governmental purpose.” *Id.* at 1001, citing [Cleburne, 473 U.S. at 445](#). The Court held the district court properly chose the rational basis standard in reviewing the Ordinance’s preference for handicapped persons. *Id.*

Constitutionality of the ordinance: race and ethnicity. Because strict scrutiny applies to the Ordinance’s racial and ethnic preferences, the Court stated it may only uphold them if they are “narrowly tailored” to a “compelling government interest.” *Id.* at 1001-2. The Court noted that in *Croson*, the Supreme Court made clear that combatting racial discrimination is a “compelling government interest.” *Id.* at 1002, quoting, [488 U.S. at 492, 509](#). It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a “ ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” [Id. at 1002, quoting, 488 U.S. at 492.](#)

In the Supreme Court’s view, the “relevant statistical pool” was not the minority population, but the number of qualified minority contractors. It stressed the city did not know the

number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. [Id. at 1002, citing 488 U.S. at 502.](#)

Ruling the Philadelphia Ordinance's racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance "possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan," [Id. at 1002, quoting, 735 F.Supp. at 1298.](#) As in *Croson*, the district court reasoned, the City relied on national statistics, a comparison between prime contract awards and the percentage of minorities in Philadelphia's population, the Ordinance's declaration it was remedial, and "conclusory" testimony of witnesses regarding discrimination in the Philadelphia construction industry. [Id. at 1002, quoting, 1295-98.](#)

In a footnote, the Court pointed out the district court also interpreted *Croson* to require "specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit" enacting the ordinance. [735 F.Supp. at 1295.](#) The Court said this reading overlooked the statement in *Croson* that a City can be a "passive participant" in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city "has a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice." [Id. at 1002, n. 10, quoting, 488 U.S. at 492.](#)

Anecdotal evidence of racial discrimination. The City contended the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. [Id. at 1002.](#) In certain instances, these contractors lost out despite being low bidders. The Court found this anecdotal evidence significantly outweighed that presented in *Croson*, where the Richmond City Council heard "no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." [Id., quoting, 488 U.S. at 480.](#)

Although the district court acknowledged the minority contractors' testimony was relevant under *Croson*, it discounted this evidence because "other evidence of the type deemed impermissible by the Supreme Court ... unsupported general testimony, impermissible statistics and information on the national set-aside program, ... overwhelmingly formed the basis for the enactment of the set-aside ... and therefore taint[ed] the minds of city councilmembers." [Id. at 1002, quoting, 735 F.Supp. at 1296.](#)

The Third Circuit held, however, given *Croson*'s emphasis on statistical evidence, even had the district court credited the City's anecdotal evidence, the Court did not believe this amount of anecdotal evidence was sufficient to satisfy strict scrutiny. [Id. at 1003, quoting, Coral Constr., 941 F.2d at 919](#) ("anecdotal evidence ... rarely, if ever, can ... show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."). Although anecdotal evidence alone may, the Court said, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here. [Id.](#) But because the combination of "anecdotal and statistical evidence is potent," [Coral Constr., 941 F.2d at 919.](#) the Court considered the statistical evidence proffered in support of the Ordinance.

Statistical evidence of racial discrimination. There are two categories of statistical evidence here, evidence undisputedly considered by City Council before it enacted the Ordinance in 1982 (the “pre-enactment” evidence), and evidence developed by the City on remand (the “post-enactment” evidence). *Id.* at 1003.

Pre-Enactment statistical evidence. The principal pre-enactment statistical evidence appeared in the 1982 Report of the City Council Finance Committee and recited that minority contractors were awarded only .09 percent of City contract dollars during the preceding three years, 1979 through 1981, although businesses owned by Blacks and Hispanics accounted for 6.4 percent of all businesses licensed to operate in Philadelphia. The Court found these statistics did not satisfy *Croson* because they did not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts. *Id.* at 1003. Under *Croson*, available minority-owned businesses comprise the “relevant statistical pool.” *Id.* at 1003. Therefore, the Court held the data in the Finance Committee Report did not provide a sufficient evidentiary basis for the Ordinance.

Post-Enactment statistical evidence. The “post-enactment” evidence consists of a study conducted by an economic consultant to demonstrate the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia. The study provided the “relevant statistical pool” needed to satisfy *Croson*—the percentage of minority businesses engaged in the Philadelphia construction industry. *Id.* at 1003. The study also presented data showing that minority subcontractors were underrepresented in the private sector construction market. This data may be relevant, the Court said, if at trial the City can link it to discrimination occurring in the public sector construction market because the Ordinance covers subcontracting. *Id.* at n. 13.

The Court noted that several courts have held post-enactment evidence is admissible in determining whether an Ordinance satisfies *Croson*. *Id.* at 1004. Consideration of post-enactment evidence, the Court found was appropriate here, where the principal relief sought and the only relief granted by the district court, was an injunction. Because injunctions are prospective only, it makes sense the Court said to consider all available evidence before the district court, including the post-enactment evidence, which the district court did. *Id.*

Sufficiency of the statistical and anecdotal evidence and burden of proof. In determining whether the statistical evidence was adequate, the Court looked to what it referred to as its critical component—the “disparity index.” The index consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the “population” of Philadelphia area construction firms. This equation yields a percentage figure which is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise. *Id.* at 1005.

The Court noted that other courts considering equal protection challenges to similar ordinances have relied on disparity indices in determining whether *Croson*’s evidentiary burden is satisfied. *Id.* Disparity indices are highly probative evidence of discrimination because they ensure that the “relevant statistical pool” of minority contractors is being considered. *Id.*

A. Statistical evidence. The study reported a disparity index for City of Philadelphia construction contracts during the years 1979 through 1981 of 4 out of a possible 100. This index, the Court stated, was significantly worse than that in other cases where ordinances have withstood constitutional attack. *Id.* at 1004, citing, [Cone Corp., 908 F.2d at 916 \(10.78 disparity index\)](#); [AGC of California, 950 F.2d at 1414 \(22.4 disparity index\)](#); [Concrete Works, 823 F.Supp. at 834](#) (disparity index “significantly less than” 100); see also [Stuart, 951 F.2d at 451](#) (disparity index of 10 in police promotion program); compare [O’Donnell, 963 F.2d at 426](#) (striking down ordinance given disparity indices of approximately 100 in two categories). Therefore, the Court found the disparity index probative of discrimination in City contracting in the Philadelphia construction industry prior to enactment of the Ordinance. *Id.*

The Contractors contended the study was methodologically flawed because it considered only prime contractors and because it failed to consider the qualifications of the minority businesses or their interest in performing City contracts. The Contractors maintained the study did not indicate why there was a disparity between available minority contractors and their participation in contracting. The Contractors contended that these objections, without more, entitled them to summary judgment, arguing that under the strict scrutiny standard they do not bear the burden of proof, and therefore need not offer a neutral explanation for the disparity to prevail. *Id.* at 1005.

The Contractors, the Court found, misconceived the allocation of the burden of proof in affirmative action cases. *Id.* at 1005. The Supreme Court has indicated that “[t]he ultimate burden remains with [plaintiffs] to demonstrate the unconstitutionality of an affirmative action program.” *Id.* 1005. Thus, the Court held the Contractors, not the City, bear the burden of proof. *Id.* Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise. *Id.* Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified. *Id.*

The Court, following *Croson*, held where a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. *Id.* at 1006. *Croson’s* reference to an “inference of discriminatory exclusion” based on statistics, as well as its citation to Title VII pattern cases, the Court stated, supports this interpretation. *Id.* The plaintiff bears the burden in such a case. *Id.* The Court noted the Third Circuit has indicated statistical proof of discrimination is handled similarly under Title VII and equal protection principles. *Id.*

The Court found the City’s statistical evidence had created an inference of discrimination which the Contractors would have to rebut at trial either by proving a “neutral explanation” for the disparity, “showing the statistics are flawed, ... demonstrating that the disparities shown by the statistics are not significant or actionable, ... or presenting contrasting statistical data.” *Id.* at 1007. *A fortiori*, this evidence, the Court said is sufficient for the City to withstand summary judgment. The Court stated that the Contractors’ objections to the study were properly presented to the trier of fact. *Id.* Accordingly, the Court found the City’s statistical evidence established a prima facie case of racial discrimination in the award of City of Philadelphia construction contracts. *Id.*

Consistent with strict scrutiny, the Court stated it must examine the data for each minority group contained in the Ordinance. *Id.* The Census data on which the study relied demonstrated that in 1982, the year the Ordinance was enacted, there were construction firms owned in Philadelphia by Blacks, Hispanics, and Asian-Americans, but not Native Americans. *Id.* Therefore, the Court held neither the City nor prime contractors could have discriminated against construction companies owned by Native Americans at the time of the Ordinance, and the Court affirmed summary judgment as to them. *Id.*

The Census Report indicated there were 12 construction firms owned by Hispanic persons, 6 firms owned by Asian-American persons, 3 firms owned by persons of Pacific Islands descent, and 1 other minority-owned firm. *Id.* at 1008. The study calculated Hispanic firms represented .15% of the available firms and Asian-American, Pacific-Islander, and “other” minorities represented .12% of the available firms, and that these firms received no City contracts during the years 1979 through 1981. The Court did not believe these numbers were large enough to create a triable issue of discrimination. The mere fact that .27 percent of City construction firms—the percentage of all of these groups combined—received no contracts does not rise to the “significant statistical disparity”. *Id.* at 1008.

B. Anecdotal evidence. Nor, the Court found, does it appear that there was any anecdotal evidence of discrimination against construction businesses owned by people of Hispanic or Asian-American descent. *Id.* at 1008. The district court found “there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts,” *Id.* at 1008, quoting, [735 F.Supp. at 1299](#), and there was no evidence of any witnesses who were members of these groups or who were Hispanic. *Id.*

The Court recognized that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian-American persons did not eliminate the possibility of discrimination against these firms. *Id.* at 1008. The small number itself, the Court said, may reflect barriers to entry caused in part by discrimination. *Id.* But, the Court held, plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. *Id.*

Conclusion on compelling government interest. The Court found that nothing in its decision prevented the City from re-enacting a preference for construction firms owned by Hispanic, Asian-American, or Native American persons based on more concrete evidence of discrimination. *Id.* In sum, the Court held, the City adduced enough evidence of racial discrimination against Blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test. *Id.*

Narrowly Tailored. The Court then decided whether the Ordinance’s racial preference was “narrowly tailored” to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Id.* at 1008. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective “race-neutral measures,” such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance. *Id.*

The City contended it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. *Id.* It relied on the affidavits of City Council President and former Philadelphia Urban Coalition General Counsel who testified regarding the race-neutral precursors of the Ordinance—the Philadelphia Plan, which set goals for employment of minorities on public construction sites, and the Urban Coalition’s programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. *Id.* The Court found the information in these affidavits sufficiently established the City’s prior consideration of race-neutral programs to withstand summary judgment. *Id.* at 1009.

Unlike the Richmond Ordinance, the Philadelphia Ordinance provided for several types of waivers of the fifteen percent goal. *Id.* at 1009. It exempted individual contracts or classes of contracts from the Ordinance where there were an insufficient number of available minority-owned businesses “to ensure adequate competition and an expectation of reasonable prices on bids or proposals,” and allowed a prime contractor to request a waiver of the fifteen percent requirement where the contractor shows he has been unable after “a good faith effort to comply with the goals for DBE participation.” *Id.*

Furthermore, as the district court noted, the Ordinance eliminated from the program successful minority businesses—those who have won \$5 million in city contracts. *Id.* Also unlike the Richmond program, the City’s program was geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs “within the Philadelphia Standard Metropolitan Statistical Area.” *Id.* The Court noted other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored. *Id.*

The Court said a closer question was presented by the Ordinance’s fifteen percent goal. The City’s data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. The Court found that the goal need not correspond precisely to the percentage of available contractors. *Id.* *Croson* does not impose this requirement, the Third Circuit concluded, as the Supreme Court stated only that Richmond’s 30 percent goal inappropriately assumed “minorities [would] choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, quoting, [488 U.S. at 507.](#)

The Court pointed out that imposing a fifteen percent goal for each contract may reflect the need to account for those contractors who received a waiver because insufficient minority businesses were available, and the contracts exempted from the program. *Id.* Given the strength of the Ordinance’s showing with respect to other *Croson* factors, the Court concluded the City had created a dispute of fact on whether the minority preference in the Ordinance was “narrowly tailored.” *Id.*

Gender and intermediate scrutiny. Under the intermediate scrutiny standard, the gender preference is valid if it was “substantially related to an important governmental objective.” *Id.*, at 1009.

The City contended the gender preference was aimed at the “important government objective” of remedying economic discrimination against women, and that the ten percent goal was substantially related to this objective. In assessing this argument, the Court noted that “[i]n the context of women-business enterprise preferences, the two prongs of this

intermediate scrutiny test tend to converge into one.” *Id.* at 1009. The Court held it could uphold the construction provisions of this program if the City had established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the ten percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.*, But, the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id.* at 1011.

The Court concluded the evidence offered by the City regarding women-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id.* at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. *Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination. *Id.* at 1011.

Handicap and rational basis. The Court then addressed the two-percent preference for businesses owned by handicapped persons. *Id.* at 1011. The district court struck down this preference under the rational basis test, based on the belief according to the Third Circuit, that *Croson* required some evidence of discrimination against business enterprises owned by handicapped persons and therefore that the City could not rely on testimony of

discrimination against handicapped individuals. *Id.*, citing [735 F.Supp. at 1308](#). The Court stated that a classification will pass the rational basis test if it is “rationally related to a legitimate government purpose,” *Id.*, citing, [Cleburne, 473 U.S. at 440](#).

The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in [Heller v. Doe, 509 U.S. 312–43 \(1993\)](#), indicating that “a [statutory] classification” subject to rational basis review “is accorded a strong presumption of validity,” and that “a state ... has no obligation to produce evidence to sustain the rationality of [the] classification.” *Id.* at 1011. Moreover, “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Id.* at 1011.

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Court held the two-percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id.* at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force. *Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negating every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. *Id.* at 1012. Therefore, the Court reversed the district court’s grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue. *Id.*

Holding. The Court vacated the district court’s grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian-American, or Native American persons or women, and remanded the case for further proceedings and a trial in accordance with the opinion.

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

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”)*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin

enforcement of the city's bid preference program. 950 F.2d 1401 (9th Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the five percent preference given Local Business Enterprises ("LBEs") and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined "MBE" as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. "WBE" was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC's constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities' legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review." *Id.* at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id.* at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the "relevant market," the

study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are “an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, citing to *Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring “the cold numbers convincingly to life. *Id.* at 1414, quoting *Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” *Id.* at 1415 quoting *Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited

in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 quoting *Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 quoting *Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, quoting *Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

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 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington’s minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and

was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a *prima facie* case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where "gross statistical disparities can be shown, they alone may in a proper case constitute *prima facie* proof of a pattern or practice of discrimination." *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics "convincingly to life." *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, citing *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of

discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, citing *Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, citing *Croson*, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program’s narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court

pointed out that King County used a “percentage preference” method, which is not a quota, and while the preference is locked at five percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County’s program provided waivers in both instances, including where neither minority nor a woman’s business is available to provide needed goods or services and where available minority and/or women’s businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County’s MBE program fails this third portion of “narrowly tailored” requirement. The court found the definition of “minority business” included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County’s business community. *Id.* Because King County’s program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County’s WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The

court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court’s grant of summary judgment to King County for the WBE program.

Recent District Court Decisions

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 Tippet. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh

Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina's MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, *et seq.* The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 19A, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs

and WBEs in subcontracting before submitting bids to NCDOT.” 589 F.Supp.2d 587. In determining whether the lowest bidder is “responsible,” NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT “dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of ‘good faith’ attempts to do so.” 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina’s road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program’s suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, “based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination.” 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, quoting *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4th Cir. 2010), discussed above.

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 (8th 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 (10th Cir. 2003). *See* discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the “plaintiffs”) brought suit against Engineering Contractors Association (the “County”), the former County Manager, and various current County Commissioners (the “Commissioners”) in their official and personal capacities (collectively the “defendants”), seeking to enjoin the same “participation goals” in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit’s decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise (“CSBE”) program for construction contracts, “but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services.” *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively “MBE/WBE”). *Id.* The MBE/WBE programs applied to A&E contracts in excess of \$25,000. *Id.* at 1312. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a

participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313. However, the district court found “the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994.” *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the “County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services.” The final report further stated “Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures.” *Id.* at 1315. The district court also found that the Commissioners were informed that “there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers than there was in contract construction.” *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present “a strong basis of evidence” indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the “gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective.” *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present “sufficient probative evidence” of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must

(1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a “last resort.” *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal’s report, most of which consisted of “post-enactment” evidence. *Id.* Dr. Carvajal’s analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County’s Department of Public Works to compile a list of the “universe” of firms competing in the market. *Id.* For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses “in order to determine the effect a firm owner’s gender or race had on certain dependent variables.” *Id.* Dr. Carvajal used the firm’s annual volume of business as a dependent variable and determined the disparities were due in each case to the firm’s gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms.” *Id.* Dr. Carvajal’s results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the “gross statistical disparities” in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he “did not find sufficient evidence of discrimination against blacks.” *Id.*

The court held that Dr. Carvajal’s study constituted neither a “strong basis in evidence” of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute “sufficient probative evidence” necessary to justify the gender-conscious measures. *Id.* The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated, “[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace.” *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it “unreliable and inaccurate” for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of

proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the “Tenth Circuit’s decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari.” *Id.* at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County’s A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, “nearly all” of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal’s study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition “that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* (internal citations omitted). The court held that “[t]his is not one of those rare cases.” The district court concluded that the statistical evidence was “unreliable and fail[ed] to establish the existence of discrimination,” and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal’s report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to “identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished ... it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone.” *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.* The court held that the County’s failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, “not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry,” leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id.* The court found this even “more problematic” because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic

preferences “must be limited in time.” *Id.* at 1332, citing *Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that “the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination.” *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated “clearly established statutory or constitutional rights of which a reasonable person would have known ... Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them ‘fair warning’ that their actions were unconstitutional.” *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they “had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs ... were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*].” *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law was “clearly established” and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs \$100 each in nominal damages and reasonable attorneys’ fees and costs, for which it held the County and the Commissioners jointly and severally liable.

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

This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors*

Association. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a “race-conscious” program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious “preferences” in order to increase the numeric representation of “MBEs” in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity (“OSD”) to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute’s purpose. The statute provided that each State agency is “encouraged” to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were “precatory.” The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, “if true,” constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as “simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.” *Florida A.G.C. Council*, 303 F.Supp.2d at 1315, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 928, quoting *Croson*, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is “permissive.” The court, however, held that “there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute ‘induces an employer to hire with an eye toward meeting ... [a] numerical target.’ *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting a MBE utilization plan. If the State agency deviated from the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all solicitations and contract awards of the agency as deemed necessary until such time as the agency met its utilization plan. The court held that based on these factors, although alleged to be “permissive,” the statute textually was not.

Therefore, the court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.

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

This case is instructive because of the court’s focus and analysis on whether the City of Chicago’s MBE/WBE program was narrowly tailored. The basis of the court’s holding that the program was not narrowly tailored is instructive for any program considered because of the reasons provided as to why the program did not pass muster.

The plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago’s construction Minority- and Women-Owned Business (“MWBE”) Program. The court held that the City of Chicago’s MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The court held that it was not narrowly tailored for several reasons, including because there was no “meaningful individualized review” of MBE/WBEs; it had no termination date nor did it have any means for determining a termination; the “graduation” revenue amount for firms to graduate out of the program was very high, \$27,500,000, and in fact very few firms graduated; there was no net worth threshold; and, waivers were rarely or never granted on construction contracts. The court found that the City program was a “rigid numerical quota,” not related to the number of available, willing and able firms. Formulistic percentages, the court held, could not survive the strict scrutiny.

The court held that the goals plan did not address issues raised as to discrimination regarding market access and credit. The court found that a goals program does not directly impact prime contractor’s selection of subcontractors on non-goals private projects. The court found that a set-aside or goals program does not directly impact difficulties in accessing credit, and does not address discriminatory loan denials or higher interest rates. The court found the City has not sought to attack discrimination by primes directly, “but it could.” 298 F.2d 725. “To monitor possible discriminatory conduct it could maintain its certification list and require those contracting with the City to consider unsolicited bids, to

maintain bidding records, and to justify rejection of any certified firm submitting the lowest bid. It could also require firms seeking City work to post private jobs above a certain minimum on a website or otherwise provide public notice ..." Id.

The court concluded that other race-neutral means were available to impact credit, high interest rates, and other potential marketplace discrimination. The court pointed to race-neutral means including linked deposits, with the City banking at institutions making loans to startup and smaller firms. Other race-neutral programs referenced included quick pay and contract downsizing; restricting self-performance by prime contractors; a direct loan program; waiver of bonds on contracts under \$100,000; a bank participation loan program; a 2 percent local business preference; outreach programs and technical assistance and workshops; and seminars presented to new construction firms.

The court held that race and ethnicity do matter, but that racial and ethnic classifications are highly suspect, can be used only as a last resort, and cannot be made by some mechanical formulation. Therefore, the court concluded the City's MWBE Program could not stand in its present guise. The court held that the present program was not narrowly tailored to remedy past discrimination and the discrimination demonstrated to now exist.

The court entered an injunction, but delayed the effective date for six months from the date of its Order, December 29, 2003. The court held that the City had a "compelling interest in not having its construction projects slip back to near monopoly domination by white male firms." The court ruled a brief continuation of the program for six months was appropriate "as the City rethinks the many tools of redress it has available." Subsequently, the court declared unconstitutional the City's MWBE Program with respect to construction contracts and permanently enjoined the City from enforcing the Program. 2004 WL 757697 (N.D. Ill 2004).

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

This case is instructive because the court found the Executive Order of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. ("AUC") sued the City of Baltimore challenging its ordinance providing for minority and women-owned business enterprise ("MWBE") participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35 percent of all City contracting dollars to MBE/WBEs. The court found this goal of 35 percent participation was aspirational only and the Executive Order contained no enforcement mechanism or penalties for noncompliance. The Executive Order also specified many "noncoercive" outreach measures to be taken by the City agencies

relating to increasing participation of MBE/WBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC did not have any of its individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a “case or controversy” in connection with a facial attack. The court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the court on October 22, 2003 dismissing the case with prejudice.

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

Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act (“MBE Act”). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

Compelling state interest. The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment’s Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id.* The Fourteenth

Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a “passive participant” in a system of racial exclusion practiced by private businesses. *Id.* at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

The district court stated that a “mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice.” *Id.* Rather, the court held that the “benchmark for judging the adequacy of a state’s factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state’s conclusion that remedial action was necessary.” *Id.* The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was “a passive participant” in private industry’s discriminatory practices. *Id.* at 1240, citing to *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest “is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts.” *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act’s bid preference “is not based on past discrimination,” rather, it is based on a desire to “encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenors’ evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenors did not identify “a single qualified, minority-owned bidder who was excluded from a state contract.” *Id.* The district court, thus, held that broad allegations of “systematic” exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the “State’s admission here that the

State's governmental interest was not in remedying past discrimination in the state competitive bidding process, but in 'encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.'" *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio's statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 *citing Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma’s Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state’s goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, “and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act.” *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the “goal” of 10 percent of the state’s contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to “graduate” from preference eligibility. *Id.* The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act’s duration was not tied in any way to the eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the “questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable.” *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act’s minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of “numerical proportionality” between the MBE Act’s aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act’s 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id.* at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is “not necessarily an absolute cap” on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, *citing Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer “substantial evidence” that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act’s bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id.* The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state’s Central Purchasing Act with no time limitation. *Id.*

In terms of the “under- and over-inclusiveness” factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id.* at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id.*

Second, the district court found the MBE Act’s bidding preference extends to all contracts for goods and services awarded under the State’s Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id.*

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id.* The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id.*

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution's Fifth Amendment guarantee of equal protection and granted the plaintiffs' Motion for Summary Judgment.

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. Peña*, 515 U.S. 200, 211 (1995).

The Supreme Court in *Northeastern Florida Chapter* held that individual standing is established to challenge a set-aside program when a party demonstrates “that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.” *Id.* at 616 quoting, *Northeastern*, 508 U.S. at 666. The Supreme Court further held that once a party shows it is “ready and able” to bid in this context, the party will have sufficiently shown that the set-aside goals are “the ‘cause’ of its injury and that a judicial decree directing the city to discontinue its program would ‘redress’ the injury,” thus satisfying the remaining requirements for individual standing. *Id.* quoting *Northeastern*, at 666 & n. 5.

The court found there was ample evidence that AUC members were “ready and able” to bid on City public works contracts based on several documents in the record, and that members of AUC would have individual standing in their own right to challenge the constitutionality of the City’s set-aside goals applicable to construction contracting, satisfying the associational standing test. *Id.* at 617-18. The court held AUC had associational standing to challenge the constitutionality of the public works contracts set-aside provisions established in 1999. *Id.* at 618.

Strict scrutiny analysis. AUC complained that since their initial promulgation in 1990, the City’s set-aside goals required AUC members to “select or reject certain subcontractors based upon the race, ethnicity, or gender of such subcontractors” in order to bid successfully on City public works contracts for work exceeding \$25,000 (“City public works contracts”). *Id.* at 618. AUC claimed, therefore, that the City’s set-aside goals violated the Fourteenth Amendment’s guarantee of equal protection because they required prime contractors to engage in discrimination which the government itself cannot perpetrate. *Id.*

The court stated that government classifications based upon race and ethnicity are reviewed under strict scrutiny, citing the Supreme Court in *Adarand*, 515 U.S. at 227; and that those based upon gender are reviewed under the less stringent intermediate scrutiny. *Id.* at 618, citing *United States v. Virginia*, 518 U.S. 515, 531 (1996). *Id.* “[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” *Id.* at 619, quoting *Adarand*, 515 U.S. at 227. The government classification must be narrowly tailored to achieve a compelling

government interest. *Id. citing Croson*, 488 U.S. at 493–95. The court then noted that the Fourth Circuit has explained:

The rationale for this stringent standard of review is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims.... While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome.

Id. at 619, quoting *Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072, 1076 (4th Cir.1993) (citation omitted).

The court also pointed out that in *Croson*, a plurality of the Supreme Court concluded that state and local governments have a compelling interest in remedying identified past and present race discrimination within their borders. *Id.* at 619, citing *Croson*, 488 U.S. at 492. The plurality of the Supreme Court, according to the court, explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself, and to prevent the public entity from acting as a “ ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by allowing tax dollars “to finance the evil of private prejudice.” *Id.* at 619, quoting *Croson*, 488 U.S. at 492. Thus, the court found *Croson* makes clear that the City has a compelling interest in eradicating and remedying *private discrimination* in the *private subcontracting* inherent in the letting of City construction contracts. *Id.*

The Fourth Circuit, the court stated, has interpreted *Croson* to impose a “two step analysis for evaluating a race-conscious remedy.” *Id.* at 619 citing *Maryland Troopers Ass’n*, 993 F.2d at 1076. “First, the [government] must have a ‘strong basis in evidence for its conclusion that remedial action [is] necessary....’ ‘Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ... in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’ ” *Id.* at 619, quoting *Maryland Troopers Ass’n*, 993 F.2d at 1076 (citing *Croson*).

The second step in the *Croson* analysis, according to the court, is to determine whether the government has adopted programs that “ ‘narrowly tailor’ any preferences based on race to meet their remedial goal.” *Id.* at 619. The court found that the Fourth Circuit summarized Supreme Court jurisprudence on “narrow tailoring” as follows:

The preferences may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own. The numerical goals must be waivable if qualified minority applications are scarce, and such goals must bear a reasonable relation to minority percentages in the relevant qualified labor pool, not in the population as a whole. Finally, the preferences may not supplant race-neutral alternatives for remedying the same discrimination.

Id. at 620, quoting *Maryland Troopers Ass’n*, 993 F.2d at 1076–77 (citations omitted).

Intermediate scrutiny analysis. The court stated the intermediate scrutiny analysis for gender-based discrimination as follows: “Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” *Id.* at 620, *quoting Virginia*, 518 U.S. at 531, 116. This burden is a “demanding [one] and it rests entirely on the State.” *Id.* at 620 *quoting Virginia*, 518 U.S. at 533.

Although gender is not “a proscribed classification,” in the way race or ethnicity is, the courts nevertheless “carefully inspect[] official action that closes a door or denies opportunity” on the basis of gender. *Id.* at 620, *quoting Virginia*, 518 U.S. at 532-533. At bottom, the court concluded, a government wishing to discriminate on the basis of gender must demonstrate that its doing so serves “important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.* at 620, *quoting Virginia*, 518 U.S. at 533 (citations and quotations omitted).

As with the standards for race-based measures, the court found no formula exists by which to determine what evidence will justify every different type of gender-conscious measure. *Id.* at 620. However, as the Third Circuit has explained, “[l]ogically, a city must be able to rely on less evidence in enacting a gender preference than a racial preference because applying Croson’s evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny.” *Id.* at 620, *quoting Contractors Ass’n*, 6 F.3d at 1010.

The court pointed out that the Supreme Court has stated an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 620, *quoting Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 582–83 (1990)(internal quotations omitted). The Third Circuit, the court said, determined that “this standard requires the City to present probative evidence in support of its stated rationale for the [10% 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 (11th Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-

enactment evidence to meet its burden of a “strong basis in evidence” for strict scrutiny, and “sufficient probative evidence” for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods “to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data.” *Id.*, citing *Eng’g Contractors Ass’n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, citing *Eng’g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County’s pre-1994 disparity study (the “Brimmer-Marshall Study”) and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a “passive participant” in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are “exacerbating a pattern of prior discrimination that can be identified with specificity.” *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a “strong basis in evidence” of discrimination to justify the County’s racial and ethnic preferences. *Id.*

The court next considered the County’s post-1994 disparity study. *Id.* at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id.* The court explained:

Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.

Id. The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id.* Additionally, the court found that the County's standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County's anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that "[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id.*, quoting *Eng'g Contractors Ass'n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. "The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a 'last resort.'" *Id.* at 1380, citing *Eng'g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit's four-part test and concluded that the County's M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. "If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id.*, quoting *Eng'g Contractors Ass'n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity ... *Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated

and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County's argument that its program was permissible because it set "goals" as opposed to "quotas," because the program in *Engineering Contractors Association* also utilized "goals" and was struck down. *Id.*

Per the M/FBE program's gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present "sufficient probative evidence" of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

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.

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

There are several recent cases involving challenges to the United States Federal DBE Program and its implementation by the states and their governmental entities for federally-funded projects. These cases could have a significant impact on the nature and provisions of contracting and procurement on federally-funded projects, including and relating to the utilization of DBEs. In addition, these cases provide an instructive analysis of the recent application of the strict scrutiny test to MBE/WBE- and DBE-type programs.

Recent Decisions in Federal Circuit Courts of Appeal

1. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9th Cir. December 19, 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019

Plaintiffs, Orion Insurance Group (“Orion”) and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law. The USDOT and Washington State Office of Minority & Women’s Business Enterprises (“OMWBE”), moved for a summary dismissal of all the claims.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE.

Plaintiffs submitted to OMWBE Orion’s application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion’s DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.

OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

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

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

Void for vagueness claim. Plaintiffs asserted that the regulatory definitions of “Black American” and “Native American” are void for vagueness. The district court dismissed’ the

claims that the definitions of “Black American” and “Native American” in the DBE regulations are impermissibly vague.

Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State. Plaintiffs’ claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations’ requirement that the state make decisions based on race, the district court held were constitutional.

The Ninth Circuit on appeal affirmed the District Court. The Ninth Circuit held the district court correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity. The Ninth Circuit also held the district court correctly dismissed Taylor’s discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act “under color or state law” as required by the statute.

In addition, the Ninth Circuit concluded the district court correctly dismissed Taylor’s claims for damages because the United States has not waived its sovereign immunity on those claims. The Ninth Circuit found the district court correctly dismissed Taylor’s claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

Claims under the Administrative Procedure Act. The Ninth Circuit stated the OMWBE did not act in an arbitrary and capricious manner when it determined it had a “well founded reason” to question Taylor’s membership claims, and that Taylor did not qualify as a “socially and economically disadvantaged individual.” Also, the court found OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.

The Ninth Circuit held the USDOT did not act in an arbitrary and capricious manner when it affirmed the state’s decision because the decision was supported by substantial evidence and consistent with federal regulations. The USDOT “articulated a rational connection” between the evidence and the decision to deny Taylor’s application for certification.

Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d. The Ninth Circuit held the district court correctly granted summary judgment to the federal and state Defendants on Taylor’s equal protection claims because Defendants did not discriminate against Taylor, and did not treat Taylor differently from others similarly situated. In addition, the court found the district court properly granted summary judgment to the state defendants on Taylor’s discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor’s claims.

Having granted summary judgment on Taylor’s claims under federal law, the Ninth Circuit concluded the district court properly declined to exercise jurisdiction over Taylor’s state law claims.

Petition for Writ of Certiorari. Plaintiffs/Appellants filed a Petition for Writ of Certiorari with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

2. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U. S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

Note: The Ninth Circuit Court of Appeals Memorandum provides: “This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.”

Introduction. Mountain West Holding Company installs signs, guardrails, and concrete barriers on highways in Montana. It competes to win subcontracts from prime contractors who have contracted with the State. It is not owned and controlled by women or minorities. Some of its competitors are disadvantaged business enterprises (DBEs) owned by women or minorities. In this case it claims that Montana’s DBE goal-setting program unconstitutionally required prime contractors to give preference to these minority or female-owned competitors, which Mountain West Holdings Company argues is a violation of the Equal Protection Clause, 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

Factual and procedural background. *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2014 WL 6686734 (D. Mont. Nov. 26, 2014); Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. (“Mountain West”), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation (“MDT”) and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit’s 2005 decision in *Western States Paving v. Washington DOT, et al.*, MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all “relevant” minority groups were underutilized in “professional services” and Asian Pacific Americans and Hispanic Americans were underutilized in “business categories combined,” but it also concluded that all “relevant” minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are

“significantly overrepresented” in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserts that there was no evidence that all relevant minority groups had suffered discrimination in Montana’s transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

AGC, San Diego v. California DOT and Western States Paving Co. v. Washington DOT. The Ninth Circuit and the district court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 713 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state’s implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state’s implementation of the DBE Program “is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.” *Mountain West*, 2014 WL 6686734 at *2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at *2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that “even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.” *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 997-999.

MDT study. MDT obtained a firm to conduct a disparity study that was completed in 2009. The district court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in “professional services” contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in “business categories combined,” slight underutilization of nonminority women in “business categories combined,” and overutilization of all groups in subcontractor “construction” contracts. *Mountain West*, 2014 WL 6686734 at *2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The district court stated the anecdotal evidence suggested various forms of discrimination existed within Montana's transportation contracting industry, including evidence of an exclusive "good ole boy network" that made it difficult for DBEs to break into the market. *Id.* at *3. The district court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

Montana's DBE utilization after ceasing the use of contract goals. The district court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at *3. The utilization rate dropped, according to the district court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent *Id.* In response to this decline, for fiscal years 2011-2014, the district court said MDT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana's overall goal of 5.83 percent DBE utilization.

MDT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

Mountain West's claims for relief. Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at *3. Mountain West's claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana's DBE program. *Id.*

The two-prong test to demonstrate that a DBE program is narrowly tailored. The Court, citing AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6-7.

District Court Holding in 2014 and the Appeal. The district court granted summary judgment to the State, and Mountain West appealed. See *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014), *dismissed in part, reversed in part, and remanded*, U.S. Court of Appeals, Ninth Circuit, Docket

Nos. 14-36097 and 15-35003, Memorandum 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017). Montana also appealed the district court's threshold determination that Mountain West had a private right of action under Title VI, and it appealed the district court's denial of the State's motion to strike an expert report submitted in support of Mountain West's motion.

Ninth Circuit Holding. The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West's appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court's determination that Mountain West has a private right to enforce Title VI, affirmed the district court's decision to consider the disputed expert report by Mountain West's expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

Mootness. The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West's claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West's Title VI claim for damages is not moot. 2017 WL 2179120 at **1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

The appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West's claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at **1 (9th Cir.), Memorandum, May 16, 2017, at 4.

Private Right of Action and Discrimination under Title VI. The Court concluded for the reasons found in the district court's order that Mountain West may state a private claim for damages against Montana under Title VI. *Id.* at *2. The district court had granted summary judgment to Montana on Mountain West's claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible "only if they are narrowly tailored measures that further compelling governmental interests." *Mountain West*, 2017 WL 2179120 (9th Cir.) at *2, Memorandum, May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at *2, n.2, Memorandum, May 16, 2017, at 6, n. 2; *see*, 407 F.3d at 987.

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'" *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, quoting *Assoc. Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187,

1196 (9th Cir. 2013) (*quoting W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from “a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a “good ol’ boys” network within the State’s contracting industry. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light of genuine disputes of material fact as to the study’s analysis, and because the second two categories of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

Disputes of fact as to study. Mountain West’s expert testified that the study relied on several questionable assumptions and an opaque methodology to conclude that professional services contracts were awarded on a discriminatory basis. *Id.* at *3. The Ninth Circuit pointed out a few examples that it found illustrated the areas in which there are disputes of fact as to whether the study sufficiently supported Montana’s actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. *W. States Paving*, 407 F.3d at 1000-01. Mountain West argues that the study did not explain whether or how it accounted for a given firm’s size, age, geography, or other similar factors. The report’s authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study’s statistical results *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 8.

2. The study relied on a telephone survey of a sample of Montana contractors. Mountain West argued that (a) it is unclear how the study selected that sample, (b) only a small percentage of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that “some of the population samples were very small and the result may not be significant statistically.” 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts, but professional services contracts composed less than ten percent of total contract volume in the State’s transportation contracting industry. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study's comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

The post-2005 decline in participation by DBEs. The Ninth Circuit was unable to affirm the district court's order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender-based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 9, quoting *Western States*, 407 F.3d at 999 ("If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination."); *id.* at 1001 ("The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs."). *Id.*

The Ninth Circuit also cited to the U.S. DOT statement made to the Court in *Western States. Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting, U.S. Dep't of Transp., *Western States Paving Co. Case Q&A* (Dec. 16, 2014) ("In calculating availability of DBEs, [a state's] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.").

Anecdotal evidence of discrimination. The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting, *Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) ("While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."); and quoting, *Croson*, 488 U.S. at 509 ("[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to Mountain West's case, it concluded that the record provides an inadequate basis for summary judgment in Montana's favor. 2017 WL 2179120 at *3.

Conclusion. The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at *4 (9th Cir.), Memorandum, May 16, 2017, at 11. The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

3. *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.*

4. *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934650 (7th Cir. 2015), cert. denied, Dunnett Bay Construction Co. v. Blankenhorn, Randall S., et al., 2016 WL 193809 (Oct. 3, 2016)*

Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT’s DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 799 F.3d at 679. (*See* 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (*See* summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

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

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

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

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

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at 687. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of

the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at 687. Dunnet Bay did meet the 22.77% contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

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

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

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at 687. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at 688. (See discussion of the district court decision in *Dunnet Bay* below in Section E).

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

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

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

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at 691. In contrast with these cases where the plaintiffs had standing, the

court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 692.

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

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

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at 693. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* at 694, quoting, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's size. *Id.*

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

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

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

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

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

In challenging the DBE contract goal, Dunnet Bay asserts that the 22% goal was “arbitrary” and that IDOT manipulated the process to justify a preordained goal. *Id.* at 698. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

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

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

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

The court did not agree with Dunnet Bay’s challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at 699. The court found IDOT’s determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id.* The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT’s supportive

services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 699-700.

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

Conclusion. The court affirmed the district court's grant of summary 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.

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

The Associated General Contractors of America, Inc., San Diego Chapter, Inc. , ("AGC") sought declaratory and injunctive relief against the California Department of Transportation ("Caltrans") and its officers on the grounds that Caltrans' Disadvantaged Business Enterprise ("DBE") program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans' DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans' DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans' substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans' program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans' DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

Court Applies *Western States Paving Co. v. Washington State DOT* decision. In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States

Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT's program because it was not narrowly tailored. *Id.*, citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for "narrow tailoring":

"(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination." *Id.* 1191, citing *Western States Paving Co.*, 407 F.3d at 997-998.

Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id.* at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California's transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a "disparity index." *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id.* at 1191. The Court stated: "Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and women-owned businesses should be expected to receive 13.5 percent of 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 *Crososn* 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.*

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 (9th Cir. 2005). This left only Braunstein's damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id. at 1183.*

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract." *Id. at 1183.* The district court found that Braunstein's inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

Lack of standing. The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT's DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id. at 1185.* The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id.*

The Court also pointed out that Braunstein did not seek prospective relief against the government "affirmative action" program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id. at 1186.* Thus, Braunstein's surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is "able and ready" to seek subcontracting work. *Id.*

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the

six prospective prime contractors rejected him as a subcontractor. *Id. at 1186*. The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein's ability to compete for work as a subcontractor. *Id. at 1187*. The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff's showing that he has been subjected to such a barrier. *Id. at 1186*.

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id. at 1186*. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id. at 1187*.

Summary judgment granted to ADOT. The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id.* The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

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

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's ("IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id. at 719*. The district court granted the USDOT's Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id. at 720*. NCI also forfeited the argument that IDOT's DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT's program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id. at 718*. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id.* This initial list was corrected for errors in the data by surveying the D&B list. *Id.* In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along with other data, including DBE utilization on IDOT's "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id. at 719*. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id.*

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

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Pena*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit's opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law "when the 10 percent federal set-aside was more mandatory") was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes more clear now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id.* at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI's collateral attack on the federal regulations was impermissible. *Id.* at 722.

The remainder of the court's opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI's arguments failed. *Id.* First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id.* NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id.* The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id.* at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled "Alternative Methods," and states: "You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market." *Id.* (citing 49 CFR § 26.45(c)(5)). According to the court, the regulations make clear that "relative

availability” means “the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate” on DOT contracts. *Id.* The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id.* The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id.*

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id.* The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id.* According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id.*

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id.* at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id.* at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id.* According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id.*

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id.*

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

In *Rapid Test Products, Inc. v. Durham School Services Inc.*, the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1981 (the federal anti-discrimination law) did not provide an “entitlement” in disadvantaged businesses to receive contracts subject to set aside programs; rather, § 1981 provided a remedy for individuals who were subject to discrimination.

Durham School Services, Inc. (“Durham”), a prime contractor, submitted a bid for and won a contract with an Illinois school district. The contract was subject to a set-aside program reserving some of the subcontracts for disadvantaged business enterprises (a race- and gender-conscious program). Prior to bidding, Durham negotiated with Rapid Test Products, Inc. (“Rapid Test”), made one payment to Rapid Test as an advance, and included Rapid Test in its final bid. Rapid Test believed it had received the subcontract. However, after the school district awarded the contract to Durham, Durham gave the subcontract to one of Rapid Test’s competitor’s, a business owned by an Asian male. The school district agreed to the substitution. Rapid Test brought suit against Durham under 42 U.S.C. § 1981 alleging that Durham discriminated against it because Rapid’s owner was a black woman.

The district court granted summary judgment in favor of Durham holding the parties' dealing had been too indefinite to create a contract. On appeal, the Seventh Circuit Court of Appeals stated that "§ 1981 establishes a rule against discrimination in contracting and does not create any entitlement to be the beneficiary of a contract reserved for firms owned by specified racial, sexual, ethnic, or religious groups. Arguments that a particular set-aside program is a lawful remedy for prior discrimination may or may not prevail if a potential subcontractor claims to have been excluded, but it is to victims of discrimination rather than frustrated beneficiaries that § 1981 assigns the right to litigate."

The court held that if race or sex discrimination is the reason why Durham did not award the subcontract to Rapid Test, then § 1981 provides relief. Having failed to address this issue, the Seventh Circuit Court of Appeals remanded the case to the district court to determine whether Rapid Test had evidence to back up its claim that race and sex discrimination, rather than a nondiscriminatory reason such as inability to perform the services Durham wanted, accounted for Durham's decision to hire Rapid Test's competitor.

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

This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. ("plaintiff") was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT ("WSDOT") under the Transportation Equity Act for the 21st Century ("TEA-21"). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id.* at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is "aspirational," and the statutory goal "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent." *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to "adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent

years) and evidence of discrimination against DBEs obtained from statistical disparity studies.” *Id.* at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (citing regulation). TEA-21 requires a generalized, “undifferentiated” minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id.* at 990 (citing regulation).

“A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses.” *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to “obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means.” *Id.* (citing regulation).

A prime contractor must use “good faith efforts” to satisfy a contract’s DBE utilization goal. *Id.* (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff’s challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington’s implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it “would not yield a different result.” *Id.* at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in “ensuring that its funding is not distributed in a manner that

perpetuates the effects of either public or private discrimination within the transportation contracting industry.” *Id.* at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* (“Adarand VII”), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that “[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination.” *Id.* at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff’s facial challenge. *Id.*

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington’s transportation contracting industry. *Id.* at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id.* The United States intervened to defend TEA-21’s facial constitutionality, and “unambiguously conceded that TEA-21’s race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present.” *Id.* at 996; see also Br. for the United States at 28 (April 19, 2004) (“DOT’s regulations ... are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient.” (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress’s nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states’ implementation of TEA-21 was narrowly tailored to achieve Congress’s remedial objective. *Id.* The Eighth Circuit thus looked to the states’ independent evidence of discrimination because “to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed.” *Id.* (internal citations omitted). The Eighth Circuit relied on the states’ statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington’s DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington’s transportation contracting industry. *Id.* at 997-98. “If no such discrimination is present in Washington, then the State’s DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex.” *Id.* at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, citing *Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had “previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination.” *Id.* In *Monterey Mechanical*, the court held that “the overly inclusive designation of benefited minority groups was a ‘red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.’” *Id.*, citing *Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, citing *Builders Ass’n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT’s DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT’s program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau’s Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent “to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period].” *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination “because it lacked any statistical studies evidencing such discrimination.” *Id.*

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (*i.e.*, 9% participation could be achieved through race-neutral means). *Id.* at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id.*

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State’s transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action’s component. *Id.* The court found that the State’s methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without “does not provide any evidence of discrimination against DBEs.” *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to “little weight” because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State’s argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress’s compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court’s grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State’s liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

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

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the federal regulations governing the states’ implementation of the Federal DBE Program were narrowly tailored, and the state DOT’s implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and Gross Seed both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment’s Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads (“Nebraska DOR”) under a strict scrutiny analysis and held

that the Federal DBE Program was valid and constitutional and that the Minnesota DOT's and Nebraska DOR's implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, Sherbrooke and Gross Seed argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side's position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state's implementation becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id.* The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id.* Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally-funded highway contracts. *See*, 49 CFR § 26.45(f)(1). The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 CFR § 26.45(b). The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See*, 49 CFR § 26.45(d).

The state must meet the “maximum feasible portion” of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See*, 49 CFR § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 CFR § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods “[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination.” 49 CFR § 26.51(f).

Absent bad faith administration of the program, a state’s failure to achieve its overall goal will not be penalized. *See*, 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See*, 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 CFR § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court’s narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, *citing Grutter v. Bollinger*, 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$750,000.00 cannot qualify as economically disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.*; 49 CFR § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See*, 49 CFR § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contracting markets. *Id.* at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the

court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and Gross Seed also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, *citing* 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id.* The precipitous drop in DBE participation when no race-conscious methods were employed, the court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id.* On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like Sherbrooke, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (*See* district court opinions discussed *infra*.)

12. Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta, 532 U.S. 941, 534 U.S. 103 (2001)

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari “as improvidently granted” without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is “narrowly tailored,” and therefore upheld the constitutionality of the Federal DBE Program.

Following the Supreme Court’s vacation of the Tenth Circuit’s dismissal on mootness grounds, the court addressed the merits of this appeal, namely, the federal government’s challenge to the district court’s grant of summary judgment to plaintiff-appellee Adarand Constructors, Inc. In so doing, the court resolved the constitutionality of the use in federal subcontracting procurement of the Subcontractor Compensation Clause (“SCC”), which employs race-conscious presumptions designed to favor minority enterprises and other “disadvantaged business enterprises” (“DBEs”). The court’s evaluation of the SCC program utilizes the “strict scrutiny” standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case. *Id.* at 1155.

The court addressed the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality. *Id.* at 1160. It was the judgment of the court that the SCC program and the DBE certification programs as currently structured, though not as they were structured in 1997 when the district court last rendered judgment, passed constitutional muster: The court held they were narrowly tailored to serve a compelling governmental interest. *Id.*

“Compelling Interest” in race-conscious measures defined. The court stated that there may be a compelling interest that supports the enactment of race-conscious measures. Justice

O'Connor explicitly states: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand III*, 515 U.S. at 237; see also *Shaw v. Hunt*, 517 U.S. 899, 909, (1996) (stating that "remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions" (citing *Croson*, 488 U.S. at 498–506)). Interpreting *Croson*, the court recognized that "the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry' by allowing tax dollars 'to finance the evil of private prejudice.'" *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1519 (10th Cir.1994) (quoting *Croson*, 488 U.S. at 492, 109 S.Ct. 706). *Id.* at 1164.

The government identified the compelling interest at stake in the use of racial presumptions in the SCC program as "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups." *Id.*

Evidence required to show compelling interest. While the government's articulated interest was compelling as a theoretical matter, the court determined whether the actual evidence proffered by the government supported the existence of past and present discrimination in the publicly-funded highway construction subcontracting market. *Id.* at 1166.

The "benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation [i]s whether there exists a 'strong basis in evidence for [the government's] conclusion that remedial action was necessary.'" *Concrete Works*, 36 F.3d at 1521 (quoting *Croson*, 488 U.S. at 500, (quoting (plurality))) (emphasis in *Concrete Works*). Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not. *Id.* at 1166, citing *Concrete Works*, 36 F.3d at 1520–21.

After the government's initial showing, the burden shifted to *Adarand* to rebut that showing: "Notwithstanding the burden of initial production that rests" with the government, "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id.* (quoting *Wygant*, 476 U.S. at 277–78, (plurality)). "[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.* at 1166, quoting, *Concrete Works*, at 1522–23.

In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, the court considered both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* at 1166, citing, *Concrete Works*, 36 F.3d at 1521, 1529 n. 23 (considering post-enactment evidence). The court stated it may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus, any findings Congress has made as to the entire construction industry are relevant. *Id.* at 1166–67 citing, *Concrete Works*, at 1523, 1529, and *Croson*, 488 U.S. at 492 (Op. of O'Connor, J.).

Evidence in the present case. There can be no doubt, the court found, that Congress repeatedly has considered the issue of discrimination in government construction procurement

contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts—especially construction contracts—necessitating a race-conscious remedy. *Id.* at 1167, citing, *Appendix—The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed.Reg. 26,050, 26,051–52 & nn. 12–21 (1996) (“*The Compelling Interest*”) (citing approximately thirty congressional hearings since 1980 concerning minority-owned businesses). But, the court said, the question is not merely *whether* the government has considered evidence, but rather the *nature and extent* of the evidence it has considered. *Id.*

In *Concrete Works*, the court noted that:

Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality’s affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality’s showing that “it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Croson*, 488 U.S. at 492, 109 S.Ct. 706. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality’s factual predicate for a race- and gender-conscious program.

Id. at 1167, quoting, *Concrete Works*, 36 F.3d at 1529. Unlike *Concrete Works*, the evidence presented by the government in the present case demonstrated the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government’s disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at 1168. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presented further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs. *Id.* at 1168.

a. Barriers to minority business formation in construction subcontracting. As to the first kind of barrier, the government’s evidence consisted of numerous congressional investigations and hearings as well as outside studies of statistical and anecdotal evidence—cited and discussed in *The Compelling Interest*, 61 Fed.Reg. 26,054–58—and demonstrated that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide. *Id.* at 1168. The evidence demonstrated that prime contractors in the construction industry often refuse to employ minority subcontractors due to “old boy” networks—based on a familial history of participation in the subcontracting market—from which minority firms have traditionally been excluded. *Id.*

Also, the court found, subcontractors’ unions placed before minority firms a plethora of barriers to membership, thereby effectively blocking them from participation in a subcontracting market in which union membership is an important condition for

success. *Id.* at 1169. The court stated that the government’s evidence was particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied. *Id.* at 1169.

b. Barriers to competition by existing minority enterprises. With regard to barriers faced by existing minority enterprises, the government presented evidence tending to show that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies fosters a decidedly uneven playing field for minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts. *Id.* at 1170. The court said it was clear that Congress devoted considerable energy to investigating and considering this systematic exclusion of existing minority enterprises from opportunities to bid on construction projects resulting from the insularity and sometimes outright racism of non-minority firms in the construction industry. *Id.* at 1171.

The government’s evidence, the court found, strongly supported the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms. *Id.* Minority subcontracting enterprises in the construction industry, the court pointed out, found themselves unable to compete with non-minority firms on an equal playing field due to racial discrimination by bonding companies, without whom those minority enterprises cannot obtain subcontracting opportunities. The government presented evidence that bonding is an essential requirement of participation in federal subcontracting procurement. *Id.* Finally, the government presented evidence of discrimination by suppliers, the result of which was that nonminority subcontractors received special prices and discounts from suppliers not available to minority subcontractors, driving up “anticipated costs, and therefore the bid, for minority-owned businesses.” *Id.* at 1172.

Contrary to Adarand’s contentions, on the basis of the foregoing survey of evidence regarding minority business formation and competition in the subcontracting industry, the court found the government’s evidence as to the kinds of obstacles minority subcontracting businesses face constituted a strong basis for the conclusion that those obstacles are not “the same problems faced by any new business, regardless of the race of the owners.” *Id.* at 1172.

c. Local disparity studies. The court noted that following the Supreme Court’s decision in *Croson*, numerous state and local governments undertook statistical studies to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting. *Id.* at 1172. The government’s review of those studies revealed that although such disparity was least glaring in the category of construction subcontracting, even in that area “minority firms still receive only 87 cents for every dollar they would be expected to receive” based on their availability. *The Compelling Interest*, 61 Fed.Reg. at 26,062. *Id.* In that regard, the *Croson* majority stated that “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government’s] prime contractors, an inference of discriminatory exclusion could arise.” *Id.* quoting, 488 U.S. at 509 (Op. of O’Connor, J.) (citations omitted).

The court said that it was mindful that “where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.” *Id.* at 1172, quoting, *Croson* at 501–02. But the court found that here, it was unaware of such “special qualifications”

aside from the general qualifications necessary to operate a construction subcontracting business. *Id.* At a minimum, the disparity indicated that there had been under-utilization of the existing pool of minority subcontractors; and there is no evidence either in the record on appeal or in the legislative history before the court that those minority subcontractors who *have* been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications. *Id.* at 1173.

The court found the disparity between minority DBE availability and market utilization in the subcontracting industry raised an inference that the various discriminatory factors the government cites have created that disparity. *Id.* at 1173. In *Concrete Works*, the court stated that “[w]e agree with the other circuits which have interpreted *Croson* impliedly to permit a municipality to rely ... on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger’s summary judgment motion,” and the court here said it did not see any different standard in the case of an analogous suit against the federal government. *Id.* at 1173, *citing, Concrete Works*, 36 F.3d at 1528. Although the government’s aggregate figure of a 13% disparity between minority enterprise availability and utilization was not overwhelming evidence, the court stated it was significant. *Id.*

It was made more significant by the evidence showing that discriminatory factors discourage both enterprise formation of minority businesses and utilization of existing minority enterprises in public contracting. *Id.* at 1173. The court said that it would be “sheer speculation” to even attempt to attach a particular figure to the hypothetical number of minority enterprises that would exist without discriminatory barriers to minority DBE formation. *Id.* at 1173, *quoting, Croson*, 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers, the court found was nevertheless relevant to the assessment of whether a disparity was sufficiently significant to give rise to an inference of discriminatory exclusion. *Id.* at 1174.

d. Results of removing affirmative action programs. The court took notice of an additional source of evidence of the link between compelling interest and remedy. There was ample evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears. *Id.* at 1174. Although that evidence standing alone the court found was not dispositive, it strongly supported the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination. *Id.* “Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” *Id.* at 1174, *quoting, Croson*, 488 U.S. at 509 (Op. of O’Connor, J.) (citations omitted).

In sum, on the basis of the foregoing body of evidence, the court concluded that the government had met its initial burden of presenting a “strong basis in evidence” sufficient to support its articulated, constitutionally valid, compelling interest. *Id.* at 1175, *citing, Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

Adarand’s rebuttal failed to meet their burden. Adarand, the court found utterly failed to meet their “ultimate burden” of introducing credible, particularized evidence to rebut the government’s initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement

subcontracting market. *Id.* at 1175. The court rejected Adarand’s characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous “disparity studies” cited by the government and its amici curiae as supplemental evidence of discrimination. *Id.* The evidence cited by the government and its amici curiae and examined by the court only reinforced the conclusion that “racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation’s contracting markets.” *Id.*

The government’s evidence permitted a finding that as a matter of law Congress had the requisite strong basis in evidence to take action to remedy racial discrimination and its lingering effects in the construction industry. *Id.* at 1175. This evidence demonstrated that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises—both discussed above—were caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at 1176. Congress was not limited to simply proscribing federal discrimination against minority contractors, as it had already done. The court held that the Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice. *Id.* at 1176.

The court also rejected Adarand’s contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. *Id.* at 1176. If Congress had valid evidence, for example that Asian-American individuals are subject to discrimination because of their status as Asian-Americans, the court noted it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. *Id.* “Race” the court said is often a classification of dubious validity—scientifically, legally, and morally. The court did not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities.” *Id.* at 1176, note 18, *citing*, 15 U.S.C. § 637(d)(3)(C).

The court stated that it was not suggesting that the evidence cited by the government was un rebuttable. *Id.* at 1176. Rather, the court indicated it was pointing out that under precedent it is for Adarand to rebut that evidence, and it has not done so to the extent required to raise a genuine issue of material fact as to whether the government has met its evidentiary burden. *Id.* The court reiterated that “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* at 1522 (quoting *Wygant*, 476 U.S. at 277–78, 106 S.Ct. 1842 (plurality)). “[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity’s] evidence did not support an inference of prior discrimination and thus a remedial purpose.” *Id.* (quoting *Wygant*, 476 U.S. at 293, 106 S.Ct. 1842 (O’Connor, J., concurring)). Because Adarand had failed utterly to meet its burden, the court held the government’s initial showing stands. *Id.*

In sum, guided by *Concrete Works*, the court concluded that the evidence cited by the government and its amici, particularly that contained in *The Compelling Interest*, 61 Fed.Reg. 26,050, more than satisfied the government’s burden of production regarding the

compelling interest for a race-conscious remedy. *Id.* at 1176. Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies. *Id.* The court therefore affirmed the district court’s finding of a compelling interest. *Id.*

Narrow Tailoring. The court stated it was guided in its inquiry by the Supreme Court cases that have applied the narrow-tailoring analysis to government affirmative action programs. *Id.* at 1177. In applying strict scrutiny to a court-ordered program remedying the failure to promote black police officers, a plurality of the Court stated that

[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Id. at 1177, quoting, *Paradise*, 480 U.S. at 171 (1986) (plurality op. of Brennan, J.) (citations omitted).

Regarding flexibility, “the availability of waiver” is of particular importance. *Id.* As for numerical proportionality, *Croson* admonished the courts to beware of the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, quoting, *Croson*, 488 U.S. at 507 (quoting *Sheet Metal Workers’*, 478 U.S. at 494 (O’Connor, J., concurring in part and dissenting in part)). In that context, a “rigid numerical quota,” the court noted particularly 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.

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

State and federal programs challenged. In this case an association of highway contractors in Wisconsin brought suit to enjoin programs by which the State of Wisconsin “sets aside” certain highway contracts for firms that are certified as disadvantaged business enterprises (DBEs), and also requires highway contractors to give preferential treatment to subcontractors that are certified as DBE’s. 922 F.2d at 421. In the first type of program challenged by the highway contractors, according to the Court, the State of Wisconsin is the principal, rather than an agent of federal highway authorities, because the state receives no money from the federal government. *Id.* The state program involving non-federal funds was enjoined by the district court. *Id.*

In a second type of program challenged by the highway contractors, the Court finds the State of Wisconsin is the administrator and disbursing agent of federal highway grants. *Id.* at 421. This federal program the district court refused to enjoin. *Id.*

State Program. The Court states that the majority of the Justices of the Supreme Court believe that racial discrimination in any form, including reverse discrimination, is unconstitutional when done by states or municipalities, unless the purpose is to provide a remedy for discrimination against the favored group. *Id.* at 421-422. The Court found that Wisconsin made no effort to show that its program was remedial in any sense. The Court rejected Wisconsin’s argument that *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), does not apply because its program involved DBEs and not MBEs.

The Court affirmed the injunction against the State of Wisconsin Program because the state did not establish that the purpose was to remedy discrimination.

Role of states as agent under the federal program for DBEs. The Court states that the basic question raised by the contractors’ appeal is the proper characterization of the state’s role under the 1987 Congressional Act relating to providing financial assistance to states for highway construction. *Id.* at 422. The Court points out that the Congressional Act offers the states financial assistance, and the receipt of funds under the Federal Act is voluntary, but a state that decides to receive such funds is bound by the federal regulations. *Id.*

The contractors did not question the validity of the 1987 federal Act authorizing the DBE program, the validity of the “set-aside provision” in the Act, or the validity of the federal regulations that implement that provision. *Id.* at 423. The contractors challenged the 1987 Act neither on its face nor as applied. *Id.* But, they argued that the Supreme Court decision in *Croson* prevents the state from playing the role envisaged for it by the Act and federal regulations unless the state is able to show that the “set-aside program”, as implemented in Wisconsin, is necessary to rectify invidious discrimination. *Id.* at 423.

The Court found that these arguments, whatever merit they have or lack, are inconsistent with the contractors’ decision not to challenge the validity of the federal statute or regulations. *Id.* at 423. The Court held as follows: “Insofar as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal servants who drafted the regulations.” *Id.* at 423.

The Court concludes the federal statute contemplates that states which decide to accept funds under it will reserve a portion of those funds for a class of disadvantaged contractors. *Id.* at 423. And, by virtue of a presumption created by federal regulations, which in this case were conceded to be valid, the disadvantaged contractors are likely to consist for the most part of enterprises controlled by members of the favored groups. *Id.* at 423. The Court held that if the state of Wisconsin does exactly what the statute expects it to do, and the statute is conceded for purposes of the litigation to be constitutional, the state cannot have violated the Constitution. *Id.* at 423.

The federal statute does not “require” the states to accept funds under it, but it authorizes them to do so, and the Court states that an action pursuant to a valid authorization is valid. *Id.* at 423. The lesson of the U.S. Supreme Court decisions, including *Croson*, according to the Court, is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. *Id.* at 424. And, the Court finds one way the federal government can do that is by authorizing states to do things that they could not do without federal authorization. *Id.*

Vulnerable to challenge or impermissible collateral attack depending on if state complied with or exceeded its federal authority. The Court makes clear that the plaintiffs in this case did not challenge the federal “set-aside program”, a creature of federal statute and federal regulations. *Id.* at 424. Rather, they challenged the state’s role in the federal program. *Id.* The Court thus held as follows: “Insofar as the state is merely doing what the statute and regulations envisage and permit, the attack on the state is an impermissible collateral attack on the statute and regulations.” *Id.* at 424.

The Court also held that if the state exceeded its federal authority, it would be vulnerable to challenge under *Croson*. *Id.* at 424. The Court concluded that the state is vulnerable to such challenge insofar as it took the presumption in the federal regulations and applied it to programs not funded under, and therefore not governed by, the federal statute. *Id.*

The district court found that the state exceeded its authority under the federal statute in two other minor ways in addition to applying the presumption in the federal regulations to state funded programs, and the lower court enjoined those violations. *Id.* at 425. The Court agreed with the district court in connection with the ruling that the state exceeded its authority under the federal statute. *Id.* at 425, citing the district court decision in *Milwaukee*

County Pavers, 731 F.Supp. at 1413-15. The district court enjoined the State of Wisconsin program in which the state was acting as the principal, not an agent, under a program in which Wisconsin set aside certain exclusively state-funded highway contracts for firms certified as DBEs. *Id.* The state Program was in violation of equal protection based on the absence of showing by the state of Wisconsin that discrimination was necessary to rectify discrimination against such minorities. *Id.*

However, the Court found that the contractors complaint about the state's *administration* of the racial presumption in the federal regulations was not sufficient to rebut the presumption. *Id.* at 425. The contractors acknowledged that they made no effort to present, in proceedings for the certification of DBEs, evidence rebutting the presumption accorded the members of the favored groups. *Id.* The contractors, the Court states, are quarreling with the federal regulation whose validity they have conceded. *Id.*

Holding. The Court held that the state funded program under which Wisconsin "set aside" certain state-funded contracts for firms certified as DBEs racially discriminates in favor of minorities in violation of the Equal Protection Clause because there was no evidence presented by the state showing that discrimination was necessary to rectify discrimination against such minorities. The Court also held that the state, by accepting federal funds under the federal statute and federal regulations, did not violate equal protection. The Court further held that the state, to the extent it exceeded its authority under the federal law and the federal regulations, its conduct was vulnerable to an equal protection challenge.

Recent District Court Decisions

14. 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.*

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

In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males

challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise (“DBE”) Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation’s (“IDOT”) implementation of the Federal DBE Program for federally-funded projects, IDOT’s implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority’s (“Tollway”) separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants’ Motion to Dismiss for lack of standing, denying the Federal Defendants’ Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants’ Motion to Dismiss certain Counts and granting the Tollway Defendants’ Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT’s implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT’s DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway’s DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants’ Motion to Dismiss Midwest Fence’s request for punitive damages.

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 84 F. Supp. 3d at 720. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality’s prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing “hard proof” to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at 720. While narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives,” the court said it does not require “exhaustion of every conceivable race-neutral alternative.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 84 F. Supp. 3d at 721. To successfully rebut the

government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

This can be accomplished, according to the court, by providing a neutral explanation for the disparity between DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. *Id.* Conjecture and unsupported criticisms of the government's methodology are insufficient. *Id.*

Standing. The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at 722. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at 722-723.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at 723. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest's ability to compete for work in these Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing. *Id.*

Facial challenge to the Federal DBE Program. The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at 725. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program's 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority- and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at 726. Sixty-four of the studies had previously been presented to Congress. *Id.* The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id.* The consultant's report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all "likely to be influenced by the presence of discrimination if it exists" and could potentially result in a built-in downward bias in the availability measure. *Id.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a "disparity index" for each study. *Id.* at 726. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed

lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep't. of Def.*, 545 F. 3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government's compelling interest in implementing a national program. *Id.* at 727, citing *Rothe*, 545 F. 3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a "strong basis in evidence" to support the conclusion that race-and gender-conscious action is necessary. *Id.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at 727. The Midwest expert's suggestion that the studies used in consultant's report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court quoting *Adarand VII*, 228 F.3d at 1173 (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id.* Midwest failed to present "affirmative evidence" that no remedial action was necessary. *Id.*

Federal DBE Program is narrowly tailored. Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at 727. In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is "overinclusive." *Id.* at 728. The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at 728. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program's duration and ensure its flexibility. *Id.* at 728. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at 728. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a "good faith efforts waiver" on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at 728. The court rejected Midwest’s argument that the federal regulations impose a quota in light of the Program’s explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at 728. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program’s goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program’s burden on non-DBEs. *Id.* at 729. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program’s presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become “overconcentrated” in a particular area of contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.*

The court said Midwest’s primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at 729. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program’s approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at 729. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants’ evidence. *Id.* at 729. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at 729. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

As-applied challenge to IDOT’s implementation of the Federal DBE Program. In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* at 730. The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT’s implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit’s decision in *Northern Contracting v. Illinois DOT*, the court said that whether the Federal DBE Program is unconstitutional as

applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at 730, citing *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, quoting *Northern Contracting*, held that a challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at 730. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at 730. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT’s implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

IDOT’s evidence of discrimination and DBE availability in Illinois. The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at 730. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT’s inference of discrimination primarily arises. *Id.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* at 730. The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* at 731. This resulted in a “weighted” DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at 731. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* at 731. For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under \$500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at 731. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at 731. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at 731. The study and the Goal-Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.* at 732.

Court rejected Midwest arguments as to the data and evidence. The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at 732. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at 732. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at 732. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.*

IDOT argued that on prime contracts under \$500,000, capacity is a variable that makes little difference. *Id.* at 732-733. Prime contracts of varying sizes under \$500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at 733. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs,

the Supreme Court has indicated that a regression analysis need not take into account “all measurable variables” to rule out race-neutral explanations for observed disparities. *Id.* at 733, quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations. The court found Midwest’s criticisms insufficient to rebut IDOT’s evidence of discrimination or discredit IDOT’s methods of calculating DBE availability. *Id.* at 733. First, the court said, the “evidence” offered by Midwest’s expert reports “is speculative at best.” *Id.* The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with “credible, particularized evidence” of its own, such as a neutral explanation for the disparity, or contrasting statistical data. *Id.* The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT’s method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at 733. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the “custom census” approach as consistent with the federal regulations. *Id.* at 733, citing to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at 733-734.

The court held that through the 2004 and 2011 studies, and Goal-Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at 734. The court said that in response to the Seventh Circuit decision and IDOT’s evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies’ result. *Id.*

The court pointed out that although Midwest’s expert’s reports “cast doubt on the validity of IDOT’s methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias.” *Id.* at 734. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT’s availability calculations. *Id.*

Burden on non-DBE subcontractors; overconcentration. The court addressed the narrow tailoring factor concerning whether a program’s burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at 734-735. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence

relating to overconcentration. *Id.* at 735. The court found that Midwest did not show IDOT's determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at 735.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at 735. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

Use of race-neutral alternatives. The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor-Protégé, and Model Contractor Programs. *Id.* at 735. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at 735. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at 736. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over \$36 million in contracting dollars. *Id.* The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

The court held the undisputed facts established that IDOT did not have a "no-waiver policy." *Id.* at 736. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* at 736-737. Because Midwest's own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at 737.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT's implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at 737. Accordingly, the court granted IDOT's motion for summary judgment.

Facial and as-applied challenges to the Tollway program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at 737. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway’s utilization of DBEs and their availability. *Id.*

The study employed a “custom census” approach to calculate DBE availability, and examined the Tollway’s contract data to determine utilization. *Id.* at 737.. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an “economy-wide analysis” examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person’s race or sex and their earning power and ability to form a business. *Id.*

Midwest’s challenges to the Tollway evidence insufficient and speculative. In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an “economy-wide analysis” similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at 737-738. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.* at 738.

Midwest attacked the Tollway’s 2006 study similar to how it attacked the other studies with regard to IDOT’s DBE Program. *Id.* at 738. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the “economy-wide analysis” revealed a negative correlation between an individual’s race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at 738.

To successfully rebut the Tollway’s evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway’s statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at 738-739. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at 739. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

Tollway Program is narrowly tailored. As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at 739.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway's method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at 739. The court stated that the sharing of a remedial program's burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 739. The court held the Tollway Program's burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at 739-740. The court held the Tollway's race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT's, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at 740.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at 740. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* at 740. Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.*

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at 740. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment. *Id.*

16. Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. 2014), affirmed, Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015)

In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an

alleged unwritten “no waiver” policy, and claiming that the IDOT’s program is not narrowly tailored.

Motion to Dismiss certain claims granted. IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT’s DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

Motions for Summary Judgment. Subsequent to the Court’s Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT’s implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at * 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT’s DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project, was based upon Dunnet Bay’s race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

Factual background. Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.*

The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at *9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at *23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at *23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.* at *26, quoting *Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority." *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any "challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay's challenges are foreclosed by *Northern Contracting*. *Id.* at *26.

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at *26. The Court also concluded "because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any

challenge on this factor fails under *Northern Contracting*.” *Id.* at *26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at *27.

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

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

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

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

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

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

disadvantage against minority-owned companies or DBEs - and have been determined to have standing. *Id.* at *30.

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

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

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

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

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

Conclusion. The Court concluded IDOT is entitled to summary judgment, holding Dunnet Bay lacked standing to raise an equal protection challenge based on race, and that even if

Dunnet Bay had standing, Dunnet Bay was unable to show that it would have been awarded the contract in the absence of any violation. *Id.* at *32. Any other federal claims, the Court held, were foreclosed by the *Northern Contracting* decision because there is no evidence IDOT exceeded its authority under federal law. *Id.* Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.

17. *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.

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

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. (“Weeden”) against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT’s DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana’s highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden’s bid actually identified only .81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana’s DBE Program. MDT’s DBE Participation Review Committee considered Weeden’s good faith documentation and found that Weeden’s bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden’s bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at *2. Additionally, the DBE Review Board found that Weeden’s mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT’s DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

No proof of irreparable harm and balance of equities favor MDT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the

Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

Court applies *AGC v. California DOT* case; evidence supports narrowly tailored DBE program. Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at *4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013)(holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id.* at 4, citing *Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry." 2013 WL 4774517 at *4, quoting *AGC v. California DOT*, 713 F.3d at

1197. The Court, *also quoting* the decision in *AGC v. California DOT*, said: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* at *4, *quoting AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court concluded that given the similarities between Weeden’s claim and AGC’s equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at *4.

Due Process claim. The Court also rejected Weeden’s bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at *5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT’s decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at *5.

Holding and Voluntary Dismissal. The Court denied plaintiff Weeden’s application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

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

This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. (“AGC”) against the California Department of Transportation (“Caltrans”), to the DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

Caltrans’ DBE program set a 13.5 percent DBE goal for its federally-funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. *Id.* at 42. Accordingly, the race-conscious component of the Caltrans DBE program applied only to African Americans, Native Americans, Asian Pacific Americans, and white women. *Id.*

Caltrans established this goal and its DBE program following a disparity study conducted by BBC Research & Consulting, which included gathering statistical and anecdotal evidence of race and gender disparities in the California construction industry. Slip Opinion Transcript at 42.

The parties filed motions for summary judgment. The district court issued its ruling at the hearing on the motions for summary judgment granting Caltrans' motion for summary judgment in support of its DBE program and denying the motion for summary judgment filed by the plaintiffs. Slip Opinion Transcript at 54. The court held Caltrans' DBE program applying and implementing the provisions of the Federal DBE Program is valid and constitutional. *Id.* at 56.

The district court analyzed Caltrans' implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005). The court stated that the federal government has a compelling interest "in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Slip Opinion Transcript at 43, quoting *Western States Paving*, 407 F.3d at 991, citing *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

The district court pointed out that the Ninth Circuit in *Western States Paving* and the Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have upheld the facial validity of the Federal DBE Program.

The district court stated that based on *Western States Paving*, the court is required to look at the Caltrans DBE program itself to see if there is a strong basis in evidence to show that Caltrans is acting for a proper purpose and if the program itself has been narrowly tailored. Slip Opinion Transcript at 45. The court concluded that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good-faith consideration of workable race-neutral alternatives." Slip Opinion Transcript at 45.

The district court identified the issues as whether Caltrans has established a compelling interest supported by a strong basis in evidence for its program, and does Caltrans' race-conscious program meet the strict scrutiny required. Slip Opinion Transcript at 51-52. The court also phrased the issue as whether the Caltrans DBE program, "which does give preference based on race and sex, whether that program is narrowly tailored to remedy the effects of identified discrimination...", and whether Caltrans has complied with the Ninth Circuit's guidance in *Western States Paving*. Slip Opinion Transcript at 52.

The district court held "that Caltrans has done what the Ninth Circuit has required it to do, what the federal government has required it to do, and that it clearly has implemented a program which is supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law." Slip Opinion Transcript at 52.

The court rejected the plaintiff's arguments that anecdotal evidence failed to identify specific acts of discrimination, finding "there are numerous instances of specific

discrimination.” Slip Opinion Transcript at 52. The district court found that after the *Western States Paving* case, Caltrans went to a racially neutral program, and the evidence showed that the program would not meet the goals of the federally-funded program, and the federal government became concerned about what was going on with Caltrans’ program applying only race-neutral alternatives. *Id.* at 52-53. The court then pointed out that Caltrans engaged in an “extensive disparity study, anecdotal evidence, both of which is what was missing” in the *Western States Paving* case. *Id.* at 53.

The court concluded that Caltrans “did exactly what the Ninth Circuit required” and that Caltrans has gone “as far as is required.” Slip Opinion Transcript at 53.

The court held that as a matter of law, the Caltrans DBE program is, under *Western States Paving* and the Supreme Court cases, “clearly constitutional,” and “narrowly tailored.” Slip Opinion Transcript at 56. The court found there are significant differences between Caltrans’ program and the program in the *Western States Paving* case. *Id.* at 54-55. In *Western States Paving*, the court said there were no statistical studies performed to try and establish the discrimination in the highway contracting industry, and that Washington simply compared the proportion of DBE firms in the state with the percentage of contracting funds awarded to DBEs on race-neutral contracts to calculate a disparity. *Id.* at 55.

The district court stated that the Ninth Circuit in *Western States Paving* found this to be oversimplified and entitled to little weight “because it did not take into account factors that may affect the relative capacity of DBEs to undertake contracting work.” Slip Opinion Transcript at 55. Whereas, the district court held the “disparity study used by Caltrans was much more comprehensive and accounted for this and other factors.” *Id.* at 55. The district noted that the State of Washington did not introduce any anecdotal information. The difference in this case, the district court found, “is that the disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well. And this evidence before the Court clearly supports a finding that this program is constitutional.” *Id.* at 56.

The court held that because “Caltrans’ DBE program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry and because the Court finds that it is narrowly tailored, the Court upholds the program as constitutional.” Slip Opinion Transcript at 56.

The decision of the district court was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal based on lack of standing by the AGC, San Diego Chapter, but ruled on the merits on alternative grounds holding constitutional Caltrans’ DBE Program. *See discussion above of AGC, SDC v. Cal. DOT.*

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

Plaintiffs, white male owners of Geod Corporation (“Geod”), brought this action against the New Jersey Transit Corporation (“NJT”) alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT’s DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

New Jersey Transit Program and Disparity Study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, “conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the “three-step process pursuant to USDOT regulations to establish the NJT DBE goal.” *Id.* at 649. First, the consultant determined “the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn.” *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified “the relevant industries in which NJ Transit contracts,” and (3) calculated “the weighted availability measure.” *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of 28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government’s compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, *citing Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT’s DBE program was narrowly tailored to further that compelling interest in

accordance with “its grant of authority under federal law.” *Id.* at 652 *citing Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

Applying *Northern Contracting v. Illinois*. The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that “a challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority.” *Id.* at 652 *quoting Northern Contracting*, 473 F.3d at 721. The district court in Geod followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state’s program. *Id.* at 652, *citing Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation “exceeded its grant of authority under federal law.” *Id.* at 652-653, *quoting Northern Contracting*, 473 F.3d at 722 and *citing also Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit’s analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit’s discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 *citing Sherbrooke Turf*, 345 F.3d 973-74. Therefore, “only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge.” *Id.* at 653 *quoting Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and *citing South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT’s DBE program was constitutionally defective, the district court focused on the basis of plaintiffs’ argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs’ arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT’s use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples

listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the “examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, *citing* 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT’s list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT’s division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only “when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal.” *Id.* at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT’s DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT

DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must “undertake an as-applied inquiry into whether [the state’s] DBE program is narrowly tailored.” *Id.* at 656, quoting *Western States Paving*, 407 F.3d at 997.

Applying *Western States Paving*. The district court then analyzed whether the NJT program was narrowly tailored applying *Western States Paving*. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id.* at 656, citing *Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id.* at 656. However, the court found that the plaintiffs’ argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id.* at 656. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id.* In addition, plaintiff’s expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id.* at 656. The court held this was insufficient to overcome the consultant’s determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id.* at 656.

The district court rejected Plaintiffs’ argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT’s expert identified “prime contracting” as the area in which NJT procurements evidence discrimination. *Id.* at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative but it does require serious, good faith consideration of workable race-neutral alternatives. *Id.* at 656, citing *Sherbrook Turf*, 345 F.3d at 972 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id.* at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the “relationship of the numerical goals to the relevant labor market.” *Id.* at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id.* at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not

provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id.*

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* at 657.

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

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at *4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id.*

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id.* The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a

demonstration by the recipient of federal funds that the program is narrowly tailored. *Id.* at *5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id.*, citing *Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at *5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at *6, citing *Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id.* at *6, citing 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id.* at *6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id.* at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id.* at *6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id.* at *7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id.* A decomposition analysis was also performed. *Id.*

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id.*

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral means. The district court concluded that "critically," plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT's DBE goal. *Id.* at *7. The court held that genuine issues of material fact remain only as to whether NJT's adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id.*

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id.* at *7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id.* at *8.

The court found, however, that what was “gravely critical” about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and “unknown,” but did not include an analysis of past discrimination for the ethnic group “Iraqi,” which is now a group considered to be a DBE by the NJT. *Id.* Because the disparity report included a category entitled “unknown,” the court held a genuine issue of material fact remains as to whether “Iraqi” is legitimately within NJT’s defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs’ and defendants’ Motions for Summary Judgment as to the constitutionality of NJT’s DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff’s Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff’s claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT’s Motion for Summary Judgment was granted as to that claim.

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

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County’s implementation of the Federal DBE Program and Broward County’s issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) should govern the Court’s consideration of the merits of plaintiffs’ claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, “whether compliance with the federal regulations is all that is required of Defendant Broward County.” *Id.* at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7th Cir. 2007). The plaintiffs disagreed, and contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County’s implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id.* at 1338.

Ninth Circuit Approach: *Western States*. The district court analyzed the Ninth Circuit Court of Appeals approach in *Western States Paving* and the Seventh Circuit approach in

Milwaukee County Pavers Association v. Fiedler, 922 F.2d 419 (7th Cir. 1991) and *Northern Contracting*, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in *Western States Paving* held that whether Washington’s DBE program is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry, and that it was error for the district court in *Western States Paving* to uphold Washington’s DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in *Western States Paving* concluded it would be necessary to undertake an as-applied inquiry into whether the state’s program is narrowly tailored. 544 F.Supp.2d at 1339, citing *Western States Paving*, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT “appears not to be of one mind on this issue, however.” 544 F.Supp.2d at 1339, n. 3. The district court stated that the “United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this agency may not concur with the ‘opinion of the United States’ as represented in *Western States*.” 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the “state would have to have evidence of past or current effects of discrimination to use race-conscious goals.” 544 F.Supp.2d at 1338, quoting *Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, “concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states’ compliance with the federal regulations.” 544 F.Supp.2d at 1339.

Seventh Circuit Approach: Milwaukee County and Northern Contracting. The district court in Broward County next considered the Seventh Circuit approach. The Defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. *Id.* In support of this position, the County relied primarily on the Seventh Circuit’s approach, first articulated in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), then *reaffirmed* in *Northern Contracting*, 473 F.3d 715 (7th Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state’s role in the federal program is simply as an agent, and insofar “as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations.” 544 F.Supp.2d at 1340, quoting *Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id.* The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state DOT's program. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v. Farris*, 942 F.2d 969 (6th Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these Circuit Courts of Appeal have concluded that “where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations.” 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that “the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program.” 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is “simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations.” *Id.*

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

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

This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the "plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at *1 (N.D. Ill. Sept. 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the "maximum feasible portion" of its DBE goal through race-neutral means. *Id.* at *4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id.* (citing regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at *7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id.* at *8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. *Id.* Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id.*

IDOT considered three reports prepared by expert witnesses. *Id.* at *9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling for relevant variables such as credit worthiness, "that minorities and women are less likely to form businesses, and that when they do form

businesses, those businesses achieve lower earnings than did businesses owned by white males.” *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses’ formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they “were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals.” *Id.* Additionally, witnesses identified 20 prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. *Id.* The prime contractors did not respond to IDOT’s requests for information concerning their utilization of DBEs. *Id.*

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County’s public construction contracts, and a “non-goals” experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id.* at *11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id.*

IDOT’s representative testified that the DBE program was administered on a “contract-by-contract basis.” *Id.* She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the “lowest responsible bidder.” IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id.* at *12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id.*

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court’s earlier summary judgment order, including:

1. A “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);
3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. “Unbundling” large contracts; and
5. Allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses.

Id. (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. *Id.*

The court found that IDOT attempted to achieve the “maximum feasible portion” of its overall DBE goal through race- and gender-neutral measures. *Id.* at *13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id.*

Anecdotal evidence. A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and “unanimously reported that they were rarely invited to bid on such contracts.” *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at *13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who “frequently are forced to pay higher insurance rates due to racial and gender discrimination.” *Id.* at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they “occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT.” *Id.* A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at *15.

Strict scrutiny. The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id.* at *16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a “‘strong basis in evidence’ to conclude that remedial action was necessary, before it embarks on an affirmative action program ... If the government makes such a showing, the party challenging the affirmative action plan bears the ‘ultimate burden’ of demonstrating the unconstitutionality of the program.” *Id.* The court held that challenging party’s burden “can only be met by presenting credible evidence to rebut the government’s proffered data.” *Id.* at *17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show “that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction.” *Id.* at *16.

The court found that IDOT presented “an abundance” of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at *17. The plaintiff argued that the study was “erroneous because it failed to limit its DBE availability figures to those firms ... registered and pre-qualified with IDOT.” *Id.* The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included

IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT's calculation of DBE availability and utilization rates was incorrect. *Id.*

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id.* at *18. Additionally, the court found "that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability." *Id.* at *19. The court found that IDOT presented "an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets." *Id.* at *21. The court also found that the statistical studies were consistent with the anecdotal evidence. *Id.* The court did find, however, that "there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This ... is [also] supported by the statistical data ... which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability." *Id.* at *21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id.* at *21, n. 32.

The court further found:

That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: '[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced *because* of industry discrimination.'

Id. at *21, citing *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id.* at *22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id.* The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT's fiscal year 2005 goal was a "plausible lower-bound estimate" of DBE participation in the absence of discrimination." *Id.* The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT's data. *Id.*

The plaintiff argued that even if accepted at face value, IDOT's marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id.* The court found first that IDOT's indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id.* Second, the court found:

[M]ore importantly, plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally-funded highway contracts. This is a fundamental distinction ... [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

Id. at *23. The court distinguished *Builders Ass’n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff’d* 256 F.3d 642 (7th Cir. 2001), noting that the program in that case was not federally-funded. *Id.* at *23, n. 34.

The court also found that “IDOT has done its best to maximize the portion of its DBE goal” through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id.* The small business initiative included: “unbundling” large contracts; allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses; a “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found “[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures.” *Id.* at *25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id.*, citing *Adarand Constructors, Inc. v. Slater “Adarand VII”*, 228 F.3d 1147, 1177 (10th Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT’s DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

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

This case was before the district court pursuant to the Ninth Circuit’s remand order in *Western States Paving Co. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff’s claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff’s claim for injunctive relief as moot. The court found “it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*,” and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving's claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT's unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the "State defendants." Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification "who averred that they had been subject to 'general societal discrimination.'"

Third, the court dismissed plaintiff's 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff's 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... Title VI." The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff's §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" — and was in fact "specifically race conscious" — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the §2000d claim.

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

This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *see above*, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (*i.e.*, the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest

and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT's DBE Program is narrowly tailored to achieve the federal government's compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT's implementation of the Federal DBE Program.

The court in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the Federal defendants' Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*"), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at *34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith consideration of workable race-neutral alternatives." 2004 WL422704 at *36, *citing and quoting Sherbrooke Turf*, 345 F.3d at 972, *quoting Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds \$750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the *Sherbrooke Turf* court's assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every women and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of \$16.6 million or less (at the time of this decision), and businesses whose owners' personal net worth exceed \$750,000.00 are excluded. 49 CFR § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 CFR § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in *Sherbrooke Turf*, that a recipient's implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with *Sherbrooke Turf* that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient's implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT's DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government's compelling interest. The court, therefore,

denied the contractor plaintiff's Motion for Summary Judgment and the Illinois DOT's Motion for Summary Judgment.

26. *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.

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

Sherbrooke involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the "federal affirmative action programs," the USDOT implementing regulations, and the Minnesota DOT's participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of "random inclusion" of various groups as being within the Program in connection with whether the Federal DBE Program is "narrowly tailored." The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the "potentially invidious effects of providing blanket benefits to minorities" in part,

by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be

included in the accounting used to set Minnesota's overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.).

The court rejected plaintiff's claim that the Minnesota DOT must independently demonstrate how its program comports with *Crososn'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.*

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

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads ("Nebraska DOR") DBE Program adopted and implemented solely to comply with the Federal DBE Program is "approved" by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR's proposed DBE goals for fiscal year 2001, pending completion of USDOT's review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist "in the construction industry" and that racial and gender discrimination "within the construction industry" is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently "narrowly tailored" to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

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

In this case, plaintiffs, an association of Indianapolis Minority Contractors, brought suit to challenge the manner in which the State of Indiana administered its program for minority

and disadvantaged businesses that is a part of the federal DBE program, which is regulated by the United States DOT. The plaintiffs contended that state officials and others engaged in wrongful actions in disbursement of federal highway funds to undeserving businesses that did not qualify for the DBE program because they were not controlled by either minority individuals or financially disadvantaged individuals. In addition, the plaintiffs claimed that because of this wrongdoing, they did not receive their fair share of the federal highway funds as minority contractors. The district court stated that this case concerns whether the State of Indiana complied with federal law related to the receipt of Federal Highway funds or whether it engaged in a practice of discrimination with respect to those funds. 1998 WL 1988826 at *10. The district court noted the case did not involve a challenge concerning the State of Indiana Minority Business Enterprise Program that did not involve projects utilizing federal funds.

The district court rejected testimony submitted by the plaintiffs as not meeting standards for expert testimony with regard to claims that the defendants were discriminating against African Americans, because the court concluded the claims were conclusory allegations and opinions, based in part on speculation, hearsay and not on any sufficient probative evidence to support the opinions. 1998 WL 1988826 at *13-15. The court rejected the statistical analysis submitted regarding a disparate impact on African Americans, finding there was no evidence shown concerning any possible error rate, standard deviation or confidence levels related to the proffered results. *Id.* The court found there was no evidence related to whether the proper statistical pool was used to calculate the percentages proffered as evidence of a disparate impact. *Id.* The testimony submitted by the plaintiffs compared Indiana DOT's compliance with the mandatory Federal DBE Program with other states, and concluded that Indiana ranked as one of the worst based on the testimony that Indiana's demographics were eight to nine percent black. *Id.* at *14. But, the district court found the state-wide demographic utilized may be a statistical universe larger than the number of firms actually qualified, willing and able to work on the construction contracts. *Id.*

The district court also found that the testimony proffered was not sufficient in connection with the claim that the defendants were discriminating against African Americans. *Id.* at *13. The court stated plaintiffs "merely" concluded that the State was discriminating based upon a review of the percentages of payments which the plaintiffs' witness considered to be "legitimate black companies," as compared to the payments made to what the witness considered to be "front" companies. *Id.* at *13. The court found that these were conclusory opinions based only on the witness's knowledge of "legitimate black companies," and deemed the opinions "problematic." The court stated the witness admitted he had not been involved in activities within the State for many years, and he did not show any basis for his knowledge as to which companies that were paid funds by Indiana DOT were "legitimate black companies" and which were not. *Id.*

The court rejected plaintiffs' witness's opinion concerning his finding that only 3.8 percent of the total contracts went to "legitimate black-owned businesses." The court noted that the regulations do not provide for a 10 percent participation by African Americans, but a 10 percent participation by many groups, including African Americans, and that the witness did not testify as to whether he performed any study of the federal reports to test Indiana DOT's compliance with the 10 percent goal based on all DBE as defined by federal law. *Id.* at *13. The district court concluded that unsupported, conclusory testimony is not sufficient. *Id.*

The court also considered the issue raised by the plaintiffs as to whether the then existing federal regulations, 49 C.F.R. Part 23, provided enforceable rights subject to a 42 U.S.C. § 1983 action brought by the plaintiffs. The court concluded that the federal regulations do not provide a basis to conclude that they were intended to provide rights enforceable under Section 1983. Id. at *28. The district court found that the federal regulations provide a means to assure that the federal DBE program benefits legitimate DBEs, and provides the Secretary of the United States DOT a means to ensure its integrity. Id.

The court stated these regulations provided a method for the USDOT to oversee the services provided by the States, rather than a means to ensure that individual DBEs receive funds for services. Id. at *28. The federal regulations do not create an individual entitlement to services, but are a yardstick for the USDOT to measure the system-wide performance of the program. Id. Therefore, the district court concluded that although the plaintiffs may benefit from their State's plan implemented in order to receive federal transportation funds, they are only indirect beneficiaries. Id. at *29. Further, the court held that as the DBE program is not an entitlement program, the regulations implementing the program do not provide enforceable rights under § 1983.

In conclusion, the court held that the plaintiffs may utilize § 1983 to enforce their right to a state-wide plan that complies with the federal requirements for the receipt of federal transportation and highway funds. Id. at *29. The plaintiffs, the court held, do not have rights under § 1983 to remedy isolated violations of requirements under the plan, which includes claims that certain companies should not have been certified under the DBE program. The court dismissed all claims under 42 U.S.C. § 1983 brought against the State, Indiana DOT and the Indiana Department of Administrative Services and all claims for damages against the State officials sued in their official capacity.

The court then found that Indiana's DBE program met all federal requirements, including ensuring that DBEs have an equitable opportunity to compete for contracts and subcontracts as mandated by 49 C.F.R. § 23.45(c). The court pointed out that Indiana DOT arranges solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules to facilitate participation by DBEs. Id. at *35. The district court pointed out that Indiana DOT requires prime contractors to solicit bids from certified DBEs as part of its good-faith efforts requirements, that certified DBEs are provided notices of bids and that these notices are also posted on the Internet and in Indiana Contractors' Association publications. Id.

The court also indicated Indiana DOT's Civil Rights Division had a Supportive Services Division that provided managerial and technical assistance to DBEs, training workshops and one-on-one consultations in estimating, bidding, bookkeeping, marketing, financial issues and other areas directed by Indiana DOT. The DBE assistance provided for business planning, bookkeeping, marketing, accounting, estimating, bidding, employee relations, contract negotiations, computerization, financial decisions and other business related issues. Consultants were contracted to perform selected training or individualized assistance to DBEs. Id. at *35-36.

Specifically, Indiana DOT provided services to assist DBEs, at no cost to them, including conducting internal orientation sessions for newly certified DBEs; provided training on the metric system through Ivy Tech State College; consulting one-on-one with individual DBE firms to improve their business operations, provided training in finance and bookkeeping analysis, business plan preparation, job cost, cash flow preparation and analysis, bid

estimation, computerization, strategic planning, loan packaging assistance and other operations; attended trade fairs, organized meetings, and performed other outreach functions for the purpose of reaching non-certified DBE firms, informing them of Indiana DOT DBE programs, and encouraging them to become certified; referred DBEs to establish state and federal business assistance organizations when appropriate; encouraged DBE firms to contact the civil rights office regarding any problems that arise on the job site or with respect to any aspect of their relationship with Indiana DOT and prime contractors and responded and sought to resolve the problems and complaints in a prompt manner; and provided classroom style training workshops including a twelve-day workshop to instruct 25 to 30 Indiana DBEs on all aspects of operations of the construction business. Id. at *35-36.

The court also found that Indiana DOT strived to remove barriers DBEs frequently encountered in other states by not requiring subcontractors to be bonded, and exploring using Supportive Services funding to provide direct financial assistance to DBEs, utilizing funds from the FHWA exclusively for the recruitment of DBEs, managerial and technical assistance to DBEs, and monitoring DBE activities. Indiana DOT also established a mentor-protégé program for contractors on Indiana DOT contracts. Id. at *37.

The district court stated that Indiana DOT met its overall 10 percent DBE goal and set practical contract goals on individual contracts complying with the requirements of the federal acts and regulations. In setting the individual contracts goal, the Indiana DOT evaluated each contract individually, including factors such as geographic location of the contract, its size, the number of items that can be performed by certified DBEs, the number of certified DBEs that can perform the work, the relative location of certified DBEs who can and are willing to work in the area, the current workload of those DBEs and DBE prequalification limits. Id. at *39.

The district court found that the individual contract goals were not rigid requirements that contractors must meet under all circumstances. The bidder that fails to achieve an individual contract DBE goal may remain eligible to be awarded the contract if it can demonstrate that it has made good faith efforts to meet the goal. Id. at *39. The district court pointed out that Indiana DOT's methods to ensure compliance with the federal regulations, reporting and recordkeeping requirements were met by Indiana DOT and that Indiana DOT's Civil Rights Office responded to requests for assistance as a part of its daily activities. Id. at *42.

The district court noted that none of the plaintiffs complained to Indiana DOT that he bid on a subcontract to a construction contract administered by Indiana DOT and was denied the bid on the basis of race-based discrimination. Id. at *42. The district court analyzed plaintiff's claims that the State does not have a bonding or financial assistance program in place, did not always conduct site visits as part of the DBE certification process, and never met the 10 percent goal requirement. Id. at *43. The court in reviewing the federal regulations concluded that the bonding and financial assistance programs were not mandatory requirements of state wide plans, although they were mentioned in the federal regulations. Id. at *44.

The district court found that although the State may not always conduct site visits in the certification process, the testimony did not conclusively establish that site visits were not conducted. The court also found that plaintiffs did not establish that Indiana failed to meet the 10 percent goal that existed at this time in the federal regulations. In light of the

evidence, the court found that the plaintiffs failed to show any genuine issues of fact regarding the State's compliance with the requirements for the DBE plan necessary to receive federal transportation funds and granted the defendants' Motion for Summary Judgment. Id. at *45.

The district court also considered plaintiffs' claims under § 1983 that the State's administration of the required DBE program violated their rights under the Equal Protection Clause of the Fourteenth Amendment. The court found that the plaintiffs produced no evidence that showed a race-based or discriminatory policy of the State, or barrier otherwise imposed by the State, that impeded the plaintiffs' ability to bid on contracts. Id at *48. The district court found that the plaintiffs did not show how they were treated differently from all other qualified DBEs in their efforts to obtain contracts, and that the State of Indiana does not have the power to modify the Congressional mandate that all certified DBEs are to compete on an equal basis. Id. Thus, the court rejected the plaintiffs' argument that because women-owned DBEs are receiving a disproportionate share of federally funded contracts, a discriminatory practice must be in place. Id.

The district court held that the plaintiffs could not show any discriminatory intent by the State of Indiana. Plaintiffs alleged that defendants had raised barriers to their participation in contracts funded by federal dollars and that they had not received their fair percentage of the contracts compared to non-African American DBEs. The court found the plaintiffs failed to demonstrate that such barriers exist, and that they did not demonstrate how they had been treated differently than the other similarly situated minority and disadvantaged enterprises served by the DBE program. Id. at *49. The court held that a showing of a disproportionate impact is not enough, as a state's "official action will not be held unconstitutional solely because it results in a racially disproportionate impact ... Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Id. at *49. (citations omitted).

Lastly, the district court pointed out that the plaintiffs did not challenge the constitutionality of the federal DBE program, but only challenged the State's administration of that program. Id. at *50. Thus, the court held "If the DOA and INDOT are only doing 'what federal law requires, [their] conduct is constitutional, at least where, as here, the constitutionality of the federal program is not challenged.'" Id. at *50, quoting *Converse Construction Co., Inc. v. Massachusetts Bay Transportation Authority*, 899 F.Supp. 753, 761 (D.Mass. 1995)(citing *Milwaukee Co. Pavers*, 922 F.2d at 423). The court noted that the Second, Sixth, and Tenth Circuits reached the similar conclusion that insofar as the State is merely complying with federal law, it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations. Id. at *50 (citations omitted).

Therefore, the court granted summary judgment to the defendants finding that they were complying with federal law and could not be enjoined under the Equal Protection Clause or under a claim based on Title VI.

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

In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at *1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id.* *1. Businesses owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.*, quoting 15 U.S.C. § 627(a)(5).

The Section 8(a) statute is race-neutral. The court rejected Rothe's allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id.* *1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA's *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id.* *2, citing 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id* at *2. The court stated the statute “readily survives” the rational basis scrutiny standards. *Id* *2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id*.

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id* *2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id* *2.

The court found that the definition of the term “socially disadvantaged” does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id* *3. On its face, the court stated the term envisions a individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id*. The court said that the statute definition of the term “social disadvantaged” does not provide for preferential treatment based on an applicant’s race, but rather on an individual applicant’s experience of discrimination. *Id* *3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered “socially disadvantaged.” *Id* *3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id*.

The court pointed out that the SBA’s implementation of the statute’s definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id* *4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA’s implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id* *4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id* *5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner’s experience of discrimination. *Id* *6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id*.

The court noted that the Supreme Court and this court’s discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id* *8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id*. at *7.

The SBA statute does not trigger strict scrutiny. The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id* *10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id* *9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id*. The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id*.

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id* *10. Instead, the court considered whether the statute is supported by a rational basis. *Id*. The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id* *10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id*. Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id* *11. The statutory scheme, the court said, is rationally related to that end. *Id*.

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id*.

Other issues. The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id*.

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id* *11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id*.

Dissenting Opinion. There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id* *12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id* *13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id* *16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id* *22.

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 (10th Cir. 2003), established legal principles that are relevant to the court’s strict scrutiny analysis. First, Rothe’s claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce “credible, particularized”

evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and "they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting." *Id.* at 838-39. The court found that the data used in these six disparity studies is not "stale" for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with Rothe's argument that all the data were stale (data in the studies from 1997 through 2002), "because this data was the most current data available at the time that these studies were performed." *Id.* The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a "bright-line rule for determining staleness." *Id.*

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are "stale." *Id.* at n.86. The court also stated that it "accepts the reasoning of the *Appendix*, which the court found stated that for the most part "the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities." *Id.* at 839, quoting 61 *Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the Appendix, the Benchmark Study, and the Urban Institute Report were “stale,” and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the Appendix to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with “concrete, particularized” evidence to the contrary. *Id.* at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government’s involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id.*, quoting *Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;
2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and
3. Over- and under-inclusiveness.

Id. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a "strong basis in evidence" upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is "beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

Compelling interest – strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relied upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing to Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson’s* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson’s* evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress “should be able to rely on the most recently available data so long as that data is reasonably up-to-date.” 545 F.3d at 1039. The Federal Circuit affirmed the district court’s conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id.*

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it “must be proven to have been before Congress prior to enactment of the racial classification.” 545 F.3d at 1039, *quoting Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id.* at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD “which Congress was emphatically not required to make.” *Id.* at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the “government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy.” 545 F.3d at 1040, footnote 11 *quoting Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, “[a] disparity ratio less than 0.80” — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — “indicates a relevant degree of disparity,” and “might support an inference of discrimination.” 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and *citing Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a “crucial question” in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by *Rothe*, that the six studies misapplied this “touchstone” of *Croson* and erroneously included minority-owned firms that were deemed

willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because “the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists.” 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id.*

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id.* However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or “relative capacity,” of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 *quoting Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id.* at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id.* at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing to Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id.* at 1044-1045.

The court stated, to “be clear,” that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id.* at 1045. The court said that where the calculated disparity ratios are low enough, the court does

not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id.* The court recognized that a minority-owned firm’s capacity and qualifications may themselves be affected by discrimination. *Id.* The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id.*

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, “we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest.” 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, *citing Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in *Concrete Works* noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, *quoting Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and “should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no ‘precise mathematical formula’ to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 545 F.3d at 1049, *quoting W.H. Scott Constr. Co.*, 199 F.3d at 218 n. 11.

Narrowly tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049.

Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination.” 545 F.3d at 1049-1050.

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 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, citing *Rothe Dev. Corp. v. U.S. Dep’t of Def.* (“*Rothe III*”), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a “passive participant.” *DynaLantic*, at *11. The Court rejected *DynaLantic’s* argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, citing *Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1995), and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of “discriminatory barriers” to “fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts.” *DynaLantic*, at *11, quoting *Adarand VII*, 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a “passive participant” in private discrimination in the relevant industries or markets. *DynaLantic*, at *11, citing *Concrete Works IV*, 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic*, at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic*, at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10th Circuit Court of Appeals’ approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or “old boy” business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from

28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) “require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination.” *DynaLantic*, at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at *31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at *31, citing 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at *31, n. 13.

Rejection of DynaLantic’s rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government’s initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a “passive participant” when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at *35, citing *Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id.*, citing *Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic’s claim that the government must independently verify the evidence presented to it is unavailing. *Id.* *DynaLantic*, at *35.

Also in terms of DynaLantic’s arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic*, at *35. In short, the Court found that DynaLantic’s “general criticism” of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across

racial lines to justify a preference to all five groups. *DynaLantic*, at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different areas. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at *37. Second, it provided “forceful” evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

As-applied challenge. *DynaLantic* also challenged the SBA and DoD’s use of the Section 8(a) program as applied: namely, the agencies’ determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at *37. Significantly, the Court points out that the federal Defendants “concede that they do not have evidence of discrimination in this industry.” *Id.* Moreover, the Court points out that the federal Defendants admitted that there “is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry.” *DynaLantic*, at *38. The federal Defendants also admit that they are “unaware of any discrimination in the simulation and training industry.” *Id.* In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at *38. The Court concludes that the federal Defendants’ position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court’s decision in *Croson*, as well as the Federal Circuit’s decision in *O’Donnell Construction Company*, which adopted *Croson*’s reasoning. *DynaLantic*, at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson*’s evidentiary requirement to show an inference of discrimination. *DynaLantic*, at *39, citing *Croson*, 488 U.S. 501. The Court rejects the federal government’s position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at *40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program

constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at *40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic*, at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than five percent of contract dollars, are facially constitutional. *DynaLantic*, at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at *48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the

sum of \$1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

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

DynaLantic Corp. involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id.* Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the

evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

APPENDIX C.

Quantitative Analyses of Marketplace Conditions

APPENDIX C.

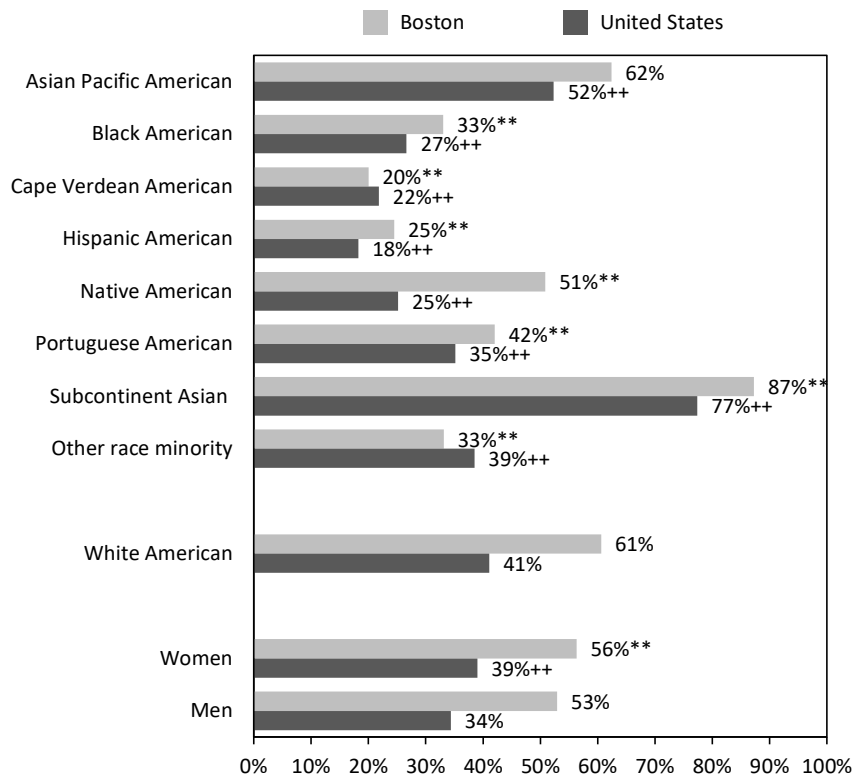
Quantitative Analyses of Marketplace Conditions

BBC Research & Consulting (BBC) conducted extensive quantitative analyses of marketplace conditions in Boston to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in the local construction, architecture and engineering, other professional services, goods, and other services industries. The study team examined local marketplace conditions in four primary areas:

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

Appendix C presents a series of figures that show results from those analyses. Key results along with information from secondary research are presented in Chapter 3.

Figure C-1.
Percentage of all workers 25 and older with at least a
four-year degree in Boston and the United States, 2014-2018

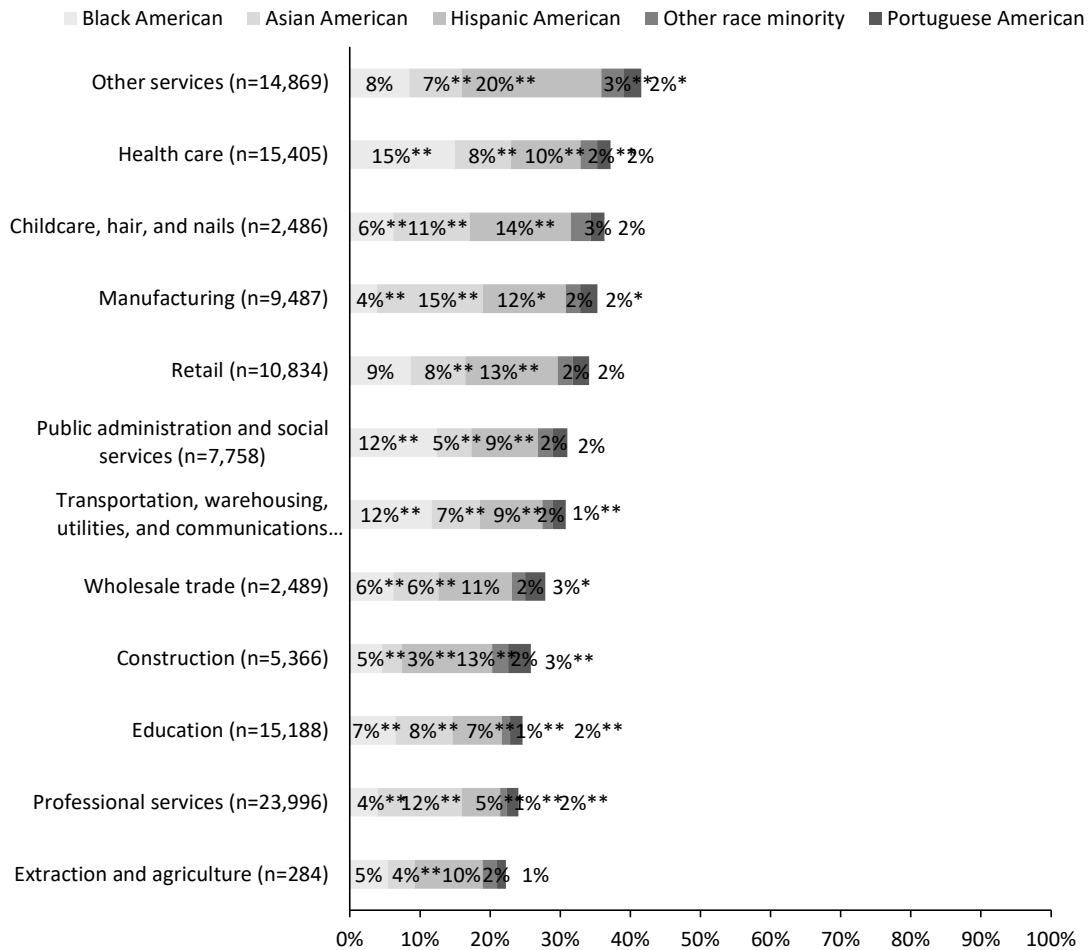


Note: **, ++ Denotes that the difference in proportions between the minority group and non-Hispanic whites (or between women and men or veterans and non-veterans) is statistically significant at the 95% confidence level for Boston and the United States, respectively.

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

Figure C-1 indicates that, compared to non-Hispanic whites working in Boston, smaller percentages of Black Americans, Cape Verdean Americans, Hispanic Americans, Native Americans, Portuguese Americans, and other race minorities have four-year college degrees.

Figure C-2.
Percent representation of minorities in various Boston industries



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

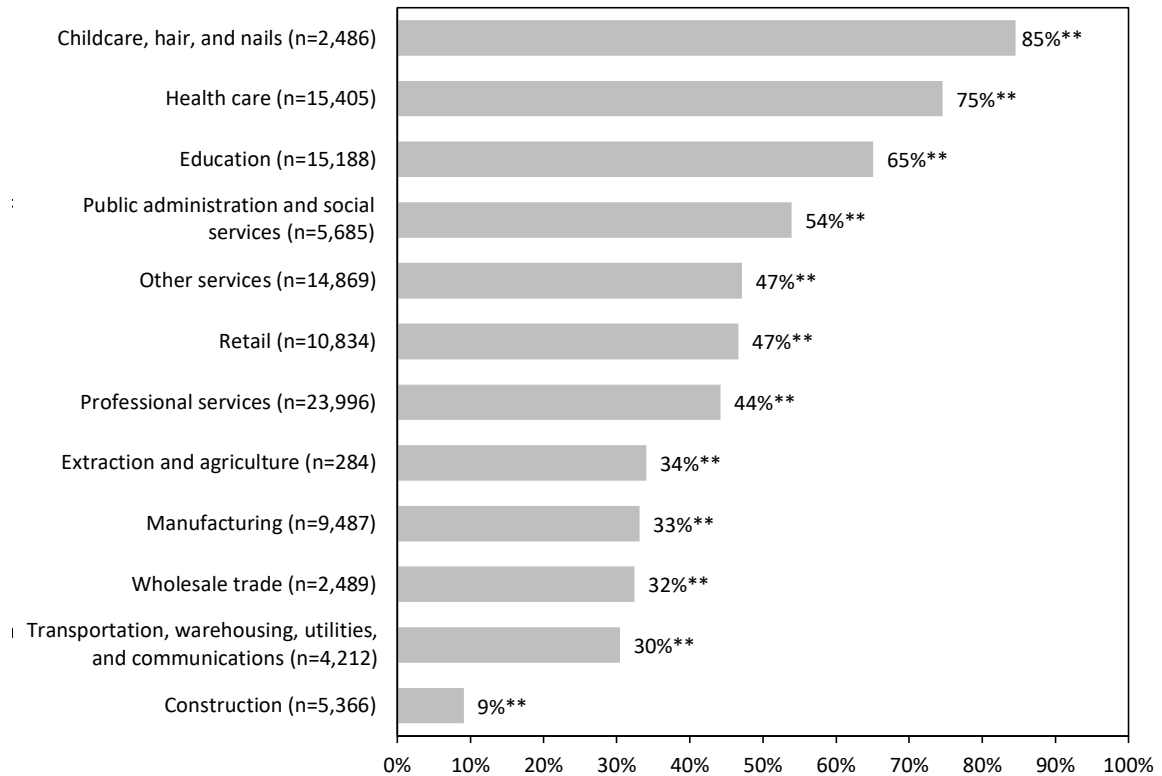
Workers in the finance, insurance, real estate, legal services, accounting, advertising, architecture, management, scientific research, and veterinary services industries were combined to one category of professional services; Workers in the rental and leasing, travel, investigation, waste remediation, 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.

"Other race minority" includes Native Americans, Cape Verdean Americans, and other races.

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

Figures C-2 indicates that the Boston industries with the highest representations of minority workers are other services; healthcare; and childcare, hair, and nails. The Boston industries with the lowest representations of minority workers are education, professional services, and extraction and agriculture.

Figure C-3.
Percent representation of women in various Boston industries



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

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

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

Figure C-3 indicates that the Boston industries with the highest representations of women workers are childcare, hair, and nails; health care; and education. The industries with the lowest representations of women are wholesale trade; transportation, warehousing, utilities, and communications; and construction.

Figure C-4.
Demographic characteristics of workers in study-related industries and all industries in Boston and the United States, 2014-2018

	All Industries (n= 118,507)	Construction (n= 5,366)	Architecture and Engineering (n= 1,704)	Other Professional Services (n= 2,511)	Goods (n= 2,313)	Other Services (n= 2,832)
Boston						
Race/ethnicity						
Asian Pacific American	6.4 %	2.5 % **	6.4 %	6.4 %	7.0 %	3.0 % **
Black American	8.1 %	4.6 % **	3.1 % **	3.0 % **	6.8 % *	13.1 % **
Cape Verdean American	1.1 %	0.8 % *	0.2 % **	0.2 % **	0.7 % *	2.1 % **
Hispanic American	10.9 %	12.9 % **	5.3 % **	5.1 % **	11.7 %	23.8 % **
Native American	0.3 %	0.4 %	0.2 %	0.5 %	0.2 %	0.2 %
Portuguese American	2.1 %	3.2 % **	1.2 % **	1.6 % *	2.8 %	3.0 % *
Subcontinent Asian American	2.3 %	0.3 % **	2.7 %	3.7 % **	3.1 % **	0.6 % **
Other race minority	0.6 %	1.2 % **	0.8 %	0.7 %	0.4 %	1.7 % **
Total minority	31.8 %	25.8 %	20.0 %	21.2 %	32.7 %	47.5 %
White American	68.2 %	74.2 % **	80.0 % **	78.8 % **	67.3 %	52.5 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
Gender						
Women	48.9 %	9.1 % **	30.2 % **	43.1 % **	29.8 % **	32.6 % **
Men	51.1 %	90.9 % **	69.8 % **	56.9 % **	70.2 % **	67.4 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
United States						
	All Industries (n= 7,743,859)	Construction (n= 472,930)	Architecture and Engineering (n= 79,990)	Other Professional Services (n= 86,232)	Goods (n= 164,429)	Other Services (n= 227,235)
Race/ethnicity						
Asian Pacific American	4.9 %	1.8 % **	6.1 % **	5.7 % **	4.7 % **	2.5 % **
Black American	12.5 %	5.9 % **	5.3 % **	8.0 % **	9.6 % **	16.3 % **
Cape Verdean American	0.0	0.0 %	0.0 % **	0.0 % *	0.0 %	0.1 %
Hispanic American	16.9 %	28.0 % **	9.0 % **	8.5 % **	18.7 % **	25.8 % **
Native American	1.2 %	1.3 % **	0.8 % **	0.8 % **	1.0 % **	1.1 % **
Portuguese American	0.4	0.5 % **	0.4 %	0.4 %	0.5 %	0.4 %
Subcontinent Asian American	1.5 %	0.3 % **	2.1 % **	3.9 % **	1.4 % **	0.5 % **
Other race minority	0.2 %	0.2 %	0.2 % **	0.2 %	0.2 % **	0.3 % **
Total minority	37.7 %	38.1 %	23.9 %	27.4 %	36.0 %	47.0 %
White American	62.3 %	61.9 % **	76.1 % **	72.6 % **	64.0 % **	53.0 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
Gender						
Women	47.2 %	9.4 % **	25.8 % **	42.2 % **	28.1 % **	30.1 % **
Men	52.8 %	90.6 % **	74.2 % **	57.8 % **	71.9 % **	69.9 % **
Total	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %

Note: *, ** Denotes that the difference in proportions between workers in each study-related industry and workers in all industries considered together is statistically significant at the 90% or 95% confidence level, respectively.

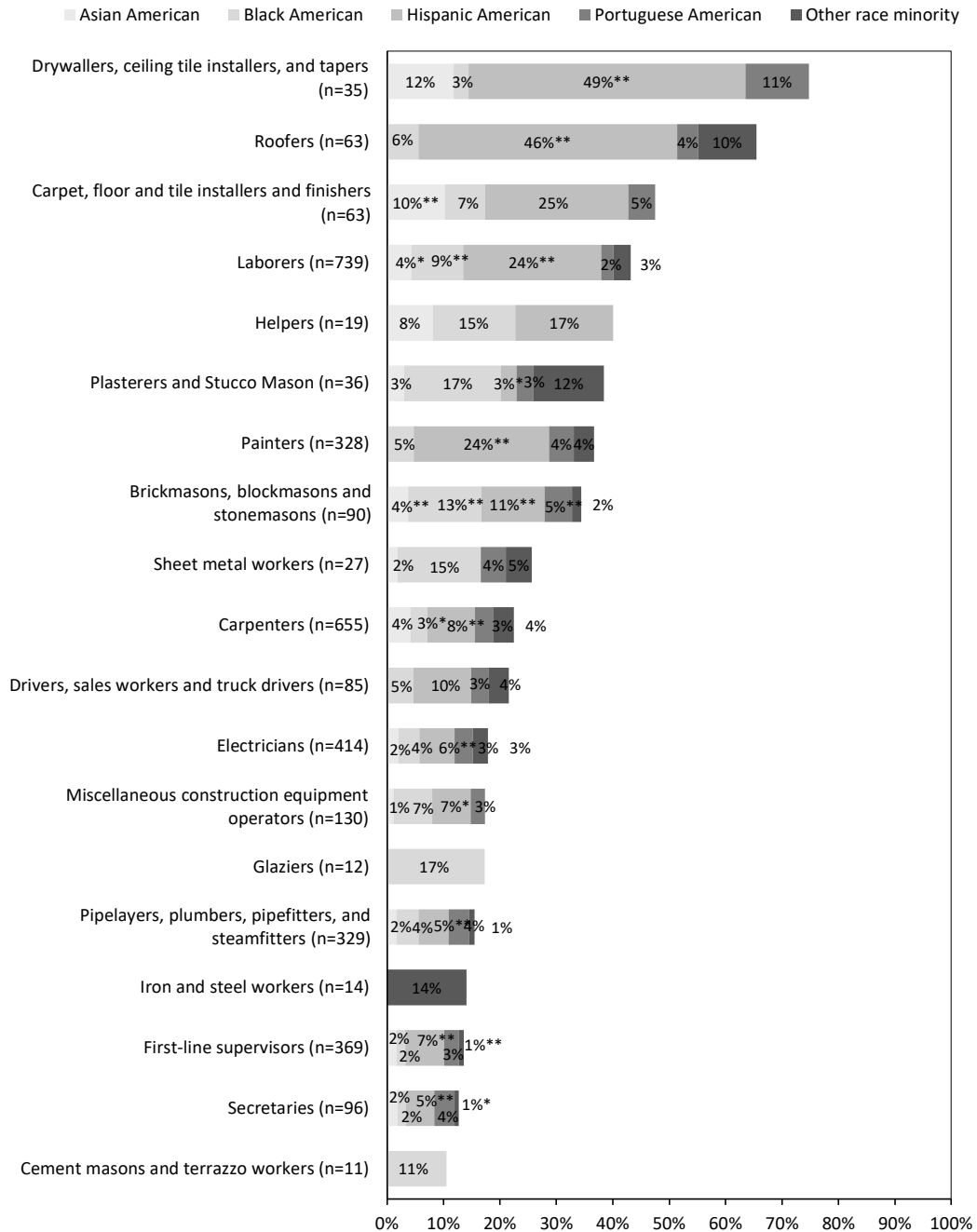
Source: BBC Research & Consulting from 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-4 indicates that compared to all industries considered together:

- Smaller percentages of Asian Pacific Americans, Black Americans, Cape Verdean Americans, Subcontinent Asian Americans, and women work in the Boston construction industry.
- Smaller percentages of Black Americans, Cape Verdean Americans, Hispanic Americans, Portuguese Americans, and women work in the Boston architecture and engineering industry;
- Smaller percentages of Black Americans, Cape Verdean Americans, Hispanic Americans, Portuguese Americans, and women work in the Boston other professional services industry;
- Smaller percentages of Black Americans, Cape Verdean Americans, and women work in the Boston goods industry; and
- Smaller percentages of Asian Pacific Americans, Subcontinent Asian Americans, and women work in the Boston other services industry.

Figure C-5 indicates that the construction occupations with the highest representations of minority workers in Boston are drywallers, ceiling installers, and tapers; roofers; and carpet, floor, and tile installers and finishers. The construction occupations with the lowest representations of minority workers are first-line supervisors, secretaries, and cement masons and terrazzo workers.

Figure C-5.
Percent representation of minorities in selected construction occupations in Boston, 2014-2018



Note: ** Denotes that the difference in proportions between minority workers in the specified occupation and all construction occupations considered together is statistically significant at the 95% confidence level.

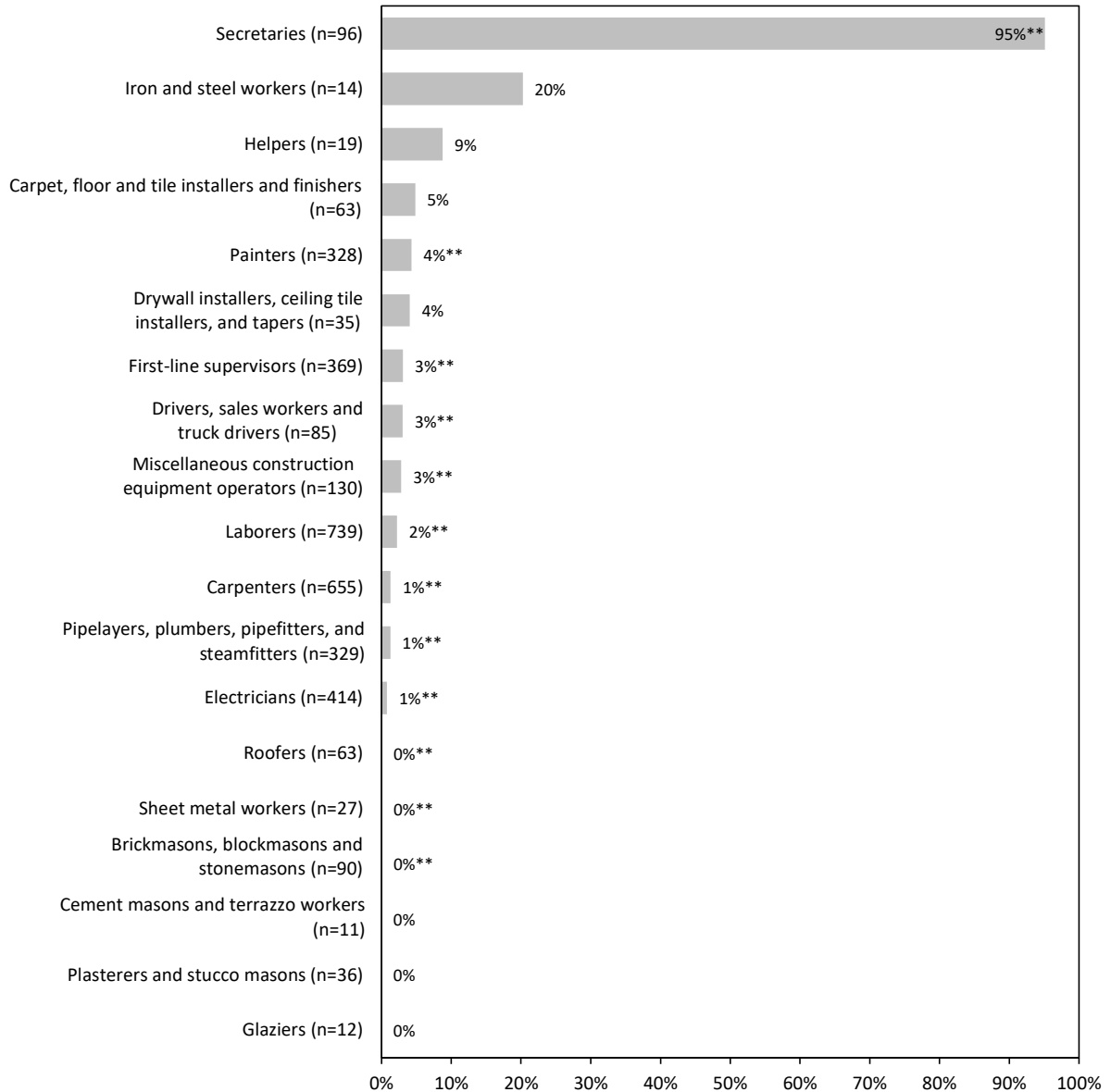
The representation of minorities among all Boston construction workers is 3% for Asian American, 5% for Black American, 13% for Hispanic Americans, 2% for Other race minorities, and 26% for all minorities considered together.

"Other race minority" includes Native Americans, Cape Verdean Americans, and other races.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators

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

Figure C-6.
Percent representation of women in selected construction occupations in Boston, 2014-2018



Note: ** Denotes that the difference in proportions between minority workers in the specified occupation and all construction occupations considered together is statistically significant at the 95% confidence level.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators

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

Figure C-6 indicates that the construction occupations in Boston with the highest representations of women workers are secretaries, iron and steel workers, and helpers. The construction occupations with the lowest representations of women workers are cement masons and terrazzo workers, plasterers and stucco masons, and glaziers.

Figure C-7.
Percentage of workers who worked as a manager in study-related industries in Boston and the United States, 2014-2018

	Construction	Architecture and engineering	Other professional services	Goods	Other services
Race/ethnicity					
Asian Pacific American	3.6 % **	3.9 %	2.9 %	0.0 % **	1.3 %
Black American	4.5 % **	0.0 % **	5.9 %	0.4 % **	0.3 % **
Cape Verdean American	0.0 % **	0.0 % †	0.0 % †	0.0 % †	7.1 %
Hispanic American	4.8 % **	0.5 % **	3.2 %	2.8 %	0.3 % **
Native American	8.1 % †	0.0 % †	0.0 % †	0.0 % †	0.0 % †
Portuguese American	8.2 %	4.1 %	6.6 %	0.0 % *	1.9 %
Subcontinent Asian	3.8 % †	12.7 %	3.3 %	6.0 %	0.0 % †
Other race minority	2.8 % **	0.0 % †	0.0 % †	0.0 % †	0.0 %
White American	9.5 %	4.8 %	5.4 %	4.6 %	2.4 %
Gender					
Women	9.5 %	1.5 % **	4.4 %	1.6 % **	0.5 % **
Men	8.2 %	5.9 %	5.5 %	4.5 %	2.2 %
All individuals	8.3 %	4.5 %	5.0 %	3.6 %	1.6 %
United States					
	Construction	Architecture and Engineering	Other professional services	Goods	Other Services
Race/ethnicity					
Asian Pacific American	9.3 % *	2.5 % **	4.3 % **	2.4 % **	1.5 % **
Black American	4.4 % **	2.3 % **	3.7 % **	0.7 % **	0.7 % **
Cape Verdean American	0.6 % **	0.0 % †	7.4 % †	0.0 %	3.7 %
Hispanic American	3.2 % **	2.2 % **	5.0 % **	1.2 % **	0.5 % **
Native American	5.4 % **	3.7 %	7.0 %	1.6 % **	1.4 % **
Portuguese American	7.8 % **	3.3 %	4.4 %	2.6 %	2.1 %
Subcontinent Asian	11.8 % *	4.8 %	4.0 % **	3.0 %	2.2 %
Other race minority	5.8 % **	3.6 %	3.9 %	2.5 %	1.4 %
White American	9.9 %	3.8 %	5.8 %	3.4 %	2.0 %
Gender					
Women	6.9 % **	1.9 % **	4.2 % **	1.8 % **	0.9 % **
Men	7.7 %	4.1 %	6.3 %	3.0 %	1.6 %
All individuals	7.6 %	3.5 %	5.4 %	2.7 %	1.4 %

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

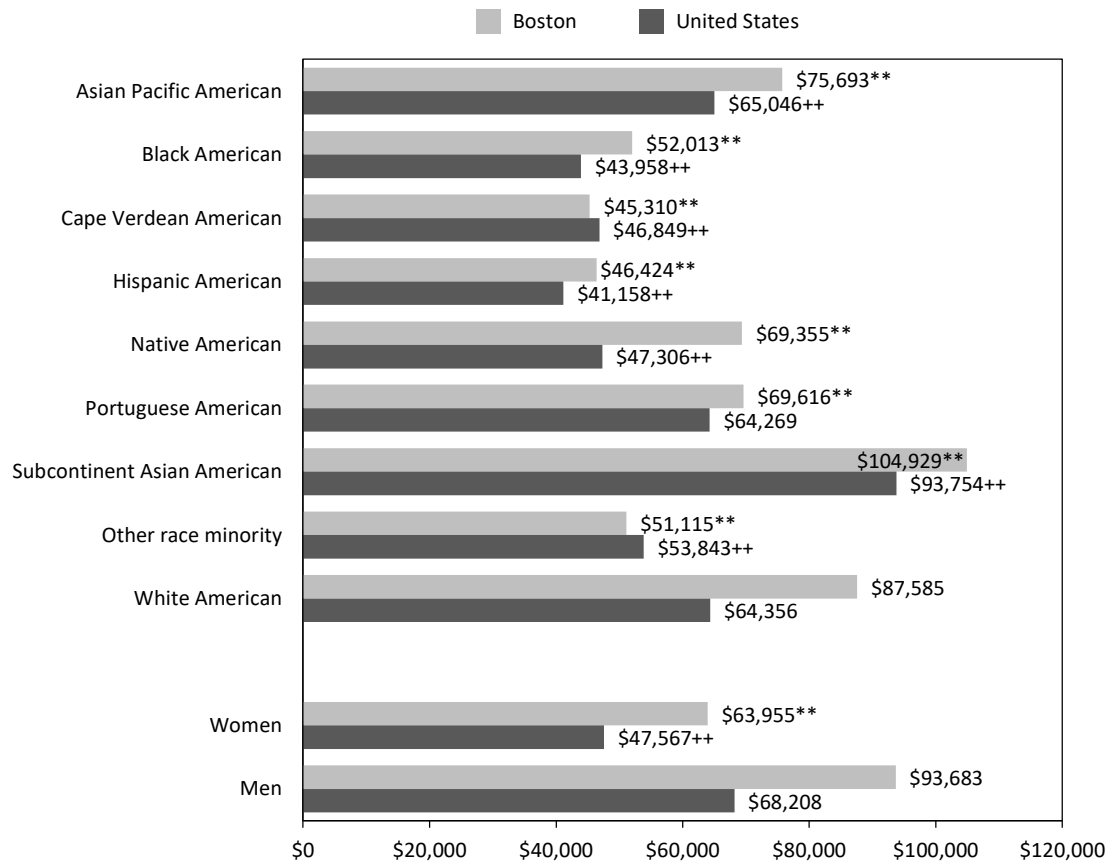
Source:

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

Figure C-7 indicates that:

- Compared to non-Hispanic whites, smaller percentages of Asian Pacific Americans, Black Americans, Cape Verdean Americans, Hispanic Americans, and other race minorities work as managers in the construction industry.
- Compared to non-Hispanic whites, smaller percentages of Black Americans and Hispanic Americans work as managers in the architecture and engineering industry. In addition, compared to men, a smaller percentage of women work as managers in the architecture and engineering industry.
- Compared to non-Hispanic whites, smaller percentages of Asian Pacific Americans, Black Americans, and Portuguese Americans work as managers in the goods industry. In addition, compared to men, a smaller percentage of women work as managers in the goods industry.
- Compared to non-Hispanic whites, smaller percentages of Black Americans and Hispanic Americans work as managers in the other services industry than non-Hispanic whites. In addition, compared to men, a smaller percentage of women work as managers in the other services industry.

Figure C-8.
Mean annual wages in Boston and the United States, 2014-2018



Note:

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

** Denotes statistically significant differences from non-Hispanic whites (for minority groups) and from men (for women).

Source:

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

Figure C-8 indicates that, compared to non-Hispanic whites, all relevant minority groups except Subcontinent Asian Americans earn substantially less in wages, and, compared to men, women earn substantially less in wages.

**Figure C-9.
Predictors of annual wages
in Boston, 2014-2018**

Note:

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

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

*, ** Denotes statistical significance at the 90% and 95% confidence levels, respectively.

The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, male for the gender variable, high school diploma for the education variables, all others for the disability variable, and manufacturing for industry variables.

Source:

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

Variable	Exponentiated Coefficient
Constant	7769.072 **
Asian Pacific American	0.871 **
Black American	0.783 **
Cape Verdean American	0.865 **
Hispanic American	0.848 **
Native American	0.944
Portuguese American	0.988
Subcontinent Asian American	0.886 **
Other minority group	0.759 **
Women	0.800 **
Less than high school education	0.913 **
Some college	1.191 **
Four-year degree	1.620 **
Advanced degree	2.118 **
Disabled	0.750 **
Military experience	1.031 *
Speaks English well	1.400 **
Age	1.065 **
Age-squared	0.999 **
Married	1.115 **
Children	1.032 **
Number of people over 65 in household	0.906 **
Public sector worker	1.020 *
Manager	1.245 **
Part time worker	0.355 **
Extraction and agriculture	0.664 **
Construction	0.906 **
Wholesale trade	0.909 **
Retail trade	0.718 **
Transportation, warehouse, & information	0.955 **
Professional services	1.138 **
Education	0.704 **
Health care	1.003
Other services	0.671 **
Public administration and social services	0.815 **

Figure C-9 indicates that, compared to being a non-Hispanic white American in Boston, being Black American, Cape Verdean American, Hispanic American, Subcontinent Asian 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 \$0.78 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man.

Figure C-10.
Home ownership rates in
Boston and the United
States, 2014-2018

Note:

The sample universe is all households.

******, **++** Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level for Boston and the United States as a whole, respectively.

Source:

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

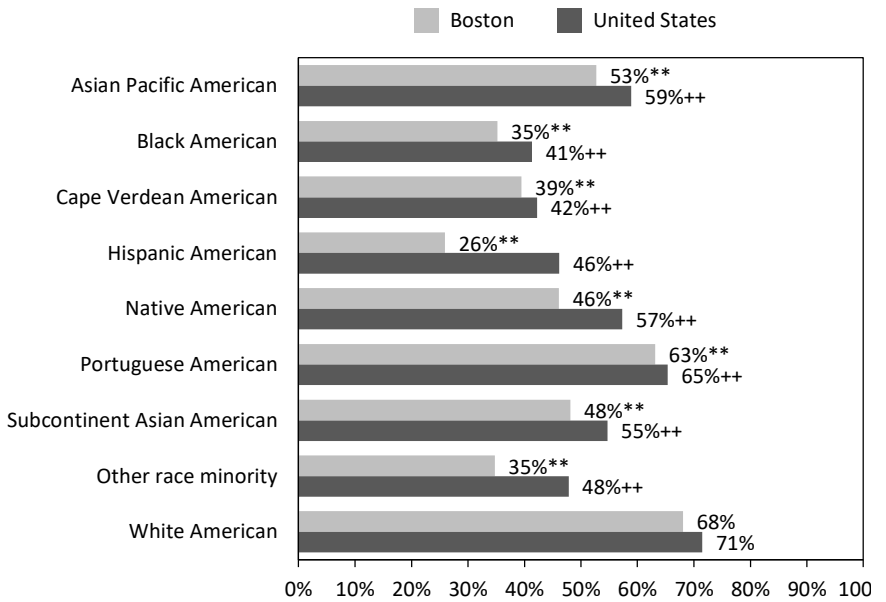
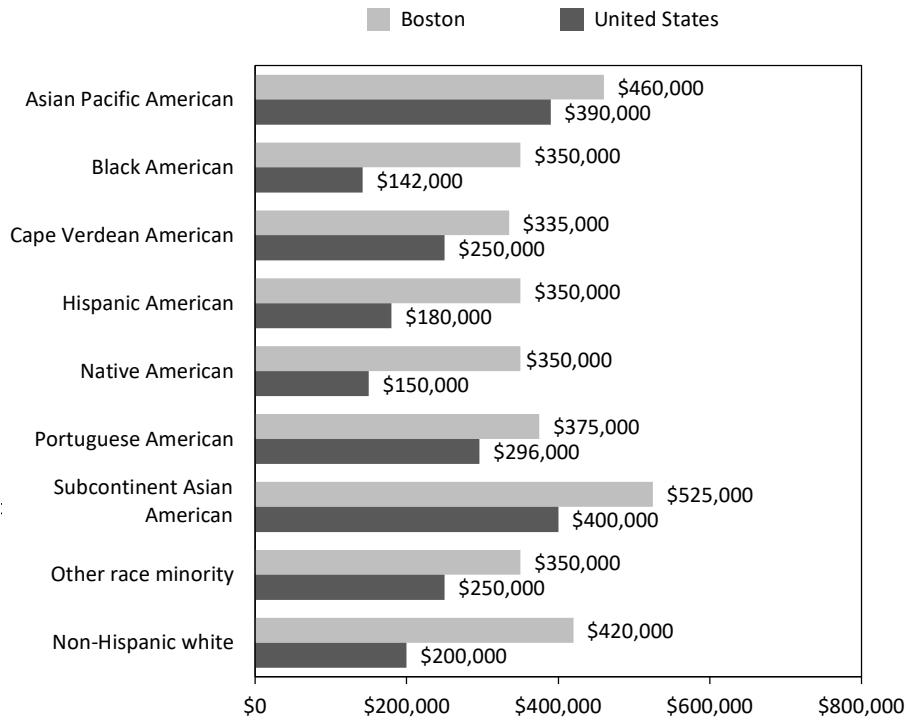


Figure C-10 indicates that all relevant minority groups in Boston exhibit homeownership rates that are lower than that of non-Hispanic whites.

Figure C-11.
Median home values in Boston and the United States, 2014-2018



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

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

Figure C-11 indicates that homeowners that identify with certain minority groups—Black Americans, Cape Verdean Americans, Hispanic Americans, Native Americans, Portuguese Americans, and other race minorities—own homes that, on average, are worth less than those of non-Hispanic whites.

Figure C-12.
Denial rates of conventional
purchase loans for high-income
households in Boston

Note:

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

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

Source:

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

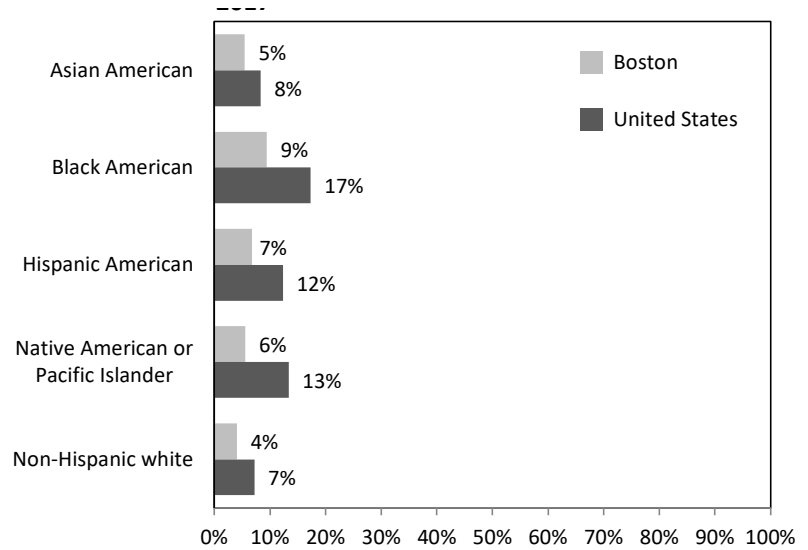


Figure C-12 indicates that Black Americans, Hispanic Americans, and Native Americans or Other Pacific Islanders in Boston were denied home loans at higher rates than non-Hispanic whites.

Figure C-13.
Percent of
conventional home
purchase loans that
were subprime in
Boston and the
United States, 2017

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

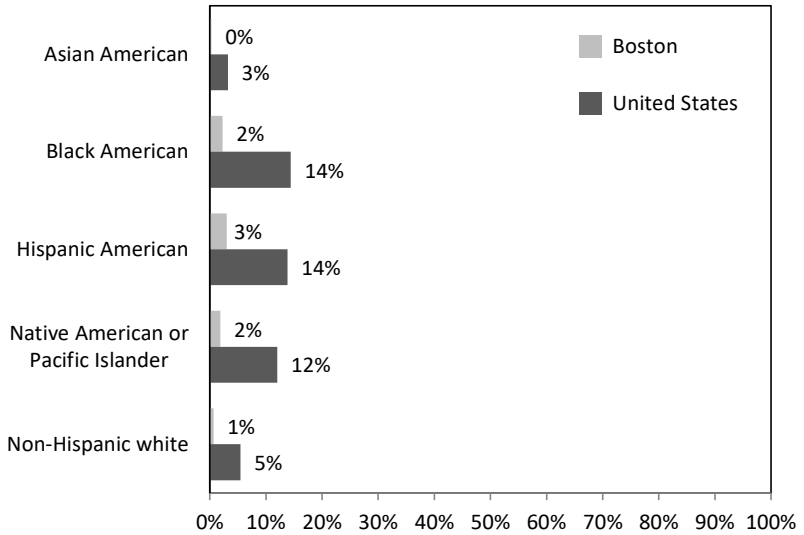


Figure C-13 indicates that Black Americans, Hispanic Americans, and Native American or Pacific Islanders in Boston were awarded subprime conventional home purchase loans at greater rates than non-Hispanic whites.

**Figure C-14.
Business loan denial
rates in the
Northeast Division
and the United
States, 2003**

Notes:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Northeast Division consists of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

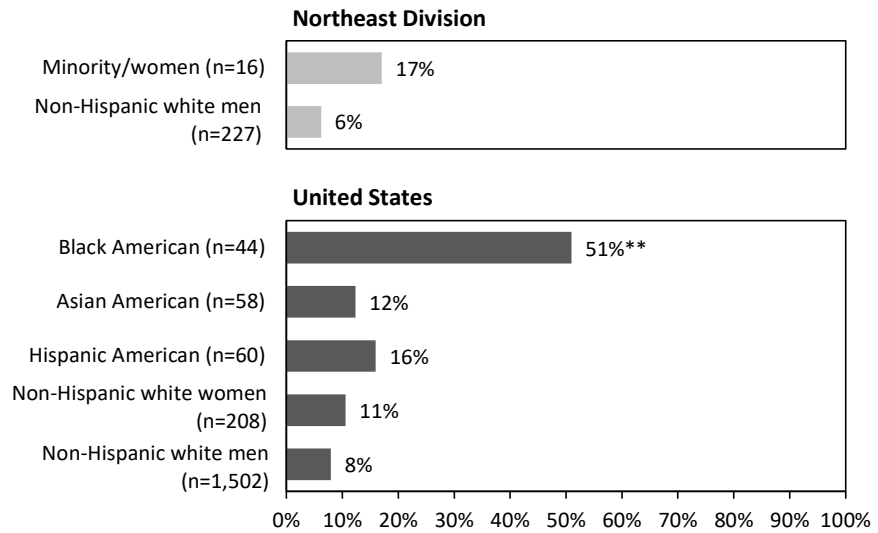


Figure C-14 indicates that, in 2003, minority- and woman-owned businesses in the Northeast Division appear to have been denied business loans at a higher rate than businesses owned by non-Hispanic white men. In the United States as a whole, Black American-owned businesses were denied business loans at greater rates than businesses owned by non-Hispanic white men.

**Figure C-15.
Businesses that did not apply for loans due to fear of denial in the Northeast Division and the United States, 2003**

Notes:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Northeast Division consists of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

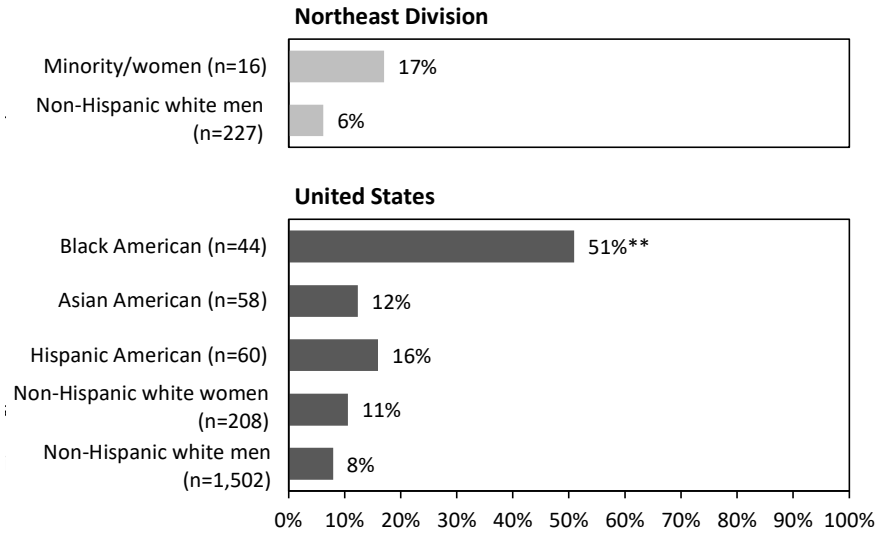


Figure C-15 indicates that in 2003, minority- and woman-owned businesses in the Northeast were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial. In addition, Black American-owned businesses in the United States were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial.

**Figure C-16.
Mean values of
approved business
loans, Northeast
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 Northeast Division consists of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

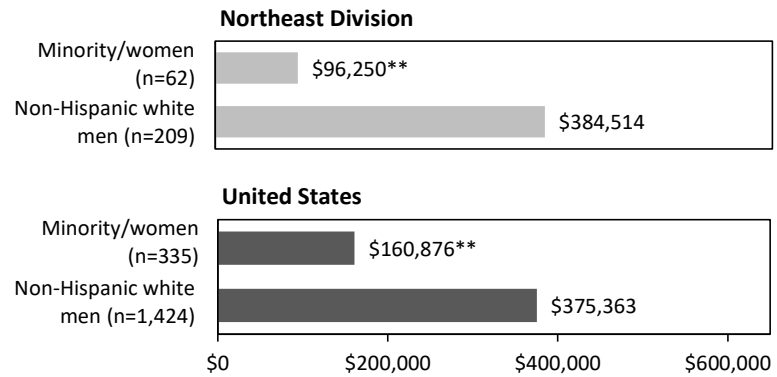


Figure C-16 indicates that, in 2003, minority- and woman-owned businesses in the Northeast Division and the United States who received business loans were approved for loans that were worth less than loans that businesses owned by non-Hispanic white men received.

Figure C-17.
Business ownership rates in study-related industries in Boston and the United States, 2014-2018

Boston	Construction	Architecture & Engineering	Other Professional Services	Goods	Other Services
Race/ethnicity					
Asian Pacific American	19.9 %	4.5 %	24.8 %	3.5 %	11.1 % **
Black American	22.8 %	10.7 %	34.4 %	3.6 %	5.8 %
Cape Verdean American	21.0 %	0.0 % †	0.0 % †	0.0 % †	7.2 %
Hispanic American	14.9 % **	9.4 %	20.7 % *	1.9 % **	6.8 % *
Native American	10.7 % †	0.0 % †	10.9 % †	0.0 % †	0.0 % †
Portuguese American	22.5 %	8.5 %	14.7 % **	7.1 %	11.7 %
Subcontinent Asian American	34.8 % †	5.9 %	10.3 % **	2.1 %	0.0 % †
Other minority group	19.7 %	21.5 % †	4.2 % †	0.0 % †	27.0 % **
White American	25.6 %	11.6 %	28.5 %	4.7 %	18.8 %
Gender					
Women	12.0 % **	7.5 % **	27.3 %	2.3 % **	19.7 % **
Men	24.9 %	12.3 %	26.5 %	4.9 %	10.5 %
All individuals	23.7 %	10.8 %	26.9 %	4.1 %	13.5 %
United States	Construction	Architecture & Engineering	Other Professional Services	Goods	Other Services
Race/ethnicity					
Asian Pacific American	22.7 % **	7.0 % **	21.0 % **	5.7 %	14.1 % **
Black American	16.9 % **	6.8 % **	23.7 % **	2.1 % **	7.7 % **
Cape Verdean American	16.8 % **	0.0 % †	31.9 % †	0.0 %	14.4 % *
Hispanic American	17.8 % **	9.0 % **	21.4 % **	3.9 % **	16.5 % **
Native American	18.8 % **	9.7 % **	35.3 %	6.2 %	15.5 % **
Portuguese American	21.6 % **	10.8 % **	27.2 % **	4.5 %	19.2 % **
Subcontinent Asian American	21.2 % **	8.1 % **	14.0 % **	7.8 % **	10.4 % **
Other minority group	25.1 %	10.7 % **	19.7 % **	3.7 %	20.4 % **
White American	25.6 %	12.7 %	33.4 %	5.8 %	18.6 %
Gender					
Women	16.2 % **	7.5 % **	27.3 % **	3.9 % **	18.9 % **
Men	23.4 %	13.0 %	32.1 %	5.6 %	14.9 %
All individuals	22.7 %	11.6 %	30.1 %	5.1 %	16.1 %

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

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

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

Figure C-17 indicates that:

- Hispanic Americans working in the Boston construction industry own businesses at a lower rate than non-Hispanic whites. In addition, women working in the Boston construction industry own businesses at a lower rate than men.
- Women working in the Boston architecture and engineering industry own businesses at a lower rate than men.
- Hispanic Americans, Portuguese Americans, and Subcontinent Asian Americans working in the Boston professional services industry own businesses at a lower rate than non-Hispanic whites.
- Hispanic Americans working in the Boston goods industry own businesses at a lower rate than non-Hispanic whites. In addition, women working in the Boston goods industry own businesses at a lower rate than men.
- Asian Pacific Americans and Hispanic Americans working in the Boston other services industry own businesses at a lower rate than non-Hispanic whites.

**Figure C-18.
Predictors of business
ownership in construction
in Boston, 2014-2018**

Note:

The regression included 4,609 observations.

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

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

Source:

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

Variable	Coefficient
Constant	-2.8350 **
Age	0.0716 **
Age-squared	-0.0005 **
Married	0.0846
Number of children in household	0.0253
Number of people over 65 in household	0.1024 *
Owns home	-0.0469
Home value (\$000s)	0.0003 **
Monthly mortgage payment (\$000s)	0.0256
Interest and dividend income (\$000s)	0.0014
Income of spouse or partner (\$000s)	-0.0006
Speaks English well	-0.0506
Less than high school education	-0.1079
Some college	-0.0410
Four-year degree	-0.1441 *
Advanced degree	-0.1418
Asian Pacific American	-0.0680
Black American	0.0039
Cape Verdean American	-0.0494
Hispanic American	-0.1656
Native American	-0.7676 *
Portuguese American	-0.0721
Subcontinent Asian American	0.6403
Other minority group	-0.0984
Women	-0.5833 **

Figure C-18 indicates that, compared to being non-Hispanic white, being Native American is associated with a lower likelihood of owning a construction business. In addition, compared to being a man, being a woman is associated with a lower likelihood of owning a construction business.

Figure C-19.
Disparities in business ownership rates for Boston construction workers, 2014-2018

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Native American	6.8%	24.5%	28
Non-Hispanic white women	11.9%	28.4%	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 2014-2018 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-19 indicates that Native Americans own construction businesses in Boston at a rate that is 28 percent that of similarly situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics). In addition, non-Hispanic white women own construction businesses in Boston at a rate that is 42 percent that of similarly situated non-Hispanic white men,

**Figure C-20.
Predictors of business
ownership in architecture and
engineering in Boston,
2014-2018**

Note:

The regression included 1,495 observations.

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

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

Source:

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

Variable	Coefficient
Constant	-3.5292 **
Age	0.0331
Age-squared	0.0001
Married	-0.1022
Number of children in household	0.0087
Number of people over 65 in household	0.0216
Owns home	-0.1548
Home value (\$000s)	0.0003 **
Monthly mortgage payment (\$000s)	0.0444
Interest and dividend income (\$000s)	0.0012
Income of spouse or partner (\$000s)	0.0007
Speaks English well	0.5122
Less than high school education	-0.6907
Some college	-0.4477
Four-year degree	-0.1090
Advanced degree	0.1164
Asian Pacific American	-0.5504
Black American	0.4189
Cape Verdean American	0.0000 †
Hispanic American	0.1570
Native American	0.0000 †
Portuguese American	-0.0682
Subcontinent Asian American	-0.1165
Other minority group	1.1314
Women	-0.1781

Figure C-20 indicates that there are no independent effects of race/ethnicity or gender on the likelihood of owning an architecture and engineering business after accounting for various other personal characteristics.

**Figure C-21.
Predictors of business
ownership in other
professional services in
Boston, 2014-2018**

Note:

The regression included 2,232 observations.

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

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

Source:

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

Variable	Coefficient
Constant	-4.0423 **
Age	0.0934 **
Age-squared	-0.0005 **
Married	-0.0578
Number of children in household	0.0329
Number of people over 65 in household	0.0454
Owns home	-0.1900
Home value (\$000s)	0.0001
Monthly mortgage payment (\$000s)	0.0038
Interest and dividend income (\$000s)	0.0017 *
Income of spouse or partner (\$000s)	0.0007 *
Speaks English well	0.0000 †
Less than high school education	-0.0197
Some college	0.0909
Four-year degree	0.2578
Advanced degree	0.4613 **
Asian Pacific American	0.1646
Black American	0.0700
Cape Verdean American	0.0000 †
Hispanic American	0.0810
Native American	-0.0697
Portuguese American	-0.1929
Subcontinent Asian American	-0.4417 *
Other minority group	-0.6106
Women	0.0519

Figure C-21 indicates that, compared to being non-Hispanic white, being Subcontinent Asian American is associated with a lower likelihood of owning an other professional services business.

Figure C-22.
Disparities in business ownership rates for Boston other professional services workers, 2014-2018

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Subcontinent Asian American	10.4%	17.7%	59

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

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

Figure C-22 indicates that Subcontinent Asian Americans own other professional services businesses in Boston at a rate that is 59 percent that of similarly situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).

**Figure C-23.
Predictors of business
ownership in the goods
industry in Boston,
2014-2018**

Note:

The regression included 1,944 observations.

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

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

Source:

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

Variable	Coefficient
Constant	-4.5287 **
Age	0.0837 **
Age-squared	-0.0006
Married	0.1599
Number of children in household	-0.0437
Number of people over 65 in household	0.2108
Owns home	-0.1248
Home value (\$000s)	0.0002
Monthly mortgage payment (\$000s)	0.0281
Interest and dividend income (\$000s)	0.0059 **
Income of spouse or partner (\$000s)	-0.0009
Speaks English well	0.0329
Less than high school education	-0.3108
Some college	0.2393
Four-year degree	0.2216
Advanced degree	-0.1417
Asian Pacific American	0.0787
Black American	0.0283
Cape Verdean American	0.0000 †
Hispanic American	-0.1898
Native American	0.0000 †
Portuguese American	0.3747
Subcontinent Asian American	-0.0094
Other minority group	0.0000 †
Women	-0.2735 **

Figure C-23 indicates that, compared to being a man, being a woman is associated with a lower likelihood of owning a goods business.

Figure C-24.
Disparities in business ownership rates for Boston goods industry workers, 2014-2018

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Non-Hispanic white women	3.1%	4.8%	64

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

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

Figure C-24 indicates that non-Hispanic white women own other professional services businesses in Boston at a rate that is 64 percent that of similarly situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).

**Figure C-25.
Predictors of business
ownership in other
services in Boston,
2014-2018**

Note:

The regression included 2,367 observations.

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

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

Source:

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

Variable	Coefficient
Constant	-3.0356 **
Age	0.0766 **
Age-squared	-0.0006 **
Married	0.1698 **
Number of children in household	0.0197
Number of people over 65 in household	-0.1932 **
Owns home	-0.2388 *
Home value (\$000s)	0.0006 **
Monthly mortgage payment (\$000s)	0.0107
Interest and dividend income (\$000s)	0.0066
Income of spouse or partner (\$000s)	-0.0016 *
Speaks English well	-0.0395
Less than high school education	0.0957
Some college	-0.1004
Four-year degree	-0.2062 *
Advanced degree	-0.1257
Asian Pacific American	-0.3648 *
Black American	-0.6385 **
Cape Verdean American	-0.6088
Hispanic American	-0.7210 **
Native American	0.0000 †
Portuguese American	-0.2285
Subcontinent Asian American	0.0000 †
Other minority group	0.1426
Women	0.3985 **

Figure C-25 indicates that, compared to being non-Hispanic white, being Asian Pacific American, Black American, or Hispanic American is associated with a lower likelihood of owning an other services business.

Figure C-26.
Disparities in business ownership rates for Boston other services workers, 2014-2018

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Asian Pacific American	11.6%	23.4%	49
Black American	6.0%	16.4%	37
Hispanic American	7.1%	29.7%	24

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

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

Figure C-26 indicates that Asian Pacific Americans own other services businesses in Boston at a rate that is 49 percent that of similarly situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics). Similarly, Black Americans own other services businesses at a rate that is 37 percent that of similarly situated non-Hispanic white men, and Hispanic Americans own other services businesses at a rate that is 24 percent that of similarly situated non-Hispanic white men.

Figure C-27.
Rates of business
closure and expansion,
Massachusetts 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.

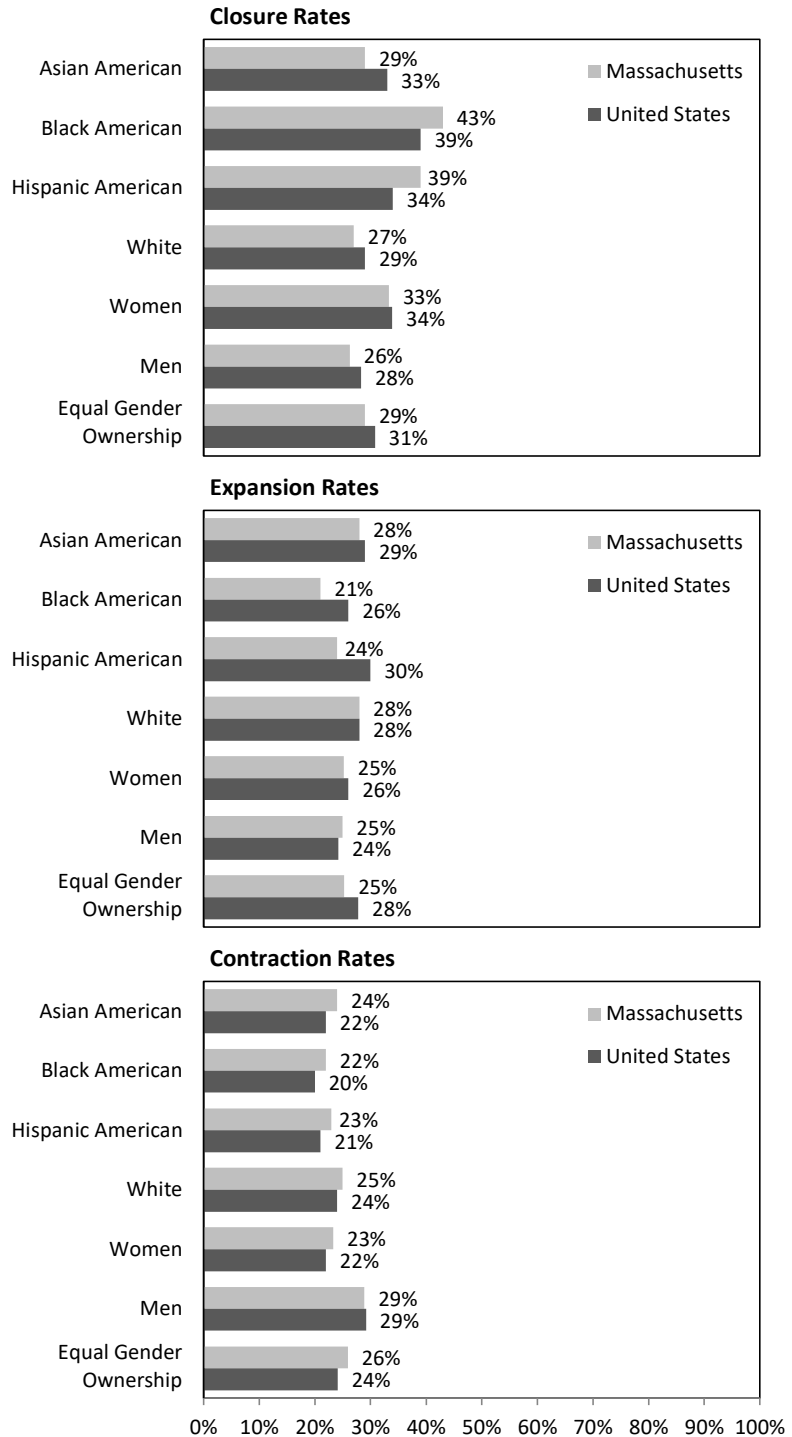
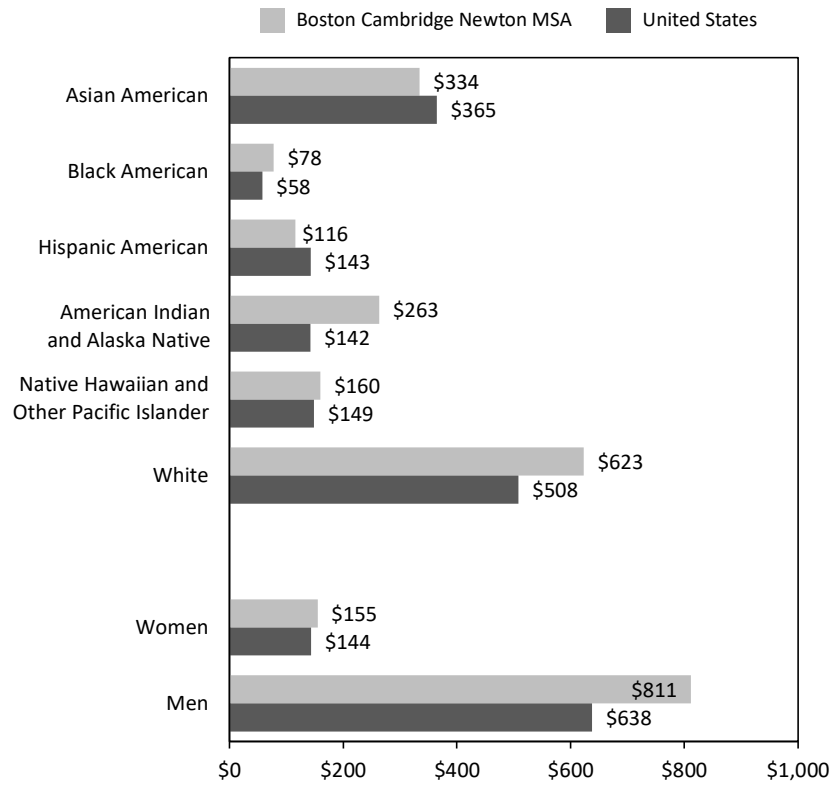


Figure C-27 indicates Black American- and Hispanic American-owned businesses in Massachusetts appear to close at higher rates than non-Hispanic white-owned businesses. In addition, woman-owned businesses appear to close at higher rates than businesses owned by men. With regard to expansion rates, Black American- and Hispanic American-owned businesses in Massachusetts appear to expand at lower rates than non-Hispanic white-owned businesses.

Figure C-28.
Mean annual business receipts (in thousands)
in Boston and the United States, 2012

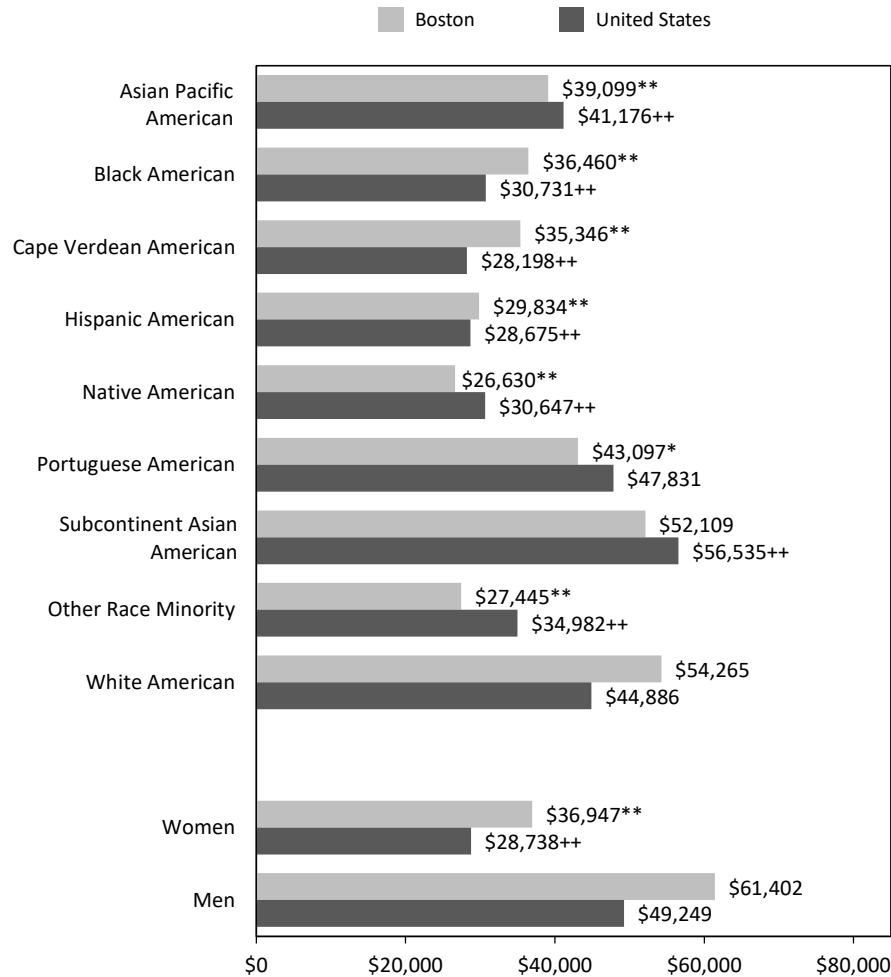


Note: Includes employer and non-employer firms.
 Does not include publicly traded companies or other firms not classifiable by race/ethnicity and gender.

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

Figure C-28 indicates that in 2012, all relevant minority groups in the Boston metropolitan statistical area (MSA) showed lower mean annual business receipts than businesses owned by whites. In addition, woman-owned businesses in the Boston MSA showed lower mean annual business receipts than businesses owned by men.

Figure C-29.
Mean annual business owner earnings in
Boston and the United States, 2014-2018



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2017 dollars.

**, ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups), from men (for women), and from non-veterans (for veterans) at the 95% confidence level for Indiana and the United States as a whole, respectively.

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

Figure C-29 indicates that the owners of Asian Pacific-, Black American-, Cape Verdean American-, Hispanic American-, Native American-, Portuguese American-, and other race minority-owned businesses in Boston earn less on average than the owners of non-Hispanic white American-owned businesses. In addition, the owners of woman-owned businesses in Boston earn less on average than businesses owned by men.

**Figure C-30.
Predictors of business owner
earnings in Boston,
2014-2018**

Notes:

The regression includes 6,104 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 2014-2018 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	486.890 **
Age	1.180 **
Age-squared	0.998 **
Married	1.090
Speaks English well	1.031
Disabled	0.478 **
Less than high school	0.599 **
Some college	0.999
Four-year degree	1.215 **
Advanced degree	1.657 **
Asian Pacific American	0.786 **
Black American	0.837
Cape Verdean American	1.114
Hispanic American	0.925
Native American	0.621
Portuguese American	0.798
Subcontinent Asian American	0.966
Other Race Minority	1.162
Women	0.507 **

Figure C-30 indicates that, compared to being the owner of a non-Hispanic white owned business in Boston, being the owner of an Asian Pacific American-owned business is related to lower business earnings, even after accounting for various other business and personal characteristics. Similarly, compared to being the owner of a business owned by men, being the owner of a woman-owned business is related to lower business earnings.

APPENDIX D.

Anecdotal Information about Marketplace Conditions

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Anecdotal Information about Marketplace Conditions

Appendix D presents anecdotal information that BBC Research & Consulting (BBC) collected from business owners and other stakeholders as part of the 2020 City of Boston (City) Disparity Study. Appendix D summarizes the key themes that emerged from their insights, organized into the following sections:

- A. **Introduction** describes the process for gathering and analyzing the anecdotal information presented in Appendix D;
- B. **Background on the construction, professional services, and goods and other services industries** summarizes information about how businesses become established, what products and services they provide, business growth, and marketing efforts;
- C. **Ownership and certification** presents information about businesses' statuses as minority- and woman-owned businesses, certification processes, and business owners' experiences with the City's and the Commonwealth of Massachusetts' certification programs;
- D. **Experiences in the private and public sectors** presents business owners' experiences pursuing private and public sector work;
- E. **Doing business as a prime contractor or subcontractor** summarizes information about businesses' experiences working as prime contractors and subcontractors, how they obtain that work, and experiences working with minority- and woman-owned businesses;
- F. **Doing business with public agencies** describes business owners' experiences working with or attempting to work with the City and local agencies and identifies potential barriers to doing work for them;
- G. **Marketplace conditions** presents information about business owners' current perceptions of economic conditions in the Boston area and what it takes for businesses to be successful;
- H. **Potential barriers to business success** describes barriers and challenges businesses face in the local marketplace;
- I. **Information regarding effects of race and gender** presents information about any experiences business owners have with discrimination in the local marketplace and how that affects minority- or woman-owned businesses;
- J. **Insights regarding business assistance programs** describes business owners' awareness of, and opinions about, business assistance programs and other steps to remove barriers for businesses in the Boston area;
- K. **Insights regarding race- and gender-based measures** includes business owners' comments about current or potential race- or gender-based programs; and

- L. **Other insights and recommendations** presents additional comments and recommendations for the City to consider.

A. Introduction

Throughout the study business owners, trade association representatives, and other stakeholders had the opportunity to discuss their experiences working with the the City of Boston; its quasi-agencies (the Boston Housing Authority, or BHA, Boston Planning and Development Agency, or BPDA, and Boston Water and Sewer Commission, or BWSC), and other organizations in the region. That information was collected through one of the following methods, which the study team facilitated between September 2019 and November 2020:

- In-depth interviews (40 participants);
- Availability surveys (320 participants who submitted anecdotal information);
- Oral or written testimony during a public forum (35 participants); and
- Written testimony via fax or e-mail (11 participants).

1. In-depth interviews. From April to November 2020, the study team conducted 40 in-depth interviews with owners and representatives of Boston businesses. The interviews included discussions about interviewees’ perceptions of and experiences with the local contracting industry, the City’s and Commonwealth’s certification programs, and businesses’ experiences working, or attempting to work, with other public agencies in the Boston area.

Interviewees included individuals representing construction businesses, professional services businesses, and goods and other services suppliers. BBC identified interview participants primarily from a random sample of businesses stratified by business type, location, and the race/ethnicity and gender of the business owners. The study team conducted most of the interviews with the owner or another high-level manager of the business. All of the businesses that participated in the interviews conduct work in the Boston area.

All interviewees are identified by random interviewee numbers (i.e., #1, #2, #3, etc.). In order to protect the anonymity of individuals or businesses mentioned in interviews, the study team has generalized any comments that could potentially identify specific individuals or businesses. In addition, the study team indicates whether each interviewee represents a Small Business Enterprise- (SBE-), Woman-owned Business Enterprise- (WBE-), Minority-owned Business Enterprise- (MBE-), Small Local Business Enterprise (SLBE-), Veteran-owned Business Enterprise- (VBE-) or other certified business.

2. Availability surveys. The study team conducted availability surveys for the disparity study from February to October 2020. As a part of the availability surveys, the study team asked business owners and managers whether their companies have experienced barriers or difficulties starting or expanding businesses in their industries or with obtaining work in the Boston marketplace. A total of 320 businesses provided anecdotal information as part of the surveys. Availability survey comments are denoted by the prefix “AV”.

3. Public forums. The City and the study team solicited written and verbal testimony at seven public forums for the disparity study held in Dorchester, Jamaica Plain, East Boston, Boston, Mattapan and Roxbury, Massachusetts. The meetings were held on September 25th and 26th, October 1st and 2nd, and November 7th and 8th of 2019. The study team reviewed and analyzed all public comments from the seven meetings and included many of those comments in Appendix D. Those comments are denoted by the prefix “PT.”

4. Written testimony. Throughout the study, interested parties had the opportunity to submit written testimony directly to the BBC team via fax or email. Written testimony is denoted by the prefix “WT”.

B. Background on the Construction, Professional Services, and Goods and Other Services Industries

Part B includes the following information:

1. Business characteristics;
2. Business formation and establishment;
3. Types, locations, and sizes of contracts;
4. Employment size of businesses;
5. Growth of the firm; and
6. Marketing.

1. Business characteristics. The business owners interviewed for the study represented a variety of different business types and business histories, from well-established firms to newly established firms, and worked on small-to-large contracts in the Boston marketplace. Interviewees described the types of work that their firm performs.

Industry. The study team interviewed 14 construction firms, 17 firms providing professional services, and 8 firms supplying goods and services.

Fourteen firms worked in the construction industry [#3, #13, #15, #20, #22, #23, #28, #30, #33, #36, #38, #39, #43, #45]. For example:

- The non-Hispanic white male owner of a majority-owned construction firm stated, “We're an electrical contracting company.” [#3]
- The non-Hispanic white male owner of a majority-owned construction company stated, “We are a construction excavation company. We do utility work, along with water drainage work, and grading for new foundations.” [#13]
- The non-Hispanic white female representative of a majority-owned construction company stated, “We are a general contractor. As a general contractor, the service they provide is called exterior envelope in vertical construction.” [#15]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “We are a traffic safety company, so anything orange, I like to say - barrels, cones,

etc. We do lane closures. Detours, we set up. Sign installation, on the smaller side. We call it P5 warning regulatory type signs. Stop signs. Street name signs. Intersections. That sort of work.” [#20]

- The Black American male owner of an MBE-certified construction company stated, “We provide electrical services, fire alarm installation, and security system installation.” [#23]
- The Hispanic American owner of an uncertified MBE construction company stated, “We do asphalt paving and hardscaping.” [#28]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “We do general contracting and construction management, primarily on commercial buildings.” [#30]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “I do consulting sometimes. Mostly I do construction being landscaping, demolition, fencing, paver work, concrete work, some excavation. I do a little bit of everything.” [#33]
- The Black American male owner of an MBE-certified construction company stated, “Our primary service is remodeling houses and we sometimes get work as a subcontractor on institutional renovations.” [#36]
- The Hispanic American male owner of an uncertified MBE construction firm stated, “Basic residential electric services and installation of fire alarm systems.” [#38]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, “We are design and construction, because we do design, we do architecture, and we do construction as well.” [#39]
- The Native American male owner of an MBE- and DBE-certified construction company stated, “[We do] roofing, concrete work, etc.” [#43]
- The Hispanic American male owner of an uncertified MBE construction company stated, “We provide asphalt paving and hard landscaping, for driveways, retaining walls, and walkways.” [#45]

Seventeen firms worked in the engineering and professional services industry [#1, #2, #4, #12, #14, #16, #18, #24, #25, #29, #31, #32, #34, #35, #37, #40, #41]. For example:

- The Black American male owner of an MBE-certified professional services firm stated, “We’re a small minority help zone certified integration IT services provider. I cover a wide variety of different services that meets and fits the client’s parameters and budget. So, we specialize with network infrastructure and design.” [#1]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “We’re a small startup that specializes in helping field scientists, which is a very strange niche to be in. But there’s a reason. Field scientists are people like a marine biologist or a geologist or an oceanographer, people who go out and collect data, and [our firm] helps them out because if you are a scientist and you get a grant from say the NSF, in the fine print it says you’re not allowed to do any engineering with your science money. Now, if you’re a guy at a bench, who cares? You buy the assail scope, you do your business license. Good. But let’s say you’re an oceanographer and you need a robot. Well, you can’t

build your robot. It's against the rules. So that's where we come in. We come in and we will build what the scientist needs, and they get free use of it forever." [#2]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I do healthcare consulting, anything that's in the healthcare IT side of things. It could be managed care, could be insurances, it could be people that are looking for insurance plans." [#4]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "I provide diversity solutions, diversity inclusion solutions to construction managers and real estate developers. And as well, I provide back office services or capacity building to diverse contractors." [#12]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, "We're a full-service environmental engineering consulting firm. The services we provide include water and wastewater engineering and environmental engineering sciences and sustainability." [#14]
- The female representative of a Black American MBE-certified and uncertified WBE firm stated, "The firm provides civil and environmental engineering services, as well as land surveying and construction management." [#16]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "We are an environmental engineering firm." [#18]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It's an environmental consulting firm, and I'm a jack-of-all trades, so I have more than one egg in the basket. What I mean is that I am a wetland scientist, a geologist, and a regulatory expert. This involves doing local, state, and federal permitting." [#24]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I probably do the most work on oil storage facilities and propane facilities in this area; we design their gasoline and diesel fueling facilities. We do inspections of their facilities." [#25]
- The Hispanic American owner of an uncertified MBE professional services firm stated, "We concentrate in building services so that's really working with residential commercial properties, staffing security guards, lobby attendants, porters, supers, anyone kind of in that genre, so we're a big company." [#29]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, "If you said to me, 'I want to build a house for myself, but I work full time. So I want to live in Dedham, Massachusetts. And I want you to be the construction manager.' I would then sit down with the architect that you had selected, I would sit down with you, I would get a sense of how much money you wanted to spend on it. I would then write up the job descriptions, I would put together the state policies that apply, and I would be moving it on your behalf. I would not be doing it; I would be moving it on your behalf. So, in a sense, we are acting as owners. That's why it's called the owner's representative. We do that for the federal government, the state government and for cities. And it is very, very detail oriented, it's money because every single hour represents a certain amount of money." [#31]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, “We are a civil engineer and land surveyor. Specializing in the commercial and residential sectors, we're the first and last call for all land and environmental solutions. Whether that's drainage studies, stormwater management, or lot staking. Our experts are well-versed in their field. We do lane surveying, civil engineering design work, which would be roads, drainage, sewer, water. Design that sort of thing. Environmental permitting. Lane permitting, in general.” [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “We provide environmental consulting that focuses on solid waste management.” [#35]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “Language translation and interpretation. Translation is anything written, so it is websites, legal contracts, authorization forms, and interpretation is the spoken word. So that is like an in-person interpreter or telephone or video or conference interpreter. Like, you'd see at the UN with people wearing headsets. We do everything spoken and written from one language to another.” [#37]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “We position ourselves with digital innovation and some of the technology that we have includes mail meter equipment.” [#40]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “We are an information technology company. We target in the area of software engineering, systems engineering, computer professional service. We work in the commercial, federal, and state industries.” [#41]

Eight firms worked in the goods and services industry [#5, #10, #11, #19, #21, #26, #27, #44]. For example:

- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “I do truck repair, truck and auto repair.” [#5]
- The Black American male owner of an MBE-certified goods and services firm stated, “I’ve integrated my marketing skills and my PR skills into a one stop solution for people doing events, needing the sort of peripheral services with that.” [#10]
- The Black American male owner of an MBE-certified goods and services firm stated, “We do janitorial services.” [#11]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “We develop commercial headsets for warehouses, trucking companies and other businesses that need this type of communication.” [#19]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “We have giant inflatable movie screens, and then we also, we're a rental company, so we rent tents, tables, chairs, a million different things.” [#21]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “We provide structural pest control.” [#26]

- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “We build vehicles.” [#27]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “Just basic recycling and waste disposal.” [#44]

Years in business. Thirty-eight businesses reported their date of establishment. The majority of firms (30 out of 38 that provided years in business) reported that they were well-established businesses; they had been in business for more than ten years. Six out of the 38 businesses had been in business for between five and ten years. Two firms were newly established, having been in business for less than four years.

Two firms reported they had been in business for fewer than four years [#17, #36]. For example:

- The Black American male owner of an uncertified MBE construction firm stated, “We started in October of 2019.” [#17]
- The Black American male owner of an MBE-certified construction company stated, “The business began in October 2018.” [#36]

Six firms reported they had been in business for five to ten years [#1, #2, #3, #10, #12, #20]. For example:

- The Black American male owner of an MBE-certified professional services firm stated, “I’ve been in business for almost a decade now.” [#1]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “The company was formed in 2016, but we were doing stuff like this way before that, back to about 2011.” [#2]
- The non-Hispanic white male owner of a majority-owned construction firm stated, “This company was established eight years ago in May. May will be eight years.” [#3]
- The Black American male owner of an MBE-certified goods and services firm stated, “We opened about six years ago.” [#10]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “I’ve been in business since 2014. So, five years now.” [#12]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “Five. I probably filed with the Secretary of State in '13, but my first real year was 2014. I didn't get much business in '13 because I was kind of setting up, finding a location, that sort of stuff. So, I would say '14 was my first construction season.” [#20]

Thirty firms reported they had been in business for more than ten years [#4, #5, #11, #13, #14, #15, #16, #18, #19, #21, #22, #23, #24, #25, #26, #27, #28, #29, #30, #31, #32, #33, #35, #37, #38, #39, #40, #41, #44, #45]. For example:

- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I’ve been on my own for about 15 years.” [#4]

- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “I started my business in 1990.” [#5]
- The Black American male owner of an MBE-certified goods and services firm stated, “We started in '93. So, we're about 25 years, a little over 25 years now.” [#11]
- The non-Hispanic white male owner of a majority-owned construction company stated, “The company was established 65 years ago in 1954 as a family business and I’m the third-generation owner.” [#13]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “The firm was established in 1978.” [#14]
- The non-Hispanic white female representative of a majority-owned construction company stated, “We have been in business since 1991.” [#15]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “We started the company in 2009, so that's 11 years.” [#19]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “Well, we've been incorporated since 1999, January 1st, 1999.” [#21]
- The Black American male owner of an MBE-certified construction company stated, “The company was established 19 years ago in 2005.” [#23]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “It's either 2004 or 2005. We'll say 2005.” [#24]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “About 45 years.” [#25]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “We've been in business since 1979”[#26]
- The Hispanic American owner of an uncertified MBE construction company stated, “I think I've been doing this since 2000.” [#28]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “We started in 2006.” [#29]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “I started the company 11 years ago.” [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “This will be our 33rd year in business continuously.” [#31]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “I incorporated in 2007. [But that name] was a DBA and it started off 10 years prior to that.” [#33]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “My former partner and I started the company 32 years ago in 1987.” [#35]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “33 years. Technically, I purchased the company 16 years ago.” [#37]

- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “The business was formed in 2008.” [#40]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “I started the company in 2012.” [#44]
- The Hispanic American male owner of an uncertified MBE construction company stated, “I started it in 2000, so it’s been 20 years.” [#45]

2. Business formation and establishment. Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

The majority of business owners and founders had worked in the industry or a related industry before starting their own businesses. This experience helped founders build up industry contacts and expertise. Businesspeople were often motivated to start their own firms by the prospects of self-sufficiency and business improvement [#1, #3, #4, #5, #11, #12, #13, #17, #18, #20, #21, #22, #23, #24, #25, #26, #30, #31, #32, #33, #35, #36, #38, #39, #41, #45]. Here are some of the founder stories from interviews:

- The Black American male owner of an MBE-certified professional services firm stated, “I came out of school and got my associate degree in computer science. I came out of unemployment and a vocational program and got certified from there. I began doing the servicing side of the office, [helping with the front] desk and with customers. I started off building the machines. I got certified with CompTIA A+, Cisco’s networking, and also on Microsoft server. It gave me a wide variety of doing a number of different services. At that point, I wanted to build my skill set so I started to learn even more in-depth IP telephony, wiring, cabling, and how everything started to connect.” [#1]
- The non-Hispanic white male owner of a majority-owned construction firm stated, “I’d been in the electrical business for about 35 years. I had another company that I sold, an electrical company. At that time when I sold it, we had 40 employees and we were affiliated with the electrical union in Boston. The people that bought the company are still affiliated with the electrical union in Boston. I had a five-year non-compete. After seven years, I decided to start up again.” [#3]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I have about 20 years’ experience prior... Not 20. Maybe about 18... working at information technology companies in healthcare. So, I had a third kid and I said, ‘Geez, I wonder if I can try to do this on my own before...’ and kind of what led to it.” [#4]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “Well, I went to trade school. I started working for a construction company, and then I ended up going to work for a rubbish company in the ‘80s.” [#5]
- The Black American male owner of an MBE-certified goods and services firm stated, “Started in janitorial services. I cleaned [a major bank]. I worked for another company for three years and the plan was to buy that company. That didn’t work out, so I ended up starting my own. With some of the relationships I had with that company, [a major bank]

and [a public agency], I ended up doing work directly for them. I started a couple of banks, [an industrial facility], [a commercial company], and it just kinda took off from there.” [#11]

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “I’ve been in the construction industry for about 38 years now. Started out in 2005 with my dad, who had a heavy and highway underground utilities installation company.” [#12]
- The non-Hispanic white male owner of a majority-owned construction company stated, “I started right out of high school 25 years ago. My grandfather started it in the forties but then he incorporated in 1954. Currently, I co-own the company with my uncle after my father passed away.” [#13]
- The Black American male owner of an uncertified MBE construction firm stated, “[He’s] an electrical engineer who has been in the field for 10 years. He wanted the benefits of making his own schedule. He wants to buy a house and take care of his family.” [#17]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “Before I started the company, my previous boss was very impressed with my work as an environmental engineer and encouraged me to go out on my own with the assurance that I would be able to get work with his company as a subcontractor. Based on his confidence in me, I decided to do it.” [#18]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “I guess I grew up in the sign industry, the traffic safety industry. My father originally owned a company back in the '70s that he sold it in the early '90s. Around the Big Dig. I was in college then, so I never worked in the company. But then I got into the industry. I lived in Chicago and I worked in sales for traffic cones. They sold traffic cones and I worked in the Midwest for about two years as a salesperson. I traveled to 10 states and kind of fell in love with the industry. It was a lot of family-owned businesses/ mom and pop operations, and the businesses were kind of relationship based. It wasn't off of bids; it was based on relationships with people. It was not so much working with municipalities and cities but working more with our type of companies and subcontractors for the most part. Forming those relationships with the general contractors, it just was really neat to see that level. I kind of did the research and came up with some money to start and then I started. I kind of got lucky. I got all my outside labor is union, and some guys that worked for me at other places had come and asked if I was hiring. I started really small, baby steps, to get bigger, but it's fun for me, and I enjoy it.” [#20]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “Well, I ran a disc jockey company from '78 to '99. And as you get older, no one wants you because you're old. So, I said, ‘I got to be more creative’, and I became more of an entertainment company.” [#21]
- The Black American male owner of an MBE-certified construction company stated, “I have an architecture background. So back in Ghana, I used to do drafting for an architect. I used to draft but when I got into the states, I was looking to do that. And because of the codes and our style of building here was completely different and was new to me. I'm from Ghana, where I came from. I tried to work with some architects, it just didn't work. They wouldn't even hire me because I had to know some of the materials, how it was put together to be

able to draft properly and all that. So, it was recommended to me to find a builder to work with so I can learn, I can get an idea of how a building is put together and all that so that if I decided to come back in to draft and then I at least have a very sound knowledge of how things are put together and why things are done and things like that. So, I did, fortunately for me there was a builder in the church that I used to go to, so I approached him. He was looking for help and so I started with him and we built a few houses. Then my in-laws got some side jobs for me to do like a brick patio and I did it for the customer, they were happy. The neighbor wanted some so I did that. I did another one, the next thing you know, somebody else, a few repairs here and then they'll call me, I'll go and do their repairs and things like that. The builder happened to go get some surgery and I was left with no work as I was running around doing all this, but a lot of repairs, here and there. And somebody told me, listen, you can actually do this yourself. So, I registered, I went into that town and I started gradually building the profile to become a business owner basically. And my knowledge in construction grew so fast that I started doing decks. And next thing you know, I started building porches and structural stuff. I just, for some reason I was just good at doing structural stuff and things like that. That's how I started basically and then it grew to a point where some of the projects I needed to pull permits, so I had to go for the classes to become a builder. I did that and got my builder's license since I got insured and that was how I started, if you ask." [#22]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "When I started the business, I had been working for the state and had been a teacher. While I was working with the state, my wife actually started the company as a WBE firm. Once we started having kids, she wasn't focused on it anymore, and at the same time, I decided that teaching was not my forte, so we decided that I would run the company and she would give up ownership." [#24]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I worked for [an oil company] when I graduated from college in a refinery in New Jersey. And then they moved me to New England, particularly Boston, where I became a regional engineer to design gas stations and oil storage facilities, and my territory was all of New England and they were located in Austin. And then they moved me to Colorado, to Denver, and I had a huge territory there for all the oil storage facilities and pipelines for [an oil company]. I loved the ocean, and I loved Boston, and I loved New England, and I was a registered engineer in Massachusetts. I quit and about that time the Coast Guard was enforcing the Clean Water Act and I also knew that OSHA was targeting oil storage facilities, and Massachusetts has the most independent oil dealers pretty much in the United States, I think. Certainly, in New England. And so, I came here, and I started." [#25]
- The non-Hispanic white male owner of a VBE-certified construction company stated, "Well, I've always wanted to do it. The recession hit in 2008 and I thought this is a great time to do it, so that's why I started it. Well, it turns out it was the best time in the world to start it because at that point everybody wanted people who could do things for less money and we had no overhead. There was just myself and my wife, so we could provide very competitive pricing." [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, "I ended up working for the state government for 18 years in

those jobs and when I left, I was essentially burned out because doing affirmative action for the state is tough, really tough. Especially in construction, where you're dealing with the unions and civil service and [all] of that. So anyway, I ended up deciding that it was time for me to take a break. I decided to be a consultant and I envisioned that I would be spending two days a week as a consultant and the rest of the time I would read and raise my child and what else. But as it happened, I got a phone call from a company in Birmingham, Alabama. They said they were looking for a woman who was preferably a minority, who understood construction, and who was politically active because they were looking to put together a team to submit a bid on the \$3 billion wastewater treatment plant in Winthrop. They flew me to Birmingham where I understood what they wanted, and I got the orientation. I came back and set up the company right away. I asked to be treated as a business rather than an employee and they said fine. And so, unfortunately, they did not get the contracts. But I had started the company. I, then, decided to chase the company that did get it, which was [a contractor]. So everywhere they would go, I would show up and ask for a job and eventually the man said, 'Okay, if I give you a day's work, will you not follow me around?' I promised him that if he gave me that I would not chase him. So, I ended up getting a contract for one day a week, and as it turned out, within a month I was doing three days a week. And then it became full time. I ended up eventually having 11 full time employees." [#31]

- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, "Oh, I love what I do and I'm fortunate with the language and culture. So that's why I always wanted to do this type of work." [#32]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, "I've had numerous companies and unfortunately bad luck, people not paying me. I've gone bankrupt twice already. This is my third time around. They are closed because I've been doing this for, I don't know, 40 years, maybe a little longer. Oh, I can take you back to the beginning. My father formed the company in 1965, [landscaping company]. He went on until he passed away in the late seventies, early eighties, at which time I took over the company. I had a partner and my brother-in-law and we didn't quite hit it off. So, at that point around 82, 83, I cut out on my own and have been that way ever since." [#33]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "The company actually started with me and a female partner. We were former colleagues in the environmental industry and saw an opportunity to create a niche in solid waste and recycling. My partner was the majority owner and when she retired a few years ago, I took over as the majority owner." [#35]
- The Black American male owner of an MBE-certified construction company stated, "At some point I felt as though I was being exploited, doing all the work and getting the least amount of benefits from it so I decided to go out on my own." [#36]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "So, I'm a licensed electrician. I worked for companies for a long time, but when I got my license, I would do what we call line work. You know, I would hire six people to help me on a construction job and maybe do some electrical work on small residential jobs. I would do these jobs after work. So, I started that when I got my license in 1998. It wasn't full time, but it was fine. Then when the economy fell apart in 2008, I established the company and

started working for myself. I also have a side business that involves custom making moving crates to hold unique, odd-sized items for moving companies.” [#38]

- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, “I grew up in Roxbury in Dorchester, been here since 1979. I went to school to study architecture. So, coming from this neighborhood after finishing school, I graduated, but it was always hard to get employment in other firms when you don't have connections, you don't have contacts, especially 30-35 years ago. After working for a certain architecture firm doing design, I end up going for my licenses in construction. And then, I ended up starting to repair and design. I always wanted to have a design build company where we could even sit with clients and design and build. So, that kind of the desire, always to do the architecture and the construction, was in me.” [#39]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “Well, I've had a total of probably four businesses during the course of my career. But for the most part this is one of the long-standing ones that I've had. I'm former military and served in the United States Air Force. I worked on communications systems and basically started my business based on my capabilities.” [#41]
- The Hispanic American male owner of an uncertified MBE construction company stated, “It started when I was a little kid around 12 and my friends in the neighborhood had little mini-bikes. I asked my dad to buy me one and he suggested that I get a paper route and save the money for the bike. So, I got a paper route and I started to save money and after like six months, I told my dad that I still didn't have enough money for it. He suggested that I ask my paper route customers if I could mow their lawns and they said yes. The next summer I had saved enough money to be able to get my minibike and I got it. I learned to work for what I want. As I grew older, I had an uncle that was in the landscaping business and I used to hang out with him and go to work with him. So, I learned the landscaping and business skills as a young kid, hanging out with my family. As I got older, I started working for a few landscapers, and started doing small jobs on my own, like retaining walls and some masonry work like walkways and paving driveways. I had a couple of friends that used to help me out, then I did some work for a guy in the area that helped me out, and it just went on from there, and so I've been doing this ever since.” [#45]

Other motivations. There were also other reasons and motivations for the establishment of interviewees' businesses [#2, #10, #19, #28, #29, #37, #40, #44]. For example:

- The non-Hispanic white male representative of a majority-owned professional services firm stated, “I was inspired, believe it or not, by Alexander Graham Bell. I was reading his biography. Everybody knows Bell is the guy who invented the telephone, which is true, but that's not what he set out to do. What he set out to do was help the blind and the deaf feel the world. So, he was trying to come up with a way for a deaf person to feel sound since they couldn't hear it. And that was the tech he created, and then realized, ‘Oh hey, look what it can also do.’ And so, he founded Bell Telephone with the same technology. But that wasn't what he set out to do. He set out to help deaf people feel sound and I thought that's a good idea. We can make the world a better place and help somebody out, and then turn around

and market the tech, which pays us to go and do something to help the next person. And so that's what we're doing." [#2]

- The Black American male owner of an MBE-certified goods and services firm stated, "So I'm sort of a serial entrepreneur, as I've been called throughout my life. I've always worked for myself since I could. Since college, I've always sort of been an entrepreneur starting out with entertainment concert promotions. And as the industry changed, I changed with it, and saw opportunity in the flyers that I used to promote the events such as a concert. As an entertainment promoter, I saw opportunity in printing the flyers then, and as the barriers to entry, went down for people to start up printing companies with the internet. And I found that I could design a flyer, print it in Florida, ship it up to Boston, way cheaper than anybody in Boston was doing it. And so, I found my little niche. And there was the birth of the second sort of generation of what I do. Through the years, I've integrated my marketing and PR skills into a one stop solution for people doing events, needing the sort of peripheral services with that." [#10]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, "We were both engineers and saw an opportunity to create a market niche in designing hi-tech headsets." [#19]
- The Hispanic American owner of an uncertified MBE professional services firm stated, "Well, so I met my one business partner in college. We both went to Northeastern. He transferred to BU. We both studied business of some sort. I was finance accounting; he was international business, and you get to your end of school and then all of a sudden you have to get a real job. So, I did a stint at [a major bank] but I quickly realized that sitting in a cubicle, as well as being transferred out to Bangor, Maine, was not as fun as it sounded when you first started. So, we sat around and came up with the idea of concierge services, which in 2008 was kind of like a booming industry so it started out as a virtual service and then the collapse came so all of a sudden you have no clients, which was fun. Then, his brother came on board when a developer came over and said, 'Hey, why don't you offer the same services you're doing online, just for residential buildings?' And then, it kind of just went from there, so we started staffing buildings in New York and we have 75 buildings there and then last year it was a big push to come back to the Boston market so we're currently in two buildings in Boston and that's kind of like the short story." [#29]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I was laid off during maternity leave and I got tired of the corporate scene. I purchased the company from a woman, so it's always been a woman-owned firm. I don't know if she had certification or not, but she was a fully owned, woman-owned company, and it was just a straight sale. She was ready to do other things." [#37]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, "She actually came out of the consulting world and then worked a great deal in the medical field, primarily around green initiatives. She has her degree in chemical engineering from MIT and a master's degree from Harvard." [#40]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "I tried working by myself, you know, to set different professional goals. I started this type of

company because people threw so much stuff away that could be recycled, so I decided to open the company.” [#44]

3. Types, locations, and sizes of contracts. Interviewees discussed the range of sizes and types of contracts their firms pursue and the locations where they work.

Businesses reported working on contracts as small as several hundred dollars to contracts approaching five hundred million dollars. However, most firms reported an upper threshold for contracts at around \$1 million or less [#11, #13, #14, #16, #17, #18, #20, #21, #23, #24, #25, #26, #27, #28, #29, #30, #31, #32, #33, #34, #35, #36, #37, #38, #39, #40, #41, #43, #44, #45]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “They are roughly half a million to a million dollar a year contracts at this point. The mall, the newer one, is 7 million a year.” [#11]
- The non-Hispanic white male owner of a majority-owned construction company stated, “Our contracts on average around \$60,000 per job.” [#13]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “The typical dollar amount ranges anywhere from \$100, 000 to a million or more, depending on the job.” [#14]
- The female representative of a Black American MBE-certified and uncertified WBE firm stated, “The contract value ranges range is between \$1,000-\$100,000, depending on the project.” [#16]
- The Black American male owner of an uncertified MBE construction firm stated, “\$1,500-\$2,000 for residential contracts.” [#17]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “Our contract values range anywhere between \$1,000 to \$100,000, depending on the work.” [#18]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “A lot of stuff, the state work that we do is ranging from, I can have something as low as \$2,000 to something to be \$50,000 to \$100,000. I had a traffic control job, one of my first traffic control jobs, it was a two-year job, and we did probably almost close to half a million. It was the only job I had. It was, I think, \$480,000, I think, was the contract.” [#20]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “You can get away for as little as maybe \$700 a night, or you can spend anywhere from five to \$15,000 a night.” [#21]
- The Black American male owner of an MBE-certified construction company stated, “It depends on the work. It can go from 16 grand to \$1 million.” [#23]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “There's a range. For example, if you look at the overall projects that I'm part of, they're often quite huge, but my chunk of it tends to range from, \$5,000 to \$60,000 depending on the job.” [#24]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, “As little as \$50,000 to as much, some of our jobs have gone on for four or five years, and that's probably getting around 500,000. So, it's a very wide range. A lot of them are somewhere around 100, I would say.” [#25]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “It runs the gambit. From small services for residential properties to, you know, we've had some contracts in excess of \$80,000 a year.” [#26]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “There's too many parts. We literally cover everything from the smallest component on a vehicle to the full vehicle build. So DBW could purchase a truck for \$130,000, equipped. Or they might buy a light for \$12.” [#27]
- The Hispanic American owner of an uncertified MBE construction company stated, “Well, it all depends on the project. Somebody's driveway could be anywhere from three to \$10,000 depending on how big it is and what we're doing. We could do a driveway for like \$3,000, small driveway, and the guy wants to do a cobblestone edging.” [#28]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “I mean, they really range. If you're just doing a part time porter to stop by a building to take out the trash a couple times a week, I mean you're talking, I don't know, 10 grand a year, 20 grand a year. And then, if you're talking skyscraper with full staff, the superintendent and everything, you're in the million dollar a year range, so it really depends.” [#29]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “Oh, we bill out about two to two and a half million dollars a month.” [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “We are currently managing, for the federal government, approximately \$400 million worth of construction. Well let's take the year 16 because that's more representative. That year we had 10 million as one contract. The low end was 10 million and one for 350,000, and then we had 120 million. That gives you the range. If you said to me can you do 800 million? I would say no I cannot do 800 million as a prime.” [#31]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, “It varies I mean sometimes I get one hundred-dollar jobs to translate. Sometimes I have a thousand-dollar job for interpretations.” [#32]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “We go from, you know, [a] thousand dollar job up to whatever.” [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “From \$1,000 up to a quarter million dollars in engineering work.” [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I'm not doing much work right now, and I'm semi-retired, so the dollar value of my contracts currently average between \$10,000 to \$25,000.” [#35]
- The Black American male owner of an MBE-certified construction company stated, “I would say anywhere between \$50,000-\$75,000 to remodel a house.” [#36]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “We work on a project basis. So, when we work for the City of Boston [schools], we do lots of little projects for them, you know? So, we’re paid project-by-project. It can be anything from a handbook, or it can be communications to parents about returning to school in their native language. So, project-based billing can vary so much. I mean, our minimum charge is \$95, and we could do a project that’s \$50,000 or \$60,000 a client.” [#37]
- The Hispanic American male owner of an uncertified MBE construction firm stated, “It’s small. So, most of what I do is in contract work. Most of what I do is what’s called jobbing. So, you would call and say, I hate the lights in my kitchen, and I want you to please change them for me. I’ll go out and change it. That’s going to cost you approximately \$150. I also do re-wiring work. I’m currently doing a complete rewire in one unit of a two family [home]. A rewiring job is about \$24,000. So, the contract amounts range from very low to moderately high. This includes kitchen and bathroom remodels which is in the \$5,000 or \$6,000 range.” [#38]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, “We are like within \$3,000,000 under. Most times we have small projects, a hundred, 200 things, but then we get five, six or seven of them at the same time sometimes going on. But the thing is that we are in our bracket trying to approach a bigger project.” [#39]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “Several million dollars, three-to-five-million-dollar range.” [#40]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “Well, the one contract I got Massachusetts in 2016 was a sub-consultant to a sub. And that with MassDot, and that was for \$24,000. So that’s the lowest I’ve ever had. The highest one is with the military, is about three point five to four million dollars.” [#41]
- The Native American male owner of an MBE- and DBE-certified construction company stated, “Contracts range from \$5,000 – ½ million to \$1 million.” [#43]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “It depends. Some contracts average \$1,000 a month and some average \$20,000. It depends on the amount of work.” [#44]
- The Hispanic American male owner of an uncertified MBE construction company stated, “The dollar value of my contracts range between \$7,000 and \$50,000, depending on the work that I’m doing.” [#45]

Twelve firms reported working on contracts solely in Massachusetts [#3, #12, #13, #15, #16, #23, #24, #28, #35, #36, #38, #44]. For example:

- The non-Hispanic white male owner of a majority-owned construction firm stated, “Most of our work inside the 128 belt of Massachusetts.” [#3]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “We work mainly [in] Boston.” [#12]

- The non-Hispanic white male owner of a majority-owned construction company stated, “Probably about a 20-mile radius from our office in the Dedham area.” [#13]
- The non-Hispanic white female representative of a majority-owned construction company stated, “We try to focus on the South Shore and the 495 Corridor. We don’t do much work in Boston with private developers because as you know, Boston is a union town, and the company is non-union.” [#15]
- The female representative of a Black American MBE-certified and uncertified WBE firm stated, “We work throughout the Commonwealth of Massachusetts, except Boston.” [#16]
- The Black American male owner of an MBE-certified construction company stated, “Right now we work anywhere between Haverhill and Brockton, including Boston, MA.” [#23]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Well I typically work in Eastern Massachusetts. I go all the way down to the Cape and I tend to be sort of East of Worcester.” [#24]
- The Hispanic American owner of an uncertified MBE construction company stated, “In the greater Boston area. Like today, believe it or not, this is my third time we’re paving in Raynham. I don’t usually come to Raynham, but you could go because with this COVID thing going on, I got worried. You know what I mean? I got worried. So, I was just trying to get everything I can, so I could keep my company going.” [#28]
- The Black American male owner of an MBE-certified construction company stated, “I primarily work in Eastern Massachusetts.” [#36]
- The Hispanic American male owner of an uncertified MBE construction firm stated, “I would say the 128 Corridor and South. Not too much past Boston.” [#38]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “Primarily the Boston metro area, East Boston, Chelsea and Revere.” [#44]

Most firms reported working in the Boston marketplace and with clients outside of the state [#10, #14, #18, #19, #20, #21, #25, #26, #27, #29, #30, #31, #33, #34, #37, #41]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “Anywhere in the world. I have clientele all over the country.” [#10]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “Our work is primarily performed along the eastern seaboard.” [#14]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “We work primarily in central and western Massachusetts and also have contracts in Rhode Island.” [#18]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “We primarily focus on regional companies, and we currently have no clients in Boston but are hoping to break into that market.” [#19]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “I cover most of Massachusetts. I’ve done a little in New Hampshire. I’ve done a little in Rhode Island. Not a lot. But I kind of like just to stay in Massachusetts. We’ll do the whole state.” [#20]

- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “Most of the time it's just east coast, but we've done jobs from Virginia and Maine and everywhere. We've gotten calls for other parts of the country, but you lose on the price because of expensive traveling.” [#21]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “It's primarily New England. We do work in Connecticut, and Rhode Island, and New Hampshire, a little bit in Maine and some in New York regarding clean-ups.” [#25]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “We service greater Boston, down to Cape Cod, up into Southern New Hampshire.” [#26]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “Well in the Boston market we have two properties. They're both residential but the New York market really ranges, anything from warehouse to skyscraper to residential, super high-end luxe residential to your run of the mill just a walk up.” [#29]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “It's Massachusetts, New Hampshire, and I think we've done one small job in Rhode Island, but most of our works in Massachusetts and New Hampshire.” [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “It's time framed. It used to be, five years ago, that I was very national. I was in every state in New England. I was in Florida, Puerto Rico, Mississippi, Texas, and ... stayed up there. I think it was South Carolina. So now, for a variety of reasons, it's shrunk. And now I'm mostly all of New England.” [#31]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “New England region, because I do work in New Hampshire every now and then I might do something in Rhode Island. I have worked in Connecticut. I have worked in Vermont and I've done work in New Hampshire as well.” [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “Massachusetts and Southern New Hampshire. We've actually, just last year, I did a project in Provincetown, and now I'm working out in Westfield. So, we'll go wherever in Massachusetts. And then, Southern New Hampshire, just because of logistics, although we're registered in all the New England states.” [#34]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “We work globally. However, our biggest presence is in Massachusetts and in Lincoln, Nebraska, where we have an office based on an acquisition five years ago. In Nebraska, we do provide global services, especially as things have gone virtual.” [#37]
- ☐ The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “So I'm one of those companies that live in Boston, live and work in Massachusetts, while I live in Massachusetts, resident, pay taxes in Massachusetts. But I got to go outside of my Massachusetts residency and corporate headquarters in order to get work elsewhere.” [#41]

4. Employment size of businesses. The study team asked business owners about the number of people that they employed and if firm size fluctuated. The majority of businesses (36 of 40 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 (26 of 40) of businesses had 1-10 employees [#1, #5, #10, #12, #13, #15, #16, #17, #18, #19, #20, #21, #22, #24, #25, #28, #32, #33, #35, #36, #37, #38, #39, #43, #44, #45]. For example:

- The Black American male owner of an MBE-certified professional services firm stated, “So I have myself, who's the main employee. But on any given time, I have an affiliate number of technicians in my network that I can call upon when we get big projects, projects that I can no longer do on my own.” [#1]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “I have one right now, myself, but I can have more.” [#5]
- The Black American male owner of an MBE-certified goods and services firm stated, “Just the two, just strategic partners.” [#10]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “I have two part-time workers, or one sub-consultant, and a part-time worker.” [#12]
- The non-Hispanic white male owner of a majority-owned construction company stated, “We have a total of five employees, and two are part-time.” [#13]
- The non-Hispanic white female representative of a majority-owned construction company stated, “Other than the owner, the company has zero employees because as a General Contractor he works with a team of subcontractors.” [#15]
- The female representative of a Black American MBE-certified and uncertified WBE firm stated, “There are five employees including the owners.” [#16]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “There are 8 employees including me and my partner.” [#19]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “It ranges. I would say between eight and 10. I have someone that's inside with me full time and then my outside labor is all union labor. So, it kind of fluctuates with the work. I have as many as 10, but I would say there's four, probably, I would consider full time. My foramen, I would say. Those are my full time.” [#20]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “We're very seasonal, but on average, if we weren't counting COVID-19 right now, we'd have at least 10. So, anywhere from 10 to 30. It's basically two full time employees and probably like I said, about 10 part-timers”[#21]
- The Black American male owner of an MBE-certified construction company stated, “Currently I don't have any employees right now. So, if I say employee, an employee that is on payroll, that's what I think you are referring to. Because I have two employees right now,

but they are not on payroll because I can't support the payroll. If it includes myself, then it will be three people." [#22]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I am the sole employee." [#24]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, "I'm the sole employee." [#32]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, "That varies. I go from anything from 5 to 18. I like to work it as a part time, full time. In other words, you work full time, as long as the jobs are there, but somewhere around November, everybody gets laid off until the following spring. Unless I pick up a bunch of demolition work." [#33]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I am the sole employee." [#35]
- The Black American male owner of an MBE-certified construction company stated, "It's just one, that's myself. No one else." [#36]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "Right now we're short. I have only six people." [#39]
- The Hispanic American male owner of an uncertified MBE construction company stated, "There's a total of nine employees, including me." [#45]

Eight interviewees reported that their businesses had 11-25 employees [#2, #3, #4, #23, #26, #30, #31, #41]. For example:

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "We're 11." [#2]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "The company size is anywhere from five to 20 employees, depending on growth and so forth." [#4]
- The Black American male owner of an MBE-certified construction company stated, "There are 13 employees including me. Most are full-time, but not all." [#23]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "22 right now, I think." [#26]
- The non-Hispanic white male owner of a VBE-certified construction company stated, "I think there's 21 of us now; they're all full time." [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, "Right now I have 23." [#31]
- ☐ The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, "About 15." [#41]

Two businesses had 26-50 employees [#34, #40]. For example:

- The non-Hispanic white male representative of a majority-owned professional services firm stated, “We’re about 28 right now. That would be the full-time employees. We do take on some help and co-ops, as well, that I didn’t count. Right now, this summer, we have two interns that are paid internships. They’ll be working their college break full time. But then, they’ll go back to school in September. Most engineering companies have, in the past decade and a half, since 2008, most of them have shrunk in size. Some have gone back to their original size by expanding their services. But what most companies are seeing is that the efficiencies from computer automation, as well as field work, as far as what’s available for tools out there in the field are making the job a lot more efficient, and then, you don’t need as much manpower as you originally did.” [#34]

One business had 51-100 employees [#14]. For example:

- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “There are 70 full and part-time staff, including the owner.” [#14]

Three interviewees indicated that their firm had more than 100 employees [#11, #27, #29]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “We’re about 600, a little over 600 employees.” [#11]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “113. About 105 are full time, the rest are part time.” [#27]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “We have about 300 employees. The vast majority of them are full time but we do have a few, a handful. It’s just easier to manage and handle buildings when you’re offering full time salaries.” [#29]

5. Growth of the firm. Business owners and managers mentioned the growth of the firm over time [#3, #5, #10, #12, #13, #14, #17, #18, #19, #20, #21, #22, #23, #24, #26, #27, #29, #30, #31, #32, #33, #34, #35, #36, #37, #38, #39, #41, #44]. For example:

- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “You’re not doing the work that you used to do on cars. You know what I mean? The exhaust lasts the life of the car. Basically, you’re doing tires and brakes on a car now. And then the way people act. Not the City of Boston or anything, but the way people act is that if they need major work on their car, they’ll just buy a new car. You know what I’m saying?” [#5]
- The Black American male owner of an MBE-certified goods and services firm stated, “And it’s been doing well as I’ve just sort of, changed my business model. I don’t do any printing in house, I outsource everything, and do all the graphic design work internally. So all I basically need now that I’ve learned in moving here, was that I just need a desk to operate my business.” [#10]
- The non-Hispanic white male owner of a majority-owned construction company stated, “I’ve been really busy the last few years with all the construction going on, so the company

has been on a positive growth curve. However, we don't look at industry comparison because we're satisfied with where we are and have no interest in becoming a large company." [#13]

- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, "The firm started with 3 employees and now has 70 full and part-time employees. In terms of growth, we fall somewhere in the middle. There are certainly companies smaller than ours and larger." [#14]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "To be honest with you, we're a small company and there are a lot of very large firms that are out there, but on a scale with other small environmental firms, we're looking pretty good with the amount of work that we're getting on a consistent basis. Part of my longevity and success is based on looking at challenges as opportunities." [#18]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, "On average we're well positioned because we have a niche with small-medium companies whose success and efficiency depends on our product. These companies have the option of selling the product to an end user or using it themselves. They put an order in and we fill it. The larger competitors only go after the big guys." [#19]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "I think I'm average. I didn't want to grow too big so, I kind of have taken it in steps. The work is out there. I think, again, it depends on the federal and state money that comes in, and the jobs that led, and who gets them. That dictates it. But as far as growth in the industry, I think I'm on par. I think some people could probably, at my point, get to another level. I'm ready to sort of step up to another level. It's a matter of resources and how that all works." [#20]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, "Well, from 1999, I've had five more kids, so they seem to eat up all my profits. But we have grown. Oh, immensely. Immensely." [#21]
- The Black American male owner of an MBE-certified construction company stated, "Last year I was doing pretty well. I was very happy with what I was doing. And honestly, I didn't want to scale up because that means if I do it just puts a lot of stress on me. It's very expensive to have the payroll. That is one of the biggest challenges for any small business. If you really, really want to go by the books, payroll is how to go. It's tougher because you have a lot of people running around doing exactly as we do that do not have payroll. So, if you are bidding, you're spending quotes and you actually prorate your stuff to cover payroll and things like that, sometimes you lose out, you don't get it because others would not do that." [#22]
- The Black American male owner of an MBE-certified construction company stated, "I think our growth has been good compared to comparably-sized firms. However, we should be doing better." [#23]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "The growth is comparable to similar-sized firms in the industry. When I started in 2005, my clients were primarily acquired either through other firms as a subcontractor or

directly as a prime. The direct work involves single-family home associations that need environmental assessments, and a lot of what I was being paid out of was paper money that people had in the stock market and they would get a statement and think they had money to do something. And you know, things were great until the market crashed. And I went from 20 to 30 billable hours a week down to two, maybe three. I struggled to stay in business, but after staying in business, the firm has evolved from less reliance on the residential projects. I still do a lot of homeowner things, but now I do more large-construction projects. I had to borrow against the house and do all kinds of things to stay afloat after that crash. But, at the time I kind of just told myself that some of my competitors won't survive it. So, if I can survive it then maybe I can make it work, and it did work. I think my growth has been equivalent or maybe a little bit higher than others only because I've got a background that is not just scientific, but I also have a master's in public policy. So, I sort of have an edge for permitting and regulatory work, requiring an understanding of how regulations are developed, and permits are issued is crucial. So, my company has evolved, and it's reached a point where I wish I had the resources to hire somebody because I've got enough work to hire somebody and I'm too busy. I just don't have enough time to get all the work done that I need to get done, and right now I'm so inefficient that I'm falling behind on work, but at the same time I totally accept the fact that I should work from home during COVID 19, because I do not want to get myself sick. As far as the industry goes, it's made up of some mom-and-pop folks like me, you know, sole proprietors or, they are an LLC even though it's basically one person and I think my growth is equivalent to theirs. But, but then there's also a bunch of really big firms, and they've been growing like crazy and buying up little guys and driving up costs and dominating, certain parts of the market, making it really tough for emerging firms to enter the market." [#24]

- The non-Hispanic white female representative of a majority-owned goods and services firm stated, "We are pretty unusual. There really is nobody who does exactly what we do. And we're probably the biggest one that does it." [#27]
- The Hispanic American owner of an uncertified MBE professional services firm stated, "Yeah, our major competitors are usually like really gargantuan companies and typically we have 300 people which sounds impressive but if you bump up to the next big boy, they're in the thousands, easy." [#29]
- The non-Hispanic white male owner of a VBE-certified construction company stated, "So our growth has not been as rapid as expected. It's been fairly stable and fairly slow, but we concentrated on profitability and we've done well in that area." [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, "We started out as one person doing small jobs and we're now able to do up to 250 million. I'm competing against big companies. So, you have to view me realistically as the flea on a dog." [#31]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, "I would say I have seen some growth over the last few years. The last few years have been good for me, mostly because the market has been good. Also, because my children are grown now, so I have more time to devote to work and the networking to get work." [#32]

- The Black American male owner of an MBE- and SLBE- certified construction company stated, “Well, for me... last year for instance was a really bad year. We did a little less than \$200,000 gross sales, which is a real bad year for us. I should, I try to be anywhere between a half a million and up to a million and hopefully one day more than that. But last year was a bad year.” [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “When I started here, there were probably about 60 employees. And then, in 2008, the housing market kind of imploded, which was a lot of work, and the company kind of shrunk down to between 20 and 30 employees, and that's where we've stayed. But what we've found is that the technology advancements in the past 20 years were about as efficient and maintained about the same volume of business with the smaller employee base. So, that's kind of, where we want to be, give or take, four or five employees.” [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Years ago, when the firm was thriving, I would have said that our growth level was comparable to similar-sized companies, but then the bottom dropped out when Massachusetts decided to place a moratorium on solid-waste disposal in the state. Since there was plenty of work in New Jersey, we did most of our business there.” [#35]
- The Black American male owner of an MBE-certified construction company stated, “Right now, I would have to say that growth wise, I have not seen that for me. I don't know if it's because of the fact that I'm new to this, but I find it difficult to grow the company the way I was expecting to do.” [#36]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “I have gone through a couple years of no growth. So, I know bigger firms are growing faster. This question is interesting because if I look at the industry as a whole, I know most of the companies in the industry are privately held, so it's hard to have any industry statistics. I haven't grown over the last couple of years and I've been reaching out to get expert advice trying to figure out why. Part of it could be lack of risk-taking, part of it could be opportunities. Also, part of it is we don't know how to do RFPs, and the final part is change in the industry.” [#37]
- The Hispanic American male owner of an uncertified MBE construction firm stated, “So, it's small compared to others, but it's small because I also do the crate work. So, if I'm comparing myself to an average electrician, all I'm doing is 50 to 60% of my time on electric work, so it's probably small compared to other electric firms.” [#38]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, “We have declined. We used to do a bigger project and we had more chance of growth. Somehow, maybe I'm just getting old.” [#39]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “We've been stagnated because we're basically a boutique shop. we're probably at the bottom because basically we're living contract to contract. We probably did 50 bids over the course of the year and we might win two. So somethings wrong about how to approach it. At the procurement level we think we understand the procurement process, but we sometimes don't have the relationship. It's all about relationships.” [#41]

- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “I am at the low end of the industry right now.” [#44]

6. Marketing. Business owners and managers mentioned how they marketed their firms, many noting the importance of online marketing and word-of-mouth referrals [#13, #14, #16, #21, #22, #23, #24, #25, #26, #27, #28, #29, #30, #31, #32, #33, #40, #41, #43, #45, #AV]. For example:

- The non-Hispanic white male owner of a majority-owned construction company stated, “Honestly, all my work is word-of-mouth, I don't advertise, I don't do anything related to marketing.” [#13]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “Given our track record and reputation most of our business is obtained through word-of-mouth.” [#14]
- The female representative of a Black American MBE-certified and uncertified WBE firm stated, “All of our work is done through word-of-mouth. We don't do any direct marketing. They previously used telephone book advertising, but the telephone book is now long gone.” [#16]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “I just basically through the web and repeat business. I have a lot of steady clients. A lot of steady clients.” [#21]
- The Black American male owner of an MBE-certified construction company stated, “I have a website and then I have other companies like Home Advisor. In fact, I was picked as one of the top pros at [an online service] last year.” [#22]
- The Black American male owner of an MBE-certified construction company stated, “I would say by word-of-mouth.” [#23]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I don't do any marketing. If you were to look at my website that's been up for 10 years, it would say under construction, it's nothing more than a tool to make sure that if somebody Googles me, they can find it and there's a contact page and they can fill something out and get ahold of me. But it's all been word-of-mouth. One client is happy, they refer me to somebody else and I have a reputation for getting projects permitted with less public hearings than other people.” [#24]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “It's all word-of-mouth. I have no idea how you found us.” [#25]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “It's been mostly online. A lot of referrals, a lot of cold calling salespeople.” [#26]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “We don't do very much marketing. We have a website presence; we attend trade shows for police and public works. That's it.” [#27]

- The Hispanic American owner of an uncertified MBE construction company stated, “Website. I do HomeAdvisor so I spend a lot of money on it hoping to get the glory job, but every year, it never happens. I just keep going as much as I can.” [#28]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “I mean, so we have like our big catalogs that we send out to what we feel would be key clients, probably once a year. That’s followed up with like postcards and letters that get mailed out on a regular basis. And then, we have like holiday emails that go out but most of these contracts don’t come up once a year, they come up every couple of years so you’re really just trying to get your name into the pile so that when the contract does come up to bid on, they just think of you. We can do cold calls but then at the end of the day, it’s a ton of legwork and so I think that really anything it’s just getting your name out there so that when these contracts do come up, it’s you’re on that list, whatever that list is. But yeah, it’s a struggle.” [#29]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “I wish it were better, but we have a guy who does marketing for us. He’s a consultant. So, he’s not really an employee, but he’s a consultant to us. And he does marketing for us. And I’ve been in this industry a long time. I know tons of people in the City of Boston and the state. So, most of our work comes from either relationships that I have, or from introductions. This guy markets for us, but the vast majority of our work is actually getting repeat clients. We’ve worked at Harvard for all eleven years of the company’s existence, and we’ve worked at MIT and we constantly get work over there.” [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “People have all kinds of marketing people. I don’t have anybody marketing. I have a website, and we have a policy that if you work for me and you find that somebody’s going to do a job, or there’s an opportunity in the market and you bring it to me, and we win it, you get a bonus.” [#31]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, “Mostly through social media and word-of-mouth.” [#32]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “Oh well I’ve been in the business 40 years. So, I know quite a few people... Yeah pretty much for my reputation. People know if I’m going to do a job, I’m going to start it and I’m going to finish it. You know, whether I make money on it or not, I have never not finished a job. Even when I know something went wrong and I’m going to lose money because all I got in the world is my reputation. Nope. No website, no Facebook site, because pretty much all of that is the website thing. I just haven’t got around to the Facebook thing. That’s what you would do if you were advertising to the public, because other than advertising to the public, you know, it doesn’t make a bit of difference when you’re not working that way. The people I worked for, it’s like, I am in direct competition with white, black, no matter what color you are, the contractors that work on these private projects and or commercial projects, you give them a price. And the bottom line is if we know your reputation or know of you and your price is the lowest price, then you’ll get the job. Other than that, it’s a luck of the draw.” [#33]

- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “We market ourselves primarily via LinkedIn as well as websites. I think again it's as a small business it is challenging to get on radar so that people can find you or find out and it's a competitive market”[#40]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “We do have some marketing people that we work with. They're on a as-need basis.” [#41]
- The Hispanic American male owner of an uncertified MBE construction company stated, “There's a bunch of ways. The internet is one way that we market the company, using Angie's List. We also get lots of referrals from previous customers, and many calls come in because people see my trucks and write down the number. Potential customers also Google the company's reviews and also review us with the Better Business Bureau reviews.” [#45]
- A comment from a majority-owned professional services firm stated, “Main channel for business expansion is thumbtack.com where i upload business profile and get requests for work.” [#AV]

C. Ownership and Certification

Business owners and managers discussed their experiences with the City, the Commonwealth, and other certification programs. This section captures their comments on the following topics:

1. City, Commonwealth, and other certification statuses;
2. Advantages of certification;
3. Disadvantages of certification;
4. Experiences with the certification process; and
5. Comments on other certification types.

1. City, Commonwealth, and other certification statuses. Business owners discussed their certification status with the City, the Commonwealth of Massachusetts, and other certifying agencies and shared their opinions about why they did or did not seek certification. For example:

Eighteen firms interviewed confirmed they were certified as MBE, WBE, or SLBE [#1, #10, #12, #14, #16, #18, #20, #23, #26, #33, #36, #37, #39, #41, #43, #PT7, #WT1]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “I'm certified by the City and the state.” [#10]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “Yes, the company is SDO certified as a DBE, WBE, and MBE. The firm has been certified for over 30 years.” [#14]
- The female representative of a Black American MBE-certified and uncertified WBE firm stated, “The company has state and I'm not sure if they have City certification as an MBE.” [#16]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “Yes, the company has a Federal DBE certification and a State WBE certification with SDO. The company has been certified for 29 years.” [#18]
- The Black American male owner of an MBE-certified construction company stated, “I am certified with the state as an MBE.” [#23]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “We are a woman-owned small business. We are certified by the state. That wasn't an easy designation to get.” [#26]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “I have been certified by the state from a year after I started the business, and I have been certified by the City. But I don't know whether that has continued because I wasn't getting any work from the City. So I may have let that lapse, but I'm not sure.” [#31]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “I got certified with the state and I should be certified with the City of Boston.” [#33]
- The Black American male owner of an MBE-certified construction company stated, “I am currently certified as a minority business owner. Both the City and the state. I would say two years, since October 2018.” [#36]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “We're certified as a WBE with the City of Boston and the State of Massachusetts. Over 10 years.” [#37]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, “City of Boston, small business and minority certification... I think I'm still actively certified, but I think I got that re-certification a couple of years ago.” [#39]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “I'm certified all over the City. So, in the City of Boston which is my home state, I have to maintain every certification possible to get to be a foreign entity doing business in another state. So, I have almost every certification that Boston offers. Boston, the state of Massachusetts, MassDot. I have everything.” [#41]
- The owner of an MBE-certified goods and services company stated, “I had gone and got my certification through a couple of organizations.” [#PT7]
- The Black American male owner of an MBE-certified professional services firm stated, “[We're certified] through SOMBA. I went and got certified through them before they changed your name to Supplier Diversity Office. And then later on hooked up with the Greater New England Minority Supplier Diversity Council.” [#PT7]
- The owner of a WBE-certified professional services firm stated, “[Our engineering firm] is a women-owned business.” [#WT1]

One firm interviewed was not certified but was in the process of applying [#17]. For example:

- The Black American male owner of an uncertified MBE construction firm stated, “We’re not certified but plan to seek certification. We thought there was a charge to apply for and receive certification.” [#17]

Eleven business owners and managers explained why their firms had not pursued certification.

Many uncertified firms were unaware of the certification or its benefits [#18, #20, #22, #23, #29, #34, #35, #38, #43, #44, #45]. For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “I was not aware that the City of Boston had a certification program.” [#18]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “I didn’t know you could get certified by the City. I signed up for their jobs at bid and that sort of stuff through, or the contractor will send me information about jobs at bid in the City of Boston, or some of the product, I don’t do a whole lot of product supply.” [#20]
- The Black American male owner of an MBE-certified construction company stated, “Honestly, I didn’t realize until recently that you can get certification with the City, not the state. I didn’t realize that there was a difference in that. I think recently, it was early this year that I got an email from the City of Boston about contracting opportunities with the City, stuff like that. I was registered as a minority business owner by the state. I was certified for... I think three straight years. And I think I got certified in 2006 if I’m not mistaken, 2006 and then 2007, eight, nine, when we had those crises, I basically just had a lot of things happening and really didn’t follow through to get re-certified and I haven’t done it.” [#22]
- The Black American male owner of an MBE-certified construction company stated, “I was not aware that the City had a certification program.” [#23]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “We’ve looked into it, but it hasn’t been something we’ve actually proactively tried to get. I think we could actually apply for the one where it’s like minority-owned, but we do not have that yet but it’s definitely something we’re looking into. Well, to be honest with you, most of our contracts are residential properties so it hasn’t really come up.” [#29]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “No we are not certified with the City because quite frankly, the City had a reputation back in the day of favoring businesses who had connections with city officials, so we never bothered. The firm was WBE certified in Massachusetts and New Jersey, but when she retired, we notified both states that the company was no longer eligible for WBE certification.” [#35]
- The Native American male owner of an MBE- and DBE-certified construction company stated, “No certifications with the City of Boston and [we’re] unfamiliar with City certification...” [#43]
- The Hispanic American male owner of an uncertified MBE construction company stated, “I’m not, but I probably should be though.” [#45]

2. Advantages of certification. Interviewees discussed how MBE/WBE/SLBE certification is advantageous and has benefited their firms. Business owners and managers described the increased business opportunities brought by certification [#10, #12, #14, #17, #20, #22, #26, #31, #36, #39, #40, #41]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “Maybe a lunch or a dinner at a meeting, to talk about it. I think that it's good because it keeps us, as businesspeople, on our toes. You know, you got to file your taxes. You gotta be prepared... we need a million pieces, you know, you don't want to be given it because you're just a Black vendor. That's why they sort of prequalify you in all of these different genres of business to make sure you're able to fulfill the bid.” [#10]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “Yeah, there are some. Because, if projects both private and public have goals, then there's an advantage to being certified. Because a company is not going to use you if they can't get credit, unfortunately. So, yeah, there's an advantage on some, not all of them, but on some. Like [a resort], that was a privately funded project. However, there was an agreement with them and [a commission] towards a spirit of diversity. I would think that if the state or City has goals as well, there could be some advantage to having the certification. Because again, for the most part, and there are some businesses that are people of color and they get engaged. But for the most part, folks want to be able to count you towards credit in order to engage you.” [#12]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “I would say that the certification status of the company has been very helpful in getting public contracts.” [#14]
- The Black American male owner of an uncertified MBE construction firm stated, “The benefits of certification include trust, loyalty from employees and higher prices.” [#17]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “With the City, I think it just would get you another level in. You're on a list. So, if people are looking for a sub, for a woman-owned company to fit the bill, I guess, to say. I wouldn't want someone to hire me just because of that. I also would like them to hire me because of my work. But that would be, I think, a benefit, that your name shows up on a list. That you're certified. Like, the City will vouch for you. They think you're a good enough type thing.” [#20]
- The Black American male owner of an MBE-certified construction company stated, “By a low effort of yours, people just go to the state's website if they are looking for MBEs and things like that. To be able to see that and call you and send you a bid. And if you are interested, you come back to it and as a matter of fact, I did get jobs from doing that, but that came with also a big hustle. Some of these prime contractors will not pay you, they want 14 days. So you pretty much have to carry on until the 14 day period for requisition to be made and all that stuff. So that was a challenging part. You get updates on how to grow your business, there were some programs out there that you could attend to just get a sense of what was going on in the construction industry, in Massachusetts and things like that.” [#22]

- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “I mean, we do a lot of work on construction projects for instance. It may be a state-run construction project, but we're actually a subcontractor for a private entity that's doing the work. So, for instance, the NBTA puts out a bid to revamp a train station. A private construction firm gets that bid and then subcontracts the rodent control portion of that project to us. And where the WBE designation becomes advantageous is they've got to make a commitment to the state to certain hiring, a certain percentage of the contract being given to women or minorities. So that's where we become advantageous because that helps them reach their commitment.” [#26]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “Well, I had hoped to see the benefits that I would have access to work that would be coming up. As it turned out, I was never able to penetrate the process. In retrospect, what I would say to you is that the City is a little more difficult for someone like me, than doing work for the federal government. The federal government is set up so that 24/7, you are getting information on your computer that tells you, this is coming out, this is coming out, this is coming out. And you can access it right away. You can contact the contact person. You can have an idea of when it's really going to hit, what you're going to need, which gives everybody the same information, but it gives you time to get ready for it. I couldn't get that. I went to a number of hearings at the City. I worked with some of the council members, but I just could not get through. I don't believe that it's because of my color. I don't believe that it's because of capacity because I'm very competent in performing the work. I don't have a problem with the quality of my work. So, I have to assume that it's just the process. I couldn't advance within the process.” [#31]
- The Black American male owner of an MBE-certified construction company stated, “For me, I was looking at it as being able to bid on contracting jobs and being able to, you know, get my foot in the door and grow my company, but that hasn't been the case. It comes back to the same challenge, which is being able to finance in a job up-front. I can't bid for a city job if I don't have the mobilization money.” [#36]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, “You get certifications, but sometimes you're certified. I'd bid on these other big jobs; they want to know you. But then when it comes to negotiating or the dealing, I don't see where the certification has helped me at all.” [#39]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “I think it allows us a unique opportunity to be part of a team where the government needs to fill that requirement with a woman-owned business. It helps us too in some ways to focus our energies on viable opportunities that we can be part of successfully.” [#40]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “Massachusetts, nothing at all. Even though we had a black governor, still I thought there was hope there and there wasn't. I've known companies that have been here like me, that left and went to other locations. Because I've been in the area for a long time. I've seen companies that try to survive and do business. They're in business for two, three, four years. They can't get the work because they're

knocking on the doors and the doors are not opening up. So, I've seen a lot of business come and go." [#41]

3. Disadvantages of certification. Interviewees discussed the downsides to certification [#12, #26, #37, #39, #PT1, #PT3, #WT6]. For example:

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "In my opinion, some of these agencies, like CWE or like when you're getting paid for a membership and certification, so that creates to me a conflict. If I can pay \$500 for my application to say that I'm a woman business, I may be more likely to get certified as a woman business because that agency wants your yearly membership. So, I don't agree with that. I don't agree with the fact that these agencies like that may not have the same scrutiny that the SDO has in certifying. So, doing the site visits and reviewing the documents, or requesting certain documents. It may not be the same process to certify. So, I question the validity of the certification. This is my opinion. For me, it's just the fee-based certification. I mean folks talk about its stigmatizing issue. You don't have to identify or certify yourself if you're a white business. Why do you have to if you're a black business? You know, so that's a block for many of our businesses. That they're like why do we have to certify? We should just be able to participate in the work, and it shouldn't, we shouldn't be pigeonholed into, 'I have to be certified in order to participate in this work.' So, that's where it becomes a disadvantage, because you should be allowed to participate on the work." [#12]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "Sometimes you don't want to even tell if you're a minority because you can feel a certain discrimination in the workforce. When you say you're a minority, they look at you like you're looking for a handout or you can't do anything. Like you're less capable in the work industry." [#39]
- A respondent in a public meeting hosted by the Black Market Association stated, "So in my office, I do internships every summer. This past summer, we took this on and had interns calling businesses to see. And what we found were many businesses did not know about being certified within the City. Those that did, didn't think it was worth it. That it was a lot of work and not a lot of benefits." [#PT1]
- A respondent from a public meeting in Jamaica Plain stated, "So a lot of the certifications were, they took way too long, and they were very time consuming. So, just to get on the other side of it, and now you're certified, but there's no contracts available. When they spoke tonight and said, and I think a number of us were expressing the same thing, that you're utilizing businesses that are minority-owned, and I'm happy about that, but they're not certified. And then you have us who are certified. We went the extra mile, we did the extra thing, but we're not getting the contracts for it, which is kind of backwards to me." [#PT3]
- The Black American male owner of an MBE-, DBE-, and SBE-certified professional services firm stated, "Ironically, for a City of Boston-certified MBE, we have done more business in Georgia and California than we have done in the City that is home to our corporate offices." [#WT6]

4. Experiences with the certification process. Businesses owners shared their experiences with the City's and Commonwealth's certification processes [#10, #12, #22, #26, #33, #36, #37, #39, #43, #PT4]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, "I think the City is easy, it's a good model that can be fixed pretty easily through communications, through getting the department heads." [#10]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "Well, I assist businesses with the certification process. So, it's not overly cumbersome to me. Now that they have reciprocity with all of the certifying agencies, it's made it that much easier. Although, I don't necessarily agree with that reciprocity. But it makes it easier in that before you had to be certified with SDO, then you had to go and be certified with the City of Boston, if you were doing City of Boston work. So, yeah, submitting all of that paperwork again, and a lot of small businesses, they don't have very solid back office infrastructure filing systems. So, it would be overly cumbersome for them to become certified. The application process, it could be cumbersome. But I think that it has to be, in order to withstand the scrutiny and verify that businesses are real, even though I know companies that are not valid companies to be certified and very easily certified. I have heard many businesses say that they tried to get certified for over a year, and then they just gave up. Because of the paperwork requirements. However, again, I don't think that the certifications are that tough. You have to answer every question. That's all. You have to address every question. A person of color, a black man may say, 'Well, so-and-so knows me. Why do I have to send a copy of my birth certificate, of my license? I'm not going to send that, because they already know me, and they know that I'm black.'" [#12]
- The Black American male owner of an MBE-certified construction company stated, "The process was actually very easy. As a matter of fact, there was somebody that came from the state office all the way down to Cape Cod to see what I was doing. I was doing a project that was a commercial project. Before I was certified, they had to come and physically check to be sure that I was actually working. I think the process itself is fairly easy, so long as you can show them you filed your taxes and business track chart, and they come to inspect to be sure that you are the one that you claim you are and things like that. That's pretty much it. The process itself I don't think it's that tedious." [#22]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "Well there really isn't a licensing process for the business. In Massachusetts, each individual applicator has to hold a license. So, it's the individual that is licensed, not the business. And we do have other federal designations and I will say that those are a little more challenging to get than the WBE." [#26]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, "I know when I did the paperwork to get from a certified to DBE paperwork was a lot more extensive and I think they told me, don't worry about it. Just get your MBE status and we can do the DBE later. So, I might have it. I'm not sure. I like what the certification is now versus what it was 20 years ago. Because 20 years ago they had a bunch of people in there and they'd ask you questions and go through your financials. I understand why, because a lot of people, white companies would say, 'Hey, you be the head of my company,

even though you don't really run it and just you know, try to manipulate the system.' And I understand, you know, asking the questions and following up on it. But in the same token, I mean, 20 years ago I had a problem getting re-certified with one of my companies, because I don't know at the time, I guess I wasn't black enough. I had no partners, no nothing, but I could not get re-certified. Thank God those days are over. It's much better. It's definitely much better than it was what it was before they go through what they have. If they get back to you about any questions or anything along those terms. They don't ask a bunch of silly questions over and over and over again in different ways. So that that's better on the process was really pretty easy. And they asked, yeah, as far as the, the state certification and the City of Boston, because I filled out paperwork for them to put that in." [#33]

- The Black American male owner of an MBE-certified construction company stated, "It was simple. I mean it wasn't difficult. The state process is much more complicated." [#36]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "It's time consuming and it's redundant as it relates to what the state certification requires. They're both asking for the same information, so it seems redundant. Yeah, I think if they partner with some certification agencies and recognized them, as the state and the Center for Women Enterprise (CWE) are doing, then there would only be one certification process that's recognized across the state and outside the state." [#37]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "I was very upset, it took me a while to go through it, because it's like, I have to prove that I am a minority. You look at my last name and you look at my passport and you look where I live, where I bleed, where I breathe in this neighborhood, what more minority can I be? But I had to do all kinds of things to prove that. Sometimes those, threshold we created, that certification becomes more of a hurdle than it is an accessibility." [#39]
- The Native American male owner of an MBE- and DBE-certified construction company stated, "We are under investigation to confirm Native American bloodline, we provided documentation. They said regulations are changing. As long as the tribe is federally recognized, it does not matter how much blood you have." [#43]
- A respondent from a public meeting in East Boston stated, "I went through the process to get certified by the state and by the City. The office for the City, the SDO office, is extremely helpful. Once I started getting into the process and I was being certified, I got some advice on how to look at certain contracts." [#PT4]

Three businesses owners described their experiences with the certification process in negative terms [#17, #PT1, #PT7]. Their comments included:

- The Black American male owner of an uncertified MBE construction firm stated, "We called Boston City Hall but the person we spoke to was not helpful. We were excited to learn there is free business advice and training available." [#17]
- A respondent in a public meeting hosted by the Black Market Association stated, "So I did the certification. I'll speak on that. But I'm curious. It's a one-person department, and so when you speak of, the priority is to increase certifications and then there's the other part of actually getting a vendor number, which is not like one and the same processes. And so, what is the strategy? Where are you getting this human capital from? Once this study is

completed, and it tells you there's people that need to get certified, that they could even bid, where's that human capital coming from? I'm certified as a women-owned business enterprise. In that process, [which took almost three months], which was absolutely ridiculous. And the process happened because it was a lot of handholding from somebody that I knew that worked in the department of economic development. And so, for me, somebody who I feel like I've actually ... I hadn't been at work; I know how to get access. I know how to get, as a person advocate for myself. I can't even imagine the process for somebody who's just kind of like oh, here's this thing I can do and how do I get done? And I don't know anybody, and City Hall is a darkened place and not always very friendly or familiar. I don't know how [I would have got that] that done. Literally, it was amazing. And like I said earlier, this is a one-person department that me and her, you know, she did her best. We went back and forth between email and phone calls [where it got to the point] just to tell me that I could get Stacey on call on the phone and say 'I have questions about this. I don't have this paperwork. I don't ...' You know? And it may be assuming, you know, she said like a lot of things you can just put [not applicable]. Like if it doesn't pertain to you, if you don't have that. I don't have a lease. My office is out of my home. There was a very like maybe automatic things you could assume. And then it was like this was the first-time process. I'm a first-time generation entrepreneur, so there is nobody to ask what am I doing, who do I speak to?"[#PT1]

- A respondent from a public meeting in Codman Square stated, "I went to try to get certified with the City as well, because I thought it would be a good idea in order to get City contracts. So, the barrier that I had was because of the type of business that I have and the way it operates. I'm certified as a broker and that did not go over well in my application. My application was denied because of that fact because I didn't have a warehouse to store and to have dissemination of products. And I'm not that big, it's a home-based business. So that was my experience and that was a barrier of success and something I wanted to talk to someone about. And then talk about different strategies of how to put myself in a better position to be able to get certified with the City because I still think that office supply products as a very viable business and I like to pursue that further and to grow it. I tried to have the conversation with the person who actually reviews the contracts, but they didn't give me any advice. I don't want to disparage them; they're just doing the job. And then because there's different requirements in the contract for the application. And she recited the section where the way that I operate is not considered something that the City would approve as an office supplier. There's nothing I could do, that's it." [#PT7]

Recommendations for improving the certification process. Interviewees recommended a number of improvements to the certification process [#3, #10, #12, #22, #24, #31, #33, #36, #37, #39, #AV, #PT2 #PT3]. For example:

- The non-Hispanic white male owner of a majority-owned construction firm stated, "We really haven't seen those requirements and I'm not sure how they're enforcing that. I could ask because we deal with the City of Boston at least once a week. I could ask the people that open the bids what they're looking for on the SBE." [#3]
- The Black American male owner of an MBE-certified goods and services firm stated, "And so the process is, I'm in the loop, but it's just... there's no reaching out. There's no real training with follow up. There's probably annual, sort of everyone shows 'Kumbaya,' but not really

following up to assure and make sure that the process is working effectively, and not making any, sort of, updates to how this process can work better for the vendors and people who are in it already, and people who want to be in it. I think it's a good process, but it needs to be put together, like the state and City. They all need to talk to each other, because at the end of the day, there's probably five or six, and then each university or government authority has their own process. I think they need to convene at some level and sort of accept a standard for the process because it could be very taxing on a business to fill out all the paperwork. That's a form of discrimination I think within itself. Well, just, having to go through all of that, you know, I think that it's another way to hold small businesses back. And, if you're struggling already, as a Black business, this here goes another hurdle. It's like, it's overwhelming, like preparing for the certifications. You know, just everyone has a different sort of twist to it and it just seems like, okay, you want to give up? So, we're part of that [reciprocity]. But I'm talking beyond that to, like, MIT has their own. You know, all the universities, sort of have their own. Some state agencies are different from others. So, you guys need to look at that and sort of understand what are the hurdles of that in terms of the different certifications that are needed and make, streamline that." [#10]

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "They have to be readily available to answer questions, and they're not. They don't seem to have enough resources dedicated to aiding, assisting contractors. They do the certification workshop, but then past that with the document collection or any questions related to the document, there isn't someone that you can call and ask a question, get an answer back immediately. You may be likely not to get a call back, or when the rep calls you back, they're not customer friendly. Because they've been doing this for a long time, so they feel that it should be automatic that you know how to respond to these questions in the document. If I'm a contractor I'm out there digging the hole. I may not be sophisticated enough to understand why you need an operating agreement for my LLC, and you don't need it for the corporation. I don't understand all of those documents or whatever, so I may need someone to walk me through that, and that resource does not exist. I guess an agency like SDO or City of Boston, or the certifying agencies, they should examine why they want these documents. If they're not using them for any reason, then they shouldn't require them. Because I think sometimes this stuff is just to check off a box. I say that because my DBE certification expired because I incorporated, so I changed to a different business structure from I think a sole proprietorship to incorporated. I just went on all legal documents or whatever and made up my certificate, because it's just me. When I sent the stock certificate, the stock certificate wasn't the normal looking stock certificate. I had the MassDOT send me back saying, 'No, we need the regular one. Where is your stock certificate?' And I said, 'This is the stock certificate. It has the same exact language. It just was formatted differently.' And he said, 'No, I need the regular form.' Well, why? I said, 'Listen, I'm an independent consultant, small business. It's going to cost me 20 dollars to get that document. Why should I spend \$20 just for you to put something in the folder?' And he's like, 'Well, my superiors say that I need it.' Bullshit. All right, excuse my language, but ... So, I got to go and spend \$20, and I know that that certificate has no value to it. It's just me. I'm an independent business. That kind of stuff. As a business, a business requires, again, with the pre-qualifications, the construction manager is looking at your capacity. If you're able to do the job. In that, they want to see your tax return. They want to see your financial

statement, because they want to make sure you're solvent, that you can carry the work. But if SDO is not examining any of that. Exactly. Perhaps they could streamline the process if they're not really using those documents to verify that you are a minority or woman-owned businesses." [#12]

- The Black American male owner of an MBE-certified construction company stated, "There was one company that used my services. I lost quite a bit of money with that company because finally the company went down, and I reached out to the state department and I couldn't get help at all to be able to recover some of the money that I lost. I lost over \$30,000 from that. And that actually sent me down the drain. So, I actually stopped contracting for some time. And I actually traveled outside the country to be quite honest with you. I left the States for Ghana for some time. And that's why I felt like, if you are certified and people go through the certification process and they use your service, who they speak and their issues, and they still cannot somehow mitigate some of this, or fight for some of us, then there's no point." [#22]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "No, the firm is not city certified. One thing I've always wished about the MBE/WBE program is it would be great if the City did more promotion of small business folks who are white males. Society has given me an advantage, no doubt. That said, I totally get that those programs are necessary. But it's also really tough for somebody like me to get work with the state or a city because either I'm not a massive, big firm or because I am competing with folks who are women-owned businesses or minority-owned businesses. I don't resent that, but at the same time I miss out on a lot of really, really fun projects. I mean, I'm almost completely excluded from that public sector market unless I'm approached by a woman-owned business where I'm a sub I really enjoy it, but I also feel that folks like you and I as small businesspeople also get excluded because there's bigger people out there who are marketing and pushing stuff, you know, crews of people that are doing stuff. So, I've almost felt like even though I'm not quite on the level of MBE/WBE, there ought to be something out there where you know, these folks get points for bringing in people whose companies are under five employees or something like that. Going back to when my wife was a woman-owned business, I think that certification program is an excellent program when it's used properly. Also, what I would love to see would be some type of reporting from the municipal and state entities that hire these firms regarding the use of certified firms." [#24]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, "Well I think one of the things that I think is always discouraging for firms is when they give you a form there's nobody who can really help you with it. You're starting out with a business. You want to get certified, but you're also the person that cleans the office, takes out the trash, goes after your marketing. You got to do payroll, you got to recruit. Now you've got to do this firm and you don't know whether you're on the right track or not. And so that's very difficult to know." [#31]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, "Well, now there's the problem. They asked general contractors if they could provide minority participation on projects, but there's no quota or mandatory thing for them to use us. So, 90 percent of all the park jobs road work out there, they don't make it. If you don't make these contractors use us or try to give them an incentive to use us, then we pretty

much don't get any work from them. Well, for the City of Boston and its surrounding towns, the certification doesn't help me at all with the City of Boston. Where it does help out is when I do the private thing. They asked me and they looked me up and saw 'Oh, okay, you are certified with the City of Boston.' So, they have City of Boston residency quotas. So, because of the City of Boston residency, that sort of helps us out. As long as we have me as an employer with a lot of minority Boston residents on the payroll, as far as the minority status, I don't think it helped me out much. You know what I mean? No one is used to signing a letter of intent, which means I'm the minority on this project. I'm going to be doing this portion of work. And this is my company, and this is all a value. I haven't filled out one of those things in 15 years." [#33]

- The Black American male owner of an MBE-certified construction company stated, "I just don't find the City to be particularly helpful in terms of outreach, education, and information about the classes and other assistance they have to offer. But to be able to get a job and get a crew in there, getting the job done, it's tough because the City requires you to come up with your own funds at the beginning of a job, you know? It makes it very hard to grow and prosper. So, the only city work I have gotten is as a subcontractor to a general contractor. At the moment I would only say the City should make certification more accessible to businesses that are not located right in the City, by making it available at various satellite locations, rather than having to go to City Hall. Other than that, there's nothing else that I would recommend." [#36]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I really don't know about the benefits because it seems to me when we're doing quotes for the City of Boston, that it's sent out to everybody on the list and then whoever gives the best price wins. So, I don't know if it's ever looked at that we're women-owned and that we use the state rates for the City of Boston. So, our rates are as good as we can get for everything that our service includes. And we're much more high-tech and high quality than a lot of the competitors. So sometimes we win and sometimes we don't, and I can't figure out a rhyme or reason to it. And sometimes I feel like the high-end consulting that we could do for the City, would be mutually beneficial, but that doesn't happen. So, I don't yet see the benefits of certification." [#37]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "To me is not a certification that is an issue here, is that if the City wanted to do economic development and help people, there should be an office where you look into local company and you discussed with them to grow capacity." [#39]
- A comment from a Hispanic American WBE and MBE professional services firm stated, "We have issues trying to get a meeting with the diversity supplier office." [#AV]
- A respondent from a public meeting in Dorchester stated, "When I first got certified with the state in like '98 with SOMBA, OSD or whatever it is now, I asked them, how do I get this work? And I know they're revamping it, so I'm hoping that it's on a better track now. But I said, how do I get this work? Why are these people even calling me? Why are these businesses going to call me? She said, 'well your name's going to be in a book.' And I said, 'what does that mean?' And she said, 'well, they have to go through the book and then they have to call you because they have to meet a quota.' I asked if I could do that and they said no. I said, 'do you have loans or how do you, how are you going to help me get my business

off the ground?' And she said, 'your name's in a book. If they call you, they call you.' And that was it. So, I've always thought the state thing was a joke in certifying. Only now I have to say it's finally turning around. It's actually got some meat to it. I don't know who took it over. But now I'm starting to get some emails. So, you know, I hate to be negative, but that's the way it was for 20 years. Just being SOMBA certified was just stupid, you know?"[#PT2]

- A respondent from a public meeting in Jamaica Plain stated, "When you go get the application and you're a new business and it says you're ready to start or grow your business. If you're starting, why do you have something on there saying give me two years' worth of taxes. Because I should've been certified years ago. But then when you look at those and I'm like, 'what are you talking about? I'm new. Where would I get this information from?' But then they want your personal stuff, but I'm a business operating on a different entity. So, they're using that against you as well." [#PT3]
- A respondent from a public meeting in Jamaica Plain stated, "I don't like the fact that we're not qualified as women. That's not fair, because you look on the state website. First of all, the way you are doing your disparity study. You're saying, 'Okay, you're qualified as an MBE but should not qualify as women.' And, on top of that, when you search the state website and you put in a woman-owned business, we don't pop up. The only way we show is through the MBE. We are women and we are black women. So, we should at least pop up in a search. Right? There's no points in the search, right?"[#PT3]

5. Comments on other certification types. Interviewees shared several comments about other certification programs [#1, #30, #31, #32, #39, #40, #41]. For example:

- The non-Hispanic white male owner of a VBE-certified construction company stated, "We are certified with the Federal government as a Veteran-Owned Business Enterprise. I don't know if we are certified with the state or the City. I'm not sure." [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, "I am certified by the United States Office of Small Business Administration and for nine years I was 8(a) business. I served my nine years and graduated and have maintained my designation and certification. I know I got it at the same time because there was, at that time, a reciprocal policy and so I was certified for a time. And then I think that the City went on to do something with a private certifying company and I wasn't doing any work with the City so I just peeled away. Well, I will tell you that of all the processes I've found the SBA as very, very good. One is they assign you a team and so if you are certified, you work with that team because then you don't lose time. What do you want to see? And they'll tell you, we want to see your history. We want to see details, send us pictures that correspond to what you're saying. We want you to break down your income. It's going to be broken up this way. And they tell you and what happens is when they tell you how you're working your income, it allows you to move forward very quickly because that's one of the biggest barriers is people putting, 'Well my husband and I earn 600,000.' All of a sudden you don't qualify. You don't understand why, because people assume that the more money you have, the more you'll be seen as qualified. When in fact you've got to meet a low line, so you have to divide everything, what your husband owns. Whatever the household owns, 50% of it belongs to your husband and 50% belongs to you.

That I find is difficult with just maneuvering through is the ability to understand the question, the ability to understand the parameters of the question.” [#31]

- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, “I am certified as a Federal Disadvantaged Business Enterprise (DBE). I never worked in the City. My work has been Federal and private sector.” [#32]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “So we were in the process of getting ourselves HubZone recertified but we don't have that as of this conversation. We don't have the HubZone certification. We used to. We let it slide and now we're in the process of trying to get re-accredited.” [#40]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “I graduated out of the 8(a) program in 2018. I've been DBE, MBE, WBE Massachusetts, for well over 20 plus years. I'm certified in nine states. I'm federally certified. I was formerly an 8(a), but I'm also certified federally at the defense as a woman-owned, minority-owned, disadvantaged business, economic disadvantaged business, and service-disabled owned business at the federal level. And then within the nine states, I have a combination of woman-owned DBE, MBE, WBE, VBE, and DBB. So that's woman-owned, minority-owned, service-disabled veteran, veteran-owned and disadvantaged business owned enterprise. I'm certified in, I think we got about five DOT certifications to do Department of Transportation. We have certification in New Jersey, New York, Pennsylvania, Massachusetts, all of New England, Washington DC, Maryland, and Texas, and Georgia.” [#41]

D. Experiences in the Private and Public Sectors

Business owners and managers discussed their experiences with the pursuit of public- and private-sector work. Section D presents their comments on the following topics:

1. Trends toward or away from private sector work;
2. Mixture of public and private sector work;
3. Experiences getting work in the public and private sectors;
4. Experiences doing work in the public and private sectors;
5. Differences between public and private sector work; and
5. Profitability.

1. Trends toward or away from private sector work. Business owners or managers described the trends they have seen toward and away from private sector work [#15, #16, #30, #31, #32, #34, #37]. For example:

- The non-Hispanic white female representative of a majority-owned construction company stated, “In 2012, 2013, and 2014, I would've told you that 80% of our work was with the public sector, but each year we've just gradually reduced the public work based on less profit and too much paperwork burden.” [#15]

- The female representative of a Black American MBE-certified and uncertified WBE firm stated, “The trend is more toward private sector work.” [#16]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “No, two years ago, three years ago, we didn't do any public work, so we've started to dabble in public work. Well, the one reason we decided to go into public work was to buffer against a recession. We all know there's a recession coming at some point. And hopefully once this clown gets out of the white house, we'll have a much more stable economy, but there's going to be a recession. Our idea of going to public work was when the recession comes, the federal government tends to spend money. So that's why we did it, but I don't really see a huge difference between the two, other than just more paperwork with the public agencies seems to be a lot more challenging than paperwork requirements in private industry.” [#30]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, “During the last three, four, five years. It's been more private sector mostly. However, I've had a contract with the federal government for over 20 years, so it averages out to approximately 50-50. The last few years I'm finally getting focused on breaking into the Boston area, so I've gotten jobs from Harvard, and MIT.” [#32]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “Usually, if we're swamped on the private side, it tends to be a lot of the bigger companies getting the public work. And then, when the private side starts to decrease, we can be a little bit more competitive on the public side of things, and we can stop winning some of those projects.” [#34]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “No, I haven't noticed a trend either way. The only time I noticed the trend, which was a drop in public sector work was when Trump got into office and started doing all the nasty immigration stuff, the discrimination, my business dropped down.” [#37]

2. Mixture of public and private sector work. Business owners or managers described the division of work their firms perform across the public and private sectors and noted that this proportion often varies year to year.

Nine business owners or managers explained that their firms only engaged in private sector work [#17, #19, #23, #28, #29, #33, #38, #44, #45]. For example:

- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “Our company does not engage directly with the entities that purchase our product on a contractual basis. They put in a specific order and we fill it. Currently, our work is with the private sector because we have the relationships, but we would also like to break into the public sector especially with the City of Boston, because it would be a great market for us, but it's not easy to navigate the system.” [#19]
- The Black American male owner of an MBE-certified construction company stated, “It's 100% private sector, and zero public sector.” [#23]

- The Hispanic American owner of an uncertified MBE construction company stated, “My work is usually private, pretty much all private. I do a lot of work for property management companies.” [#28]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “It’s all been private so far.” [#29]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “I mean, for the municipalities, the state, federal, and local governments and things, I do a few jobs for them, but it is nowhere nearby... In the '70s, '80s, '90s, I only worked for the municipalities, meaning the state, the city, the town. Now I work on private properties a lot. Well, 98-99% of my work is with private things like a housing development, a house being rehabbed and turned into apartments. That kind of thing, which is not so much state work or federal work, but it may have federal estate money involved.” [#33]
- The Hispanic American male owner of an uncertified MBE construction firm stated, “It’s all private where I work directly for a client. I’m a member of the electrical union, although I haven’t worked there since the economy collapsed in 2008. I still pay my dues in case I ever need to go back. That’s the only public work I’ve ever been on.” [#38]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “I don’t have any contracts with public agencies. All of my work is with private companies.” [#44]
- The Hispanic American male owner of an uncertified MBE construction company stated, “I just work with private customers.” [#45]

One business manager explained that their firms only engaged in public sector work. [#27].

For example:

- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “It’s mostly the public sector. We do very little private.” [#27]

For fifteen firms, the largest proportion of their work was in the private sector [#1, #5, #12, #13, #15, #21, #22, #24, #25, #26, #30, #34, #36, #37, #43]. For example:

- The Black American male owner of an MBE-certified professional services firm stated, “On the government side is probably like 5%.” [#1]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “It’s mostly private. Right now, I’d probably have to say 25% is municipality.” [#5]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “Most of my work is private. It could be, but some are on public projects. I may have been engaged by a construction manager that is working on a City of Boston funded project.” [#12]
- The non-Hispanic white male owner of a majority-owned construction company stated, “I would say I do 80% private and about 20% public.” [#13]
- The non-Hispanic white female representative of a majority-owned construction company stated, “My best guesstimate is it’s about 80% private and 20% public.” [#15]

- The female representative of a Black American MBE-certified and uncertified WBE firm stated, “Approximately 80% of the work is done with the private sector and 20% with the public sector.” [#16]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “I’d probably say 10 or 15% comes from the public sector. I’d probably say at least 85% of my business is from private and 15% would be governmental.” [#21]
- The Black American male owner of an MBE-certified construction company stated, “I would say since I’ve been in business percentage wise, I will put residential at 80% and probably commercial at 20%. So, the bulk, majority of what I do is residential. Most of the commercial stuff that I did was through the state certification, because most of the projects were all public projects, and they were all commercial projects. Yes and no, because the construction industry is such that if you want to keep afloat, you have to keep all options open, because you may bid on 10 different jobs in the private sector, and you may only end up getting one. The state and public are the same. So, you bid wherever you can, just to be able to keep up. Yeah. That is why the option of being able to transact business between the two is a plus. If you limit yourself only to just one, then if the inflow is not coming from that aspect, then you are stuck.” [#22]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Right now, I would say 95% private sector, and 5% public sector.” [#24]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “It’s a mix but I would say that it’s like 85 to 90% private sector.” [#25]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “We’re doing business mostly in the private sector.” [#26]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “Probably 10% from the public and 90% from the private.” [#30]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “We’re mainly private sector. We try and keep 20%, 30% in the public sector, just because we like to have a diverse client base. Having your foot in both pools kind of allows you, when the recessions come, and as work changes, that you can draw from one when the other starts to shrink.” [#34]
- The Black American male owner of an MBE-certified construction company stated, “Right now, all of my work is with the private sector, except for small jobs that I occasionally get as a subcontractor doing minor rehabs for colleges and hospitals.” [#36]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “Probably 30%-40% public sector, and 60% private sector.” [#37]
- The Native American male owner of an MBE- and DBE-certified construction company stated, “Trends toward private work.” [#43]

For five firms, the largest proportion of their work was in the public sector [#3, #14, #20, #35, #40]. For example:

- The non-Hispanic white male owner of a majority-owned construction firm stated, “We probably do about 70% public, 30% private.” [#3]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “The percentage mix between sectors goes up and down from year to year. However, on average 70% of our work is with the public sector and 30% with the private sector.” [#14]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “I would say 90% of my work is public. Maybe 10% is private. A lot of public. I do mostly state work, on state, mat highway contracts.” [#20]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “That’s a good question, because for many years, the majority of our work came from the public sector, but not in Massachusetts. It was in New Jersey with waste disposal contracts. And, of course once the moratorium was lifted in Massachusetts, the location of the cash and clients shifted back to Massachusetts. We were still getting good business elsewhere in other States, but it shifted back to Massachusetts. Very little of our work came from the private sector.” [#35]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “We have a great deal of experience in the private healthcare area as well. But our focus has been in trying to pursue government opportunities.” [#40]

Four 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 [#4, #18, #32, #41]. For example:

- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Both, public and private. 60 private, 40 public.” [#4]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “Right now it’s about 50-50 for each sector but it varies from year to year, and it’s been a mixed bag from day one.” [#18]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, “I would say half in terms of the revenue. It’s roughly a 50-50 split.” [#32]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “I bounce between the two.” [#41]

3. Experiences getting work in the public and private sectors. Business owners and managers commented on what it’s like to seek work with public and private sector clients in the Boston area.

Fifteen business owners expressed that it is easier to get work in the private sector. Many noted the benefits of personal relationships, the difference in process, and the ease of finding work as reasons they see getting work in the private sector as easier [#12, #16, #18, #20, #24, #25, #30, #31, #32, #33, #34, #36, #37, #43, #PT7]. For example:

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “I think it's becoming more and more open, because now these, in my experience many of these private projects have a diversity strategy, diversity plan that they've agreed to engage minority businesses or minority women businesses. There's a strategy, there's an agreement with whatever agency they may be dealing with that there's a commitment towards diversity. They do this in order to also get less resistance from the community. So, when they're going through the community process, the community wants to see that they've involved, or they're going to involve. What is a commitment to minority women, local businesses, minority women, local workers? So that's all laid out in the front. Now, the developer wants to do another project. This isn't the only project that they're going to want to do. They're going to want to do another. Now, if you have poor behavior on this project, your next project is not likely to pass community scrutiny or get the support. They're looking aggressively for diverse businesses.” [#12]
- The female representative of a Black American MBE-certified and uncertified WBE firm stated, “The private sector is easier because it typically involves a construction project that is ready to go and we get the work based on referrals. In the public sector there's a lot of red tape and delays.” [#16]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “I think, maybe sometimes word-of-mouth. ‘We saw you out on the pike. Would you be interested in quoting this work?’ or, ‘So-and-so gave me your name.’ It's a lot of word-of-mouth.” [#20]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Generally, I have a real hard time getting a lot of the public work, so I tend to just be very selective about what I try to go after in the public sector. And again, there's no resentment due to the roadblocks of the bigger companies and the public sector's desire for the bigger companies to use a sub to woman- owned business or minority business as subs. Generally, the private sector work is what more easily comes my way, and I'm so busy that I don't have enough time to chase down the public sector work.” [#24]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “In the private sector, it's a lot less formal. Some of our work in construction is not a bid at all. The oil company that we're designing for, we have about three or four contractors that we really like. We put those out to bid, get prices, and the oil company then selects company to do the work.” [#25]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “Well, for us it's easier in the private sector, because we know we're familiar with that world, we know how to talk to the developers. We don't know how to do those kinds of things in the public sector. We never really did it before. But the public sector is harder to connect with people. At least that's been my experience with the public sector.” [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “I much prefer the private sector for the process of getting work. They'll send out a request for proposal and they'll say ‘You have three weeks. Call me any time, tell me what you need to understand. It's going to be money-based, if you're too far

out, we're not going to take it. If it's reasonable value, we'll accept it. And by the way, send us a resume of your key person.' So that will move very fast." [#31]

- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, "I would say it's easier to get work in the private sector because if somebody wants you for a job, they can just hire you right away. In the public sector there are more decision-making layers. The private sector is just a less cumbersome process." [#32]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, "Private sector. It's not so much paperwork and stuff, but it doesn't really matter because either way to work on either project you must be the low bidder and or have some kind of connection with the general contractors whomever it may be. And if you don't, if you have a relationship with the general contractors then that's a shoe. Let's say that's a brownie point for you, because at least they know of you and then you send in the prices. The better chance of them trying to negotiate with you and selling you the job, or you negotiating to win the job versus just cold calling a company you never worked for, sending them a price, and then you never hear from him again. Which happens every single day. I've been doing this so long. At this point, I pretty much work for the same contractors because at least I can trust them to tell me the truth. 'No, Rich your price high. Okay. Your price is good. We're going to give you that job.' Even though my job might not start for six months or so." [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I think the private sector, when it's available, is a lot easier to get work from than the public side. The amount of time and effort to put into a proposal that you may not even get a callback for, if the private side of things is busy enough, then, it doesn't make sense to expend that effort on billable time to bid on a job where you may not even get a call back, and you spent thousands of dollars preparing the proposal." [#34]
- The Black American male owner of an MBE-certified construction company stated, "I've already described my frustration about not being able to get work with the City because of the lack of upfront funding. Even though I need the same funding for private jobs, my clients are generally willing to give me partial payment up-front for site mobilization." [#36]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "It's easier to get private sector work." [#37]
- The Native American male owner of an MBE- and DBE-certified construction company stated, "It's easier to work with private sector because it's less competitive than the public sector." [#43]
- A respondent from a public meeting in Codman Square stated, "It's a little bit, well they have small contracts or small relationships. It's a lot easier to work with. It's not as much paperwork, it's just almost like a handshake deal. You just make the connection and then they followed through with buying with whatever they need." [#PT7]

Nine business owners elaborated on the challenges associated with pursuing public sector work [#12, #13, #22, #26, #29, #33, #34, #35, #41]. Their comments included:

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “So, it's different. The public work, and when I think about public work, I think about like the MBTA or MassDOT, those type of with the DBE certifications. Those projects a lot, and there's been fraud for a long time. So, the relationships are already established. So, it's just really difficult, because no matter what, they're going to keep going. The public projects are going to keep going. They're going to keep getting funded, whether they achieve these goals or not. The private projects really need to have community support, to get off the ground and get going. So, there's a little difference.” [#12]
- The non-Hispanic white male owner of a majority-owned construction company stated, “It's hard to say because it depends how busy people are. As a small company, I sometimes have the advantage of being the only bidder. But most of the time, I am bidding against other people. I always seem to be in the middle when it comes to cost estimates. I'm never the cheapest, I'm never the most expensive. Everyone's always like, you're right in the middle. So, I don't know if that's a good thing or a bad thing.” [#13]
- The Black American male owner of an MBE-certified construction company stated, “On the other side, when you do commercial stuff, or with the state, which most of the commercial stuff comes from the state, the requirement over there is very stringent, because I was required to have a bond, and at the time, I had a house on the cape, and the bonding company, because I had a house, they would look at that and issue you a bond. After the crisis in 2008/2009 came, I lost my house.” [#22]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “Well the biggest difference is most public sector jobs are all low bid opportunities. And that's not always the business we're looking for. In the private sector you can look at a problem and come up with a solution and price it accordingly. When you're looking at public sector bids, for the most part, they're strictly low bid. So, it's not necessarily always the best solution. quite honestly, there's times when we see the results of those low bid contracts and wonder how anybody can provide service for that amount of money.” [#26]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “I mean, I've actually looked on the U.S. government to bid on projects from there but it's like the stuff in our area or it's hard to find a project even to bid on and to be 100% honest with you, I wouldn't even know where to look to find public projects in the Boston market.” [#29]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “The difference between government work is one, you got a lot more paperwork to do.” [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “We'll respond to a request for proposal when possible. The big drawback is usually when they ask for, must have performed similar services for municipalities within the past X number of years. Kind of look at it like, just because you're doing these designs on the private side, doesn't mean your experience isn't valid.” [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Well, the public sector was certainly stringent in terms of the pay rates, what they would pay for on an hourly basis and the services. The private sector accepted higher wages. But

due to the stringent laws and regulations associated with the environmental industry, both sectors conducted stringent oversight of the work as it was performed. Also, even though most of our work was with the public sector, it was much more difficult to get work in the public sector because when the public sector issued a Request for Proposals, you had to jump through a lot of hoops to get the work. Whereas, in the private sector, you were selected based strictly on the qualifications.” [#35]

- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “We probably did 50 bids over the course of the year and we might win two. So, somethings wrong about how approach it or how we're... At the procurement level we think we understand the procurement process, but we sometimes don't have the relationship. It's all about relationships.” [#41]

Two business owners and managers described public sector work as easier or saw more opportunities in this sector [#10, #18]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “I think that private companies just, they don't know. They haven't gotten the message about the disparity, and why their company would do well by hiring minority-owned companies to do... it would be helping our community as well as building a good name for their company as a supporter of this cause. And there's over 30 of them, like just in our city between, you know, larger, you know, fortune 100 companies and universities, just in our city, they all have diversity programs, So, you got to go to them and talk to them about it. And particularly in the printing realm of things, we just got to convene and come up with an overall policy around, you know, how we get this information out to people in a big way, in a meaningful way.” [#10]

Two business owners or managers noted that it is not easier to get work in one sector as compared to the other [#14, #27]. For example:

- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “It's our experience that with the company's M/W/DBE certification, it's easier to get both private sector and public sector work.” [#14]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “I mean the substantial differences is that the private sector doesn't have necessarily the same purchasing requirements. So, they don't have to go out to bid or they don't have to purchase on contracts. However, I mean most prudent companies shop competitively so they're not required to. They certainly do pretty much behave in the same way. They're price sensitive, like anybody else.” [#27]

4. Experiences doing work in the public and private sectors. Business owners and managers commented on what it's like to do work with public and private sector clients in the Boston area.

Eight business owners discussed their experiences doing work in the private sector [#13, #15, #22, #30, #32, #37, #39, #45]. Their comments included:

- The non-Hispanic white male owner of a majority-owned construction company stated, “I would say the private sector is a little more lenient than the public sector. Usually, the public sector has a deadline. You have to have certain things done in a certain time. I would say payment in the private sector is a lot faster than the public sector. There's a lot less paperwork, a lot less aggravation in the private sector. I found that the public sector has an awful lot of bureaucratic crap that you have to go through.” [#13]
- The non-Hispanic white female representative of a majority-owned construction company stated, “The paperwork burden is lower with the private than the public.” [#15]
- The Black American male owner of an MBE-certified construction company stated, “Residential, all that you need is your general liability insurance and your workman's comp to get any job, because as a matter of fact, homeowners don't even look at that, but when you go to pull a permit, you have to have these documents in place in order for you to be able to get a permit. So, that is easy, and that is why it is very attractive to do that.” [#22]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, “I find that the work in the private sector is much more intense than the public sector.” [#32]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “The private sector is more visionary about they want. Like we'll get in and we'll help them with strategy more on how to leverage our services, and that doesn't happen with the public sector. The public sector is not as strategic about how they're buying these services in general.” [#37]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, “In the private sector, people come in, do their job and go, we don't have a lot of paperwork. There is a lot of people out here making okay money without going to all of the requirements that is needed for the City or State jobs.” [#39]
- The Hispanic American male owner of an uncertified MBE construction company stated, “Usually it's payment upon completion of work. So, I usually cover the cost of a job up front. For instance, the job we did today was \$5,000 bucks and we went in, we did the prep work, brought in the gravel and then paved it. Then we got paid.” [#45]

Five business owners discussed their experiences doing work in the public sector [#2, #21, #24, #31, #34]. Their comments included:

- The non-Hispanic white male representative of a majority-owned professional services firm stated, “The lesson I've learned is get everything spelled out neat and clean in the contract so that there's no confusion later. Never make assumptions. If you're going to make an assumption, write the assumption down. And then I'm not biased towards any one type of contract. There's no one type of a funding mechanism that works well for everything. Because it depends on the kind of problem you want to solve. The trouble comes when you've got somebody on the other side of the table who does not understand the difference. It's like, ‘No, no. We want a firm fixed price for this thing that's never been done before. I have a million dollars. I want anti-gravity. And therefore, anti-gravity will cost a million dollars.’ It's like, ‘No, it doesn't work that way.’” [#2]

- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “It takes a lot longer to get paid.” [#21]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I generally am far more forgiving on how I bill the public sector. You know, if I'm with a private client, I may not shave hours off like I would with a public client. I like what I'm doing with the public sector so I'm not going to bill the public sector for everything. I'm just going to get it done. But with the private sector, I tend to offer more competitive pricing.” [#24]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “On the other hand, I really like working for the Feds because there's a lot of work. So, it takes longer to get the work. It takes a much more formal process that's tedious, and it may take up to four months to get that work. But once you get it, it's going to be 60 million, 100 million, 80 million. So, for me, you can't say one is better than the other, it depends on what you like. I like the big projects where I can put an exciting team together and I got work for two years.” [#31]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “The public sector tends to take a little bit longer to go through, just because, on the private side, there's usually one or two key stakeholders that have input. On the public side, there tends to be a lot more of a process going through. But they're both equal. We have different people that we assign to different tasks to kind of play upon their strengths and weaknesses.” [#34]

4. Differences between public and private sector work. Business owners and managers commented on key differences between public and private sector work.

Seven business owners and managers highlighted key differences between public and private sector work [#3, #14, #16, #18, #39, #40, #41]. Their comments included:

- The non-Hispanic white male owner of a majority-owned construction firm stated, “They're pretty similar. They have procurement people, and they have the price and then the price will go up to make sure that there's a PO for it. And then there's somebody that will review the work to make sure the work was done properly. You'll get an electrical inspection if it's required. So, things like that. And I don't know, I think they're about the same. I mean, as cities and towns evolve, which they have by leaps and bounds over the last 10 years, they've become more efficient and they're almost falling into the same line as private.” [#3]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “Not really. Both sectors typically take the same approach in environmental engineering. The only key difference is that there is less oversight with public sector work.” [#14]
- The female representative of a Black American MBE-certified and uncertified WBE firm stated, “The private sector is less cumbersome.” [#16]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “I would say the big difference is that the public sector requires more

paperwork and is slower in paying. In the private sector the big companies also require a lot of paperwork, so it's a mixed bag depending on who you're working for." [#18]

- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "It differs, because in the, let's say with city or states projects, sometimes you can have bigger projects and you can have, you can grow, have a track and grow capacity. With private sectors, let's say the thing is that, if you work hard and in case there's a lot more of those all over the place. Especially, now I try to specialize on home additions because we design and build. And we understand the permitting process really well and the zoning process. So, in the suburbs, we can go after the people that are looking to do home additions and we can sit with them and design, build, take care and go and do that. With the City and the state, the requirements, a lot of the certification, the insurance, and it's a lot of paperwork in the competition, you put a bid." [#39]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, "I think in some ways working in private sector tends to go a little faster than working in public sector working in government it takes time. You need to go through the procurement process, ensure that you're adhering to all of the guidelines of that procurement, ensuring that you have the right contracts. There's always ... It's just, it could be a 12-to-18-month engagement, where working in private sector often times those opportunities go by faster." [#40]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, "The most structured is going to get in the federal government. The city government, they have structure as well. They get funding for the federal guys and they require certain things like audits and compliance's and licenses and all of that. Commercial is a little bit more free hand. I mean we've been in the commercial arena. I'll tell you the commercial arena is for me a more comfortable spot." [#41]

5. Profitability. Business owners and managers shared their thoughts on and experiences with the profitability of public and private sector work.

One business owners perceived public sector work as more profitable [#22]. For example:

- The Black American male owner of an MBE-certified construction company stated, "I am not sure, because every project is a little bit slightly different than the other, but in all, I will say that the commercial projects or the public projects, if executed right, it's profitable. You can probably be 15% better than just doing the private, because private, you know how everybody like to manage and micromanage their money and things like that. I'm not trying to say that the state doesn't this way. The state may have a cap, so if you are within that cap, you are fine. Homeowners tend to be a little bit different than the state if you are looking at private and public. Private is a little bit... sometimes you do good, sometimes you don't. So, I would say in profitability, I think if you do public, if you do your things right, you stand the chance of making more profit than the private." [#22]

Seven business owners and managers perceived private sector work as more profitable [#13, #14, #15, #21, #24, #31, #32]. For example:

- The non-Hispanic white male owner of a majority-owned construction company stated, “I would say the private sector is probably a little bit more profitable.” [#13]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “Profitability is typically higher on private sector jobs.” [#14]
- The non-Hispanic white female representative of a majority-owned construction company stated, “The profitability level is higher with the private work than the public.” [#15]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “Well, if we look at how much business I do, I will have to say It's private.” [#21]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I would say it's more profitable to do large jobs over small jobs, but I find the private sector is probably more profitable, but only because I make it that way. You know what I mean? I think there's more money probably to be made in the public sector than I try to make out of it to get a job.” [#24]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “I'll take the private sector. I would say that because government has what they call the GSA schedule, which is essentially is a rate sheet based on education and years of experience. So, for example, my husband has written a book on construction. He's written five papers on claims. He has successfully settled a \$30 million claim. He went to Harvard Law School. However, the GSA schedule suggests that I pay him \$120 an hour. I can put him on a private case for \$790 an hour. So, this discrepancy is humongous. So that's the reason that I like the private sector. On the other hand, once you get a contract with the government, we have what they call in the government, they call it the Lump Sum contracts. I love Lump Sum contracts. Because what it says is, we've agreed to the price of 30 million. If you do item one through 40, and we are substantially happy, and you did it for only 20 million, you can keep the rest. So even though the margin may not be as good as the private sector, if you're very efficient, you can actually make very good money.” [#31]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, “In my field the private sector pays better. We charge by day or half day, the private sector pays more, but the workday is much more intense.” [#32]

Seven business owners did not think profitability differed between sectors [#18, #25, #26, #27, #30, #33, #34]. For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “It's about the same.” [#18]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “A lot of our work is just basically at our professional fees. Sometimes it's order of magnitude, and sometimes we give a price and we're selected because of our professional abilities.” [#25]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “It varies on the contracts and whether the municipality has gone out to bid, if a

municipality bids on their own without the multi-jurisdictional contact, it can become very price competitive.” [#27]

- The Black American male owner of an MBE- and SLBE- certified construction company stated, “Absolutely. Well, the major factor is if you're working on a prevailing wage job, you're paying a guy \$60, \$65 an hour versus a non-prevailing wage job, and he gets his normal salary of \$20, \$25 an hour. That's a big difference right there. But you know, in the same token, the prevailing wage jobs, the prices should be that much higher, but you got to know that they're only going to sub the work out to the lowest price. So, I mean you would say, okay, so that's no big deal. I got to pay more money for labor. So, I make up the difference in my price. Well, the higher your price the less likely you are getting the job. It always boils down to the lowest bid wins.” [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “We work on a pretty low profit margin. We're right around 15%. The good thing is the public side always ends up paying. You kind of have your pluses and minuses. The private side, you get a lot more trying to negotiate bills, trying to pay a percentage of it and get it cleared off the book, versus the public side, you've agreed on a price, and you perform, and you get paid for the work that you've done. The big issue is the proposals. If you're not winning a certain percentage of them, then, it can really drive-up overhead costs.” [#34]

E. Doing Business as a Prime Contractor or Subcontractor

Part E summarizes business owners' and managers' comments related to the:

1. Mix of prime contract and subcontract work;
2. Prime contractors' decisions to subcontract work;
3. Prime contractors' preferences for working with certain subcontractors;
4. Subcontractors' experiences with and methods for obtaining work from prime contractors; and
5. Subcontractors' preferences to work with certain prime contractors.

1. Mix of prime contract and subcontract work. Business owners described the contract roles they typically pursue and their experience working as prime contractors and/or subcontractors.

Five firms reported that they primarily work as subcontractors but on occasion have served as prime contractors. Most of these firms serve mainly as subcontractors due to the nature of their industry, the workload associated with working as a prime, the benefits of subcontracting, or their specialized expertise [#16, #18, #20, #33, #36]. For example:

- The female representative of a Black American MBE-certified and uncertified WBE firm stated, “The company only works as a subcontractor to a prime contractor. We don't have the capacity to perform work as a prime contractor.” [#16]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “We work with developers and contractors to provide environmental services on projects, so we only come in as a subcontractor, never as a prime contractor.” [#18]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “I would say I’m 100% subcontractor work.” [#20]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “Subcontractor? 100%.” [#33]
- The Black American male owner of an MBE-certified construction company stated, “Thus far, I have never done any work as a prime contractor or a general contractor, only as a subcontractor because to be a prime requires access to capital.” [#36]

Eight firms reported that they usually or always work as prime contractors or prime consultants [#27, #28, #30, #31, #32, #37, #38, #44]. For example:

- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “We are primarily a prime contractor.” [#27]
- The Hispanic American owner of an uncertified MBE construction company stated, “Prime. Because these private owners are contacting me, not really any municipalities.” [#28]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “A hundred percent as a prime contractor. It’s a hundred percent.” [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “I do sell from time to time, but primarily I like to run my own jobs. I work primarily as a prime. I worked as a sub for a long time, and then in 2004 I made a jump to the prime level. I’ve been a prime ever since and I do once in a while, I’ll do sub work. One, I don’t like that because that’s just spending money to do something you’re never going to get. I prefer to be the prime. I put together the team. If I use you, you will get used and you will be paid. I write the proposal, I do what I want with it, we manipulate the money so that we can make a profit. That’s a little bit easier for me.” [#31]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, “My clients hire me directly, so I work as a prime contractor, never as a subcontractor.” [#32]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “We always work as a prime contractor, directly for the client.” [#37]
- The Hispanic American male owner of an uncertified MBE construction firm stated, “It’s a tricky question. I guess, as far as electrical work goes, I’m a prime contractor. But, if I do this potential job in Medford, they’re going to get a general contractor, but I will still be working directly for the client. It’s still the general contractor, but I’m not really working for him directly.” [#38]

The majority of firms (14 of 28) firms that the study team interviewed reported that they work as both prime contractors and as subcontractors, depending on the nature of the project [#2, #13, #14, #22, #24, #25, #26, #34, #35, #39, #40, #41, #43, #45]. For example:

- The non-Hispanic white male representative of a majority-owned professional services firm stated, “Depending on the project [I’m either a prime or a sub], of course it has to be something in my area of expertise, but I know how to do it.” [#2]
- The non-Hispanic white male owner of a majority-owned construction company stated, “I would say we work as a prime contractor 30% of the time, and a sub 70% of the time. The utility work represents the prime contractor work, and the excavation work I generally perform as a sub.” [#13]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “Because [the owner] does not have the PE license, the firm only works in Massachusetts as a subcontractor. In other states or municipalities, the company works as a prime or a subcontractor.” [#14]
- The Black American male owner of an MBE-certified construction company stated, “I’ve been prime in both, but when it comes to the residential part, I am prime. I don’t do subcontract in the residential, no.” [#22]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Yes, I only work as a prime for peer review projects, smaller contracts with some municipalities, where they know that I’m familiar with an area with a certain type of environmental expertise, and they bring me in. But in large part I always get brought in as a sub to either a design firm or a construction firm.” [#24]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I would say about 80% is prime, and about 20% is subcontractor.” [#25]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “It’s a mix of both. We’re only the subcontractor when it’s a construction project. It’s usually rodent control on a construction project where we act as the subcontractor.” [#26]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “For private work, we’re generally the prime. For public work, I’d say it’s 50/50. If it’s a straight engineering project, then, we would be the prime. A lot of times, we get involved through architects and landscape architects as their engineer, because the projects are more for park design or building design. The actual building itself is the most valuable portion of it. The site work is ancillary.” [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I would say in the beginning, roughly 50% of our work was performed as a prime, through our direct contracts with states and municipalities. However, over the years, we began to get more work as subcontractors, as part of a team working on construction projects, or working as a team for municipalities, because that’s how the industry evolved over the years.” [#35]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, “Most, I think lately we’ve been mostly prime contractors, because these are smaller projects that we’ve [been] doing ... Usually with homeowners going through the banks and things like that, mostly on renovation or home additions. So those are, we are prime, but subs, I’d done a few years ago [as a] sub, but it was so difficult for us to get there.” [#39]

- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “We do both and it really does depend upon being part of the right team. We have a couple of ... We have several contracts where we are the prime and we have a number where we're a sub, providing services. It could be a specific contract vehicle that we don't have access to, but we have the past performance, and we have the key personnel that makes up the ... And we have an 8(a) status that makes us an attractive teaming partner. However, without having the right contract vehicle, it would preclude us from being a prime.” [#40]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “When we go direct, we go to direct... On the commercial side we normally do direct as they do B2B, business to business. So, we would be our own prime contractor. We've been a prime probably about 15, 20 times. We're doing sub-work as well. We understand how to do our own procurement bidding, pricing, [and] proposal development work.” [#41]
- The Native American male owner of an MBE- and DBE-certified construction company stated, “Mostly works as a prime contractor but has worked as a sub in Boston.” [#43]
- The Hispanic American male owner of an uncertified MBE construction company stated, “I have worked for a lot of builders/contractors in the past. Typically, they build the house and I do the exterior paving, but to be honest with you, I don't like to work for them because there's too much of a chase to get paid. I'm not saying they're all like that, but some are.” [#45]

One firm explained that they do not carry out project-based work as subcontractors or prime contractors [#19]. For example:

- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “Neither. It's just a straight manufacturing/distribution relationship.” [#19]

2. Prime contractors’ decisions to subcontract work. The study team asked business owners if and how they decide to subcontract out work when they are the prime contractor. Business owners and managers also shared their experiences soliciting and working with certified subcontractors.

Fifteen firms that serve as prime contractors explained why they do or do not hire subcontractors [#2, #4, #21, #22, #24, #25, #29, #31, #32, #34, #37, #38, #40, #44, #45]. For example:

- The non-Hispanic white male representative of a majority-owned professional services firm stated, “Most of the government programs I've worked on, I've always had a partner of one kind or another. And my method of doing it is there are certain areas that I'm really good at, and there's other areas that I'm just not good at. Maybe I could figure it out, but the best I can hope to be is mediocre. It would be smarter to find somebody who's really good at the thing I need and partner up with them. So they do what they do best, I do what I do best. We meet in the middle. We fix whatever needs fixing. And if you're open and straightforward about it, you can make, sometimes a company may be your partner on this program, but on the next one they may be competing against you. And then the one after that, they're your

partner again. And the trick is be open and up front about it, and no hard feelings. And on average, everything tends to work out." [#2]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I've done it both ways where [there was a] skill set I didn't have, so I've had to subcontract it to somebody that I knew or somebody that I've worked with before." [#4]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, "Generally not, and if I did, I would make sure that they'd have all the proper insurance. But no, I'm pretty self-contained. I have almost everything we need. We have tents, everything. I usually don't hire anybody." [#21]
- The Black American male owner of an MBE-certified construction company stated, "I have a list of subcontractors, sometimes I just sub it because it's actually economically feasible just to sub it instead of it being two, three, four [employees on payroll]. I do all the time. I sub out stuff. I just decided I don't want to roof anymore, so I sub my roofing out. And siding, I sub it out. Electrical, some plumbing, for instance, I don't do it myself. So, all of that has to be subbed out. And some drywall stuff. Depending on the magnitude of the work." [#22]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "This year I actually had a private sector job where I brought in two competitors that were from Western Mass, so I knew they wouldn't be coming into my market, and they helped do the field work because I was just so far behind. But generally, no, I don't pass any work through, because it's expensive, so I rarely do it." [#24]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Yeah, if it's necessary. A lot of it is structural engineering we need to subcontract, because sometimes we get into work that is more than we should do professionally. We also subcontract electrical design work, yes." [#25]
- The Hispanic American owner of an uncertified MBE professional services firm stated, "I'm not saying we wouldn't, but no. If we're coming in, you're dealing with [company name], all the employees are [company name]. We source all the staff, we do all the legwork, so I'm not saying I wouldn't be a subcontractor to a larger project. I'm happy to talk about that, but I'm not really looking to subcontract my work out." [#29]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, "All the time. I'll tell you what I use the most - I use schedulers, I use estimators, I use architects, I use structural engineering firms, sometimes I will hire people who are commissioning agents. The commissioning will be done under my supervision, but there'll be a firm that's used to doing them." [#31]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, "I perform all of the work. I don't use subcontractors." [#32]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Usually, landscape architecture is the one that we'll sub out, or other studies, like sewer inspections or things that we don't handle directly in-house." [#34]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "All our linguists are subcontractors. We make a conscious decision that none of them are

employees because now we can match the subject matter and the language needs to who we put on the assignment. We provide over 200 languages. So, we have hundreds and hundreds of linguists to match up." [#37]

- The Hispanic American male owner of an uncertified MBE construction firm stated, "No, I don't. Occasionally, I hire a friend, who's an electrician and who will occasionally work for me and I'll work for him. But he's not a subcontractor, he's an equal that helps me out from time to time. That's just a day's work." [#38]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, "There has been a number of pursuits where we actually have looked for subs in order to again meet a gap that may exist without a solution set or fill a contract requirement. For example, maybe they're looking for a portion to be veteran-owned business or the government may also be looking for a specific past performance that we don't have specifically." [#40]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "Sometimes I hire subcontractors, depending on the size of the job. I use them about five or six times a year." [#44]
- The Hispanic American male owner of an uncertified MBE construction company stated, "I never hire subcontractors. My employees do every single job." [#45]

Seventeen firms that the study team interviewed discussed their work with certified subcontractors, and explained why they hire certified subs [#2, #3, #4, #13, #14, #15, #22, #24, #25, #30, #31, #33, #34, #35, #37, #39, #40]. Their comments included:

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I've had a lot of contracts where there's a lot of terms and conditions that they did [and] you want the money to spread around. I can't think of any occasion where we didn't find a way to do that [and] still kept everything focused on the problem. So, I haven't. It's been a little more work for us, but nothing that I would say distracted from actually getting the job done. So, you just got to think it through. Okay, how can we do this? And how can we do this and satisfy the conditions that they want to satisfy? And I tend to focus on not the letter, but the spirit. What do they want? They're saying this, what is it they want me to do which caused them to say this? Okay, fine. I get that. Let's see how we make that happen." [#2]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "We have a good network of people that we work with that are both WBE and MBE and I would say about 30% of our workforce are minorities, so we're pretty good. And we have Boston residents that are also on the payroll, so it doesn't make it too difficult for us. We've been around the block, so we know how to deal with it. And if we need female participation, we can always go to our union and ask if they have somebody that's a female who's not employed right now that we can get them on the job for a little while. It's not a small list. It's a big list. And if you are a little bit savvy, you can talk to your competitors and say, 'Hey, you know what? I just won this, and I need a WBE. Have you used a WBE that you could recommend or an MBE or a veteran?,' and I find that 80% of people that did public works, that have been around the block, have worked with everybody in those categories and have

built good relationships where they can say, 'Yeah, this person's great, reasonable, gets the job done, and I would highly recommend them.' Like I said, if you want to get somebody to do something in your home, right? As soon as you've got a name and then you'll do a Yelp review or Angie's List or something to see if this person has good reviews online, and unfortunately there's nothing like that right now for MBEs or WBEs. But I do think that it's word-of-mouth. I remember when I first got into the business and we bid [for] a job for the City of Boston and we needed I think it was 5% WBE and 10% MBE, and I had asked a friend of mine [who] was a general contractor. I said, 'Geez.' I said, 'I'm looking for this,' and she was a WBE. She was a pretty good-sized general contractor. She told me that I should use this woman that was both WBE and MBE, and she highly recommended her. I went to the woman's office and she was wonderful, and we were able to do business and down the road. If I ever needed anything, I would always call on her and say, 'Hey, are you interested? If not, do you know somebody else that might be?' A lot of it is word-of-mouth and relationships." [#3]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well, I use the Small Business Bureau in Mass for that to find minority-owned. Actually, a woman-owned company was one of them. And quite honestly, my mom's owned [a] company for 35 years, so a lot of times I'll just use her company as a woman-owned company. I worked with her for about 10 years. I know there's benefits of it." [#4]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I can't say I do; I don't really solicit the work like that. If I need a subcontractor, I pick a guy I know. But there is a female trucking company that I call when I need extra help hauling soil, and some of her crew is minority, but they work for her." [#13]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, "There's no difference [between certified and non-certified subs]." [#14]
- The non-Hispanic white female representative of a majority-owned construction company stated, "A few MBEs, but not that many. The only time that we would be reaching out to MBE/WBE subcontractors is if a trade is needed that is not covered by the regular crew, we try to include M/WBEs to give them an opportunity. For instance, if there's a building 20-30 feet high that needs foam insulation, that is not something we do, so I would then reach out to M/WBEs. Everyone will get back to me if they're interested or not." [#15]
- The Black American male owner of an MBE-certified construction company stated, "Well, if it is not a requirement, I don't even go that route. But fortunately, or unfortunately, all the subs that I use are minority business owners. So, in that, regularly I'm fulfilling that part of the requirement. Pretty much all of them, there are few that come in... There's one plumber, for instance, that is not. And then there's one electrician that is not. But the ones that I use constantly, they are people of color. It depends. They can only handle... If I'm doing a commercial building, for instance, some of my guys, the subs, they don't want to do that. There's a set amount of work that they want to do. They don't want to go beyond that. In that case, I have to call somebody else, and the person might not necessarily be an MBE or of color, something like that. I sincerely don't think so, because it's pretty much known how much a plumber gets and how much... the difference is maybe a dollar less or a dollar more. So, sometimes a person of color can come in and throw some numbers at you, and he may

hit your head against the wall. And somebody's who not of color will come in and give you... It's vice versa. Like I said, in terms where I was certified, for instance, I had to fulfill some of the requirements if they [were] need[ed], and that is the good thing about when you start looking for subs and you can't find them, you go to the state website. That's where you find them. And so, we do utilize that database, but if I should tell you I go there every day on every job, I'll be lying to you. Unless it's very crucial, it's critical, you really need somebody from there, all your options have been exhausted, then you turn around, and if you go there, there are quite a number of them that it's easy to find. And there, when you click a contractor, you know they've been cert-ed, they've gone through a process, so the capability is there, you understand. And that is the other thing. Because most of the people are certified and they do a lot of state jobs and city jobs, their wages are based truly on public [rates]. So, when you translate that or you transfer that into the private or the residential, it doesn't work there. It is not the same. Hourly wages, or what is it called? The minimum wage for state or city job[s] is different from private. So, if I'm on a job that actually does not mandate me to get an MBE or a WBE or whatever that is, I don't have to go there. I can find somebody, and when it comes to that, I don't think there is any [oversight] in terms of who I get. It just matter[s] who can do the job. They can be any color. They can be any race, I should say. Public sector, it is a requirement that you have to use a certified person. You cannot bring anybody who is not certified. You have to use... And I have done that many times. I went to [the] extent of buying material from a lady to fulfill that requirement. Like I said, it's a little bit pricier than if you had just gone to Home Depot to get it, but it was the law, so I have to fulfill that. For example, it was just a private project. Somebody who come[s] in and say[s], 'Okay, I'm going to do this for you for a dollar if I come on.' My budget don't allow me to do one dollar. I give you 90 cents. The person will look at you and say, 'Okay, let's do it.' Whereas MBEs, they can't say no, that you have to use them regardless. It's either him or the next person. There's a document that everybody looks at, and the wages are there. So, they won't cut their wage. So, he comes in and he's there, a dollar is a dollar. They will cost you more money. They cost more, and that is the fact. That's why I'm saying, so if you are doing a state job or a city job, those structures have been built into the project, whereas [in] the private sector, it's not like that. Before a contract document is put together in the public sector, they actually look at all these things, and then they work all the numbers into the contract. That's why if you see a [inaudible 00:26:00], you say, okay, I will replace a car tire for \$10 from the state. If it was just private, it will probably cost you \$5. But it's because of the fact there's the various factors that are the requirements in there that you need to go through. I think the state or the city have done a very good job looking at all those factors and putting all of that into work. So, the contract may look a little bit hefty, but by the time you are done going through all of this process, you realize that, wow, somebody sat down and thought through this thing before they put the document out there. Unless the MBE is coming to work for you on the private sector, and who actually... I think there was one guy who did that before. He told me, 'This is not a prevailing wage job.' I said, 'I know, I know, I know. I'm not going to give you a prevailing wage process here.' They do that. Some do. Some do. But others, no. There are some that are doing state work, they love doing it, they don't care." [#22]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, “We have, but we’re so specialized that there are very few women owned businesses or minority businesses that are in our field.” [#25]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “It really depends. It depends on the project, but I’d say maybe, maybe 10% of the solicitations we do are specifically to WBE or MBE firms. Very little [outreach], actually. It’s mostly people that I’ve known before. So, we don’t really have an active outreach program for minority or women-owned subcontractors. Generally, I have worked with many WBE and MBE firms, and I find no difference. In other words, MBEs and WBEs are equally qualified as majority-owned firms, the only difference is some of the MBEs do not have the management structure in place to manage some of the larger projects that we do. But nothing major. For example, it’s mostly the ability to process paperwork. But in terms of expertise, I don’t really see a huge difference in the quality of the work between MBE/WBEs compared to non-MBE/WBEs.” [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “First of all, I normally know exactly who I want to use, and there are firms that are a minority [owned firm]. There was a minority estimator that I really liked working with, but he’s always so busy because he’s one of so few that everybody goes to him if you have to have a WBE or an MBE. There is a woman who is Japanese-American and she’s a phenomenal scheduler, just phenomenal. I go to her all the time. I know the quality. I can tell her anything and she gets it done for me. You sort of form a level of comfort. Again, female estimators, maybe a handful in this area. For example, when we did the work outside of El Paso, I wanted to use local firms that would benefit from such a huge project there. I made it a point to look for minority firms and I encountered the same problem. I had to bring them from New England because they just were not there, or I had to go to San Antonio. I got the fire company that I use, fire inspections, [and it] was a Mexican American man coming out of San Antonio. I use a liner, a guy who does the concrete lining for the huge sewer pipes, he was African American from Illinois and very, very good, but I could only find him. That becomes problematic ... because if he has to be in El Paso, when he’s based out of the Midwest, that’s an increase in total cost to the project. You have to say, ‘The government isn’t going to pay for it so it’s going to come out of my profit line.’ But they’re out there, they’re just not in big numbers. I will tell you that, for example, right now I’m writing a proposal and they want a [Vietnam veteran-owned] business to be involved. They said, ‘We’re not going to make it a contractual obligation, we’re going to make it a goal. We would prefer that you have this.’ I found one firm and that firm said to me, ‘We’re willing to do it for you, but we expect to be paid and we may or may not do it with our own people. We may be bringing in a non [Vietnam veteran-owned] firm, but they’ll work under our umbrella.’ That doesn’t do anything for me and it really doesn’t do anything for the [Vietnam veteran-owned] business other than the guy’s going to make money. It really becomes a pass-through. What I’m now going to be doing is writing a letter about why I will not be able to comply with that, and that occurs everywhere. It occurs with women; it occurs with racial minorities. I understand it because there’s just not that many out there, but I just can’t participate in that type of stuff. I find that some minority firms are extremely responsive. They want to really make that growth. They work really hard. On the other hand, so do white firms. I run into some minority firms where they’re too small to do

what I need done. That's really where the big difference for me is, is that the projects that I do are demanding projects. The work that we do is demanding. I need for people to be able to move at my speed and that takes financial resources. I found one gentleman, Hispanic, who was an estimator. I showed him the plans and I explained the project and he was very anxious, and he said, 'Yes,' he could do it, fine. I always go to see what their offices are like. I showed up unannounced and it turned out that he lived in Jamaica Plain, and he was working out of his garage, which is not a problem, that in itself is not a problem. But what is a problem is that he intended to do the estimating manually. That's just an impossibility. To answer your question, for me, the problem is mostly the size of the firm to the size of the project that will present the problem, capacity, a bit capacity and resources. I don't question their ability, like that man was clearly a competent guy in terms of doing it, but he wasn't ready." [#31]

- The Black American male owner of an MBE- and SLBE- certified construction company stated, "There's no difference there because the only reason why they exist is I'm either too busy or it's too big for me to handle. So, I would definitely be going that route anyway. Now being minority or non-minority has no base factor at all." [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "We have a couple that we work with. We don't go out of our way, I guess. If it's in their area, we call them. If not, we basically look for referrals from other companies that we've worked with. I guess it's not a primary decision-making factor. But there are a couple of good friends that we've worked with that are designated or woman or minority-owned." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Yes, because during our work as prime contractors, we had to ensure that we had minority and female subcontractor participation in order to get the work with the public sector. In our specialized industry, we had to select people who were qualified to do the work, so all of them knew what they were doing. So, you know, I would say they were all pretty well qualified and they did the work well regardless of race, ethnicity, or gender." [#35]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Absolutely. We use MBE/WBE subs all the time because they are linguists from different countries. All of our workforce is diverse. We're always trying to hire MBE/WBE subs whether they are certified or not." [#37]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "I don't solicit them. They're part of my composition. We work together. I'm a minority and my guys are local. People we've been working [with], it's all from the neighborhood or from here or from Brockton and minorities. People like me, people that I'm comfortable dealing with. Maybe they are not certified WBE [or MBE], but they are minority by the color of their skin, their behavior and where they live, like me. They might not have the paperwork, but they bleed, breed and breathe in [these] neighborhoods, you know?" [#39]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, "Absolutely. I think that is typically the first phone call we make to other 8(a)'s that we know and trust. I think that's an important

piece, because you need to have team members that you can trust and who are competent to do the work. I think regarding how we've positioned ourselves; we haven't pursued too many private sector types of opportunities with these 8(a)'s. Those pursuits primarily have occurred in the public sector arena." [#40]

3. Prime contractors' preferences for working with certain subcontractors. Prime contractors described how they select and decide to hire subcontractors, and if they prefer to work with certain subcontractors on projects.

Prime contractors described how they select and decide to hire subcontractors [#13, #14, #22, #24, #25, #30, #33, #35, #37, #44]. For example:

- The non-Hispanic white male owner of a majority-owned construction company stated, "Most of the time, we have subcontractors that we've been working with for years. So, it's more of a relationship type of contract than it is just trying to find someone." [#13]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, "We have a list of subs that we maintain for each state and municipality that we work in." [#14]
- The Black American male owner of an MBE-certified construction company stated, "These are people that I've known. In the construction industry, we know each other. So, some actually come by recommendation from friends that I've contracted, that I've used these people before and things like that. The norm is that once you use one sub, you don't want to change the sub, honestly, unless something goes really, really bad. Once you pick one, you tend to stick with the person, because you've already seen what the person is able to do and things like that. And people do call me because they can search contractors that are based in the Boston area, the neighborhood, and a contractor near you, and call you. Sometimes they will leave their cards on your job and say, 'This is what I do. If you need help and you're doing this...' That's how we get subcontractors. Sometimes you'll be there, and they'll call you and say, 'Listen, your name came up when I did a search, and this is what I do. If you need this...' things like that. They'll call you and tell you, and then you'll take." [#22]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I asked the survey folks who were working on the same job if they had anybody in mind they've worked with and they named a couple of people and then I made some phone calls to some women, some guys, and said, 'Can you help me or do you know of anybody who can?' I basically got some names that I knew enough about to know that they worked and would be decent. But that was kind of crisis mode. But yeah, anywhere there's somebody who can do the work, this is where I would go especially if it fits into my budget. In the case where I brought the two subs on, I didn't make any money. I wrote the check, and I billed the same amount to the client. But it helped me get the work done." [#24]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It's basically through word-of-mouth, looking for companies that have good reputations, and sometimes we interview, but sometimes we continue to use the same subs, because we don't do that much but if you have a structural engineering company that you like, you use them." [#25]

- The non-Hispanic white male owner of a VBE-certified construction company stated, “Mostly, we have a group of subcontractors that we work with all the time. We try to bring people in, and we do that, but most of the time it's with people we've worked with before, and these are relationships that I've had for 30 years.” [#30]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “I pretty much have a lifetime of telephone numbers. And then honestly, I'll ask different general contractors, ‘Who can you suggest? I got a job I need to sub out, you got anybody, you know that you could suggest?’ And they'll let me know who they think is good. And that's how I meet new people.” [#33]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Yeah, we would use subs periodically, and most of the time we would select them for work in both sectors. Our selection was primarily based on referrals from other companies.” [#35]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “We select them based on word-of-mouth and from social media. We build relationships with the linguists and if the client is satisfied with their work, then we use them on other jobs. If the client is not satisfied, then we don't use them again.” [#37]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “You know, these jobs are very physically demanding. So usually, I look for guys who can handle restaurant cleaning and waste disposal. I recruit people that I know from East Boston who are primarily from Columbia and El Salvador. Everybody in the neighborhood knows everybody, so it's easy to recruit subcontractors that I know or who are referred by people that I know.” [#44]

Primes discussed the effect working in the public or private sector has on their decision to hire subcontractors [#13, #14, #30, #31, #34, #37, #40]. For example:

- The non-Hispanic white male owner of a majority-owned construction company stated, “I would say [I use the] same subs [in] both sectors.” [#13]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “We use these subs for work in both sectors.” [#14]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “With the private sector, we don't really have any requirements. However, in the public sector, they do require best-faith efforts. They'd like to see 30% women-owned businesses and 50% minority-owned businesses. So, it's mostly the public sector that have the real stringent criteria. Even though I would expect a place like Harvard or MIT to have the same criteria, but this is much more regulated in the public sector than the private sector. However, I don't think there's any case where we've been required to hire MBEs or WBEs. With the public sector it's just best-faith efforts.” [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “It is different, in the private sector, they will tell you, ‘We want to make sure that your sub-consultants are capable of doing the work. Here's a list of the guys we have generally worked with and if you can make it work, fine. If you can find equivalent

contractors, fine.' In the City, in the state, that's a little more difficult because, one, you've got the trades, so if you're going to be doing construction and you need a plumber, you have to make sure that it's not considered a trade so that you don't end up having a problem with the trades. Secondly, if you're going to hire a sub-consultant for a city or a state job, you got to submit them, their paperwork, their credentials, and their fee. They may or may not accept their fees and it becomes much more tentative." [#31]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "If we pick a sub on a public sector job, it's usually someone who's local, ideally that we've worked with before. And it's mainly a time and price consideration. On the private side, again, I guess they're pretty much the same. You want someone who's local and can perform quickly, and at a reasonable cost. Sometimes, if the contract mandates that a certain percentage [are disadvantaged], then, obviously, we'll look directly for disadvantaged subs. But, otherwise, it's more about, are they local, and are they capable, and can they turn the work around quickly enough?" [#34]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, "I think there are many small businesses where they just focus within the private sector, so they're not looking at any of that public sector types of opportunities and, you know, you tend to have your network of small businesses that you work very well with. Again, small businesses tend to share that they're going to focus their energies within a specific swim lane. Many small businesses don't focus within the public sector, at least on a local basis." [#40]

Firms who work as prime contractors explained that they do not want to work with subcontractors who are unreliable and consistently under-perform. Preferred subs usually have a long-standing relationship with the prime and are responsive to the needs of the project [#22, #30, #34, #37, #39, #40, #44]. For example:

- The Black American male owner of an MBE-certified construction company stated, "If there is a sub that I don't want to work with, then that means I've worked with that sub before and I'm not happy about the way he does his things, or the professionalism was not there or some kind of... his behavior was unacceptable, or something. There has to be a reason why I would not want to work with a sub. It has nothing to do with race, color, creed, whatever. Nothing. The fundamental or the underpinning of what I am looking for is integrity. If the person has it, then it doesn't really matter to me where the person is coming from, because I need the work done and done professionally so that I don't have to redo it. I had to. I had some guy who I think was from... somebody recommended him. He was a Spanish guy. He came and did some work. I was not happy. There's no way I can call that person back again." [#22]
- The non-Hispanic white male owner of a VBE-certified construction company stated, "There is one MBE firm, I think they're out of Boston, and he's just really, really difficult to deal with in terms of getting the work done on time. There's a flooring subcontractor that we've worked with that we will not work with anymore. Yeah. It's just quality of work. We used them on one job and the quality of work was absolutely terrible. We don't tolerate that, so we never use them anymore. There's also a HVAC contractor we won't work with because

his pricing on changes we thought were very unfair, so we don't use them anymore, but that's about it." [#30]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "No. The only subs that we don't work with are ones that we've had bad experiences with. But I don't know that we've had any disadvantaged businesses that we don't work with. We have a landscape architect that we try and use frequently, just because we're at the point that we don't have a retainer with them. We've used them enough and we just kind of, the handshake sort of deal. How much is this going to cost? All right. Let me know if it's going to go above that and get started tomorrow. But that's just more from having a long-term relationship that they refer work to us, and we refer work to them." [#34]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "We won't work with subcontractors that don't provide quality work or they're not on time. Or if we send an interpreter out to an appointment and the client doesn't like them, for whatever reason, then we just don't send them out again." [#37]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "I have my local plumbers, electricians, plasters, roofers, all the people that I work with local[ly] that I've been doing project work with for the past 30 years." [#39]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, "You have to be very guarded and I think it comes down to reputation and trust and ensuring that you've got a team of individuals that are going to be able to do the work, because at the end of the day it's your reputation that is at stake and you don't want to get into any challenges where our C cards would be impacted as a result of a sub that we have on our team that may not be fulfilling the requirements that they should." [#40]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "I mostly work with the same people. But, if they are not available, then I bring on other people." [#44]

4. Subcontractors' experiences with and methods for obtaining work from prime contractors. Interviewees who worked as subcontractors had varying methods of marketing to prime contractors and obtaining work from prime contractors. Some interviewees explained that there are primes they would not work with.

Two subcontractors mentioned the helpful role the City's programs play in finding work [#12, #22]. For example:

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "Everyone knows the players out here now. I think more and more of the prime contractors are blasting out to the communities. I think more and more prime contractors are working with these different agencies like SVO, MMCA, CWE, whoever. All of these. City of Boston. And they're saying, 'Get the word out. We have this project that's coming on board.' So, there's correspondence all over the place that lets the small business know that work is coming down the pipeline. A lot of these projects now are putting out these opportunities, even their construction timeline, so that these small businesses are even able

to plan for the work. Like see that, 'Okay, my scope is not going to be bidding for two years,' but now they're receiving this reminder notice every month or every couple months that their scope is getting closer and closer. That helps them to prepare for the bid. So that part of the business I think is being done a little differently now, in that some time ago you would get those notices and say, 'We need this price in a week.' I think the communication has gotten better." [#12]

- The Black American male owner of an MBE-certified construction company stated, "The listing. Yeah. They go through the state and then they'll look at all the listings and then see what you do, because under the state, they will list all the sub-categories that you do, so when they are looking for framing and all that stuff, they call you and all that. That's how I get them." [#22]

Eight subcontractors reported that they are often contacted directly by primes because of their specialization, their certification status, or because of they are known in the industry [#14, #20, #24, #27, #31, #33, #36, #40]. For example:

- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, "Our ability to get work as subcontractors is twofold: (1) The company's status as a M/W/DBE firm; and (2) We have strong, long-standing relationships with primes such as ... large environmental engineering firms." [#14]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "Some of them seek me out because a lot of the state work, they need DBE or WBE percentages on the job. So, they reach out to me. Well, the state, they advertise and bid work every, they have biddings every Tuesday. So, that's a list. And I either have, the contractor sends me the plans, or they have it listed on their website. Same thing. Those same contractors will send me, if, even the City of Boston, or if Milton, if they have a municipal job that bids, they'll send me a request for quotes for that sort of stuff, as well." [#20]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I typically get calls to be part of the team, or sometimes I'll get an email from somebody who thinks I'd be interested in a project, and what I often do with those, I look at them and think of who would I want to work with on this and send it out to them if I'm not the right lead and hand it off to somebody else who's got more bandwidth to put together a proposal and chase it down." [#24]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, "Reputation. People know we can do the work." [#27]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, "To me, it does not differ [between sectors]. Normally what will happen is I'll get a call from any company and they'll say, 'Have you heard that the MBTA is going to do blah, blah, blah.' 'No, I have not heard.' 'We're going to go after it. Would you like to be part of it?' 'What part do you have in mind? What do you see? Send me the spec so I can look at it, send me the RFQ so I can read it and see.' Then, if I feel that my work will actually complement what they're doing and that they will complement me and that I will have the ability to work cooperatively and part of the integral team, then we'll put together our part of the proposal, we'll put together our numbers, we'll send it over and we will say

something like, 'I just sent it over to you, take a look at it. I'm flexible on the cost. I'm flexible on the approach.' We will then sign [a form] to do whatever it is that they want us to do and that we agreed to." [#31]

- The Black American male owner of an MBE- and SLBE- certified construction company stated, "I find out about jobs because people know my email and they email me and ask me if I want to quote. Secondary, they'll go to the state minority listing and they'll see if there's a minority in there that they get our telephone numbers and stuff like that and call you. A cold call just on the rare chance that you might be bidding this job." [#33]
- The Black American male owner of an MBE-certified construction company stated, "Based on my track record they generally seek me out and this has worked very well for me." [#36]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, "It comes down to our reputation and our past performance as well as our status as an 8(a), so people find us, teams find us specifically to help them fill some of the gaps that they may have within their team if they are the prime." [#40]

Eight interviewees said that they get much of their work through prior relationships with or past work performed for primes. They emphasized the important role building positive professional relationships plays in securing work [#13, #16, #18, #24, #33, #34, #35, #36]. For example:

- The female representative of a Black American MBE-certified and uncertified WBE firm stated, "It's all based on relationships and word-of-mouth referrals, across both sectors." [#16]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "All of our work with developers and contractors is secured through word-of-mouth referrals and relationships. Since we come on the job as a subcontractor there is no difference between the public and private sector." [#18]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I get the work through track record, word-of-mouth advertising, and relationships. I also attend outreach events, such as a conference at Holy Cross College, or the Mass Conservation Commission. It's sort of where all of the companies and commission members from all across the state go. And it's where a lot of consultants who do what I do go to make connections." [#24]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, "Based on always, always, always the prices first. I never got a job in my life because my price was high. Never, ever. Always got to be the low guy or at least close enough to them. And they wanted to give me some work that I got it. It's all about the money, honestly. Your reputation is good and that kind of thing. But if the price is too high, you're not going to get it, no matter how much they like you personally or know your quality of work." [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "The central register for public jobs. We'll see what's up for bid. But as far as private jobs, it's just a lot of word-of-mouth. Clients. Friends of previous clients. Sometimes, some of

the boards that we've [worked with] before will recommend us with other firms. They'll give you three or four. We'll get something that way. But there's no real focused marketing, or anything. We have a couple of architects that we have a decent relationship with, that we've done work for. We'll get a call from them if they're doing something on the public side and they have to sub out for civil. But it's pretty much, you have a working relationship with someone, and they know you're going to perform, and they know your pricing is reasonable, and you have good communication. That's kind of how you end up. We don't do much marketing, really. Engineering is a weird industry. There isn't much that happens, as far as marketing, other than trade shows. But we just generally rely on word-of-mouth. We don't really do much, as far as trade shows or any of the other general ways that engineers market, which kind of rely on work. And usually, when there's a construction sign, we have our name on the sign. So, that's kind of it for marketing." [#34]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It's all based on reputation, track record, and professional relationships with the prime contractors. I rely on past history and I have great professional relationships with people in the business. And like I've said, I've done work with public entities and private entities. In the private sector it been mostly engineering firms, large engineering firms." [#35]
- The Black American male owner of an MBE-certified construction company stated, "As I indicated before, it's generally based on word-of-mouth referrals." [#36]

Two business owners reported that they actively research upcoming projects and market to prime contractors. Those businesses reported that they research upcoming projects and sometimes identify prime contractors using online and other resources. Some firms then contact the prime contractor directly to discuss their services [#20, #26]. For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "When I first started, I went individually to a lot of the contractors to introduce myself. When I'm bidding on a job, and I get a job, and I haven't done work with the contractor, I like to meet them face to face." [#20]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "Just from calling on them and realizing that there was that segment of the business that we were probably missing out on. Well, it is some [cold calling]. And usually through the AGC, which is the Association of General Contractors. I can't say how often that [been sought out because of certification status] happens. And I think part of that is we were doing business with a lot of these primes before we became WBE certified." [#26]

5. Subcontractors' preferences to work with certain prime contractors. Business owners whose firms typically work as subcontractors discussed whether they preferred working with certain prime contractors.

Many business owners and managers indicated that they prefer to work with prime contractors who are good business partners and pay promptly [#13, #18, #20, #22, #24, #33, #34, #35, #36, #39, #40]. Examples of their comments included:

- The non-Hispanic white male owner of a majority-owned construction company stated, "My frustration with some primes is that some people just don't know their job, then everyone

on the job suffers. And that is frustrating when you're working for someone that just doesn't know their job. So, I have other people I work for that are very good at the job, they know what they're doing. Most people are very easy to work for. Others not so much, but I can work with anyone." [#13]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "Obviously, there are some primes who are easier to work with than others, but no one's behavior is such that we wouldn't want to work with them." [#18]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "I have some that I work regularly with. I know if they win a job that I have a good shot of getting it. But there are new companies, too, that will take a chance. Or, I have worked on another job down the road from them and they've seen how we perform, and they'll call me. 'Hey. We saw you on this job. Would you be interested in giving us numbers on this?' So, it works in that way, too. I would say I rarely turn down work, but if someone's not a go-, you know, I have a few that don't pay." [#20]
- The Black American male owner of an MBE-certified construction company stated, "Yeah, they can't frame. I had to drive all the way from Cape Cod to Boston to come and frame for them, and they wouldn't want to pay. I didn't have time for that. When that happened, I couldn't actually support my payroll and wait for that 14 days, 15 days to get paid. I just decided not to use them in order to look for sub jobs, because I don't have the money to carry costs until when I get paid. And the primes don't want to give you any money. They want you to virtually come in and use your own resources and work for two weeks, more than that sometimes, three weeks, and then you get paid. I don't have that resources." [#22]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "There are a handful of developers that I don't work with, given some of their payment practices and some of the way they treated people that I've worked with. Like when one developer said to me, I referred him to a woman who I think he needed to go to for something and he said, well, I used her on another job and when she sent me the bill, I thought it was too high. So, I just didn't pay it. So, I don't think she'd work for me. Now that I know that you treat people like that, I'm never going to work with you again, you know. I didn't really say that directly. But I haven't worked for him since. You know, if people treat somebody else that poorly, one day they'll treat you that way. So, so yes, there are some people that I don't work with. It really has to do with either how they've treated people, monetarily, and if they don't treat them well, why should I work for them when I'm busy enough to get work other places." [#24]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, "Well, other than not knowing them, [it] would be the only reason. There are general contractors that I won't work for, because like I said, I've had five different companies in my lifetime and three of them went bankrupt due to the fact that general contractors stuck me, and I had no way of getting my money. I only worked for a handful of companies because I can trust them." [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "There are firms that we prefer to work with, I guess. And that's just mainly having a good track record, as far as paying their bills, paying on time, and building a quality product.

You don't want to be associated with a failure of a project. I don't think there are any that we won't work with. There are just some that we'll ask for a larger retainer, based off of payment history and that sort of thing." [#34]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "There were primes that my former partner and I did not want to work with because they were reckless in ignoring some of the regulatory requirements. When they approached us, we simply claimed unavailability." [#35]
- The Black American male owner of an MBE-certified construction company stated, "There aren't any primes that I have issues with except the MBE primes that don't pay on time. It's difficult to get to the root cause. The non-MBE/WBEs pay on time." [#36]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "If you go as a subcontractor, the bigger GC will skin you to the bone and you end up working in doing that all the time, but you'll never grow." [#39]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, "Because they are ethical. They are, there's a strong relationship and I think there's respect." [#40]

F. Doing Business with Public Agencies

Interviewees discussed their experiences attempting to get work and working for public agencies. Section F presents their comments on the following topics:

1. General experiences working with public agencies in Boston;
2. Barriers and challenges to working with public agencies in Boston; and
3. The City's and quasi-agencies' bidding and contracting processes.

1. General experiences working with public agencies in Boston. Interviewees spoke about their experiences with public agencies in the Boston area.

Eight business owners had experience working with or attempting to get work with public agencies in the Boston area and in other places [#1, #2, #10, #22, #31, #32, #37, #AV]. Their comments included:

- The Black American male owner of an MBE-certified professional services firm stated, "So in my travels, all my journeys through doing contract and independent work, I would say, yes. I have done multiple layers at each level, at the local level, of course, but also at the state and federal level. And it was only through a third party's company that I did these works and there was nothing really direct. So, I did do work for the state, but I've actually been all up and down through Boston and all the Boston proper and thereafter." [#1]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "It's a little different working with, at least my experiences with the City are a little different than something like the Department of Defense. But their motivations are different, so it makes sense. The DOD is, number one on the list is, does it work? And will it make things way, way better? And that's their main criteria. The City of Boston is more

concerned about it had better work and there had better not be negative repercussions when it works or does not work.” [#2]

- The Black American male owner of an MBE-certified goods and services firm stated, “So, you have to be proactive. So, I said to myself, that I have to go to each and every department, in the City, introduce myself, because one of the main reasons for that is because the way that the system is set up, is that it's on different tiers, like, you can do 10,000, if you're doing 10,000 or more, it goes through a bid process, if you're doing under that, which is tremendous amount of business under that 5000, 10,000 benchmark that you don't have to go through that stuff, you can go through a department. So, with that knowledge, right? Because I didn't really know that or understand that. Yes, you have to be proactive. Now I find the only way that I'm going to get that business is put on my salesman hat and go to these department heads, and arrange meetings with them, and, and sort of let them know we're here. Because most of those sort of under five thousand contracts, department heads, don't even think about it, someone in the office is doing it. So, it's, you know, we're not meeting any benchmarks here. They don't know about the bigger picture and, where the business is going to. And then, when I go into office, and I tell them, you know that we're a minority business, they don't even understand that connection, and what that means for their department in terms of they make you know, points, or they may be thought of as working with, with them to help reach certain goals. It matters, it helps your department, in terms of being acknowledged as a company that works with minority vendors, and that they get, you know, they get those points for it. People can monitor and see real numbers, you know, as opposed to... because those, it's under the radar, all that 5,000, 10,000 it's all under the radar I know that everybody prints, you know. I know from a simple business card, to a presentation folder, to a annual report, you know, or a poster, or print a flyer. It's amazing, the need for it, but we just have to make... And I don't know the numbers on the millions of dollars the City spends on printing, you know, so that's a real number, that's millions of dollars, maybe a couple of million? Yeah, we don't even get a percentage, you know, like maybe, you know, less than 1%. Which is the real number around, you know, for all the, sort of, vendors that I've been talking to.” [#10]
- The Black American male owner of an MBE-certified construction company stated, “A project like the [a nearby city's] Police Station rehabilitation was a commercial project. I did something in Hudson, Massachusetts for the city. I don't know the program. Homeowners would get some kind of grant or something from the city or the town. For home improvement, so it was a business on the main street that would do some rehabilitation. That was a commercial project. Everett school administration block I did. That was commercial. That I did it by myself with no people. I actually got the bid directly from the town, the town of Everett. I was the prime on that one. And some of the other ones that I mentioned I was the prime. It was only the Dennis Police that I was not the prime. I was a sub to the prime.” [#22]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “I have attempted, but I have not been successful, but I have not worked for any of them. It's very hard.” [#31]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, “The only work that I have done in the

Boston area is an interpreter for Chinese clients in meetings between Chinese clients and the City, but in those cases, I was always hired by the private sector. You know, only recently have I been interested in pursuing work with public agencies in the Boston area.” [#32]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “We actually had a huge problem with the court on a public contract. It was the state of Massachusetts Court. They said that they weren't going to pay travel costs for interpreters, and they needed, I don't know, some unusual language interpretation at the Courthouse on Martha's Vineyard. So, they approved the interpreter to travel to the court up there and then they came back and said, we're not going to pay any travel expenses. Well, the travel expenses were more expensive than the actual hours you spent on the job. And the judge had asked for it and the court had asked for it and they just said, no, we're not going to pay. And I tried to fight it for ages and I finally wrote it off and it was highly annoying because we had all the written documentation to say that we did the work.” [#37]
- The owner of a majority-owned goods and services firm stated, “We serve many town halls surrounding Boston and have experienced minimal barriers in communicating and completing the job.” [#AV]

Eighteen business owners described their experiences working with or attempting to get work with the City specifically [#3, #11, #15, #21, #24, #26, #27, #33, #35, #39, #40, #44, #AV, #PT2, #PT4]. For example:

- The non-Hispanic white male owner of a majority-owned construction firm stated, “Like I said, they've really made great strides, especially in the last 10 years, trying to be more inclusive with small businesses and the requirements, especially the resident requirements that the City has. Right now, I think that they're doing a pretty good job. I mean, if you have a qualified bidder that has a low bid, then the contract will be awarded to you. And if you're smart enough, when you reviewed the requirements you'll know if there's MBE, WBE, resident requirements, so you'll have to follow those requirements. And that, you'll have to deal with the City and they're pretty tough. They're actually very tough when it comes to enforcing those requirements. I think what happens is usually when you go into the bid room, the people that are opening the bids have been there quite a long time and they do have experience in knowing who a lot of the players are, and if they're fortunate enough to get three or four or five bids, if somebody's bid is very low they may think that that person may have made a mistake in their mathematics or may have forgotten to add something, and they will ask them if they're comfortable with their bid after to make sure that they didn't miss anything. But of course, they ask for a bid bond and if your bonding company is going to give you a bid bond, then you better finish that job or somebody else will.” [#3]
- The Black American male owner of an MBE-certified goods and services firm stated, “For me, I know they put it in the globe and the banner, they... You know what? Maybe that's not true. Because me, I call up Susan Cunningham, ‘Hey, when is the bid coming out?’ they wanted me in on the bid too, which is just crazy the way this thing happened. Because it went out a year ago. They were trying this new system where they were putting the health and welfare in until they added this like \$5 an hour to the rates. And so, they did a one-year contract. And so, not too many people want to bid a one-year contract. So, I bid it and I

made a mistake on it, because I didn't factor in the health and welfare to \$5 an hour. So, I messed up on that one. And they were like, 'Oh, we really wanted you back in here,' and they were telling me when it was coming out. Because somebody was to call up and said, 'We want this guy.' Because they were disappointed that I screwed up last time on the bid. And so, I just didn't get it this time, because they just changed on me. Everybody that I was dealing with just turned on me. And some of them could call and say, 'listen, I know that that happened, but we're still friends and I understand...' No call backs. It's like, somebody really said to them, 'this is what we want'. But what are you going to do?"[#11]

- The non-Hispanic white female representative of a majority-owned construction company stated, "We don't do much work in Boston with private developers because as you know, Boston is a union town, and the company is non-union. [Our firm] gets some work with private developers in Boston on non-union jobs. The company does not do any work for City of Boston agencies because of public bonding requirements that we can't meet." [#15]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, "Well, no one else was doing it. There was no competition if they were going to bid, they were going to have to bid from a guy either out of New York or New Jersey. My price was so much cheaper. It was during, I think maybe it was a soccer match over in the North End. One of the restaurants was showing the World Cup or something like that. And, we had an inflatable screen there and Mayor Menino and a couple of his guys saw it and gave us a call as soon as they saw it, and they said they wanted to do movies in the park. The City of Boston is probably the best example, providing equipment for the park so that they could show movies. We were showing movies during the summer and then the last movie of the series, they gave away goodie bags for getting ready for school, like back-to-school bag, kind of thing. My experience with the City of Boston was fine. They value what we had to offer in our expertise and so, they made it real easy." [#21]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "The other problem is lack of information coming from the City of Boston. I probably can just get on my good friend Google and probably find more information, but I'm not sure I would know where to begin to look for work related to what I do that the City was putting out there. So, I don't know if the City has a clearing house website for this type of thing or, whether it's just reliant on individual agencies sending out information and publishing them somewhere. I mean I just don't know enough to know how to get the information about opportunities. Everything I've ever seen from the City has been forwarded to me via email." [#24]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "Any of the contracts we've had with the City have come through the state contact for pest control. It's useful in finding the opportunities. But, again, more often than not, it falls to that low bid opportunity." [#26]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, "It's certainly easy to find out, yeah, definitely easier to find out about the work. Because there's already a feed of information and we know who is responsible in those departments to go out to bid. Boston's very competitive. They want what they want. And they're pretty specific in wanting some kind of unusual things. In some sense, it makes it a little bit more challenging for us because they don't always want normal things." [#27]

- The Black American male owner of an MBE- and SLBE- certified construction company stated, “Unless I become a general contractor, there’s zero chance of me ever doing a job in the City of Boston again.” [#33]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “The reason why I have not sought any work with the City of Boston is the perception that it was rather complicated to get work with the City, because you had to be connected. That’s my recollection. I’m not saying it was corrupt, that’s not my point. The point is that the perception that there was favoritism during the procurement process.” [#35]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, “I don’t do much with the City nowadays because the circle changed. Sometimes you do a lot, but then comes to a new generation where the people.” [#39]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “I actually have an RSP tracker that I use from time to time and you know I’ve identified a couple of things that could be of interest to us, but we have not pursued them primarily because of bandwidth. At the time that those opportunities were presenting themselves not having any line of site to the individuals that were part of the program within the City and knowing that we were working on other things we just chose not to pursue them, because we didn’t have enough time to go after them. The other piece is that as a small business it’s really important to focus in areas that you think you’re going to have a success with. Often times you have contract officers who are doing their job and they need to get three bids in order to justify their award. You don’t want to necessarily be just part of their process. It’s interesting that you’re calling about the City of Boston, because quite honestly we’ve not seen a lot of opportunities locally that we have been made aware of. I think this conversation is certainly going to be helpful for me, because fundamentally we’ve been positioning ourselves in the federal market.” [#40]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “In Boston, there needs to be more focus on a program for recycling. It’s really hard to get a foothold, especially in the Boston area.” [#44]
- The owner of a WBE-certified goods and services firm stated, “When we work with the City of Boston in the public-school areas and it’s difficult to try to find the decision maker.” [#AV]
- The owner of a WBE construction firm stated, “Don’t want to work with the City of Boston.” [#AV]
- The owner of a majority-owned construction firm stated, “It is great to work with Boston, and Boston is a great city.” [#AV]
- The owner of a majority-owned goods and services firm stated, “The City is a pleasure to work with.” [#AV]
- A respondent from a public meeting in Dorchester, “When I went in to meet with that person, they didn’t get why I was there. It took them a while to realize that I’m trying to get business with you. Once I started talking to this person a bit more, it was very clear that she wasn’t getting it. Something happened because I wasn’t even talking to her in the office. I was talking to her in an elevator bank. Someone came up, she perked up, spoke to the

individual. This individual spoke to me and I'm like, oh wait a minute. So, she tells me he's one of their vendors and I'm like, could you explain to me how he got a contract with you guys? Because I know his operations, I've met with him before. He explained his whole business structure and everything. His business structure is similar to mine. You get a contract; you scale up just as you would for a consulting firm or with an advertising agency. You start hiring vendors based on the project. She really didn't have much of a response. So, for me, I've got to say, chasing opportunities with the City, it seems like it might not be worth my time. I might actually be better off pursuing opportunities with people who are not saying that they are focused on diversity, and don't even go through the process of having an office that's saying we're addressing our diversity situation." [#PT2]

- A respondent from a public meeting in East Boston stated, "So to me, all indicating, it seems like there's an interest in diversity. But once it comes to dealing with people at the City, I don't think that they're really getting it or if they're not really taking someone like me seriously." [#PT4]

Ten business owners described their experiences working with or attempting to get work with one or more quasi-agencies specifically [#10, #15, #18, #25, #26, #27, #33, #34, #39, #AV]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, "The one I'm talking about is the Sewer Department, they wanted a three-year contract on a printing gig, and I missed it by a simple document that I needed to have in. But I learned about the process and learned about, you know, you gotta pay attention to those applications, you gotta understand and look at every detail. So, I would have possibly won that contract if it were not for that one document. So, I sort of blame myself for that one. I did finally find out, because only I knew somebody who was Black in that department, who was a cheerleader for me to go after the opportunity. And she said you missed it because you didn't... She could only do so much without it being a conflict of interest. But if it were someone who knew, they would have said, hey, you're missing, you know, this. I believe that someone should have called me and said, hey, you're missing one little piece. So, when you're missing a piece, they don't call you back. They don't tell you, that you know, it's just incomplete. Specially if you're like on a real time crunch... I think I was right up to the button on the timeline where it was." [#10]
- The non-Hispanic white female representative of a majority-owned construction company stated, "We subcontracted on a job with the Boston Housing Authority. It was a HUD project, so we had to use prevailing wage." [#15]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I did submit a bid proposal to the Boston Water and Sewer Commission for a small contract but wasn't selected. However, I have had contracts with the Massachusetts Water Resources Authority, and it's a lot easier to get work there because they typically offer small contracts to give small businesses a shot, but Boston Water and Sewer seems to prefer awarding large contracts to the big companies. But you can't take it personally. I think they should designate someone to reach out to small companies who are interested in working with the agency [BWSC] and change their policies so that small contractors can get work with them." [#18]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Only Boston Water and Sewer if we've had an oil spill and I've had to call them up and say, 'Hey we got oil going into your sewers.' It wasn't a contract with them. It's emergency response.” [#25]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “We've done work for Boston Housing Authority. Providing pest control services. As a prime. It was much easier to work with the schools than the Housing Authorities, to be honest with you... We generally find those opportunities through COMMBUYS, So Boston Housing may announce their bid opportunity on COMMBUYS and that's how we find out about it. Or by going to the City's website where they announce all the upcoming bid opportunities. So those are the two places where we find City of Boston opportunities. you know, when I'm sitting at my desk, I will check on various city's websites to see what bid opportunities might be out there. Some of the larger cities, like Boston, we're going to find out either through their website or through COMMBUYS, which I check on a daily basis as well.” [#26]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “All of those, all the housing projects that I've been working on, whether it was demolition, landscaping, site furnishing or site work, that would have been under the, what'd you say the name of it is? Not BRA, but something else? The Boston Planning and Development Agency. The new name, yeah. Right, right. So, they have their quotas for minority participation on the workforce and things like that. So that might be one of the reasons why [big primes] like doing business with me because 90% of my employees are all Boston residents. I guess it doesn't hurt that I'm a minority too. When you're a sub like I am all contract goes from the owner to the general contractor, the general contractor down to the subs.” [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “They have their own permit that you need to obtain for private work. We just did a couple of developments in the Seaport district of Boston, so, the water, sewer and drainage all needed to be approved by Boston Water and Sewer. They now take the filings electronically and they'll respond electronically, which helps immensely, versus having to drive back and forth to their office to drop plans off, and then, pick up the comments back. That helps a lot. They're pretty much it. If you follow their standards, you don't have an issue. If you look for relief from their standards, they're going to try to get you to find a way to follow the standards. And then, if it can be demonstrated that it's absolutely not practical and not feasible, they'll relax their standards. Which is their job. They have standards for a reason. The big thing is now they're working electronically, and allowing for filings electronically, and responding electronically. It makes things a lot easier for everyone involved, I think. A lot of other communications have a permit tracking system. Even the City of Boston utilities system, their system works great in that you can see where you are at any point in time instead of having to reach out to someone directly. I mean, it's a nitpicky thing, but I think that would help a lot. And probably cut down on phone calls and correspondence coming into them if you could see where you sit in the process.” [#34]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, “I see sometimes they're soliciting project here, but most of the time they send

me the invitation to bids, but most of their bids, you have to be DCAMM certified and I'm not DCAMM certified. So, that's why I'm missing a lot of contracts, through that particular organization [BHA]." [#39]

- The Hispanic American owned WBE and MBE goods and services firm stated, "We have done many jobs with the Boston Housing Authority, for example. We are not aware of having worked with any other City of Boston or local Boston area agencies." [#AV]

Thirteen business owners described their experiences getting paid by public agencies in the Boston area [#3, #10, #21, #24, #26, #27, #33, #37, #39, #AV, #WT8]. For example:

- The non-Hispanic white male owner of a majority-owned construction firm stated, "We're not finding that at all. I mean, once the receivable goes over 30 days, we just put a reminder in to them that the receivable is over 30 days, and normally somebody on the other line will apologize that it slipped through the cracks and get us paid pretty quickly. A long time ago they were very bad, but they've become very efficient, especially now. They will issue purchase orders before the work starts and pretty much once the purchase order has been issued, the money's guaranteed to be there for you." [#3]
- The Black American male owner of an MBE-certified goods and services firm stated, "Pretty good. I've been getting my checks on time. It's so, because of my new movement for being proactive and stuff, I said damn, I got my check in a couple of weeks. That was good, because it used to be, you know, three months, six months, and that's a real barrier to entry." [#10]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, "I'm going to be honest with you. I didn't have a huge problem. I just find that working with any government agency, it's just, they just can't pay you on time. I'll be honest with you. I'm fine with it. My wife isn't, but I'm fine. It's just money in the bank. You've got two choices. Either you deal with it and you get business or, you just say no, and then you don't get their business. So, that's just the way it is. As long as I get paid, I don't care. I would like it sooner than later." [#21]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "My expectation and my experience with all municipal clients has been that you can rely on getting the payments. Sometimes you have to wait a little bit because things need to get authorized. I would add that my current expectation, whether it's valid or not, is that the City is probably going to be somewhat slow on paying than they might be normally just because of everything we've gone through with COVID-19." [#24]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "Well we did work at a number of housing projects and some were easier to work with than others. But I will say that we've had a couple that it was very difficult to get paid on. Through the BHA I mean, some were very easy. Some, there were no issues at all. But some, we were chasing payments for a long time. But, again, it wasn't the same for every BHA project. Certain ones were very easy to work with and you got paid in a timely manner. And others, you just had to chase." [#26]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, "It's not an across-the-board thing. That one was easier, and the other was easier, it's

just sometimes the particular transaction in any department. And it goes back a little bit to some of the inter-agency purchases. Where it may be shared between one department and the other and who's funding the piece of it. I can't say that on any department was harder or easier to deal with. It was just some of the transactions within a department sometimes were more difficult than others. We do sometimes have to make a lot of phone calls. For both the City and the police to remind them that they owe us money. And then sometimes you get the, 'Well, can you resend the invoice?' and, 'Can you put this on the invoice' and do that. So again, it's not across the board, it's not like every single transaction is that way but there's phone calls at least every month. I'm looking really quick at the days outstanding on. I'm looking at City of Boston Public Works right now. And they're average, 74 days. The longest it took them to pay us was 253 days. Boston Police, yeah, it's average of 48 days. But the longest they took was 546 on one of them. Boston Sewer's really well though, seven days." [#27]

- The Black American male owner of an MBE- and SLBE- certified construction company stated, "Up until I did Reggie Lewis and the police headquarters. I was working for Suffolk Construction and pretty much I gave away \$60,000 because I couldn't get paid. I asked the City of Boston for help with direct payment. If you're a minority on the job and if the general contractor is not paying you, you can file for direct payment and it went absolutely nowhere. Needless to say, I never got paid. I've never seen any of my money for both of them. I mean, I got about 50% of my money on both jobs. I did Reggie Lewis in the early-'90s, I think." [#33]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I think it's been okay because they're not one that comes up a lot on the list to call for collections." [#37]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "My past experience. It was pretty tough. Pretty tough. I had times they owed me in different small projects. They owed me \$180,000 and took forever to get paid. I have to go borrow money to keep the company floating. Takes forever sometimes. 90 and a hundred and something days. Good that through the years I built a cushion that I could wait, I could hold, but for a lot of companies if you don't build that cushion, it is hard working for the City. You got to do the job and then go vacation, and the hope when you come back, your cheque is there. We talked about this so many times when I was doing things with the City, but nothing will change. We got to make sure that people were like, at the least, when they say you get paid in 30 days, you actually get paid in 30 days, or in 60 days. But what it is, is that is so many different departments approving, and a lot of people in the City, in each department, by the time it circles, it takes forever. I wish they could say, when you send a requisition, you'll get paid within 30 days, people can wait 30 days, but 120 days, 90 days, sometimes it's a lot. It's one of the things that working with the State or with the government, it usually that way." [#39]
- The owner of a WBE-certified construction firm stated, "They don't pay that well or in a timely fashion." [#AV]
- The owner of a majority-owned professional services firm stated, "Trouble getting paid." [#AV]

- The owner of a WBE-certified professional services firm stated, “When I worked with the public school's it would take a while to get paid.” [#AV]
- Written testimony submitted to BBC stated, “For Vendor Payments - this is a long process. The system to set up a vendor account is also not up to date so when I was trying to help a new business sign up to be a vendor, we were not able to. We were finally able to once we switched to an older computer that had not updated their browser window. Calling for help from the City of Boston was not helpful as the person we left a voicemail with never called back. We enlisted the help of another business owner who had informed us of the issue with using updated software.” [#WT8]

2. Barriers and challenges to working with public agencies in Boston. Interviewees spoke about the challenges they face when working with public agencies in the Boston area.

Twenty-one business owners highlighted the length and large size of projects, allowable profit margins, communication with decision makers, and lead time before projects are announced as challenges, especially for small, disadvantaged firms [#1, #5, #12, #14, #19, #26, #27, #32, #36, #39, #41, #44, #45, #AV, #PT4, #WT8]. For example:

- The Black American male owner of an MBE-certified professional services firm stated, “So, I think the biggest thing, and I've had this gripe with Boston for many years. It's almost like, when you're at school and they give you a privilege to do something, and then there's always that one bad seed that destroys it. And all of a sudden you can't have that privilege no more. So that hurts everybody else to go and try to do that one thing. And that's the thing, comparison that I look at over here. So, it looks like, for whatever it's worth, a lot of these things get political on the work side. Whereas now, they're just forgetting and saying, well, this became an error. Let's not do this. And now small businesses like myself can't get it. Or everything is traditional on the Boston side where you got nepotism and, well, it's not what you know, is who you know. But for years, that's the ultimate tradition in Boston. And this is where the passion for me come to say, this has to be broken at some point in saying, hey, this is going to keep going and become an ongoing process. But I'm saying this from my mindset and where I speak as a man, forget about even being black, blue or yellow, but as a businessman who wants to get his foot in.” [#1]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “I'm not just, got a contract and here I am. One day you wake up and somebody down the other end decides that they're not going to need you anymore, or they have a friend that they can send the work to or whatever. That can hurt. Not too often, but I was doing school buses for the town of Millis and the lady that was running it ... I didn't have a contract with them, but I was doing their work and stuff. And then just one day, she decided to blame me on what was going wrong, not anyone else. I know everybody in a municipality usually work on PO numbers and stuff. You have to wait for the PO number to come out and this and that.” [#5]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “Being able to get the room. The technical assistance courses that a lot of these construction managers offer help you to get in the room, develop these relationships - that's one. Another is, it's all about who you know, and whatever city state you're in. Say Chief or

the Mayor said, 'Suffolk I want you to sit down with these five contractors and we want them on this next project,' then that's going to happen. Suffolk is going to look at those five contractors, sit in the room, and find out what they need to do business with these contractors. But, if there's no one looking at this, then it just falls by the wayside. There has to be someone looking at this and someone saying that they want it to happen. Then, you have the sub-bid issue with DCAMM and the specialized trades. That's another component that's taken out of the process or out of the running for a lot of the diverse businesses. Especially, with the DCAMM subcategories. Folks aren't able to bid on the schools, the City of Boston schools or the state schools, municipal buildings. There is a barrier to entry with DCAMM. That process is not easy at all. Now, even when businesses do get certified with them, they do not know how to navigate the DCAMM system, and they can't figure out. It's so cumbersome. Now that is a system that is very cumbersome. And small businesses don't have the capacity to learn how to make DCAMM work for them. A lot of them that I know, anyway, they may have been DCAMM certified, but they haven't had the opportunity to make that work. That's another agency that doesn't have someone that's appointed to sit down and show folks how to get through how to navigate that system. How do I receive bid notices? What am I supposed to be looking for? What do I need to provide? You know, so there's a true disconnect with that agency." [#12]

- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, "Even though we have done a small amount of work with Boston Housing Authority and the Boston Water and Sewer Commission, we currently don't do any work in the Boston area because the City requires all staff of environmental engineering firms, including the owners, to have a PE license. Dr. Abron, the owner, does not have a PE license." [#14]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, "We would love to get contract opportunities with the City of Boston., such as the Boston Water and Sewer Commission or Public Works because these types of agencies use headsets. Up to this time, we have not approached any particular agency because we have no idea who to approach." [#19]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "We want to do business with as many different entities as we can, private and public. But as I said before, it's the low bid process that really hinders us providing the service we ... well, it doesn't hinder us from providing the service. We bid the opportunity based on the service that's needed and that's why we have fumbled with low bids." [#26]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, "It's tough to say, agency to agency, how much difficulty there is. I think the problem is on some of the smaller agencies, there is nobody dedicated to the task. A smaller department doesn't have somebody whose whole job is vehicles. The smaller departments will have somebody and their whole job is purchasing everything -- telephones, copiers, paper and vehicles. And when you're dealing with somebody who doesn't know the vehicles really well, it can be hard because now they need to communicate something that they don't even understand. Compare this with a bigger department, like parks, fire and the police which have people whose job is to manage the fleet and know what they have for vehicles and know what they need. So, you can communicate better with them. I think the only time

we struggle a little bit sometimes there are the sort of inter-agency purchases that are made. Recently, Boston was buying some things that were actually for Cambridge and surrounding communities. I think the issue is more when the funding sources are not normal. Like if it's not coming out of their normal funding sources, they've got a federal grant that's going to pay for something or they've got some special community grant, that's when things get a little confusing for us. Who is writing the check for this?"[#27]

- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, "I've never seen any jobs out there, so I never, never tried." [#32]
- The Black American male owner of an MBE-certified construction company stated, "I have not because I can't come up with the mobilization funding. When I look at bids online, the upfront funding requirement is always the stumbling block." [#36]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "I always been closed working with the City in the previous administration, in the Menino administration, especially when Charlotte was in place, always gave those opportunity, as a minority. I did well when Charlotte Goldberg was in D&D. But she left, a lot of things changed in the City. Yeah, things were not something was like hard now, with the older people that were there that were familiar with, I did a lot of work, then they brought new people with D&D at the Reva street, I believe, in High Park. And then things changed. I stopped being with the City. I find it difficult here, even trying... I've been designing and building for the past 40 years, 30 years with my company, 10 other years working for other people. But now I like to develop properties through the City of Boston or D&D land, but if find it a little more difficult, now. Back then with Charlotte, I think it was more minority oriented than it is now." [#39]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, "So we've kind of fallen short but I find it that when we go after bids in some opportunities, we try to establish those relationships which have been difficult because the doors don't open, and that's where the issue becomes. The doors are not opening, especially here in Massachusetts. It gets to the point where you're throwing good money after something you're not going to win. We tried getting work with the MBTA here. Even that, we couldn't do that either. I'm doing the same work in New York and New Jersey, but I can't even apply for work down here. The problem is I see a lot of work going to companies that are out of the state versus companies that are here. Minority companies knocking on the door, yet the work goes out of state to smaller or larger companies that are not minority based. We can offer a lot, but just getting the opportunity, getting through the business development, the marketing, the procurement process, getting the opportunity into that organization, that's the key thing. Getting a chance to get inside to the people and say this is what I do this is how I do it." [#41]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "I have never tried to get work with public agencies in Boston because I don't know how to get work with the public agencies." [#44]
- The Hispanic American male owner of an uncertified MBE construction company stated, "I would say that nobody from the City has ever reached out to me to, so I have no clue how to

go about fitting in or getting work with the City of Boston or any other public agencies.”
[#45]

- A Black American owner of an MBE construction firm stated, “City of Boston projects are way under budget for the marketplace.” [#AV]
- The owner of a majority-owned construction firm stated, “In the City, minority participation requirements [is a barrier].” [#AV]
- The owner of a majority-owned goods and services firm stated, “They don't use small business.” [#AV]
- The owner of a WBE majority-owned professional services firm stated, “Different agencies have different requirements and make it difficult to keep up with. The financial barrier and a fee for an audit.” [#AV]
- The owner of a majority-owned construction firm stated, “We have not tried but are concerned about the amount of paperwork involved and the hassle of getting qualified.” [#AV]
- A respondent from a public meeting in Dorchester stated, “So coming into this I thought, okay, well this will be a process that will be pretty easy and streamlined. And that wasn't the case, because contracts less than I believe \$8000, it's not even really on a website.” [#PT2]
- A respondent from a public meeting in Dorchester stated, “You have to work your way into certain departments, to hopefully have a rapport with someone, so that you're aware of projects that are coming up because it's under a certain threshold.” [#PT4]
- Written testimony submitted to BBC stated, “Calls and emails to the Mayor's Office of Economic Development have a very slow response time. I had emailed the office in April to ask for more information regarding technical assistance. No response was given so I emailed again in June and was then given an appointment time to speak about the services the City offered.” [#WT8]

3. The City's and quasi-agencies' bidding and contracting processes. Interviewees shared a number of comments about the City's and quasi-agencies' contracting and bidding processes.

Nine business owners shared recommendations as to how the City, quasi-agencies, or other public agencies could improve their contract notification or bid process [#5, #24, #26, #27, #33, #37, #39, #41, #44]. For example:

- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “If you guys get backlogged with work or work that they don't want to do, it would benefit my business. You know what I'm saying?” [#5]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Well since I feel uninformed in terms of how they do it now, it feels kind of idiotic giving them advice on how to improve something that I just don't know enough about. Let me say this, if it's not in a central place, it'd be really helpful to have a central place to look at a searchable online listing of current opportunities to read and upcoming things would be

really helpful. But if it already exists, how do I tell them they should do something they are already doing; you know what I mean?" [#24]

- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "But what might be nice for a company like us is if there were some type of announcement. Let's just say that Boston Public School was going to announce a bid opportunity. If they could email it out to companies that have bid before instead of just putting it on COMMBUYS or on the City's website. I find that COMMBUYS is not the easiest site to navigate either. If you don't have the exact keyword you may not find the opportunity. Sometimes on the City's website I've seen an opportunity listed but couldn't find the actual bid. And then when you call somebody says, 'Oh, we haven't really released that yet. We just made an announcement' and then vice versa. You hear from a colleague that they're bidding an opportunity and you can't find it anywhere. So COMMBUYS isn't the easiest site to navigate or find information. Sometimes with these opportunities, when we were certified by the state under FAC92, the way it was explained to us was that was kind of like a clearing house for all these municipalities to say, 'Okay, here's a group of companies that have already been vetted by the state so we know they're qualified to perform the services we're looking for' and, to me, that should streamline the process. If the state has vetted us and looked at our financials, and looked at our insurance certificates, and we've submitted sample IPM plans, we shouldn't have to submit that all over again and do it in triplicate. Or do it by mail or in person. To me, if we've been vetted, we should be able to submit that bid electronically and that's not always the case. Some agencies allow it, some don't. Right. And in multiple copies. And I shake my head when I read an email that says, 'Save a tree and don't print this email' but then you want five copies of my bid, which will end up being a few hundred pages at least. Well, I think, for the BPS, I think they did a great job. Everything was clear, concise. You dealt with one person as far as administration went. If you had a payment question, you knew who to call. With the BHA, there was a time when we were servicing five different BHA projects and the billing went through the individual manager. And some were better administrators than others. So, some submitted your invoices in a timely fashion, and you got paid and others didn't. And we only knew who to contact at the housing office itself, not at the main BHA office. And I think if they streamlined their billing to go through the BHA and not the individual housing project, that may make it easier to get paid. We would be submitting the invoice to the agency that's actually going to pay it. In these instances, we're sending the invoice to the individual property manager and then relying on her or her to be submitting that to the proper department for payment. And that didn't always happen." [#26]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, "Yeah I mean, it's important that they're reaching out to the right people in the organization. I do have a tendency to see that if somebody goes onto COMMBUYS, like some of the towns will go onto COMMBUYS to source information through the state's portal, they're either not using good descriptions of what they're intending to buy, and I end up getting solicitations for things that have nothing to do with what we're doing. Which means the person who probably would like that solicitation didn't get it. Because they picked the wrong category, they didn't really know what they were buying so it ended up going to the wrong bidder list. So, I think, again, I think it goes back to the fact that if you have somebody buying for that agency that's just not that familiar with what they're buying, then they don't

know who they're supposed to reach out to. They don't know who provides that thing. So, I think it's a combination of maybe having the right, sort of the right descriptive information in the hands of the buyer as well as the seller knowing how to communicate its categories to the state or to the town. Because I just see mismatches with what I'm getting bid solicitations for. So, I assume that I'm not the only one seeing those mismatches. In terms of the contracts, I think it's really important to understand what you're buying and who the potential bidders are. And some of these entities now, for us, if I get an email and I realize it's a bid solicitation, I know internally who it belongs to. But they may be working with old lists, potentially, if it's not something they're buying all the time and they're either emailing the wrong person or there's nobody there. No one's getting the email so some effort into cleaning up their distribution lists would be helpful. So that they're getting the right companies with the right contact and getting the right person. So that would be helpful and maybe providing a good description of what they're looking to purchase. And then from the seller's side, if you're trying to encourage smaller businesses, they need to be able to describe their products well enough so that it matches up with the way the cities and towns buy things. So, I think that would help. In terms of payment, it's obviously the more that you can pay electronically, the better. That we're waiting for paper checks. From my point of view, if a purchase order's been issued for a certain amount and the dollar amount is invoiced and it matches, then that should just happen. A payment shouldn't sit on somebody's desk for the agency or entity to approve the purchase. Once the funds are encumbered then there should be no sitting on the chief's desk, waiting for approval or something. If you approved a purchase order, it needs to be paid. That's the part that can get frustrating. We did everything right but we're still not getting paid." [#27]

- The Black American male owner of an MBE- and SLBE- certified construction company stated, "I understand the City does or used to. I haven't looked lately so I don't know. But I think the City used to put stuff in the City register or something like that for free. The only improvement that I can think of, if you say you're going to do stuff, then you should follow through and do it. Meaning if a minority subcontractor has a problem with a general contractor, you should take the time. Not just to listen to the general contractor but find out what's going on with the sub because pretty much when I had my problem, the City of Boston did not talk to me at all. Pretty much I got ignored. Remember when you say, the minorities' certification thing says that 'we can help you with this, that, and the other thing' and then when something does happen and you need to get paid and you're not getting paid, and then nobody wants to help you. Even though they're telling you this all this time, but then when that day comes that you actually need that help, it disappears. That's been happening, and that puts more people out of business. Then you would really think just because of the fact. Let's say a guy owes you \$10,000. If you take him to court, you're going to spend \$5,000 retaining attorney and your time. And the general contractor is going to move it along in the courts, so it takes two years. So, you're going to spend 15, 18 grand trying to get them. That's where the State or the City of Boston should be kicking in because small people like us, even if it's \$2,000, you don't care. It's money that you don't have, and you work for it that you need to get. If you can't get it, then that's the difference of whether you eat this week or don't eat. It can get that bad. It could be your mortgage payment. You never know. Whatever it is, it's your money and you should be able to get paid. There's a problem in the authorities. They should be able to intervene, and not so much intervene

because it's their money they're paying out. If the general contractor wants to play games, then there should be some way that we have a voice to call and say, 'Listen, we need help'. The State of Massachusetts says, 'Oh, yeah. You can ask for direct payment if general contractor doesn't pay you after 30 or 60 days.' Pretty much that's what happened with me at Billerica Project and it never went anywhere. We had to get an attorney through the bonding company. But you're supposed to be able to tie the job up and lean on to the job and things, which we weren't able to do. Worst of all, no one we called could walk us through the steps of how to do it. We called the state office and of the awarding authority, DCAM and said, 'Okay, we need to speak to the DCAM attorney so we can put a claim in, which you're supposed to be able to do.' And like I said, people just ignore you and blow you off just so you can't do. They're not doing their job so you can't put your claim in. You end up in a bad place there. When it was the City of Boston and the Boston Police Headquarters and the Reggie Lewis Center, I tried going to the City of Boston and talked to the City of Boston attorneys regarding this and we went nowhere. Not one person ever called us back. So, we had no clue where to file papers, how to file papers, what to do at all. All that in, they say that 'Yes, we can help you if something happens like this. You should do this, that and the other thing.' If they set up a system where if people are not paid, they should pretty much just follow the money. If they say they're paying a subcontractor 50 grand, make sure that there's proof both from the subcontractor and the general contractor that he got 50 grand. That's really easy. All you got to do is show a cancelled check, talk to the subcontractor and say, 'Hey, did you receive this money? That's what we wanted to know. Thank you.' Doesn't take a lot of effort. And if there's a problem because I mean all of these authorities have people that say, 'Yeah, we can help you when something happened, something goes on or whatever.' But when that time comes, everybody disappears. It should be a clear path on how to resolve an issue between the general contractor and subcontractor that's not involved in the court." [#33]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I think the people that we've been working with have been fine. I just think coming up with more of a strategy around leveraging our knowledge for the City of Boston, to be better at how they're procuring and, and leveraging their translations, you know, opening more doors on accessibility to other City contracts has been difficult for us. The other thing when it comes to being competitive, is there's a big challenge with the federal procurement process, so we've stepped out of that. I'd hate to see the state and City go the same route because there are MBE/WBE firms who specialize in just winning contracts. These firms then subcontract the work out. They're not specialists at providing translation and interpretation services. They're only specialists at winning contracts from the federal government. Eventually they've taken a markup we can't afford to compete. These companies are doing really well because they win the contracts, but the government's not working with the actual people who are providing the service. Also, I almost hate to say this about the City of Boston, but they never look ahead at the range of services needed. They shop strictly on price. They've got to figure out who can provide the best service, and then what areas they're going to do the services. For instance, we work for Tufts and they got a new procurement person who was going to save costs. So, they went out and they got a company from Arizona that specialized in telephone interpreting. And now the marketing

people and communications people are pulling their hair out because the company can't do good translation. So, you've really got to know the range of services that you need." [#37]

- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "I find there should be a City program to deal with local businesses and how to catch them into where they're at and how the City would help them by giving them open access to projects where they can negotiate projects, where they can show the level of capacity and bring the level of capacity higher. I thought that would be happening with this administration, but I don't know why. There is a lot of beautiful things written in languages, how to assist local contractors to grow in capacity. But I don't see it in action. I'm one of those, that I believe after 30 years, I know what I'm doing, but every time we put the proposals, and we put in things, I don't think there is that venue or that avenue that we can go in and say, 'Okay, this is where I'm at, let that department to work with you and brings the capacity to things.' It's written that, that's how those development projects are supposed to, but actually they don't." [#39]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, "Basically they need to have an oversight committee on the whole procurement process. That's what they need to do. They need to have oversight on the certification process, the bidding process, the procurement mechanism. Which is an independent third-party entity. And in New York they do. They have what they call, they have the Civil Right with MTA. Pennsylvania has one. Massachusetts should have one, but they don't offer it. Massachusetts is so behind. They're like 10, 20 years behind than some of the other states that we're certified in." [#41]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "It'd be helpful if public agencies reached out to you and let you know if they need recycling work." [#44]

G. Marketplace Conditions

Part G summarizes business owners and managers' perceptions of Boston's marketplace. It focuses on the following three topics:

1. Current marketplace conditions;
2. Relief programs for businesses affected by COVID-19;
3. Past marketplace conditions; and
4. Keys to business success.

1. Current marketplace conditions. Interviewees offered a variety of thoughts about current marketplace conditions across the public and private sectors in light of the COVID-19 pandemic.

Twenty-one interviewees described the effects of COVID-19 on the marketplace and their firms as negative, describing a decline in sales, slower payment, difficulty obtaining supplies, and general anxiety about future ventures [#3, #15, #17, #18, #19, #21, #22, #24, #25, #26, #28, #30, #31, #32, #33, #34, #37, #38, #39, #40, #44]. For example:

- The non-Hispanic white male owner of a majority-owned construction firm stated, “[A] lot of places will not allow anybody into their buildings right now to perform work. We do a lot of hotel work. So unfortunately, the hotels have gone. Not just now, but in the next two years their capital budgets are going to be reduced by about 90%. think there's a lot of stuff that stopped but unfortunately, like I said, my hotel customers are telling me that their capital budget, that they can't spend any money for 2020 and 2021. And I'm sure that the airlines will not be spending any money that they don't have to, and convention centers and the people that are in the convention business and the people that work at stadiums, whether it's Gillette Stadium or TD Bank and Boston, I think that we're going to take a hit. We're going to take a hit. Yep. Watching the vaccine will recoup, but I think we're in for a little bit of a ride for the next 18 months, unfortunately. You've got all these restaurants that have closed. They're not going to be able to pay their rent. And the companies that own the buildings probably have a mortgage and they're going to say to the bank, 'Look, you know what? We're screwed for a little while', and so I think that, yeah, I think that the credit market is going to get tight.” [#3]
- The non-Hispanic white female representative of a majority-owned construction company stated, “Because of what has happened with the COVID-19, work has slowed down. Our projects outside of Boston are still up and running but we are requiring social distancing and wearing face masks. Every day I'm getting emails from contract owners of construction sites with requirements for maintaining health and safety. And then we're creating change orders asking for more money on our contract to cover the cost of these new protocols. Say the project is \$200,000 how much will it cost us for the protocols? Ten thousand, twenty thousand for protocol is our estimate of what it costs us to run a job site with these protocols. The company is also flipping houses to create an additional revenue stream.” [#15]
- The Black American male owner of an uncertified MBE construction firm stated, “Business has slowed down in the current COVID climate.” [#17]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “The impact has been in the private sector work, but not the public sector. Our private sector work has been put on hold.” [#18]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “We have been impacted because COVID-19 has shut down international commerce and transportation. Thus, our headsets are in limbo because they can't be shipped from Hong Kong. Right now, we have a backlog of orders with no product to fill them.” [#19]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “We're very seasonal, but on average, if we weren't counting COVID-19 right now, we'd have at least 10. Well, I have seven different sized screens. So, as an example, I have the [one of the] largest screen in America, so that screen is very huge. You can do drive-in movies. So, right now, because of this COVID-19, all the malls are calling me up to try to do a drive-in movie. That's four phone calls today. I have five meetings now. Yeah, right now, I'd have 15, 20, and quite few of them would be putting in overtime every week. We're at a dead stop right now. We're getting calls, and I'm hoping to stay alive. This has halted me so much that it's ... if things don't change, I'll probably go under. But I'm optimistic. I feel like I'll make it

work one way or the other, but it's very, very hard, hundreds of thousands of dollars in business I'm going to lose right now." [#21]

- The Black American male owner of an MBE-certified construction company stated, "Nobody wants you to come into their homes and... How we get jobs has dramatically slowed because of all that is going on and a lot of protocols that you need to follow and all that. So, it's impacted everybody. I have friends that are also in the industry and everybody's struggling. From the least to the biggest, everybody's complaining because of the health crisis that we are facing with. As a matter of fact, I have several thousands of jobs that were supposed to start this spring, but because of this, I had a whole house to build in Queens and now this thing has put a dead stop in its tracks. I have no idea even if that project is going forward, I don't know. I have a business partner in [another location] that will reach out to me to see if I could get a supply for PPEs, because they could supply PPEs, and I was trying to see, because you really can't get through to talk to anybody at the state or the City... I don't even know where to start. And so, I was checking to see the way to be able to do some supplies while I wait for this thing to pass, so that work can come to normal. I don't even know. So yes, it would be helpful to see what is out there, what I could do." [#22]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It absolutely has. My average number of billable hours going into the end of January was over 40 per week. I was swamped in terms of how hard I was working, how many hours I was working. Now, my average number of billable hours has dropped to between 20 and 25. I'm losing money every month from what I would've been making. I'm making ends meet." [#24]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Some of our work is obviously property assessment, and our clients that are in that business, they're not doing anything right now. So, there's a client that we had that wants to sell a piece of property in Boston and we did the environmental assessment, but I think because of COVID, the buyer is not able to get the financing and work with City of Boston. I'm sure it's a lot to do with housing development and everything like that. I'm on the outside of that. So, what I'm telling you right now is secondhand, but we've had some clients telling us to stop or work because they just don't have the money. They don't have the income. Rental properties, small businesses have stopped paying the rent so the owner of the property can't pay us. And so, we've been stopped. Even car dealerships. We were cleaning up a car dealership and that job has stopped." [#25]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "Well we service a lot of restaurants and with all those restaurants that were shut down. With the mayor of Boston halting all construction projects, if we can't get into the project, we can't service it. If we can't service it, we can't bill it. And the same thing with the restaurants. While some stayed open, trying to do takeout, most put their services on hold. I mean, we have a couple of restaurant chains that we service. One of them we offered to continue servicing and wait until they were back open for business for payment. But for a lot of them it was pretty costly. I would say we looked at one point and I think we had figured a little over \$50,000 in revenue was lost." [#26]
- The Hispanic American owner of an uncertified MBE construction company stated, "Like today, believe it or not, this is my third time we're paving in Raynham. I don't usually come

to Raynham, but you could go because with this COVID thing going on, I got worried. You know what I mean? I got worried. I was just trying to get everything I can, so I could keep my company going. A lot of my friend's companies, they're not even operating right now. So, I've dropped like a dollar a square foot on my price for asphalt because of it. So, I mean, I'm not making as much as I was, but what am I going to do? I got to pay my bills." [#28]

- The non-Hispanic white male owner of a VBE-certified construction company stated, "Well, two months ago things were humming along and then there was the shutdown. Right now, things are coming back online and we're currently working at about 80% of capacity. So a lot of jobs have opened up in the last two weeks. The other thing we've done is every job we have open now has a sanitization station where we have hand sanitizers and we have put up posters on safety measure. They tell you how to wash your hands, what to do. If you're feeling sick. Also, face masks are required on all of our projects." [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, "It certainly has and very directly. All of my employees are currently home-based. That means 10 project managers in the Virginia-DC area; two project managers in Rhode Island; and three in Massachusetts. Which means that they're doing paperwork, which has low priority rather than high priority for what we do. Because so much of construction management it's meetings and making sure everybody's on the same page at the same time, understanding where we're doing, those meetings now are going to have to be done by computer. You're not sitting there. The good thing is that we are very computer literate. We all have access to software that allows us to see the same plants at the same time. But in terms of saying, 'Let's go down to the site and take a look at it again'. We can't do that. Just too close a contact. We had four pieces of work in the Boston area that were scheduled to get started. They are now on hold. To me as a business owner, when you tell me it's on hold, I'm losing money. I'm losing the potential that you may decide that we're not going to invest in that anymore. That is likely to go away. It's very, very frightening. I believe that we have enough work that we can survive it for a year, but I don't believe we can survive it beyond a year. If we don't have an answer to this pandemic nine months from today, I don't think I'll be here because this is a business where you don't get paid unless you're performing. It's a business where schedule is everything. You got to stay on that schedule. For example, not only is the virus impacting us in terms of labor, resources, time, and schedule, but also because the President's fights with China has the potential to absolutely throw us upside down because the cost of cement, steel, tile, wire, all of those things are going to skyrocket if the wrong moves are made." [#31]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, "So definitely my business actually has been profoundly affected by the pandemic more than most Americans, just because so many of my clients are businesses based in China. Essentially since January, my contracts in China have been reduced significantly because as you know, first the Chinese were blocked from coming into the country and then the disease came here. So, right now I don't have any China-based conferences or seminars for translation and interpretation. So, what have I done to mitigate this situation? There's not a whole lot that I can do. The situation is just not good, and the industry is moving to online interpretation. So, I have been practicing using the technology, using zoom and all that stuff, but I really haven't had as much luck." [#32]

- The Black American male owner of an MBE- and SLBE- certified construction company stated, “Pretty much shut me down. I have a demolition job that we were supposed to start three months ago inside of a nursing home... And there's no way on earth we can go there and do that work. That's one of the hot spots. Even if they said we could work, I would not subject me or my guys to that right now. I mean, the virus just shut us down, period. Every job everywhere stopped. They pretty much are still stopped and we're getting ready to go back to work. But where I'm doing demolition, where in the beginning of the job or I'm doing landscaping or furnishings, that's towards the end of the job. So, even though people are gone back to work, I'm still stopped. they have to get to that phase of work that I do. And because they lost three months, that shoots my work off three more months on top of whatever time they needed to do their work. So, if I was going to job in June, that job probably going to now happen in November. This couldn't happen this year at all.” [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “We try and keep 20%, 30% in the public sector, just because we like to have a diverse client base. Having your foot in both pools kind of allows you, when the recessions come, and as work changes, that you can draw from one when the other starts to shrink. I think we're in a unique situation here, where I think the private side and the public side are probably going to both contract similarly, as a result of the pandemic. We had a good month stretch where there was very little coming in for work. Because a lot of our work is associated with home building, we were considered essential, and we were working on those tasks. But had some reduced hours. And, right now, we're back to, I'd probably say about 80% of the workload from where we were before the pandemic hit. At least, before the restrictions came on. So, we're doing a lot better than most, I think. So, we're happy with where we are, but just nervous about the future.” [#34]
- The Black American male owner of an MBE-certified construction company stated, “Yes, it has. I have not been able to shut down because of the work that I'm doing on a small renovation project at [a Boston hospital] but everything else is on hold right now.” [#36]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “Right now it's difficult to make any kind of growth projections with the pandemic. I was planning to hire a couple of people this spring, but that's all on hold. Revenues are down, along with people working from home. So, it's not like you can pick up the phone and call somebody cause their office line isn't going to ring. Right?”[#37]
- The Hispanic American male owner of an uncertified MBE construction firm stated, “I had a \$10,000 job canceled and the work has slowed down on the construction jobs that I was doing, and I have a few jobs, but nothing compared to the previous summers. So, there's definitely been an impact. I would say the COVID-19 impact with the shutdown of city halls throughout the state was an issue related to getting permits for work that needed to be done. Also, you can't get an inspector to come out and inspect a job. Technically, everything you do is supposed to have a permit, but that's just not how it's working right now.” [#38]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, “Right now, even to get a permit that you would take, in same day, it may take you a week or two or three, because of the permitting process, you got to have all of these COVID plans that you got to put together and show and prove what you're going to do. That you got to make sure it's in place before you go to work with people. So, it's totally different.

If you really see, even the cost of material, a two by four, that was \$3 and 40 cents. Now it's \$6 for one [of] them, two by four. So, the material has gone up. People don't look at it, but because of the COVID, you will be looking for, sometimes you wait four days to find the door that you go to Home Depot, you can find that door. So, the effect, that meaning door, windows, every time you order materials that comes from like say siding and things, things that will take you do three weeks, it's taken a month or two now. And you have to see, when you work, how you work with, so you don't contaminate one another, and it has changed. And people sometimes you give prices, people think, Oh, your prices is crazy. There are guys that can still do it for the old prices, because they don't realize that, when they work night and day and realize they made no money and they lost money, because most of us in this kind of industry, we work, work hard, but we don't analyze our numbers. You find out after the end that you actually didn't make no money, because you don't look all of these. Some of us that make sure we go sites and put the right price and the right materials, we ended up not getting the job, because the price... people are not factoring the COVID, that the situation we are in, things are much more difficult and more expensive.” [#39]

- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “COVID has changed things significantly for us, so where we could have participated in face-to-face marketing events those opportunities are no longer part of our, no longer part of our strategy at this point. We have marketed, tried to market ourselves through FDA and have participated in a number FDA Zoom events recently. I think we have been nimble in order to pivot to support our customers. The remote learning and Zoom to support customers. There are a number of our employees who are considered key personnel, so they are actually on site within some of these agencies performing work, because they are critical to the day-to-day operations of some of the agencies that we do business with. I think fundamentally we have been able to manage and pivot, because we were in a place where we were conducting remote learning and we were conducting telehealth, so in some ways we just did what we always did. What has been a detriment is just having that, the ability to do face to face networking and to participate in conferences where essentially you're able to identify more opportunities and other places in which you can market yourself.” [#40]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “The focus on recycling is not as great since COVID-19.” [#44]

Seven interviewees noted that COVID-19 has had little to no effect on their business [#14, #16, #20, #27, #29, #35, #45]. For example:

- The non-Hispanic white male owner of a majority-owned construction company stated, “A little bit, I guess. Because I can't work in some towns that are shut down, so I guess a little bit but not a lot.” [#13]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “Our work is both science-based and environmentally-based, so we have enough work to sustain the company during COVID-19.” [#14]
- The female representative of a Black American MBE-certified and uncertified WBE firm stated, “Even though some of the work has slowed down, we have had no negative impacts.” [#16]

- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “For me, because I’m small, it actually hasn’t been too bad. And because we’re coming off the winter months, my employees were low. So, the people that were working continued to work. I’ve had to, obviously, [buy] the PPE. In road construction, they were safety glasses. They’ve added the masks. But I have them each take their own truck. So, my gas, maybe, has gone up a little bit. But, besides that, I have kind of given them the fairness of, if they’re comfortable, and if not, then, they don’t have to work. But, in traffic safety, they rarely have to be super close together. I put off as much sign work as I could until, actually, this week is my first week we went back to sign work, because they have to be close to each other. But, the traffic control, they don’t have to be that close to each other, for the social distancing. If it did affect my business, I won’t see it for six months, because that’s when I would get paid for all the work we did now.” [#20]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “So we have actually been in pretty good shape, for March and April. Because we just had a lot of backlog of work to work through and because we’re providing to essential services and the public works, public safety and we’re repairing police vehicles, we remained open. The problem we’re about to have is we’ve got supply chain issues because our suppliers in various parts of the country have experienced some closure. Or slowdown. For us, it’s the production pipeline issue as opposed to our customers are cities and towns so they’re still there. We don’t deal with the public, so there was no issue with us closing our doors to visitors. We did that right away, to make sure our employees were protected. So, it really is a supply chain problem for us, going forward. There’s not a lot we can do because there’s only a few companies in the world that make cars. Ford and GM, I mean they all shut down. So it’s not like you can get them somewhere else and because they’re specialty vehicles that we deal with, they’re purpose built for the police departments, you can’t just go to a local dealership and buy their inventory. Because they don’t stock those vehicles, those are ordered specifically for law enforcement. So that’s the other challenge. If we were just in regular vehicles, then there’d be a supply of them available. But we’re not there, they’re special built for the police.” [#27]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “Well, so most of the buildings are considered essential because they’re residential. A few of the commercial buildings have just closed, just like, hey, when the City opens back up then... so we have those issues. like anything more like business, like a commercial property. We have one on Fifth Avenue that’s like... I mean, no one’s showing up to the office so why are you going to pay the staff downstairs? But we do have a large chunk that’s residential so that’s kept so that’s good, but when this thing first started coming out, especially like the New York market, the news makes it into this you walk outside, and you’ll be dead before you hit the curb. So, you get everyone who just doesn’t want to go to work. So, it’s a struggle. We had to get passes out to all the staff. It was just tons of work and then even if someone has the sniffles, which may or may not be related to COVID, no one wants someone downstairs who could potentially have this, so they have to be put on leave. They can’t come back to work until they get medical notices, just a ton of legwork. So, we ended up hiring tons more people just to fill the gaps so even though technically our business hasn’t been affected, it has just because like the extra cost of doing business and most of the buildings are not... I mean, you have a contract with a building, and you can’t just all of a

sudden start billing more because of COVID. In the contract there's an act of God which I don't know if this falls under it but usually refers to like a hurricane that comes to town. But yeah, it's just a lot of buildings are still on a day-to-day basis, but we have seen a lot of people just start coming back to work. That first month, that first two months, were really hard but things have kind of leveled out, I guess, at this point. We do have a service that brings some special cleaners in and we can wipe down surfaces a lot more often than we used to and none of it's 100% guaranteed but you try your best. You get the little stickies that go on the elevators, the buttons, so that they saw it's cleaned. Is that 100%? You know, I don't know but it's a lot better than... the places are going to be a lot more sanitized than they previously were." [#29]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I don't have many particularly active contracts going on right now, but if I did obviously, they would be slowed down and delayed because of the inability to contact people directly. And when people ask me questions, investigate with my work, you know, we have to go out and determine the environmental impact of a particular project, how we're going to permit that project. A shutdown doesn't necessarily work that well in this business." [#35]
- The Hispanic American male owner of an uncertified MBE construction company stated, "At the beginning of COVID 19, the company was affected with work slowing down, but when they came out with the public safety guidelines, I was able to get back out there and work. We didn't really miss a lot, because when you're paving, you're working outside, so it's less of a problem. Also, the work continues because right now everybody's working at home, and looking at their property saying, geez, we can't have any inside work done right now, so let's do the outside." [#45]

2. Relief programs for businesses affected by COVID-19. Interviewees shared their experiences applying for and receiving programs to reduce the impact of COVID-19 on their businesses. Most firms noted that they received some form of financial support through federal or state programs. Other firms described the type of support that would be most beneficial to their type of business during this time.

Twenty-one interviewees mentioned their experiences applying for and/or obtaining COVID relief programs [#5, #19, #21, #24, #25, #26, #27, #28, #29, #30, #31, #33, #34, #35, #36, #37, #38, #39, #40, #43, #45]. For example:

- The non-Hispanic white male owner of a majority-owned goods and services firm stated, "Well, I did apply for some, but I don't know if I'm going to get anything or nothing. I tried to apply for unemployment, believe it or not. I got to the point where it says it wanted to know what town I'm in. It told me it was the wrong town, and then it told me my phone number was the wrong one. It just locks you out. You can't do nothing." [#5]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, "We're working with our bank to secure funding under the Paycheck Protection Program, but it's been a logistical nightmare." [#19]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, "Yes, I did get a couple of them. I did get the PPP. And I did get the, you apply for, I don't

know the name of it, I filled it out long, long time ago and I was fortunate enough to get it. I did get \$10,000 of- I got the disaster relief of 10,000.” [#21]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, “[I] was able to get a PPP loan, which is going to help me out greatly. It wasn't for a lot of money, but I just need to tread water and I'm not having no hurry to rush back to work as long as I can pay the bills. The funds literally just went into account yesterday. I ran into challenges. The first was I wasn't allowed to apply because I'm a sole proprietor, so during that time, the bigger corporations came in and swooped up the money. I finally was able to apply, I applied and then I needed to provide them with a bunch of information, and with the time it took me to do that, they ran out of money. So, I got funding in the second round, but in the meantime the bills were still coming in and, and so I just took the ones that I absolutely had to pay, and I went into my overdraft. So, I'm grateful because it's going to help me get through this.” [#24]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Well, we applied for the federal PPP loan, and we did get that loan, and I have two employees that I've kept on the payroll that I otherwise, probably would have let go, and a third is coming up shortly because what he was working on is ending. So, yes, the small business loan.” [#25]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “There were some programs through the federal government. Mainly that payroll protection loan. Yes, we did. It was fairly simple, the process. Round one [is when we got the loan].” [#26]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “Yeah, I mean we're aware of what the CARES Act brought out, the PPP and the emergency disaster relief- With the PPP we did, yup.” [#27]
- The Hispanic American owner of an uncertified MBE construction company stated, “My employees, they get all the tax benefits, so I still have to pay my bills. The government helps out a little bit with the payroll and everything, but it's never enough, you know? We do, but there's that one for... They wanted me to give me, I guess like 130,000 for 30 years. And my wife said that she didn't want to get involved in it. She says she doesn't want to be in debt to anybody for 30 years. Which made sense to me. I don't need it. Believe me if I could, I would buy all new equipment. But I mean, if I'm doing it this way, I can just keep going this way. I mean, I have decent equipment. I employ a full-time mechanic that does all my stuff, all my maintenance. But I don't know. I'm doing that [using the PPP loan] right now. I have eight weeks of it. My wife said it was eight weeks, so I have four more weeks after this week. And that's helping a great deal. But still, it's not going to last forever. You know what I mean?” [#28]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “Yeah, we applied to the PPP loan. I'm knocking on wood; do you know what I mean? I don't know.” [#29]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “So we applied for and received PPP funding. Hopefully, we don't have to pay it back, but I guess we'll find that out.” [#30]

- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “The PPP? Yes. We applied and we were successful. We did get that and that was because of the extremely close relationship I have with the bank and my accounting firm. We have an outside accounting firm that's quite large and they just went to work on our behalf right away. I'm not sure we could have gotten it without them and our bank and that is a major help to us.” [#31]
- The Black American male owner of an MBE- and SLBE- certified construction company, “So it's been a nightmare for me. And then to take it one step even further, the federal government helping out with the PPP and the EDIC loans, the grants or whatever. Because I had a bad year last year, did not show a profit, I am not entitled to PPP. I can't get any help from. Of course, I applied but they won't send me application because I did not show a profit. Yeah. The EDIC, I was able to get that. I thought I wasn't going to get that either. So, I got 10,000 from that, which was great. It held me through for another month and a half. And now, we're back to right where we were before. The whole idea of that PPP program was to help you out based on the volume of work that you were doing and your pay, what you were paying out and what you were doing, not if you made a profit or not. So, I had a problem with the SBA and the PPP program because they were basing the loans of this money coming from the federal government on the FDA regular rules like we were doing business. This was not a FBA loan like you walk in and got before the virus. There's no special conditions. Yeah, they're loaning money to a person like me or giving me this grant money and stuff had nothing to do with the fact that I made a profit or didn't make a profit. It had absolutely nothing to do with that. If you were in business and doing business, let's say I just started my business in December. Hell, I couldn't have showed a profit.” [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “The PPP loan that we got allowed everyone to come back full time. I'm guessing that a lot of other companies received a loan, because work did pick up after loan disbursements started going out.” [#34]
- The Black American male owner of an MBE-certified construction company stated, “I did apply for the PPP. I was successful in getting PPP.” [#36]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “We were successful in getting PPP funding and we are just about through that.” [#37]
- The Hispanic American male owner of an uncertified MBE construction firm stated, “I did. So, it's funny. I got \$37,000 in PPP funding. I didn't think I needed it, but the woman at the bank encouraged me to take it because she said you don't know what conditions are going to be like a few months from now. So, I applied for the PPP loan, and was approved.” [#38]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, “I had applied for when it first came, we did get some help through the federal help. The ones that they gave, I did get some money. I didn't even realize because I'm still chasing projects, I don't really put time to see what's available. So, I know right now, any kind of help would be good help, but I don't know what's out there. Do you understand? Because with a small company... I'm so deep in putting my estimates, chasing the payments and running the projects that I don't really see what help that is out there that is available for companies like mine.” [#39]

- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “[I] did obtain some funding for via SBA for the pandemic.” [#40]
- The Native American male owner of an MBE- and DBE-certified construction company stated, “The company received a small SBA loan, \$15,000 to start and then and then another 10 or 15k.” [#43]
- The Hispanic American male owner of an uncertified MBE construction company stated, “I was successful in getting funding under the Payroll Protection Program but, I didn't take the economics into consideration because I don't like the terms. I don't like to owe anybody any money. It was very straight forward, and I had no problems.” [#45]

Seven interviewees did not apply for or were not aware of COVID relief programs [#13, #15, #17, #18, #20, #22, #32]. For example:

- The non-Hispanic white male owner of a majority-owned construction company stated, “I should be, but I haven't. They should be giving the money to small businesses rather than the big guys. I feel the people with the restaurants really need it. I have more than enough work right now.” [#13]
- The non-Hispanic white female representative of a majority-owned construction company stated, “[My firm] has not taken any steps to get funding and I'm not aware of the funding programs. He [the owner] tried to build strong relationships with local banks and if they're on that list that would be good. If there is any assistance that he can get he'll take it. Because we do have other things that are happening at the sites, like ongoing costs. We have to keep the sites open, you know, like painters and dumpsters and you know, we're moving material that the company normally would be getting paid for that. So those are the kinds of scary things that he would be facing if this goes on for longer than another six weeks.” [#15]
- The Black American male owner of an uncertified MBE construction firm stated, “[I'm] not aware of city, state or other relief programs.” [#17]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “I have not applied for any funding yet but plan to. I haven't had the time to figure out what's available.” [#18]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “I didn't apply for any of the PPP loans. I didn't do any of that. I think I'll see; April 1st is usually when all the new work starts. And so, because there wasn't a lot of new work, it's just the existing work I had. So, it'll be a slower start, but it also could have rained for the month of April and May, and it would've been slower anyway.” [#20]
- The Black American male owner of an MBE-certified construction company stated, “If you don't have a set payroll, you're probably not going to get it. So, right off the bat, I was just discouraged by it. And the complaints that I got, that it has been set up so that it favors a very few. I am a small businessperson, but there is somebody who have 10 employees who's also considered as a small business person, you understand. And so, that person, both of us apply, that guy will get it, probably get it, and I may not. So, I have not done that.” [#22]

- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, “I have not [pursued federal funding]. That’s because my understanding is that the hurdles are high. I have been able to get some financial support from the state, so I’m still collecting that. I thought once you get one, you cannot double dip, so I just didn’t.” [#32]

Six interviewees shared suggestions on the most beneficial types of assistance their firms could receive to reduce the effect of COVID-19 [#3, #22, #30, #31, #33, #37]. For example:

- The non-Hispanic white male owner of a majority-owned construction firm stated, “The City of Boston, the City mainly they bid everything out and so there’s really nothing they can do. I mean, hopefully they open up construction. The mayor will allow people to go back to work on construction sites once he feels it’s safe, but that would help.” [#3]
- The Black American male owner of an MBE-certified construction company stated, “Some of the relief loan. That will be great.” [#22]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “Give us the vaccine. Hah! I think that the big thing was just getting us back to work and you know, I’m concerned for example, about people getting sick on our projects. So we’ve tried to mitigate that by putting safety measures in place. So I’m worried about that. I think that’s a big key for us in the construction industry.” [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “I tell you what would be very helpful is everybody who works for us has to have medical plans. That’s what keeps your employees in place and right now we cannot sustain the cost. I pay 65% of the cost of a family insurance for all my employees, that’s a huge investment in them in today’s world. When money is not coming in and I still want to maintain that benefit for them, it’s extremely costly. For example, Blue Cross Blue Shield came up with something that said, ‘Here’s how we’re going to lower the rate for the time being for the next, let’s say 10 months.’ That’s fine. That would be a huge help. If people could get their insurance: medical, pharmaceuticals down, that would be helpful. It’s those kinds of things, insurance, liability insurance, all of those things, those are necessary to function, there are operations costs, but if they take away my liability insurance, I can’t function on a job. They’re going to throw me off the job, rightly so. How do we maintain it when there’s no work, no money coming in? It’s a tough one.” [#31]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “It’s a financial assistance to get us through. I mean, I’ve got bills to pay, rent, gas, all that... but all my money, I mean, and it worked. I could do to bring money and stuff. So I made a stuck in a hard place. The federal government came out but that lasts for several weeks, a week and a half. And I have no more income coming from anywhere up until when [they say], ‘Okay, you just go do some work.’ And the longer it goes, the less money or less waiting I have to pay my people when it’s time to go to work because I ran out of money. Now I can’t even pay my own payroll.” [#33]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “Yeah. Another round of PPE for salaries to keep people on. I hear they’re coming out with an answer soon about whether you can apply for PPE more than once.” [#37]

3. Past marketplace conditions. Interviewees offered thoughts on the pre-pandemic marketplace across the public and private sectors, and what it takes to be a competitive business. They also commented on changes in the Boston marketplace that they have observed over time.

Seven interviewees described the pre-pandemic marketplace as increasingly competitive [#29, #30, #31, #34, #7, #40, #AV]. For example:

- The Hispanic American owner of an uncertified MBE professional services firm stated, “So we're microscopic in the industry, I guess you could say, and most of that stuff... I don't want to name any names, but we have turnovers, anyone does, but at that level, you have management turnover. They come into the City, they hire a bunch of sales reps, they go out and their job is just to make sales and it doesn't really matter what comes out of their mouth, as long as the sale gets done, they get paid and whether the quality's there or the quality's not or even if they're in the industry for more than 12 months, you never know. So, we have a lot of competition where they just underbid projects just to get in the door and they'll underbid the project for the first year and then they come into the second year and say, oh yeah, like this is our new bill rate. I'm not going to say it doesn't work but for the long run, cutting corners doesn't last, at least in my humble opinion. Well, I mean in the Boston market, the biggest problem is hiring and the casino that went in really put a damper on a lot of that. So I mean I'm all for businesses allowed to do what businesses do, so hey, it does put a constraint on my business because less people are walking through the door for that. We're pretty much in the same ballpark of population that we're going after. So, my staff in the Boston market is paying anywhere from 16 to like 18 an hour and I know or I think the casino is coming in the low 20s so just like a no-brainer. They were hiring like wildfire and I can't compete. I have a contract that I have to abide by but you put up with it. But yeah, in general, the Boston market's just a tight market. There's a lot of college kids and I'd prefer not to hire the college kids just because this is not their dream job, I guess. They're here in the City. They're here to get an education and then they're going to go off to whatever they're going to go off to.” [#29]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “I mean, we know there's a construction, boom, that's for sure, and that's been good and bad. It's great to have all this work. It's difficult now to find talented people. It's very competitive out there in terms of getting contracts. So that's a plus and a minus for us, but I hope that the growth will be slower because in my experience it goes up really fast. Much slower growth would be good for a while so that we have time to enjoy this ride.” [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “Over the last two or three years, I think the cost of medical insurance would be number one. Two, the tendency of government to move toward low cost, technically acceptable, which is a phrase that is used in public work. And what that means is, if I give you a guy with 10 years, but he's going to cost you \$48 an hour, and my opponent can give you a guy with three years, but it'll only cost you \$25 an hour, the government is now saying, that's where we're going to go. That's a very difficult situation because one, the older guys then are being pressed downward. Two, I'm working with a less skilled team than I want to because potentially, they don't have the experience to anticipate

a major problem on a major construction project. Those are serious issues. Somebody makes a mistake because they didn't see that the concrete did not cure well and then it falls on top of somebody, you're going to have a dead worker there." [#31]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Most engineering companies have, in the past decade and a half, since 2008, most of them have shrunk in size. Some have gone back to their original size by expanding their services. But what most companies are seeing is that the efficiencies from computer automation, as well as field work, as far as what's available for tools out there in the field are making the job a lot more efficient, and then, you don't need as much manpower as you originally did." [#34]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "It's hard to say because what we do is unique. The pattern is that it upticks and then it slows down. For instance, right now it's difficult to make any kind of growth projections with the pandemic. I was planning to hire a couple of people this spring, but that's all on hold. The Trump Administration's immigration policy has been horrible because number one, we're continually looking for qualified interpreters who can go out to work our jobs, but our job market has dried up because of immigration policies. Also, those immigrants who are need of our services are not reaching out because they are living in fear." [#37]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, "I think again it's as a small business it is challenging to get on radar so that people can find you or find out and it's a competitive market." [#40]
- A comment from a majority-owned professional services firm stated, "It's a competitive market." [#AV]

Sixteen interviewees observed that marketplace conditions were generally improving, especially for small and disadvantaged businesses [#12, #13, #15, #18, #20, #26, #27, #28, #32, #34, #38, #44, #45, #AV]. For example:

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "I'm seeing there's more and more opportunity for businesses like mine currently, because folks seem to be taking the minority business participation more seriously than they have in the past, as far as from the top down. In the past, it has been my experience that the agencies would give companies a pass on participation. There wasn't any verification of efforts made towards engaging diverse companies. There wasn't any enforcement to say you have to do this. So you're finding that agencies now, agencies, owners are taking this a little more serious than they have in the past. So that lends an opportunity to diversity consultants for folks who do not have a full-time compliance or diversity person on staff that deals with diverse business utilization or diverse workforce utilization. They will hire a consultant like me to show them how to do it or train an in-house person to do it." [#12]
- The non-Hispanic white female representative of a majority-owned construction company stated, "In 2011 there was still a slowdown in the construction industry from the 2008

market downturn, but since 2012 [my firm] has definitely been in a positive growth mode" [#15]

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "The whole green industry, whatever you want to call it, has really mushroomed with the whole focus on climate change, I would say in the last two or three years, and it's amazing. That industry is really blowing up in terms of needing businesses with the expertise to do all of these sustainability submittals that have to go into the city or the state with a development project. Since we have the skill set to do this, it's opened up a whole new market for the firm." [#18]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "In the City of Boston, your vertical building has kind of boomed. There's a lot of development on that end. And as far as the infrastructure and the roads, there's always going to be need for that. I mean, look at our roads. I look at, especially in Boston." [#20]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "We've had a steady growth. There's some years that the growth is bigger than others, but we've stayed pretty steady. We grow a little bit each year. I'm not sure we're going to show much growth this year, because I don't know how long it's going to take to overcome this pandemic." [#26]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, "The communities across New England still have, I mean their vehicles break down, they get into crashes, they age out, so they need to replace them. And most cities and towns maintain a certain level of police and public service vehicles, so it's been fairly steady." [#27]
- The Hispanic American owner of an uncertified MBE construction company stated, "I mean the workload's been steady, but I've never really had to fight for it like I am now. You know what I mean? Because everybody's in the same position." [#28]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, "From my perspective, local marketplace conditions are good for the translation and interpretation industry. I want to say it was the trade war with all that stuff has been sort of a worsening of China relations. Right now, I haven't ended up in Beijing for any work. It has been okay. So, I'm just hoping, you know, after the pandemic, things don't get any worse, and we still have a commercial business relationship between the two countries." [#32]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I mean, the interest rates have been low. So, as long as people are able to borrow money, they seem to keep moving forward with their projects. Things have been going very well on the private side. There's been a lot of investment. We'll see how that continues, going forward. But previously, up until now, things have been actually going pretty well." [#34]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "The work is out there and my work is pretty consistent, and electricians are busy, and I'm pretty busy right now." [#38]

- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “Right now, I get work on a regular basis. No problems with the local marketplace” [#44]
- The Hispanic American male owner of an uncertified MBE construction company stated, “I would say that the work is steady and the company is growing.” [#45]
- A comment from a majority-owned construction firm stated, “Booked for a year and a half with work.” [#AV]
- A comment from a majority-owned construction firm stated, “Work comes in every day.” [#AV]
- A comment from a majority-owned construction firm stated, “There is a lot of work in it right now. Lot of opportunity for expanding on old infrastructure. There are opportunities to grow smart city initiatives hardened security, continue to partner with other agencies, etc.” [#AV]

Six interviewees observed that pre-pandemic marketplace conditions were in decline [#10, #24, #25, #35, #43, #AV]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “Yeah. I just think that it's you know, it's not growing. It's just, because a lot of print shops are closing, a lot of, because of Amazons of print, are coming into the market. so those are coming into the market, and so just like, all other service orientated business have, they're all finding out ways how to monetize, you know and digitize all of these business genres, and print can't escape from it. So like, any entrepreneur you got to be able to adjust to it, understand it, and move forward. So yes, it's been definitely impacted, and that's why I'm a small company, I got a small footprint, I understand that. You know, that's the only way that I'm going to sustain and grow in that particular genre.” [#10]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “The last two to three years-I'm not going to say names, but somebody has screwed it up real bad when it comes to the environmental industry. it's something that was started by the prior administration. You have to go back really five, six, seven years after the crash. The stuff the former president did to bring the economy back is really what got me from zero to 60 and I've been, for the last five years I've been getting a lot of work. So far, the current President has screwed it up by eliminating environmental regulations. I tried to stay out of politics here, but he has screwed things up.” [#24]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “No, not really. One thing that I do know is that the Massachusetts Department of Environmental Protection with the licensing of professionals, there are not as many contaminated properties in Massachusetts as there used to be. And in our business there are fewer spills and releases because all the underground storage tanks, all the steel tanks had to come out about five or six years ago and we got a lot of tanks and cleaned up a lot of sites, and all that work is now over. So, I would say that Massachusetts is a lot cleaner underground than certainly it used to be, yes [so there is less work for us].” [#25]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Yeah, the President of the United States has changed the local and national market

conditions. The Trump administration has basically destroyed environmental regulations. He's set us back a lot." [#35]

- The Native American male owner of an MBE- and DBE-certified construction company stated, "Work is slow right now." [#43]
- A comment from a majority-owned goods and services firm stated, "The industry itself is more internet driven and the quality of product has gone down." [#AV]

4. Keys to business success. Business owners and managers also discussed what it takes to be competitive in the Boston marketplace, in their respective industries, and in general [#1, #3, #10, #13, #14, #15, #17, #18, #20, #21, #22, #24, #26, #27, #29, #0, #31, #32, #33, #34, #35, #36, #37, #38, #40, #44, #45]. For example:

- The Black American male owner of an MBE-certified professional services firm stated, "I've been able to come to a number of different clients, good and bad, but also understand what the market needs and what my clients needs. That's why I think why I'm still here now, because I honed in on becoming more family connected than just business structure. That's a different field for me because I put in the effort of saying, listen, I want to be as close to you, like a family man, but so I can understand your business needs, if that makes sense." [#1]
- The non-Hispanic white male owner of a majority-owned construction firm stated, "You have to have skilled tradespeople that work for you. They need to go to a site and get the job done in a timely fashion. They need to be polite to the customers. That's it. You need a really solid workforce that understand that they need to get the work done and get it done in a neat and workman-like manner, and at the same time being courteous to the customer." [#3]
- The Black American male owner of an MBE-certified goods and services firm stated, "You reap what you sow. So what you put in is what you're going to get out. You put in a little, and you get a little bit out. So I found the times that I've put in a lot, like just networking and going, yeah, the connections happen. I think that it's more about knowing and building relationships. So, it's the few customers that I've gotten from the City most recently have been because they know me, they know of me. They know that I'm a minority business, and that 'Oh, hey,' and through association with me" [#10]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I would say accurate cost/bid estimates, high quality work, a solid track record, and dependability." [#13]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, "A good mix is analytical skills, regulatory knowledge, environmental expertise, and professionalism." [#14]
- The non-Hispanic white female representative of a majority-owned construction company stated, "I would say I think the first key element would be quality of the work. You have to be high quality no matter what service you're performing. Quality and oversight would be number one. And then I would say as the second one, you know a very deeply organized office administration. Even if you're just one person doing all of it you have to keep track

with everything because the project success depends on it. Some projects last a year and getting qualified subcontractors and making sure that they are representing you the way that you want to be represented in the field is also critical to success" [#15]

- The Black American male owner of an uncertified MBE construction firm stated, "Quality customer service keeps firms competitive." [#17]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I would sum it up as expertise, track record, professionalism, and a strong work ethic." [#18]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "A lot of times, it is, I think, price. And I think, also, I think, your reputation. If people like to work with you, or they like the field people, or your equipment looks nice, I think that has a way to go with it, too. Again, going back to the relationship. But I think, especially, in any kind of business, I think that person-to-person relationship is, I mean, I'll go to an event, and I know someone's voice but I don't even know what they look like. I've never met them. But I'll be at a table and I'll hear the voice. I'm like, "Oh, that's Charlie from so-and-so." I think you're trusting in someone to do the work for you, and it's going to be done right." [#20]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, "Well, the thing is, is that I found out many, many years ago your company is a whole lot better if you're diverse. So right now, we're a rental company, but we also have an indoor facility where we host events. So, when the rental season dies, the party season begins in the indoors. When your movie season is good, it's good. But then, if you have a rainy summer, then it's very bad. So, I have four or five revenues of my company, it's all under the same umbrella, but if one dies, usually the other one picks up. I've never been fortunate enough for all of them to do great at the same time." [#21]
- The Black American male owner of an MBE-certified construction company stated, "Well, my work, that speaks for itself. So, that is where I have a competitive edge from the others, because of my reliability. So when people look you up, those are the things, the quality of work. They check your reviews to see what you can offer to the client and things like that. And they make their decision based on that. So, that's what gives me a competitive edge over others, because I complete my work in a timely manner, I respond to clients, I am pretty fair in my pricing, I don't go over budget, I don't have any hidden costs anywhere. I think the overall thing that people look at is reliability, and that I think I have a competitive edge over quite a bit of people around." [#22]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It's a complex mix of technical knowledge along with policy knowledge, integrity, and being able to think on your feet with presentations at public hearings. It also involves being able to read people and being able to speak to people. Cause you know when you get in front of a board chair or conservation professional, you're dealing with a mix of the technical, the regulations and also the people you need to get to raise their hands. So that's why I think I'm sort of in the place I'm in. It's because I just happened to be experienced enough that each of those things give me a competitive edge. Are there better technical

people out there than me? Yeah. Are there better public hearing people than me? Yeah. Are there better policy people than me? Yes, but very few that have all three skill sets.” [#24]

- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “Education and experience in this business. We see a lot of companies that hire a lot of seasonal employees and we don't. We don't hire seasonal, we don't lay people off in the winter time if things slow down, so we're able to keep everybody fairly busy all year. And that goes to the experience of the technician. The more they're working and the longer they're with the company, the better the service they provide, the more knowledge they attain. And I think that's a lot of what sets us apart.” [#26]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “Yeah, ours would be tough because it's a lot of equipment and a lot of expensive equipment. So you would need to be well financed and then you'd have to be really patient because you mentioned before the prequalifications.” [#27]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “I think the key for us is that we grow at a steady pace and we don't lose accounts. I think if you have a strategy of just trying to get as many buildings in your belt as possible, you end up, the quality goes down so you end up burning your name. So I think the key to us is that you build but you also keep. I don't think we skyrocketed to 300 people by any means. We've been doing this since 2006 so the growth rate is not something you really look at but it's definitely a strategy of just maintaining the accounts and it's really doing the work day in and day out, seven days a week, 24 hours a day, to make sure that all the clients are happy, consistently. I think a lot of contracts, you start losing it when the management has change overs, the staff doesn't even know who to call if they have an HR problem or so forth, so just keeping that consistent, seven days a week, 24 hours a day, is really just like putting in the work. There's no easy way to do it.” [#29]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “You have to hire the right people. You have to love what you're doing because there are days when it's a miserable experience. Most of the times, it's great, but you have to really love what you're doing. Also, the most important thing I think is you have to be able to read people and deal with them because you deal with a thousand different personalities and especially in the private sector.” [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “Very relationships, and keep the money, keep the pricing down. Sometimes I do public speaking and I will say to companies, because I'll have people say, ‘Well, I charge \$190 and not a penny less.’ And my answer to that is, ‘You may think you're worth \$190 an hour and your mother may think you're worth that, but if the owner of a job thinks that you're worth 120, he's going to go find somebody worth 120.’” [#31]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, “Well, you know, having connections definitely helps you get your name out there. When my children were younger, I was not as aggressive about seeking a level of work that would take too much time away from my children, so I wasn't out there making connections. So I think connections and being aware

of what's going on, but, you know, I wasn't aware of what the City of Boston needs in terms of, translation and interpretation.” [#32]

- The Black American male owner of an MBE- and SLBE- certified construction company stated, “Honestly, it's different every single time. Pretty much if you weren't there on prevailing wage job, you know the labor rate. Your labor costs the same as my labor. Unless, of course, you're a union, then it's going to cost you even more. But the labor is the rate to go to be pretty much the same on prevailing wage jobs. The materials would probably be about the same because we all know who to buy what from. The difference between my estimate and somebody else's estimate is how greedy are you. Can you work for a little less than this guy can work for? Can he work a little less than I could work for? I mean, it's just a matter of you're estimating and you're negotiating when it's time to get a contract from someone. You got shot in the dark. You got to hope for the best. There's no magic pill for this. It's every bid that goes out for new adventure.” [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “The big thing is responsiveness. You just need to be able to respond quickly. Then, the second thing is, obviously, price. I think that's just, market-wide, everyone's looking for the lowest price. Again, we try to be very responsive, and that sometimes offsets the pricing need for a lot of contractors, because time is money, as well.” [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I suppose like the environmental business has changed significantly over the years that I've been around. When I first started environmental consulting in 1973 the industry was in its infancy. Today it's a much larger industry and it's much more profitable to the point where many people coming out of school today, very commonly have environmental backgrounds. Whereas, back in the day, we built the background. But, to answer your question, it's a highly technical field, so you need knowledge of environmental law and regulations and how to apply them to real-life situations.” [#35]
- The Black American male owner of an MBE-certified construction company stated, “It always comes all the way back to getting mobilization funding. Without the funding, it's hard to compete in this industry.” [#36]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “We've always focused on providing high quality services to build our client base. But, on the other hand, I recently had a client come to us, and indicate that our firm is more expensive than another one. I said, well, the cheaper firms that are crowdsourcing, which means you're losing all confidentiality and quality control. You know, so I'm really trying to educate potential clients about why Google Translate doesn't work and why it's important to have somebody that's with you for the long term.” [#37]
- The Hispanic American male owner of an uncertified MBE construction firm stated, “I try and price a little higher to test the market, and I'm not at the top, but right now, I'm also not trying to do 10 jobs in a day. So, it's the money, you know, the people you would find on Craigslist, other handymen or whatever miles away from them. So, I try and get a minimum of \$100 an hour for a job. I typically charge for an hour and a half minimum. So, part of my plan to be competitive is to try and stay on the low end of the high side, if that makes any sense, and I'm not afraid to lose work if I have enough work.” [#38]

- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “I think the key is that you need to have the right people. You need to have key personnel and you need to have a competitive price and an ability to leverage technology to be able to support the projects that you're going to go after” [#40]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “Clients have to know that you can be depended on to do the job well and always be on time” [#44]
- The Hispanic American male owner of an uncertified MBE construction company stated, “I would say, reputation, the quality of your work and good customer service.” [#45]

H. Potential barriers to business success

Business owners and managers discussed a variety of barriers to business development. Section H presents their comments and highlights the most frequently mentioned barriers and challenges first:

1. Obtaining financing;
2. Bonding;
3. Insurance requirements and obtaining insurance;
4. Factors public agencies consider to award contracts;
5. Personnel and labor;
6. Working with unions and being a union or non-union employer;
7. Obtaining inventory, equipment, or other materials and supplies;
8. Prequalification requirements;
9. Experience and expertise;
10. Licenses and permits;
11. Learning about work or marketing;
12. Unnecessarily restrictive contract specifications;
13. Bid processes and criteria;
14. Bid shopping or bid manipulation;
15. Treatment by primes or customers;
16. Approval of the work by the prime contractor or customer;
17. Delayed payment, lack of payment, or other payment issues;
18. Size of contracts; and
19. Other comments about marketplace barriers and discrimination.

1. Obtaining financing. Twenty 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 [#20, #22, #30, #32, #33, #34, #35, #36, #38, #40, #41, #44, #AV, #PT1, #PT3, #PT6, #WT3]. For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “I think you have to be an established business for a few years to get that financing. I was lucky enough to have relationships on the supplier side that they gave me good terms. But if you don’t have a relationship with your suppliers, it’s hard to start out, I think. Your overhead costs are so high. So, it could be a barrier. It’s not definitely my barrier, but definitely, I could see how it could be.” [#20]
- The Black American male owner of an MBE-certified construction company stated, “Yes, financing is a huge barrier, absolutely.” [#22]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “We’ve never had a problem with that, but I know a lot of firms that have had problem with getting financing, getting loans, getting things like that. So, yeah, there’s a big problem in obtaining financing, particularly for new firms.” [#30]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “That is beyond tough. I mean, I’ve gone from high to low, to nothing and back up again. Honestly, getting financing is a tough thing to do. Especially if, for instance, you’ve had a year that’s bad. My tax return not showing a profit, FBA won’t loan me money, which in times SBA wouldn’t approve me for PPP, which is an oxymoron because of the fact that it should not have anything to do with your profits from last year, if you need money this year and currently. Other than going to the SBA, I’ve had to borrow money. Personally, I borrowed money from internet companies or private people, which are basically attorneys that lend out hard money is what it’s called. I get loans from them quicker, easier, and less... Well, I always get loan from them because, going through the mainstream, they have criteria that if you’re starting out, it’s going to be hard to meet due to the fact that you’re just starting out. Secondary, you may or may not own anything because you just purchased \$200,000 worth of equipment. That just puts you in debt. You don’t have ownership of anything. How are you going to borrow money when it looks like, ‘Oh, I’ve been in business six months but I’m owed \$250,000 out.’ I mean, that forces you to go to alternative market. SBA won’t lend you money if you’re an existing business and you don’t show a profit. Hell, lots corporations don’t show a profit. You reinvest your profits as you go along.” [#33]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I think certainly insurance requirements and funding are always barriers to small businesses. With regard to race and gender, my opinion is that would be easier today for a woman-owned business, then it would have been in 1987 when we started the business. I think social consciousness has changed a little bit. But, at the same time, it’s still hard for minority businesses to get access to capital and insurance. In fact, minority businesses still don’t have a leg up over a white male in obtaining financial assistance. You know, cause there’s no programs that are out there right now outside of the Small Business Administration.” [#35]

- The Black American male owner of an MBE-certified construction company stated, “My biggest challenge is an inability to access the up-front funding that is common in this industry to mobilize and start a job, before receiving any payment by the client. It’s hard for a newly established business in this industry to get a foothold because of this challenge. I want to stop you here and say that obtaining financing is a major barrier for MBEs.” [#36]
- The Hispanic American male owner of an uncertified MBE construction firm stated, “So, the one thing I would say is, I think that most small business owners are afraid of being denied loans. Now, in my case, I have very good credit, which helps me, but most lending institutions are afraid to do loans, especially if you’re a sole proprietor. For me, they would rather just use my wife's income and not get involved with me as a sole proprietor. I don't know if you followed any of this, but I found a lot of difficulty in the beginning with getting a loan when I first started. I was trying to get money to get going. Then I had to go to like seven places just to get some credit and they wanted to use my house for credit. And I'm like, I'm not doing that. But eventually I got two credit cards with \$20,000 limits on both, and that’s basically how I financed my start up.” [#38]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “That's a joke first of all. You can't get money. I actually learned how to do it through my colleagues from Washington DC. So, I was able to learn how to do the financing and meet all of the federal requirements, and then meeting the state requirements were a lot easier. So, what I was able to do is, I found myself, once I understood how they do the financing, line of credits and all that stuff, I was able to develop using the federal model, I used it into the state model and I used it into the commercial model.” [#41]
- A comment from a Black American MBE construction firm stated, “It’s tough to start a business as a minority, financially.” [#AV]
- A comment from an MBE goods and services firm stated, “[It’s hard to find] funding to stay afloat and for operating expenses.” [#AV]
- A respondent in a public meeting hosted by the Black Market Association stated, “We decided to apply to this RFP [whose] deadline was in November. So, on Monday, there was a pre-submission conference where we attended. Pretty much, you go in there and tell you all about the RFP, what the ins and out and gave you a summary about it. Okay? At the end of that conference when I left, I decided that we were disqualified. And we weren’t disqualified because we were not capable of providing the service for these slots. We were disqualified based on three things. Based on finance, experience, and insurance. With the finance, this contract that is getting RFP is about \$11 million of revenue. Okay? They said there's a certain percentage that they would like to see to back that contract. I'm not quite sure if it's in ranging or it's between 30 to 40%. So, we're talking about four to 5 million. Okay? Four to 5 million, a small company does not have that on hand. That’s just not how it works. That's catered to whom? That's catered to large corporations, the guys that already had these contracts for the past 30-40 years.” [#PT1]
- A respondent from a public meeting in Jamaica Plain stated, “Sometimes we're facing the fact that we're running this business on empty. We have to pay rent, we have to pay

commercial space, we have to pay all of these other bills while there's no contracts being required." [#PT3]

- A respondent from a public meeting in Jamaica Plain stated, "When you in real estate as well, they don't give people doing real estate if they want to do something far development, they don't give you loans for that type of thing. As a startup company, they do give you loans for that. So, you will have to read, describe your business in a different way in order to even sit at the table to put in for the loan. So that's another disadvantage as well." [#PT3]
- A respondent from a public meeting in Jamaica Plain stated, "There was a contract that came out where I was going to need to expand, and I needed a capital loan. Now, my competitor, who was a Caucasian female had been in business for three months. She was able to get capital funding for \$4 million. I was not able to get capital funding at all." [#PT3]
- The Black American female owner of an uncertified MBE- and WBE-professional services firm stated, "What do you call it when you are using your own money to keep your business open? I've been doing that for years. I have a part-time job. I'm part retired and I get money, it goes directly into my business. Unfortunately, I don't have a savings. It goes into my business and I go to a lot of places where I find out if there's funding for my type of business, and I've been to the City several times. Workshops, finding out what I needed to do to get my business together. And one of the things that I find that happens, is the city staff assumes they know more about your business or business in general than you do. They just assume it. They don't look at you or hear you. They assume it. So one of the things that I've experienced is not being really taken seriously. Being told, 'Oh, the City is doing that. Why are you doing it?' You know what I mean? So, I have experienced that, people telling me that my business is not needed basically in the City. Now, it wasn't until really this year that I've gotten treated with more respect and I think... I submitted for a contract and I was immediately denied. And I said, 'You know what?' I said, 'With less than 1%, you all gave less than 1%?' I was immediately denied. Told, 'Well, you need to go to another source to get money.' And I'm like, 'Uh-uh (negative). I pay my taxes.' I wrote them back and I said, 'Listen, I pay my taxes. I've been building my business for three years without you and I will continue to do it, but you are not going to deny me. Period.' And then I got... When I did that, I sent that person a note that, 'No, this is unacceptable. I'm not getting denied.' And they sent me back a note and said, 'Oh. Well maybe we'd look at your business and find out more about what you do and what you're planning on doing.' And then, I was totally accepted to the point where I actually got a letter recently saying that they were going to help me finance my business. So, I'm just saying that the process, I think that the staff needs training as to how to communicate, how to work with business citizens, certainly how to respect businesses and the work that we've done on our own. Because we believe in what we're doing, period." [#PT6]
- The owner of a WBE-certified goods and services company stated, "Access to capital is an ENORMOUS challenge for any small business with limited collateral or guarantee and weak credit history. City's BLDC is inconsistent and slow in lending." [#WT3]

2. Bonding. Public agencies in Massachusetts typically require firms working as prime contractors on construction projects to provide bid, payment, or performance bonds. Securing bonding was difficult for some businesses and sixteen interviewees discussed their perspectives

on bonding [#3, #15, #18, #22, #26, #27, #30, #31, #36, #38, #39, #45, #AV, #PT4, #WT3]. For example:

- The non-Hispanic white male owner of a majority-owned construction firm stated, “Well, I think the banks are going to get strict and the bonding companies want to see that you have a line of credit with the banks. And the banks are going to get beat up, too, because people are not going to pay them because they can't afford to pay them.” [#3]
- The non-Hispanic white female representative of a majority-owned construction company stated, “The company does not do any work for City of Boston agencies because of public bonding requirements. The key potential barrier for [our firm] is meeting bonding requirements”[#15]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “Also meeting bonding requirements on some jobs is a challenge because some public agencies require a high bond even for small firms like mine. For example, my current bonding capacity is limited to \$2-\$3 million, but some jobs require up to \$10 million, so the firm loses opportunities because we can't meet these requirements.” [#18]
- The Black American male owner of an MBE-certified construction company stated, “The requirement over there is very stringent, because I was required to have a bond, and at the time, I had a house on the Cape, and the bonding company, because I had a house, they would look at that and issue you a bond. After the crisis in 2008/2009 came, I lost my house. And even that didn't further explain the reason why I didn't want to go back for certification, because if I didn't certify again, some of the contracts require that I have the bond, and now the insurance company will not issue me a bond, although I have never had any claims, or nobody has ever filed a claim against me. It's just that the structures that were in place for me to be able to get bond was no more, so I could not.” [#22]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “I see fewer and fewer bids require the bonding. The last one I can remember is the Boston Public Schools.” [#26]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “Boston doesn't do this but some communities do, the requirement to post a bid bond, which I think is completely unnecessary for what we do. I mean, if it was a construction project then you need it. But for vehicles, a bond seems absurd and that could be a barrier to somebody. It's just not necessary for what type of work that's being produced. Somebody hasn't finished building you a road, then you need to make sure the funds are there to finish building it. But if you don't get the delivery of a car, well you can just go get a car from someone else. It's not a completed works type of thing.” [#27]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “So, that's the same thing. That's a huge barrier we've actually had. I've kept a lot of money in my company, so we don't have any problems getting bonds, but I do know minority friends who had issues, getting bonds to cover projects that they want.” [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “Bonding is always going to be a problem if you're in construction,

if you're actually the builder and the sub. And I know a lot about that because that's what I studied." [#31]

- The Black American male owner of an MBE-certified construction company stated, "Bonding requirements are also a big challenge because it requires shelling out a lot of money that small businesses don't have." [#36]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Yeah, bonding is a problem. I had looked at a project and I wasn't able to get a bond, so I couldn't get the work." [#38]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "It's not easy, even though we've been around, we can get bonding for three, four, 500,000, but those projects are in millions and it takes time for you to get it there. All of those have been barriers because sometimes when we see, how do we... We run our business and are a small company, and day-to-day it takes time, or I think having the right people to get engaged with all these documents, and it's not easy to put all these things together so you can get bonding. I got bonding, I think for \$400,000, but what is \$400,000 in construction? How do we really sit down to see, how can we be able to say, this company honestly gets a million or 2 million bonding? What do we need? What is the strategy to discuss that? That's why, instead of running through all this, I ended up going to the private and doing the residential home additions, building homes and things like that, because most of that is not required. None of this bonding and all of that, it just required insurance and all those that were that you do have, but it's not a lot of bonding required. So then, we find a way maybe just to go the easy way out." [#39]
- The Hispanic American male owner of an uncertified MBE construction company stated, "We have bonds that we need when we go to pull a permit with municipalities. But I don't even really know too much about how the bonding works for bigger projects, so it would be helpful to be more informed about this." [#45]
- A comment from a Black American MBE construction company stated, "You cannot work with City unless you are bonded." [#AV]
- The representative of a goods and services company stated, "One other point I just wanted to make about the process because they also the performance bonds and the bid bonds, which are also, one of these big bids, it's very large but sometimes they don't match the actual reality of the spend and they go, because when they bid on these contracts they put the higher number on it, especially in the food so that if it falls short. They have at least some kind of budget or something. Right. So, then you're stuck with getting a bid bond that might be 20 to 30% higher and they don't seem to make adjustments around that. So that's another barrier." [#PT4]
- A respondent from a public meeting in East Boston stated, "That's a lot of money. Especially doing multiple projects. You know, you put a bid bond in, and you know, knowing balance is \$30,000 each, you do more than two it limits you. So now you've got to say well, do I have a chance of getting this one or do I go for that one? And it just limits your opportunity as a small business. And that's been an argument. If they're asking for a 5% minority, they should be asking for a 5% bid bond. That's my opinion. You'll get more participation that

way if those are realistic because they're basically, a bid bond is basically to say, Hey, I'm serious about this bid. I'm not wasting your time." [#PT4]

- The owner of a WBE-certified goods and services company stated, "Food and delivery service contracts with the City, BPS, etc. are large, require bid bonds and deposits, and allow for limited fee increases regardless of contract length. A city should consider eliminating need for bonds and deposits on smaller contracts and limiting multi-year contracts to allow more and smaller companies to bid." [#WT3]

3. Insurance requirements and obtaining insurance. Fifteen business owners and managers discussed their perspectives on insurance [#2, #15, #19, #20, #22, #24, #26, #29, #30, #34, #35, #40, #41, #AV, #PT1]. For example:

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "We tend to play in the realm of prototyping and research and development. So sometimes we get requests for insurance that just don't make any logical sense to us because well, we're not going to do that. We're not installing something as a permanent thing. We're going to put it up for 48 hours and then we're going to take it away. Once I had to fill out paperwork for, we were going to put a camera tripod up, and we had to fill out, but it was near an airport. So, we had to fill out all the FAA paperwork and describe the height of our system in meters. All the paperwork was meant for radio towers. And it's like, "No, no. This thing is five feet tall, and it has the effective range of 12 feet. This is not an AM radio tower, really and truly."[#2]
- The non-Hispanic white female representative of a majority-owned construction company stated, "Clients require insurance because materials and equipment gets stolen from projects because we could not get high enough insurance coverage. And so each time we get a project we put it as one of my projects to focus on, try to figure out ideas or ways to have, you know, the ability to take on more insurance and money. We take on that insurance too. That cost gets passed directly on the estimate, meaning the Developers because we automatically add 5% performance for insurance initially and then I would say on heavy equipment we would add like 11%." [#15]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, "The other barriers we currently face include high insurance costs, and license and permit fees." [#19]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "When you first start out, it's because you're under, especially with the equipment, you're under an umbrella. But sometimes the umbrella policies and stuff that certain, like, the state requires, I think it's a 5 million umbrella. Which, when you're first starting out, is a lot. I mean, it's a lot. Again, it's costs that you're not always thinking about. I think insurance was one of my biggest costs when I started out. No one tells you that." [#20]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Okay, well, in terms of starting the business, the biggest barrier I had was health insurance. By far the biggest, because in my industry you got a laptop, you got a printer, you're kind of good to go. Maybe a pair of boots, but health insurance is a huge financial barrier to start business for me and the Obama care is actually what really saved me. I couldn't have gotten

health insurance. That was done. The next thing would be the other insurances, professional liability, general liability, umbrella liability. Sometimes those insurance requirements don't fit me and they can be huge barriers. In the private sector. I can often get those waived because I'm a sole proprietor. I carry professional, I carry general, but sometimes these public jobs want folks like me to have \$2 million and \$3 million in coverage. So, this is definitely a barrier to getting work with the City of Boston and other municipalities. You know, I have commercial plates on my truck, but I can't get commercial vehicle insurance because it's not a commercial vehicle, not big enough, heavy enough, whatever. The other thing might be to look at what the City's insurance policies are for contracts, making sure that there are provisions and being able to wave provisions when they don't make sense. For example, if I only have to go on site and look at plants and wetlands should I have to carry \$2 million in general liability for damaging something when the most complex tool I have with me is a small shovel? Despite these differences, this is the same liability you would carry for somebody going out with a backhoe. You know what I mean? The magnitude is just not the same. These are huge barriers." [#24]

- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "I've definitely seen over the last five years that insurance requirements by some of our primes have increased, but it hasn't been a problem to obtain the necessary insurance." [#26]
- The Hispanic American owner of an uncertified MBE professional services firm stated, "As you grow, you get more and more insurances and the rollover period comes up and you're like, what insurances do I have for our company again? So, you have a whole laundry list of things that you're paying for that who knows if you'll ever even need it but I guess that's why you pay the big bucks to the insurance companies." [#29]
- The non-Hispanic white male owner of a VBE-certified construction company stated, "Both of those insurance issues are a market barrier for startup companies because when you start up, you go into this pool where the rates are terrible. Right. And it takes a couple of years to get out of that." [#30]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "We haven't had any issues with that. Sometimes, we've had some weird coverage amounts that have been kind of difficult to obtain, but we've always found ways to get secondary insurance to meet those coverage amounts." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I think certainly insurance requirements and funding are always barriers to small businesses." [#35]
- A respondent in a public meeting hosted by the Black Market Association stated, "At the end of the day, it's parking. If you want to park it, you understand. Whether you're managing it or you're operating it, it's all the same. Okay? So, operating from a smaller insurance standpoint, let's say about three to \$5 million in insurance, that's what you need currently to service our existing clients. They're saying 'No, we want you to have anywhere between 10 to 15 million.'"[#PT1]

4. Factors public agencies consider to award contracts. Thirteen business owners and managers discussed their perspectives on the factors public agencies consider when awarding contracts and discuss barriers these factors may present for their firms [#2, #4, #10, #12, #20, #25, #27, #37, #40, #41, #AV, #PT7, #WT3]. For example:

- The non-Hispanic white male representative of a majority-owned professional services firm stated, “there are other occasions where they may have had their own agenda, which sometimes they don't even know they have. And so if you didn't say all the right magic words, they couldn't really comprehend what you're trying to explain to them. It's another case of maybe you can get through to them and maybe you should just call it a day and go home. So with a city such as the City of Boston, because they probably need so much new technology, but they're not quite clear on what that is, it would be a whole lot easier if they could explain what their problems are than blindly going out with an RFP, hoping that they will magically come across what it is that they want. It's better to say, ‘Here's our problem or here's the results we're looking for. What can you do about it?’ And then have people come to them and say, ‘I can solve your problem this way. And this is why it would be a good idea.” [#2]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I mean, not being a minority-owned business and not being a woman-owned business. Sometimes they get, I don't want to say preferential treatment, but that's the model sometimes. Some of these RFPs have to be a minority or a woman-owned business, which I guess a woman-owned business would be considered minority.” [#4]
- The Black American male owner of an MBE-certified goods and services firm stated, “I think that they need to stop the sort of contract process because that's another way that they know, they do these three, four-year contracts. And you're out of a bid for four years because somebody has the contract. And I think they need to be more flexible on that and open. I understand, like the consistency, and they like to... But it's just I don't think it's working in terms of, you know, long term contracts and evaluate it on a job-by-job basis. Why do you need this guy to do this for a six-year, or five-year contract? Why? To me, I think it leads to people sleeping on the job, like we got this for the next five years, you know, there's no one else can get in. Just who gets the bid. You know, that's always been like a secret thing. Like, who gets the bid? And what was the price, so that you as a businessman can come in, and I think there needs to be more transparency over the, who got it, why they got it. And, you know, as information on how you can make your bid process better moving forward. Or sometimes you don't even get the information, like they don't... I think they need to contact people who bid on the jobs and let them know. Transparent as possible. How, you know. So, I think it needs to be more transparent, that whole process. And I think there should be, you know, other considerations as to why a person, you know, can and cannot get that. That price can't be the single because, you know, it might be part of the processes that we're trying to get more minority participation in the process. And even though this bid was, you know, \$1,000 cheaper. But, you know, we have an opportunity to put, you know, 10 minority businesses, or employees from a business and, you know, into play in helping us solve a bigger picture than the price of the job. So I don't know how you guys come about something like that. But that's something that we know that's a real problem. It's not just price. The only complaint I have is just the transparency on, you know,

what the result of the job was, in some sort of explanation, or you can go into more detail as to why you lost a bid, because it's usually a simple... Well, again, most of the times, I have to call. In like, what's going on with the bid. And so, communication is terrible around that.” [#10]

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “If I've practiced the same business model as my white counterpart but because of the color of my skin I'm denied access or the same lending rate or preferred rate from a supplier, then that's no fault of mine and I think that has to be recognized. I think, like with the City, their position is that ‘Well, it's the lowest bid.’ I don't think that's fair, because the minority company may never have the lowest bid. We face different challenges. I think, yeah, it should start with the City.” [#12]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “Sometimes, I do think it's unfair to the prime contractor. I understand they want the minority and the female percentages high on a lot of, especially the federal funded jobs. But I also think they need to look at, is it really feasible to be able to do that? I have contractors that are asking me, ‘Can you do this? Can you do this?’ Because they're so desperate for that information or need to meet their percentages that the state is requiring.” [#20]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Once or twice. We bid on jobs that I know that we were the low bidder, but the jobs were given to minority companies. think it was a woman-owned business that got a state contract. It had to do with sewage pumping at marinas, and obviously, we know how to do that, but there were about six small towns that needed sewage pumping systems. We bid on that, but we didn't get the job.” [#25]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “The state requires a certain amount of spend or they ask you for a certain commitment to spending part of the revenue of the contract with women and minority-owned businesses. Which is fine, you can ask that, but in some industries, it's extremely difficult to find those businesses to partner with. In our example, we have an extremely expensive product, a vehicle. Say \$40,000 for the vehicle. To then find a vendor to spend 1% of that with, it's tough. Because the vehicle itself comes from Ford Motor Company, so you can't source the vehicle with a minority vendor so you have to figure out what services you can source with a woman or minority vendor. And that part of it can be a challenge.” [#27]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “It can be a little dicey because you submit bids that are basically the same that you submit for the state, but the City typically goes with the lowest bidder. I can't get my hands wrapped around how much translation and interpretation work the City of Boston needs. So, I don't know how much time I should spend going after it, and then my operations people say, Oh, they're just buying the price anyway. So if somebody comes in with a lower price, we're not going to win it. So, we add so many different services even though we may not be the low-cost provider. But you can be real sure that it's going to be done well and done on time. So that's what stopped me with the City of Boston is how much time do I put into trying to procure a contract if they're just going to go out on price anyway.” [#37]

- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “I remember working with the technical people over at the City of Boston at the time. This is many years ago. I’ll just give you one example. And we were building a large network configuration that would allow security, communication, advanced notification. we put a bid on it and teamed up with. But our solution was nice and dandy. But we spent a lot of time vetting it getting it in, but yet it was given to another company that someone had a relationship with and didn't do half the stuff that we did. And just because they knew somebody it was given to them. So, we came in at a lower price point too, but it wasn't about price. That's my experience with the City of Boston on just one of those issues. They wanted us to go in with another company. So, we were trying to do it as a prime. We were trying to do it as a prime, but we were trying to bring one of the equipment manufacturers in as a sub. We were the integrators. We can do the work as the integrator. Is it a friend of a friend? Does the procurement officer know somebody over here? I mean we all know how it really works. But the underlying mechanism is offer a fair, open, competitive bidding process for small business, large businesses, that is based off of best value, lowest price... Whatever they put out there, but make it fair. And don't let the color of the skin of the company call the shots.” [#41]
- A comment from a majority-owned professional services firm stated, “Paperwork entry is very hard and small businesses get overlooked.” [#AV]
- The Black American male owner of an MBE-certified professional services firm stated, “I think though, as part of the turnaround is going to get rid of some of the old stick in the muds who only want to give out contracts, and not so much based on the quality of effort or quality of the RFP, but based on what was their ethnic heritage. Were they Italian, where they Irish, where they Jewish? If they're not one of the three main tribes of the Northeast, they ain't getting nothing. Now those are the politics. If all of a sudden, they get rid of those stick in the muds, and all of a sudden they have to start looking at the quality of effort that's coming in the door, then I think that'd be a good step in the right direction.” [#PT7]
- The owner of a WBE-certified goods and services company stated, “City health department is FAR more strict and restrictive than any of the surrounding Cities-huge disincentive for food companies to locate in Boston vs. Somerville, Cambridge, etc. City should work to adopt more consistent rules with surrounding communities.” [#WT3]

5. Personnel and labor. Fifteen business owners and managers discussed how personnel and labor can be a barrier to business development [#2, #3, #12, #18, #24, #26, #27, #28, #29, #34, #37, #AV]. For example:

- The non-Hispanic white male representative of a majority-owned professional services firm stated, “Personnel, sometimes they want somebody with a specialty that, if we don't have it, we'll try and find it. The contract may require somebody with a particular specialty. If they require it and it's not what we do, I'll try my best, but it would really be helpful if I had some suggestions. Like, ‘Here's some places you could go to find somebody like that. Since we demand it of you, we'll give you a leg up on places you can go to start looking.’” [#2]
- The non-Hispanic white male owner of a majority-owned construction firm stated, “The one thing I see, and every generation says the same thing, is that we don't have enough good,

young, qualified people coming up through the ranks. And these guys - for a long time people were told not to go into the trades - get a college education. It's more valuable. And I mean, a 23-year-old kid that's been in a union, whether it's plumbing, electrical, HVAC, that just did the five-year apprenticeship walks away with zero debt and starting salary is \$103,000, okay? If enough young people could understand that they could make a very good living in the trades and walk away and after five years of apprenticeship they don't have any college debt. [I] think that that would be great if our high school administrators would start trying to push these kids to go into trade schools. It should start in junior high school where these kids should know, look, if you go to a trade school and you come out, and you have some sort of knowledge of plumbing, carpentry, electrical, automotive, anything, that is a head start for you. And eventually you might be able to be fortunate enough to get into one of the unions and go to their schooling, and after five years you're going to make quite a good living." [#3]

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "As far as the workers are concerned, if you're talking about, like, professional services in the company, it may be a little more challenging, because folks want to go and work for the big companies, and not necessarily a small contracting company that may be struggling." [#12]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I've had trouble with labor/personnel issues in terms of finding qualified staff and facing the challenge of paying them competitive salaries, so they don't leave." [#18]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I'm looking to try and bring on staff. If I could find somebody who was qualified to help me out, and we could start working on a contract basis, I'd bring them on. Right now, my problem is I don't want to hire somebody as an employee without knowing that I can pay them for a year or two, you know, and then offer them good pay and good benefits." [#24]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "Last year we did have a problem recruiting. Just seeing we couldn't find people. It wasn't even a matter of, 'Did you find the right people,' it was, 'Could you get anybody to even show up for an interview?' I can't tell you how many times we scheduled interviews and then the person never showed up. In speaking with colleagues in the business, everybody seemed to be in the same position. So, I don't know if it was just the case that there weren't a lot of people looking for work or ..." [#26]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, "What's a barrier for our business is trained employees. Finding people to do what we do here. It's difficult." [#27]
- The Hispanic American owner of an uncertified MBE construction company stated, "I employ a full-time mechanic too. Geez, I can't do it all. When I was a lot smaller, I was able to work on a lot of my stuff and do a lot of things myself. But it's impossible to do the sales, talk to people, go to my appointments, do the proposals, pull permits. It's just too much. You can't do it all." [#28]
- The Hispanic American owner of an uncertified MBE professional services firm stated, "So, I mean I'm all for businesses allowed to do what businesses do, so hey, it does put a

constraint on my business because less people are walking through the door for that. We're pretty much in the same ballpark of [the] population that we're going after. So, my staff in the Boston market is paying anywhere from 16 to like 18 an hour and I know, or I think, the casino is coming in in the low 20s, so just like a no-brainer. They were hiring like wildfire and I can't compete. I have a contract that I have to abide by, but you put up with it. There's always people out there, you just have to do the legwork to find them. I think that would be the biggest thing in the Boston market I've noticed over the past year or two. There's a lot of college kids and I'd prefer not to hire the college kids just because this is not their dream job, I guess. They're here in the City. They're here to get an education and then they're going to go off to whatever they're going to go off to. Yeah, exactly, and standing at a door at a luxury building maybe kind of sexy and fun for the time being, but if they have finals they're going to call out. If Mom and Dad tell them they're going on a trip, they're going to take off, so they're not always the most reliable. So, I try to hire people that are not in that spectrum, which is what, one in five people in Boston? But in general, you find the people." [#29]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Actually, for a while, we had a hard time, last summer, looking for help. It was very hard to find anyone that had experience and was looking to start a new position. Those that were looking for some exorbitantly high salaries, so it was very difficult to find qualified candidates." [#34]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Regarding personnel/labor issues, we need universal health care. I mean, as a small company, we don't have to provide insurance. Frankly, I can't afford it. I carry personal insurance on me only, and that went up too. It jumped by \$120, so I'm paying \$500 to \$600 this year, even with no claims on it last year. So, you know, healthcare is extremely expensive, even if you're not using it, and I can't provide it to employees. So I need to look for employees that don't need health care insurance. That knocks out a bunch of people. So that's a huge hit on the potential labor pool. We hire virtual people, and we look for good people. And I just got something from the state of New Hampshire that says I have to pay, you know, because I have a worker up there. I carry workers' comp on that person in Massachusetts, and now I need to spend time looking into whether the workers' comp can be written in Massachusetts or must be written in New Hampshire. She works from home, we're all virtual. And now I've got to think about where the best person that I can hire [is], where they're located, even if they're virtual." [#37]
- A comment from a majority-owned goods and services firm stated, "Always looking to expand and employ more people. Most employees come from tough neighborhoods." [#AV]
- A comment from a Black American owned professional services firm stated, "We need more people to hire." [#AV]
- A comment from a majority-owned professional services firm stated, "We would like to hire more qualified architects. Looking for about a year and not pleased with the quality of candidates." [#AV]
- A comment from a Hispanic American owned WBE and MBE goods and services firm stated, "It is very tough to find employees, but that is well known." [#AV]

6. Working with unions and being a union or non-union employer. Eleven business owners and managers described their challenges with unions, or with being a union or non-union employer [#2, #15, #20, #21, #29, #30, #33, #36, #38, #39, #43]. Their comments are as follows:

- The non-Hispanic white male representative of a majority-owned professional services firm stated, “We’ve hit some, union stuff varies. Unions are off and on my entire career. When you get good guys, everything’s great. When you get the guys that they’re in it for the money, I’ve had people show up at five o’clock to do the work for the sole reason that they knew they were going to get time and a half, even though they were sitting around for an hour. I was watching. That happens. And I think the only real way to fix that kind of a problem in my thinking is what I call fresh air and sunshine. If you know what’s going on and everybody knows what’s going on, it’s a lot harder to get away with shenanigans.” [#2]
- The non-Hispanic white female representative of a majority-owned construction company stated, “We don’t do much work in Boston with private developers because, as you know, Boston is a union town, and the company is non-union.” [#15]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “I’m union, so, to be honest, the barrier I have is finding minority and women labor within the union.” [#20]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “Nine times out of ten, if we work with a union, we don’t deal with the union. When we do the Tribeca Film Festival, we have to work with the riggers and I’m the boss and then I just tell them what to do. I’m trying to say that in a nice way because we’re not allowed to, technically, they’re not allowed, I’m not supposed to do my work, but how can I not do my work when they don’t even know how to do my work. I’m the only one that knows how.” [#21]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “We are 100% non-union and in the Boston market that’s not really an issue, but in the New York market, yeah. There is a big union in town, and they pay a lot more for the services. However, I think, probably over the past 10 years, New York has definitely been less union than it used to be. There’s a big movement to go non-union so it really depends on the project as well. There’s a lot of projects that you kind of know, when you’re selling a penthouse for 40 million dollars or something ridiculous, I think the guy with that penthouse should be paying through the teeth for the guys downstairs.” [#29]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “Let me stop you here to say that no one is immune to the union issue. I was a union member for 30 years in Boston. Well, 20 years anyway, and now we’re not a union firm now, and I will say I find that the unions are a lot less of a challenge than they were 20 years ago or 30 years ago.” [#30]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “You have your state work that you could work on, which is really tough to work on these days, considering the prevailing wage rates [of] 16 plus dollars an hour for labor. That means that man makes \$2,500 a week gross. [crosstalk 00:11:36] If you got 10 guys out

there that's a \$25,000 a week payroll. And that's not a, that's not an easy thing to maintain if it works, not consistent[ly]. Working on union jobs is a nightmare. Pretty much ... well, let's see. Give you a quick scenario. I had a union company, 40 employees, payroll, \$25,000 a week. These guys want to go home at three o'clock on Friday, they have to have their checks in their pockets by Friday, 12 noon, at lunch. For every four laborers, there has to be a labor foreman who absolutely does no work. He just stays around and looks at the other four guys working. That's the union rules. I'm non-union 100%. I'll never do another union thing in my life. It's just way too expensive. When they sit there and tell you that union work doesn't cost more than non-union work - I can't even tell you how many times they're lying." [#33]

- The Black American male owner of an MBE-certified construction company stated, "I don't know what it is with union workers because I face a lot of discrimination as a non-union member trying to get work." [#36]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "So, like I said, I am in the electric union. I had a project that was in a union building, but the project ended up not happening. But I spoke with one of the agents, and he said I would need to get bonded, but they would convert the bond into insurance if I had to. But what he said to me is I would need to be a union contractor, which is sort of different than just a union electrician. What he told me was that they wouldn't stop me from working, but I would need to become a contractor and I would need a bond. Like I said, the project ended up not happening." [#38]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "How many minority [companies] that [do] carpentry actually work with the unions? I would, but for you to work with unions, you got to have at least [\$200,000], \$300,000 sitting in the bank to pay the dues of the unions. It's not too many minorities out there, actually in the union. Unions are not our color friendly. They may be [able to] create jobs for ... some workers, but company-wise, corporation wise, I don't see them helping minority companies in the union if you go there and you may lose your shirts. But you have to see that we [have] grown, but you got to watch where we put our feet because you may go into union[s] and lose your shirt, because who you [are] going to compete with is the people in the union. The corporation[s] that sit on the boards of the unions are the companies that are actually [the ones] we compete with. What are the chances of you continu[ing to] hav[e] the jobs that they go after? Listen, that's a whole conversation for another time that I think, it's more having to do with politic[s] and the legislation. I don't know how they make legislation that made these jobs. And the development has to go straight to the union people while a lot of us out here in this area don't... the union doesn't do nothing for us at all, to tell you the truth, but that's the connections [of] the legislation that they drop and set up, but it doesn't help here." [#39]
- The Native American male owner of an MBE- and DBE-certified construction company stated, "Frustration with Boston unions. Large companies work mostly with unions, which is costly because of benefits." [#43]

7. Obtaining inventory, equipment, or other materials and supplies. Seven business owners and managers expressed challenges with obtaining inventory or other materials and supplies [#12, #20, #26, #27, #29, #33, #38]. For example:

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “As far as the equipment is concerned, again, you have to be creditworthy, and you have to be able to produce your financial statements. So, there may be a challenge in getting equipment.” [#12]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “For me, a lot of the time, if I’m competing against my industry, it’s price. Because I have newer equipment, so my equipment costs a lot more than these people that have been in business for 20 and 30 years, where they’ve paid for a lot of their stuff over and over again. So, they can put a barrel out for 10 cents. I can’t. I have to put it out for 25 cents. And they cost \$68 a piece. Or, same thing, like, the cones. I don’t buy truckloads of cones. I can only buy half a truckload. So, my cost is more to supply it than a bigger guy. That part’s hard, too.” [#20]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “And the only issue we’ve had is, and I’m sure we’re in the same boat as everybody else right now, is personal protective equipment. We go through rubber gloves like you can’t believe. And that’s on a regular basis. Now throw this in - sometimes it’s difficult to get supplies. We’re buying gloves that we didn’t buy before simply because what we were buying is no longer available. I mean, we’re able to get it, but the quality isn’t always the same as what we were used to. But that really hasn’t been much of a barrier. Everything else we use is in ready supply so we don’t have any issues.” [#26]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “Because of the closures, other factories are experiencing [supply chain closures].” [#27]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “Well, just getting the personal protection stuff has been a nightmare, like, I just can’t... you order the stuff, and they say it’s going to be delivered by X date, but the reality is that it’s not there, so we just had masks come in from California that we ordered over a month ago. So, I reached out to even Brooks Brothers to get it and their stuff is, I mean, of course, it’s Brooks Brothers, it’s really expensive. But, like, for protecting the employees, like, they’re the heart and blood of the company. If they don’t show up to work and they’re not healthy then you can’t be in business. So, at this point, paying extra for gloves and so forth, we’re just kind of spending money willy-nilly to make sure that it gets there, but it’s a day-to-day struggle.” [#29]

8. Prequalification requirements. Public agencies sometimes require construction contractors to prequalify (meet a certain set of requirements) in order to bid or propose on government contracts. Five business owners and managers discussed the benefits and challenges associated with pre-qualification [#10, #27, #29, #34, #36]. Their comments included:

- The Black American male owner of an MBE-certified goods and services firm stated, “I think what's happening, and with the whole disparity report, is that a lot of Black owned businesses just aren't qualified to do the work. Especially on the bigger level projects and jobs, and the opportunities out there. But it's so small, like, the amount of people qualified to do some of this stuff that they're asking. So yeah, they can say, you know, like, the state, they're doing this initiative. But when they ask for Black businesses in particular to step up to the plate, they're finding that ... where do you find the qualified vendors now? And we sort of look like egg in our face, because they're not really there on that level.” [#10]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “So on the larger ones, because of what we do, most of them require that you have so many years of service in the industry before you can be allowed to bid. So usually, they're looking for some evidence that you have successfully provided so many vehicles to so many departments of this similar nature. So yeah, I'd imagine it'd be tough for somebody new to the industry to kind of get a toe hold because they won't have that. I guess I mean it depends upon the risk of what they're buying. If it's something that ... If they're buying a commodity and everybody knows that it is, like everybody knows ... Well frankly, everybody knows what a car is, right? So yeah, we know what [it's] supposed to do. Just a plain old vanilla car. Then you could probably buy one of those from any car dealership, anywhere, because you know what the product is and you know it's going to serve your purpose. Where you get into the gray area is when, with something like what we do, where you're doing extensive modifications to something with really special purpose equipment. And you don't want somebody who just learned to do that last year. Because you're going to spend \$60,000 and maybe it's not going to work. And maybe the company won't be there to fix it when it doesn't work. So, I think the more expensive the investment or the more expensive the thing you're purchasing - or it's something that you expect to last five, six, seven, ten years - that you're going to want somebody who's been around and who's done it before. But if you're buying something like, I want to buy a Toyota Corolla for the department and I'm not doing anything to it, it's a Toyota Corolla. I can get one at any Toyota dealer. I know it's going to last, and I can bring it to any Toyota dealer to fix it. But the minute you start doing something to it to make it special, to modify it, to change the way it operates, to integrate your computers with it, to do the things that we do to customize it for a very particular use, then I think that's when having some type of prequalification helps protect the buyer. But the generic stuff, copy machine, I don't know that there's any benefit to prequalifying other than maybe that the business has been around long enough to cover the warranty period.” [#27]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “Well, I think every building wants another client to vouch, to say, ‘Hey, you're making the right choice by going with this company and we are in the same market, in the same situation as you are, and I am also board president at this building, and we have the exact same number of units and the same...’ You know? So I think that's also like when you get those questions, having those references that, where you do have people that will vouch for you, is a big game changer.” [#29]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “So, that's the big thing, having so many years of experience doing this type of work for this type of agency versus just having experience in the type of work.” [#34]

- The Black American male owner of an MBE-certified construction company stated, “With respect to the experience and expertise, and prequalification requirements, some companies, some big contractors expect me to be in business for more than two years before they would even look at hiring me as subcontractor, so it’s hard. These are barriers.” [#36]

9. Experience and expertise. Interviewees noted that experience and expertise can present a barrier for small, disadvantaged businesses. Experience is often compared to the requirements for prequalification [#27, #36, #44, #AV, #PT1]. For example:

- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “And that’s pretty hard to overcome as a start up company in a specialty equipment environment, to be able to either build your business with some smaller cities and towns that might not have those prequalifications and to have enough practice or enough work under your belt to then go after the bigger cities. Or the state. That’s a tough one.” [#27]
- The Black American male owner of an MBE-certified construction company stated, “With respect to the experience and expertise, and prequalification requirements, some companies, some big contractors expect me to be in business for more than two years before they would even look at hiring me as subcontractor, so it’s hard. These are barriers.” [#36]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “Some clients try to pay me less and other companies more based on experience.” [#44]
- A comment from a Black American owned MBE construction firm stated, “I give them my telephone number and then I’m asked if I have worked with them before and I say no. I never hear back from them again.” [#AV]
- A comment from a WBE professional services firm stated, “Experience. Feels like you need experience to get experience.” [#AV]
- A respondent in a public meeting hosted by the Black Market Association stated, “When I started in 2012, I had one restaurant. I have 10 now, okay? So, when it comes to experience, I must know something when I have 10 restaurants and I’m still here today talking to you guys in business. For them, for them, their experience was, ‘Well, you need to service at least three parking garages of the same size as these garages?’” [#PT1]

10. Licenses and permits. Certain licenses, permits, and certifications are required for both public and private sector projects. Ten interviewees discussed whether licenses, permits and certifications presented barriers to doing business [#14, #19, #21, #PT1, #PT3, #PT4, #PT7, #WT3, #WT4]. For example:

- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “Even though we have done a small amount of work with [the] Boston Housing Authority and the Boston Water and Sewer Commission, we currently don’t do any work in the Boston area because the City requires all staff of environmental engineering firms, including the owners, to have a PE license. [The owner] does not have a PE license.” [#14]

- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “Our primary barriers when starting the company was based on the cost and time related to getting our patent approved for the headset.” [#19]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “Usually what we do is, I know more than them. Sounds cracky, but it’s not. Let’s put it this way. The Massachusetts Department of Public Safety. My certificate ran out and I had to take my license. I had to take the test over again. When I took the test over, I was in a room full of about 300 people and there [were] pipe fitters and everybody else was in ... they were giving out 10 or 15 different tests at the same time. Said, ‘If you have a problem raise your hand. I can’t give you the answer, but I’ll be able to tell you something.’ So, four times I had to ask him and told him that the questions were incapable of being answered and he said, ‘I’m sorry, we can’t help you.’ And I said, ‘Fine.’ So then, I asked for the supervisor and I said, ‘You’re giving a very poor test out. That question’s wrong and that question ...’ I gave them four questions. The gentleman handed me his business card and said, ‘Don’t worry. If you don’t pass, you know more than we do.’ That’s a true statement. What we do is, what we do is very ... we do our giant screens. [The] government can’t know everything, and I’m not saying they should, or they shouldn’t. I’m just saying, they just don’t. And we just know some things and the only reason why we know them is because we’ve done them 1,000 times, and we know what is required on it.” [#21]
- A respondent in a public meeting hosted by the Black Market Association stated, “As a business owner, I’m a business owner on paper. I got my [EIU] back in 2015 and haven’t been able to do anything with it, because in my business plan, I didn’t plan to be displaced from my neighborhood. And so, things like that and things that happened as a result of that, that just exposed me to where I can’t use my own goods and services for myself and my family.” [#PT1]
- A respondent from a public meeting in Jamaica Plain stated, “I just want to say a quick story about a person that I helped. He had a hot dog truck and [in order] for him to get his truck license, he had to go to [Mass Avenue] several times and with the inspectors. I was there and I was able to speak English. He always spoke Spanish. He was very diligent, but I must say that it was really rough for him because, first of all, the cultural barrier was very noticeable. When we went for the inspection, it was clear that he would have had, it would have been better for him to be coached over the thing that he had to get done. So, there was a bit of [a barrier]. Every single time we went there, and I went with him [as his translator], it was the same thing, the [same attitude]. And so, he actually didn’t get too much [feedback]. And so, it was very hard for him. He thought we’d get the license and later on he [asked me] [to call the person who had worked on the truck in order to say, ‘Just give him the license already and everything’s there.’ So anyway, I just want to point out that barrier of language. We are in the City of Boston; we have a lot of money in the City of Boston. How can there not be any [inspector] that speaks Spanish or that speaks all their languages, so at least [they can] call somebody to please be able to talk to them [in] their language? But, anyway, I just wanted to put that story out there. It isn’t mine, but it’s about a person that I [helped get his license].” [#PT3]
- A respondent from a public meeting in East Boston stated, “I’ve been 22 years with my business, with my mother. I tried twice to apply for the liquor license and there’s, like, never

something available for me. But businesses that have opened three or two years ago already got their licenses." [#PT4]

- A respondent from a public meeting in East Boston stated, "So those big announcements on that a couple of years ago where ... you made a big point, the big to-do about it .. about how they'd gone to help small businesses and make sure that the rest of these [liquor] licenses are diversified to the minority community ... You know that they put out these big announcements, they do this big hurrah, and then, when the dust settles, it's back to the same old people or the people who, it's just funny that you know, it's the cousins of somebody who helped finance something or who fundraised or you know..." [#PT4]
- The Black American male owner of an MBE-certified professional services firm stated, "It's not me personally, but a good friend of mine, to show you how things have been going. He has a lawsuit right now going with the City of Boston. Because in his case, he wanted to put together a tour boat company, something to compete against [the] Boston Ducks. Now, it started at least 10 years ago because the Menino family owned the Boston Ducks, [and] the Hackney division within the Boston Police Department would not give him a license. No matter how many times he applied, they'd always come up [with] some other excuse: 'Oh, you got to do this.' He'd go back and do it. 'Oh, you got to do that.' He'd go back and do it. And it all boiled down to, they were hoping that they would wear him down and finally he'd just give up and go away. But he didn't do it. He kept coming back and coming back and coming back. And he has a contract with a foreign bus manufacturer, which would provide state of the art buses that could not only go on city streets but could also go out on the water out on the harbor. So, you cross the river, go up the river, go out on the harbor, and they use a state of the art [bus]. And unlike the Ducks, which are like 80 years old, they use ... brand spanking new [equipment] and have all the latest amenities in terms of safety features. Because how many times you've looked in the news and saw where somebody got killed by one of those World War II era Ducks? His, you wouldn't have that because they've got better safety features involved. And so right now he is in the middle of a lawsuit against the City of Boston. I believe that once it's filed with the court, it becomes a matter of public record. But take it for what it's worth, it boiled down to internal politics here because he's black, he's a former police officer. They were trying to block him because they wanted to protect the powers that be. Therefore, the Menino family didn't want no competition out there. In which case, you had the same people sitting behind the desk approving those applications that had been there for decades, not one decade, that's decades with an 's' on it. So therefore, it's old fashioned, old school city politics, didn't want anybody coming in there who could want to share the pie and because of quality they probably get a bigger share of the pie than the existing parties." [#PT7]
- The owner of a WBE-certified goods and services company stated, "Two words-- LIQUOR LICENSES-- still a big challenge for food businesses-- need more; more transparency; etc." [#WT3]
- Written testimony submitted to BBC stated, "I registered my business about 2 years ago and wasn't aware of the annual requirement to refile paperwork and pay ~\$500 each time. This is a hefty fee for a small business that is still working to define its products and market and therefore has no revenue coming in yet. This fee should be revisited and only assessed once

a company has a revenue stream that supports the ability to absorb that cost fairly."
[#WT4]

11. Learning about work or marketing. Seventeen business owners and managers discussed how learning about work is a challenge, especially for smaller firms [#2, #4, #10, #11, #30, #32, #33, #40, #AV, #PT2, #PT3, #PT7, #WT3, #WT7]. For example:

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "The biggest will be just finding them, finding someone to talk to. If I go to, for example - I keep using the DOD because I've worked with them the most - they have a site, FedBizOpps, where if anybody in the government needs something, they put it there and then it's up to you to go digging so you know where to go look. I'm not sure there's a Boston analog to it. Or, if there is, I don't know where to find it, where I could say, 'What kinds of things is Boston trying to get, or any department in the City of Boston trying to deal with?' So that I could start looking through to figure out, 'Hey, I can help them. I have something that would help them.' I don't even know where to look right now. It's pretty much I know a guy who knows a guy, and that's how I find out, which really isn't efficient. I'm at the City website now. I know if I'm a resident, I know, hey, I could pay my real estate taxes. I can pay my parking ticket. I can do whatever. But if I'm somebody who wants to help the City, where do I find issues that Boston would like dealt with or problems they would like to solve? I don't think there's anything on here for that. Now, if there was a link saying, 'Okay, so here's [here's what] the Parks Department needs ...' Or better, 'Here's all the things that all the different parts of Boston need in one spot.' And then when you start looking, you say, 'Oh look, the Parks Department needs something. Well, Water and Sewer needs something. Or whoever - the City Engineer's Office needs something.' Then I would at least have a place to start. I could reach out, I could send them a white paper saying, 'I read that you have a problem with potholes, and I happen to have a wonder material that goes right in and fills the potholes. Here, let's explain it to you in this paper and give you a couple of slides or a 30 second video so you can see it in action. If you like it, reach back out to me.' It'd be great to have a way to get that kind of a connection going." [#2]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Obviously, just access to any of their... I know the cities would have to go through an RFP and so forth. I don't think... Just more knowledge, I guess. It's difficult sometimes to get contracts with the City of Boston from what I've been told." [#4]
- The Black American male owner of an MBE-certified goods and services firm stated, "A lot of my print business can go to a Kinko's or, you know, they just don't think about where they're sending their dollars. So we had to put our businesses on the radar. Like, 'Hey.' And a lot of times, we can do it better and cheaper than a Kinkos or, you know, a service like that. So, around education, and letting people know that we exist, because we're on all their vendors lists, you gotta give quality work. And, you know... And I think, just [an] easy process for that is to Google the company, you know. And I work hard on my Google, you know, likes and... Because it takes a lot to get a customer to write a review for you, you know, on your business. So, I mean, that's a part of the due diligence." [#10]
- The Black American male owner of an MBE-certified goods and services firm stated, "You have to get out there and do your stuff too. You got to put some of the onus on the small

businesses too. You got to get out there and you've got to start looking at where the advertisements are. But the thing is, I don't know how much more they're going to do, if you talk about the Globe or the Banner. Because, for me, they email me that stuff, the record, the city record, they email it to me when things are going out." [#11]

- The non-Hispanic white male owner of a VBE-certified construction company stated, "Learning about work is a barrier. That's a challenge for us. It's a challenge for almost every company that I know." [#30]
- The Asian Pacific American female owner of an uncertified MBE, uncertified WBE, and DBE-certified professional services firm stated, "I don't even know where to look for contract opportunities with public agencies in the Boston area. When you come to the City of Boston, they need to do more outreach with companies. More promotion of goods and services contracts. I'm kind of ignorant. I didn't seek out those opportunities, but they also didn't reach out to me." [#32]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, "The list of things where they tell you what jobs are going out for bids, things like that. I stopped doing that about a year ago because the price went over two grand a year and it's like, yeah, I want to keep my money. I mean, it's nice because you find out about everything in New England going out for [a] bid, but 99% of those people, I don't know. And working for people you don't know could be very dangerous because you may never see your money." [#33]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, "I think COVID probably will change things at the end of the day where some small businesses may not survive, so that might change the landscape a little bit. But again, it's very hard to gain visibility on the stage for capabilities that we can provide [for the] government. You know, I even think [that] on a local basis - to be [in] Boston, how do you get in front of those people? There really isn't, I think, a good way to have government stakeholders get to know who we are and identify maybe some projects that we could help to support." [#40]
- A comment from a WBE professional services firm stated, "Requests [for work should] be on one platform or one agency." [#AV]
- A comment from a majority-owned professional services firm stated, "We don't actively seek. We would if it were not so much trouble to follow." [#AV]
- A respondent from a public meeting in Dorchester stated, "And for five years I got no work through [the] government, and my barrier to success is the filters. I do get some emails, but the filters are terrible. The proposals that I get have nothing to do with my business in any way, shape, or form. And, as you had mentioned earlier, as a one-person business, I do not search these databases regularly because of the complications of contracting with a government agency. And I have yet to figure out a way of finding relevant proposals or subcontracting work that is relevant to my job and worth the effort in trying to develop a proposal." [#PT2]
- A respondent from a public meeting in Dorchester stated, "I also want to say to that, it's a matter of trust. And no one will hire you if they don't have trust, you know, so people aren't

going to hire someone that they don't trust. And I think that I gave trust by constantly [knocking on the same door], you know? And in showing, you know, that, that I'm trustworthy or, or getting that one customer that really trusted me, you know, because they saw what I did and they knew I was trustworthy. Give me your keys, give me your codes, you can give me a car. I'll, you know, I'll do whatever it takes for this job. And then it took, it just took that one customer to tell somebody else you can trust this girl." [#PT2]

- A respondent from a public meeting in Jamaica Plain stated, "I'm certified with the state and I still don't get the email alerts. I think there should be some, once you're certified. You should definitely get email alerts for whatever it is your business [does], and it should be automatic because I signed up online, I got certified, but I still don't get an email." [#PT3]
- A respondent from a public meeting in Jamaica Plain stated, "Like, retail is much easier to advertise. But I can't, I don't cater to the public. You're not going to walk up to my space and go, 'Oh, I want metal.' I need to be match-made like she does [when] contracting [for] plumbing. You know, I need to be match-made for people that want commissioned work. You know, either metal arts or precision engineering where a category can work with the engineering and technical services. I need to be partnered with that. I need to be able to [be seen] and be found as a woman owner, engineer, or whatever. Even if I'm doing engineering and not [fabrication] either, the [fabrication] engineering. I need to be found. She goes, 'What is your biggest pain point?' I said, 'I have no idea how to message myself to the City.' Right? So I finally found a space, but now I don't even know how to message myself." [#PT3]
- The owner of an MBE-certified goods and services company stated, "I haven't seen any advertisements. I haven't looked, and I'm not quite sure where to go to look for any opportunities for office supply products with the City. I know they definitely put them out to bid. I think I may have gotten a call one time from someone for the City, and they were looking for printing services. It does kind of fall under the umbrella of what I do, but when I again explained the structure of my business, they wanted to go off to the contractor who was actually a minority contractor that is actually doing the printing." [#PT7]
- The owner of a WBE-certified goods and services company stated, "Overall, marketing and publicity of opportunities is not widespread enough or early enough for smaller companies to find out about them and have time to respond. For example, none of the food vendors on City Hall Plaza are based in Boston, none are minority-owned, etc.... [The] City has to be able to do better on City Hall Plaza!!" [#WT3]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "Equally, what are other contract opportunities? Since the submission of that proposal, I haven't received any further emails to reapply or info about other contract opportunities. Where does a small business owner go to learn of these city contracts and how does it work for a consultant? Someone who provides a service and not a product?" [#WT7]

12. Unnecessarily restrictive contract specifications. The study team asked business owners and managers if contract specifications presented a barrier to bidding, particularly on public sector contracts. Thirteen interviewees commented on personal experiences with

barriers related to bidding on public sector and private sector contracts [#11, #20, #24, #26, #27, #33, #34, #36, #37, #40, #AV, #PT6]. Their comments included:

- The Black American male owner of an MBE-certified goods and services firm stated, “[I] have seen UMass Boston put it out and say, ‘You have to have done a million square feet of higher ed.’ Okay? So, now you’re steering towards certain companies. The Convention Center here put out a bid that said, ‘You have to have done a Convention Center in Massachusetts.’ There’s only two companies who’ve done the Convention Center in Massachusetts, right? So, it is definitely not a diverse company. And so, those things caused problems.” [#11]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “When I first started, a lot of, they want you to have three years of experience to do something. But if you’re just starting your company, how do you have three years of experience? Whether it be traffic control. Whether it be some new technology. For me, they had the real time traffic, where they have these traffic centers. And I knew about this company. I had hired someone that I could have as a technician. And I bid on the job, and I got the job. And then, they threw me out because they said I didn’t have three years of experience, because my company hadn’t been around for three years. How do you get started into something? So, in growing, you have to, I think there’s steps that you probably have to take. It’s hard to get into a new market. Even if you work somewhere else, they don’t count it. Or, at least, that’s the way they said it to me.” [#20]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “But you know, I also think a big obstacle is, public agencies playing favorites. I know when I worked for the state, I saw other folks that would write stuff that would go out and they would write the bid documents to try to make sure that at least some people were qualified to bid on it, and they would write the specs because they would think of a firm that they wanted to get the job. So, the overly restrictive stuff, I definitely see that at times when they put in qualifications that seem unnecessary for the work that’s being done. One solution might be to try to come up with training on how to write those documents to make sure that public agencies aren’t unnecessarily attracting a narrow bid.” [#24]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “I mean, we’ve had no issues with the criteria for the bid. It’s really been the ... and I don’t want to sound like I’m complaining about the low bid process. But sometimes, just to give you an example, we’ve seen contracts ... especially, you know, the City of Boston always says they want you to pay a living wage. But then saying it’s a low bid process is contrary to that, because in order to pay a living wage you’ve got to be able to charge for that service. And when it’s low bid, when you look at the cost of payroll, the cost of insurance, the cost of vehicles, the cost of materials, it’s all contrary to the low bid process.” [#26]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “Yeah, so if the agency were crafting something in a particular way to either exclude somebody intentionally, obviously that’d be a barrier. I mean, if they came up [with] something arbitrary that said, ‘You have to be,’ I don’t know, ‘Within 22 miles of this,’ and there’s no reason for something to be 22 miles away, that could be a barrier. I mean, some of the barriers are logical. For example, you might put a geographic limitation on a bidder

because you need to be able to, let's say in our case, service a vehicle. Say, 'Hey, we can't buy the vehicle from Detroit because we're not going to take it back to Detroit for service.' So that means maybe the bidder has to be in Massachusetts or within 30 miles or something and that would make sense. But if [you] put that exclusion on for something that you didn't, an exclusion that made no sense, then that would be a barrier." [#27]

- The Black American male owner of an MBE- and SLBE- certified construction company stated, "I don't do a lot of City of Boston work and things. But the Big Dig, I loved it. Menino went on TV saying, 'Yep. Everyone can work on this job. Oh, by the way, you have to be in the union to work on the job.' Which means the job is a union job. Immediately eliminated all non-union companies. That's a hell of a catch 22. Yeah. But they're still running around and saying, 'Oh yeah, everybody could work on this job.' Yeah, if you join the union." [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "A lot of it is set up that it's the same players that get the work, because if you need five years of experience doing the work for municipalities, you're only going to get it if you're someone who's already doing work for municipalities." [#34]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I run into that time and time again, not knowing, you know, when we get asked for stupid little stuff and I'm like, what? The RFP process is twisted. It's always the big companies that win because they have more resources. I just don't know what they're looking for in somebody who's got more experience. Like the State of Massachusetts contract, we didn't get approved for telephone interpreting and we've been providing those services for years and they made the application process so difficult. They didn't have one small diverse company on the contract from Massachusetts. I'm like, are you flipping kidding me? There were people who could provide those services. And I brought it to them and they just, they did nothing about it. Pissed me off." [#37]
- A comment from a majority-owned construction firm stated, "[The] City of Boston's residency requirement can be complicated at times." [#AV]
- A comment from a majority-owned construction firm stated, "Paperwork and other required compliance/transparency required of contractors slows [the] process down and increases cost." [#AV]
- The Black American female owner of an uncertified MBE- and WBE-professional services firm stated, "There was the wording of the contract for like, you would have to have like three years of experience, or you would have to have tax papers to be able to back it up. And so, I found that there was no way I was going to be able to do business like that because I can't even get off my feet. So how will I be able to come up with three years of bank statements? I'm not implying that [for] any company or any contracts that come from the City, that you should be unqualified for those contracts. Because a lot of the city contracts ha[ve] to do with development and real estate and you definitely need experience for that. But I would like to find out how we can start to get this experience so we can move forward." [#PT6]

13. Bid processes and criteria. Eighteen interviewees shared comments about the bidding process for public agency work; business owners or managers highlighted its challenges [#10, #11, #12, #20, #37, #39, #45, #AV, #PT1, #PT3, #PT4, #PT6, #PT7, #WT10]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “She finds a little, those little cracks for bids and opportunities for her company, and she goes, and goes after them. But it takes a lot of like, due diligence and focus, you know, to find those little cracks. And it's not, you know, it's not the process is not open enough, and we got to fight more on our Black sort of stuff. Like why isn't, when you know, printing is not really a Black need, right? It's a, everybody needs some sort of printing. We just, you know, want an opening to the opportunities, and be able to, you know, to bid on jobs and know that we're going through the process like everyone else and that we, you know, made the best man win. It can be pretty taxing. Again, you got to be prepared for it, you got to have your insurance in order, you got to have a number of, you know, what have you done lately. You know, show us a history of work. In my case, you know, you got to, you know, I'm like a, like a Suffolk Construction, which is a big construction company here. They get the bid, but there's thousands of contractors underneath that general contract, that, in order to fulfill a bid. So, to be able to sub, and to take on a contract with a team, you got to have the capacity to do that as a general contractor on jobs. Just communications, opening it up, letting people know that on the smallest level... Like for me, a \$1,000 job is a great job, even a \$500 job, it's a great job. So, opening it up to the whole system, letting them know that you can bid on a \$500 job, up to a 10,000, or 20,000 job.” [#10]
- The Black American male owner of an MBE-certified goods and services firm stated, “I think that's all even for everybody. I mean, I think that diverse companies could do a better job at preparing their proposal. But I had people, the RA would come to me and say, ‘We're taking your proposal and we're showing it to other people, so that they can do their proposals similar to yours, in a format like you have.’ And so, I think that could affect other companies in a bad way. I mean, if they're preparing their proposals, if they don't have the back office staff to put together a good proposal, and I've seen companies that weren't diverse companies who had the same issue. I was lucky to have a person who worked with me who worked for Johnson Controls and M Corp, and he put proposals together for them. And so, he was a contractor for me that I hired, and they would look at my proposals and they were blown away. Like, ‘Wow, his proposal looks better than the \$50 million company.’ And so, that kind of helped me, but when it comes down to it, they still are going to look at capacity size and everything else.” [#11]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “On the public projects, I hear that it's more cumbersome, and folks are finding that they call them dog and pony shows. The agency folks are going to do business with the same folks. So there truly isn't a program to bring new businesses into the fold. It's really hard to or difficult to access the public work, from what I hear, if you don't have some kind of pre-established relationship either with that agency, or with a contractor that you've developed someplace else that is going to bring you along on that public project.” [#12]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “I quote a lot of work. I also quote a lot of work that I know I have no chance of getting, but it's just to throw your name out there and say, ‘Hey, we're here. This is where

I'm at.' Because my prices are higher, because I'm small. I don't compete against the people, all the time, in my industry. I'm competing against the other subs that are providing a different service. And then, sometimes, then it's based on the numbers. It's tough to say, because every contractor, I would say, bids their work differently." [#20]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I don't know how to say this but with public procurement, everybody is trying to be so fair that they're not giving information that would help small firms better understand how to submit competitive bids. This is the type of situation that favors incumbent contractors. So, the word on the street is if you don't already have a relationship with the people who are buying, the procurement, you can pretty much assume that your quote or RFP is just one that they have to do to go through the process. Also, improving access to opportunities is a big challenge. How do we find the City people who manage the process? If you do a regular RFP process, you're going to miss out because we don't know how to do it. Small companies don't have the time to do RFPs and we don't win." [#37]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "I put a couple of proposals in, but then you never get answered back. Or where are you at? How did you do?"[#39]
- The Hispanic American male owner of an uncertified MBE construction company stated, "I never really learned how to bid for public agency jobs. I know I could do it, but I just don't have that skill set that allows me to get work with public agencies." [#45]
- A comment from a WBE construction company stated, "Very paper intensive process." [#AV]
- A comment from a Hispanic WBE and MBE goods and services firm stated, "Simplify the process of business and make it more transparent." [#AV]
- A comment from a majority-owned goods and services firm stated, "We have been asked a number of times to provide proposals in the past and have had no success securing those proposals." [#AV]
- A comment from a majority-owned professional services firm stated, "The focus is too much on the project proposals. Proposals are really expensive." [#AV]
- A respondent in a public meeting hosted by the Black Market Association stated, "I mean, the whole bidding process, that skill is over 'Am I underbidding? Am I overbidding? Who do I know?' Again, this is an old white boys' network of once you get a contract, you keep the contract. Like who's in the contract? How did they get the contract? And then there's a couple of folks, even people of color that they've got the promise that they're going to get a bid contract? And so, this whole process feels daunting. I'm pushing through because I'm committed to being a full-time entrepreneur, but I literally cannot imagine someone who doesn't know how to advocate." [#PT1]
- A respondent from a public meeting in Jamaica Plain stated, "I would say you should try to have someone go through the procurement. That system, like I've tried three times to actually list my business and it keeps crashing. I think it's systematically created, and I deal with computers all day, but it's systematically created to have someone to fail." [#PT3]

- The representative of a goods and services company stated, “I would say that, you know, barriers to success. I think it's really more of the process. You know, for a small company doing large bids that take, you know, weeks to do is not really practical and it's really more geared towards bigger companies that can, that can do that, that type of thing. I have experienced myself, too, getting information late. I don't know if other bidders have got it, you know, with not enough time to put it together. Especially with the capacity for a smaller company, including bidders conferences.” [#PT4]
- A respondent from a public meeting in East Boston stated, “We just have very limited resources and we just don't have the time to do it. It takes a lot of money and time to bid. A lot of money and a lot of time. I stopped bidding on million-dollar projects, for that reason.”[#PT4]
- The Black American female owner of an uncertified MBE- and WBE-professional services firm stated, “I watched a friend actually go through the process. He was very persistent. It took like six months and then, he got on a contract with someone else and I was just like, ‘I don't have time to do all that stuff. I need to make a living and not just be like pulling together all these papers.’ I think that when you're small and you're trying to figure out how to make it, it's really hard to have this really complicated system to be able to get jobs or contracts with the City that might be great for you. But the process is so unwieldy that it's difficult to do.” [#PT6]
- The owner of an MBE-certified goods and services company stated, “In terms of looking at some of the state contracts. They look very difficult to fill out, and bid on, and fill out the bid. So, it's kind of complicated, and that's something I need to get up to speed on as well is try to actually how to navigate through that particular a bid process for the state.” [#PT7]
- The owner of a WBE-certified professional services firm stated, “Good afternoon. I would like to express an opinion: It is easy for certain industries and services to do the normal procurement. However, for a service similar to what we provide, we are not always as easily chosen as one that paves roads, sells office supplies or works with employment training.” [#WT10]

14. Bid shopping or bid manipulation. Bid shopping refers to the practice of sharing a contractor’s bid with another prospective contractor in order to secure a lower price for the services solicited. Bid manipulation describes the practice of unethically changing the contracting process or a bid to exclude fair and open competition and/or to unjustly profit. Five business owners and managers described their experiences with bid shopping and bid manipulation in the Boston marketplace [#10, #23, #34, #40, #AV]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “That's, like, up on a higher level [of] stuff that, you know, some of us vendors would hopefully never know, because that person would be prosecuted [for doing] something like that. So... But I believe it exists. Yes, I believe that's a part of the ‘good old boy’ system. Again, it doesn't have to be ‘good old boy’ based on races, it's just a, you know, they have an established relationship. And that's the way they do business. Just, when you think that you've done your best, and you've come down with a really low quote and you're like, damn, I don't know how anyone else could have came up with something better than that.

But again, you know, some of you know, because the market is so competitive, people are doing that. They're just like, bidding just to keep their doors open, particularly in the print field. So, you really can't measure any sort of discriminatory actions on that. I've never caught anybody on that level doing that. And I would know how to deal with that, if I did." [#10]

- The Black American male owner of an MBE-certified construction company stated, "I can't tell you how many times I have submitted bids to public agencies only to find out that they were using my bids to negotiate the numbers down with their favorite companies so they can get the work." [#23]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Surprisingly, on the private side more than the public ... because the bid requirements are pretty straightforward on the public side. The private side, you get a lot of price shopping because there's no set written guidelines. Sometimes, you'll have people who leave things out or make very simplified assumptions to keep the price down, knowing that they'll come back for a change after the fact." [#34]
- A comment from a Black American owned MBE construction firm stated, "I think there are jobs out there, and we bid, and they show our bid to a company and ask that company if they can beat that bid." [#AV]

15. Treatment by primes or customers. Two business owners and managers described their experiences with treatment by prime contractors or customers during performance of the work was often a challenge [#27, #PT2]. For example:

- The non-Hispanic white female representative of a majority-owned goods and services firm stated, "It can be, if you have a particularly persnickety or difficult, say, fleet manager who is coming in and changing the scope of the work and the job or being really difficult, it's intimidating. It's particularly intimidating for some city, state or government personnel when they come on site and start throwing their weight around, literally. It can be very intimidating and if you're not in a ... Yeah, if it's relatively new to you or you're not sure what your rights are. Some of these folks can be extremely intimidating and you could find yourself giving away stuff you didn't need to give away. Make this change or that change and put this on the vehicle and yeah, you need to do this or yeah. I mean, it's happened. I don't say it's common, but I can see somebody finding it hard to deal with, not knowing if they're right or they're wrong." [#27]
- A respondent from a public meeting in Dorchester stated, "Some other subcontractors, mainstream, let's say - I don't like to mention in between the color of skin, white or black or that - but mainstream that would not get the contract and come to me just to satisfy that, what I'm as a minority. And now instead of being a second-tier subcontractor, I'm a third tier. So that means I'm working for 50 cents on a dollar (silence). I'm not, no longer now, getting the dollar that is allowed for the subcontractor there because I cannot communicate now with the prime. I cannot, I got to communicate with two or three people in front of me. So, I believe that's something that is happening on the side in the construction industry that we have to make sure that the subcontractor, the minority that's used to fit the certain

quota, is actually not going through other people taking advantage of that minority who will uphold our regulation." [#PT2]

16. Approval of the work by the prime contractor or customer. One business owner described their experiences getting approvals of the work by the prime contractor or the customer [#44]. For example:

- The Hispanic American male owner of an uncertified MBE goods and services firm stated, "I don't have problems getting work, but some clients don't understand the amount of work involved in separating the recycling items and they sometimes expect me to do more work for less money, which I can't do. That's a big challenge." [#44]

17. Delayed payment, lack of payment, or other payment issues. Seventeen business owners and managers described their experiences with late or delayed payments, noting how timely payment was often a challenge for small firms [#4, #12, #15, #18, #20, #22, #25, #28, #29, #30, #33, #34, #39, #41, #43, #PT1, #PT5]. For example:

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Some of my clients probably pay worse than the City or government does, meaning the time you wait for the money. I'm not talking compensation." [#4]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "Payments take a long time no matter what. But yeah, prompt pay is always an issue. Because with the contractor, you're putting the work, installing the work for 30 days. Then you requisition. Now there's another 30 to 60 days, and when you get paid. That both on the private side and the public side. And again businesses, small businesses and especially if they're union, can not. They don't have the capacity to carry payroll basically for 90 days before they're paid. For 30 days. And not even pay for those 30 days, because now you've got to take out the retainage. That has, again, a financial impact. Because, these small businesses, they have their creative financing. They're getting credit card debt, higher interest rate, and so they're eating up their 10% retainage, 5% retainage. Retainage becomes even another issue of that, or challenge that they have to deal with. That's something that I was thinking about. Because I was, again, underground utilities installation site work. So, I'm the first contractor on the job. If the job is three to five years and my retainage isn't getting reduced until the third or fourth year, until the job is substantially complete, then that's causing a burden on me. I think that retainage, after the small business is substantially complete, their retainage should be getting released, and should not be tied to the overall project. I think that's a mechanism that's also missing that could help the capacity of a small business." [#12]
- The non-Hispanic white female representative of a majority-owned construction company stated, "Another key barrier is timely payment by the customer. This is definitely a big barrier for a construction company." [#15]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "Getting paid is really difficult. Some of it, because it's state work, there is a chain. But others, it's tough. It's tough. That's my hardest battle, is getting paid." [#20]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, “It's never been nonpayment, but they've certainly been slow from time to time, yes.” [#25]
- The Hispanic American owner of an uncertified MBE construction company stated, “Some builders, I'm worried. I'm scared to work for them, because I don't know them, number one. Right now, I'm owed money and I don't like it. Well, I mean like you worked last week and there was probably like \$17,000 owed to me from three different contracts. So, I kind of try to stay away, but sometimes I have to do that while this whole COVID thing is going on, I have to pay my bills. I spend money to make money and then they don't pay me. And it's like, I'm stuck. Then the chase is on. I don't like that.” [#28]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “I think the biggest issue I would have is like when we first started, we got like an office tower and the payroll was like a million dollars every two weeks or something. But even if we got the contract we couldn't support it and if the building decided to go 90 days out, I'd be millions of dollars in the hole, so I just couldn't financially do it and I think that would be my one issue with dealing with the City because you... and nothing against any city or any public place I'd love to do business with, but I think my one thing would just making sure that we get paid in a timely manner. Yeah, it is what it is but I think, as long as you kind of know. I don't mind if you pay 120 days late, but you have to pay, you have to pay every month, 120 days late. You know what I mean? If that makes sense.” [#29]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “We've had some challenges getting paid on time. We've gotten better at it now that we are much more aggressive about chasing money from people, but that's always a challenge.” [#30]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “I've had five different companies in my lifetime and three of them went bankrupt due to the fact that general contractors stuck me and I had no way of getting my money. Well, I mean, I have a project that we did at [a prison] for almost five years ago and we're still in court waiting to get a court date and get this thing resolved. The general contractor ended up going out of business and we never got paid. We joint ventured on some work for these guys. We got four projects and didn't get paid for pretty much any of them. So we got a couple, \$300,000 in limbo. We broke our own rule by working with this guy because we didn't know him. Our pockets were hurting. That's where the State or the City of Boston should be kicking in because small people like that, even if it's \$2,000, you don't care. It's money that you don't have and you work for it that you need to get. If you can't get it, then that's the difference if you eat this week or don't eat. It can get that bad. It could be your mortgage payment. You never know. Whatever it is, it's your money and you should be able to get paid. There's a problem if the authorities are there. They should be able to intervene, and not so much intervene because it's their money they're paying out. If the general contractor wants to play games, then there should be some way that we have a voice to call and say, 'Listen, we need help.' The State of Massachusetts says, 'Oh, yeah. You can ask for direct payment if the general contractor doesn't pay you after 30 or 60 days.' Pretty much that's what happened with me at Billerica Project and it never went anywhere. We had to get an attorney through the bonding company. But you're supposed to be able to tie the job up and put a lean on to the job and things, which we weren't able to do. Worst of all, no one

we called could walk us through the steps of how to do it. When it was the City of Boston and the Boston Police Headquarters and the Reggie Lewis Center, I tried going to the City of Boston and talked to the City of Boston attorneys regarding this and we went nowhere. Not one person ever called us back. And if there's a problem because I mean all of these authorities have people that say, 'Yeah, we can help you when something happens, something goes on or whatever.' But when that time comes, everybody disappears. There should be a clear path on how to resolve an issue between the general contractor and subcontractor that's not involved in the court So I can't tell you how many times that I had to just say goodbye to six grand, the 7,000, the 5,000. Because by the time I got an attorney and everything else, I'd spent triple that trying to get \$5,000. So, I pretty much had to say, 'Well, that's that.'"[#33]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "That's a huge one. We have people who treat you like the bank. So, they expect you to hold up on receiving anything until they have approval. So, you spend six, eight months carrying your work. That's kind of a tough one. And if you take them to court over it, they just say, 'Well, I don't have the money.' They'll go on a payment plan. So, here's 100 bucks a week. That's why you gain the experience, and you ask for more money upfront if you get someone who does that. If they don't like it, they can move on otherwise. But, municipal side of things, you don't get paid, you're supposed to get paid every 30 days, but there's a process. It definitely doesn't drag out longer than 60, but it's between 30 and 60, which, again, is a lot better than most of the private side." [#34]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "Sometimes you say it's a lot of mumble-jumble in all the requirements that you need to get this job at the end. If you're a sub, by the time you get paid by the prime contract, you got to borrow money to keep afloat waiting for that money." [#39]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, "We've had payments going six months, nine months trying to get paid. I know the City, the state, Massachusetts, they were having hard times getting paid too. So, I know that there were times... Years ago I heard the story, that it would take you six or seven months to get paid by the City or the state for work that was already performed." [#41]
- The Native American male owner of an MBE- and DBE-certified construction company stated, "Difficulty in getting paid. 'You don't get paid until we get paid' This kills us. Usually we get paid 1/3, 1/3 and the balance when the job is done." [#43]
- A respondent in a public meeting hosted by the Black Market Association stated, "One of the challenges that we have experienced with the City is payment issues. We did an event at the beginning of September and we just recently got paid for an event, so when the City takes so long to pay us for our services then we are late-paying our vendors, suppliers, and so we want to have good credit and good standing with our publishers but if we're paying them late they're looking at us like 'Okay, well, why would we give you these books or this added-on credit, and you are taking so long to pay us?' But they don't understand that we're waiting to get paid by the City and it takes a long time." [#PT1]

- A respondent from a public meeting in the Central Library stated, “It's still not being enforced correctly, for payment issues, you know, contractors that have got, who had not gotten paid, who have literally lost money on these bids. There's also the people who don't get their money in time. You know, there's a gap I think that would call it, but it's something that they call it that where they don't, they do the work, it gets inspected, but it's still 60 to 90 days before they get their pay.” [#PT5]

18. Size of contracts. Five interviewees described the size of available contracts as challenging. [#11, #12, #17, #AV] For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “Well, I mean, it's different for me even now, because before, when you were smaller, it was always a struggle. It was very hard to break in. They look at you like, ‘Okay, this guy. He's \$2 million, he's \$5 million, and he can't compete.’” [#11]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “The City hires consultants to provide the technical support, but there are many consultants that are bidding for the same work. For me, as a consultant, the way that I heard their program is it's not feasible for me to put a proposal together if I'm bidding against so many other technical assistance providers and the jobs are very small. So [it] is not lucrative. It's not feasible. I think their budget, I want to say, they may have had a \$200,000, let's say \$200,000 budget. I would like to see that go to a technical service provider, as opposed to 1,000 technical assistance providers.” [#12]
- The Black American male owner of an uncertified MBE construction firm stated, “The firm's small capacity limits the size of contracts.” [#17]
- A comment from a majority-owned construction firm stated, “Sometimes bids go out for [the] City. We're not a big enough company, [and] small businesses do not get the bids.” [#AV]
- A comment from a Black American owned WBE and MBE goods and services firm stated, “Ability for fair play for small business[es] in conjunction with finding local and state contracts. Having the David and Goliath effect when bidding on state and local contracts.” [#AV]

19. Other comments about marketplace barriers and discrimination. Twelve interviewees described other challenges in the marketplace and offered additional insights [#15, #20, #30, #39, #AV, #PT2, #PT3, #WT3]. For example:

- The non-Hispanic white female representative of a majority-owned construction company stated, “I don't know if it's smart, but the certified payroll has been contracted out because in order to remain competitive, we have to submit certified payrolls because that's what the clients require.” [#15]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, “Again, you struggle, but I don't necessarily think even being a woman or a minority is, I think it's just starting a new, the struggle is getting in. That's the hardest part, is getting in and getting people to know you. To be fair to try out, and ... take a chance on you.” [#20]

- The non-Hispanic white male owner of a VBE-certified construction company stated, “I think that it’s a challenge for minority-owned businesses to get good opportunities in the area. The opportunities are good for firms like mine. I think there are fewer opportunities for minority firms.” [#30]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, “As the GC, to grow [the] capacity to do that, you need just a DKM certification. I’ve been trying that forever and it’s been difficult, because I have to run the day-to-day and then ... and I’m not blaming [it] on the other side, and I’m not blaming it on my side, because doing the day-to-day work and then doing the paperwork, it ends up being a little, and you end up burned out by the end of the day, so I find, but I’m going to give [it] another try.” [#39]
- A comment from a majority-owned professional services firm stated, “Haven’t tried to do business with Boston. Have done business with the state. State rules are BS. Particularly if [a] business is taxed as [a] partnership. That is because [the] state requires [it].” [#AV]
- A comment from a Black American owned WBE and MBE professional services firm stated, “Regulation of Massachusetts [is] strict for the owner.” [#AV]
- A comment from a majority-owned professional services firm stated, “Navigation through the process of government agencies. Go through the surveys and have to pay at the end over 10,000 dollars.” [#AV]
- A comment from a WBE professional services firm stated, “One concern would be [the] continued sourcing [of] work [from] China instead of [the] United States and local companies.” [#AV]
- A comment from a Hispanic American owned WBE and MBE goods and services firm stated, “Costs of disposal tripled between 2015 and 2019, and disposal costs of certain items like mattresses and TVs continue to increase rapidly.” [#AV]
- A respondent from a public meeting in Dorchester stated, “It’s good if the City and the state have qualified people to tell the rest of us what’s going on. And I did have a rep at SOMBA, OSD, whatever the state, that told me 20 years ago. So you know, I’m getting these, you know, I got like one contract with Massport, but I have to be in New York within an hour to, you know, get around at the toll booth. I just can’t, you know, run on a dime. And I said, ‘Can I sub out someone’s contract?’ It’s like a \$24,000 [contract]. I said, ‘Can I sub some of that out?’ She said, ‘Absolutely not.’ I said, ‘Well then, how can I grow my business if I can’t hire some other people? I’ll still do a portion of it or just give a portion [to] them so I can help grow my business.’ She said, ‘Absolutely not.’ Twenty years later ... all of a sudden I started getting all these hospital companies calling me saying, ‘Can we, you know, can you, you know, partner with us to do these big state contracts?’ I said, ‘That’s totally illegal. I can’t do it.’ And they said, ‘No, we were told that you, we need you.’ And I said, ‘That’s not true.’ I call[ed] the state, to the same person that’s been my advisor there for 20 years. And I said, ‘You told me 20 years ago I couldn’t have subs.’ She said, ‘I never said that.’ And I said, ‘So for 20 years I could have had the help from other pest-control companies to grow my business.’ [#PT2]

I. Information regarding effects of race and gender

Business owners and managers discussed any experiences they have with discrimination in the local marketplace, and how this behavior affects minority- or woman-owned firms.:

1. Price discrimination;
2. Denial of the opportunity to bid;
3. Stereotypical attitudes;
4. Unfair denials of contracts and unfair termination of a contract;
5. Double standards;
6. Discrimination in payments;
7. Predatory business practices;
8. Unfavorable work environment for minorities or women;
9. 'Good ol' boy network' or other closed networks;
10. Resistance to use of MBE/WBEs by government, prime or subcontractors;
11. MBE/WBE/SBE fronts or fraud;
12. False reporting of MBE/WBE/SBE participation; and
13. Other forms of discrimination against minorities or women.

1. Price discrimination. Three business owners and managers discussed how price discrimination effects small, disadvantaged businesses with obtaining financing, bonding, materials, and supplies [#PT3]. For example:

- A respondent from a public meeting in Jamaica Plain stated, "You know, they talk about the rental spaces. The rental prices, those get accelerated because of they see us coming." [#PT3]
- A respondent from a public meeting in Jamaica Plain stated, "This summer I hounded on the mayor's office for a while until I found my commercial space in Hyde Park. But up until I found commercial space, I was kind of hounding them about all these boarded up commercial spaces that you can't do anything with, the warehouse. And if you ask them, 'Oh, can you just carve out a thousand square feet for me? I don't need 10,000 square feet.' But it's totally empty. They're like, 'Oh no, we're not going to do that.' I'm like, 'Okay, so you could have rent from somebody in the corner, and at least give me a start.' Right? Like you'll have something versus nothing. Oh no. Until I hounded on the mayor's office about why do you tolerate this boarded up stuff, commercial space all over the City and not allow small businesses a chance to plant their seed and root and grow, regardless of what it is growing thing." [#PT3]
- A respondent from a public meeting in Jamaica Plain stated, "We have two commercial spaces or anything right now. One of them is going to be costing \$5,000 for a thousand square feet per month and the other one was way more than that. I tried to broker a Latino couple to do a beacon shopping there and they were charging them \$5,000 per month and

then they said that it was too much money, which makes a lot of sense. But then a month later one of my other clients which is a white couple said they were actually waiting to give it to them for less than that.” [#PT3]

2. Denial of the opportunity to bid. Three business owners and managers expressed their experiences with any denials of the opportunity to bid on projects [#14, #41, #PT7]. For example:

- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “With the company’s status as a M/W/DBE our experience is just the opposite. We’ve never encountered that problem.” [#14]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “At the federal level I deal with it, state level I deal with it all the time. And commercially it’s who you know. So, I deal with every project I go into almost.” [#41]
- The Black American male owner of an MBE-certified professional services firm stated, “Boston is no longer a white majority city. When you look at the residents who are registered voters to include African American, Latino American, Asian American, the scale has now slightly then tipped with whites are more like 49% that no longer controlled over 50% like they did in previous decades. But yet when you look at the money, total money that the City of Boston spends on outside vendors, minorities get, according to BECMA, less than 1%. So, you’d almost have to go to other States to the era of Jim Crow to find people getting such a small piece of the pie. I think you need to take a look at the accounts payable sheet because I have a feeling there’s some contracts that just do not ever come up for bid. And I think mostly what I’ve seen over the years has been in construction where it might be some little small contract or cleanup. But when you start looking at things that licensed professionals can do, such as in my case, things like group health insurance, group life insurance, who’s managing the 401k or the 403B asset, 457 assets. I can do that. I may not be as big as some of the major players out there, but in a primary contractor, subcontractor role, I could do it. I could be the subcontractor, in which case I bring in somebody like JP Morgan, or I bring in Alliance Bernstein or some big major, major player who probably could put together a competitive bid. But the way it’s been, who knew the same company has had that for 20 years. They ain’t ready to give anybody else a chance at it. Because even one of the times that we’ve talked about... I know this is not under Mayor Walsh’s regime, but under the Mayor Menino regime, you look at the Big Dig. Here you had situations where there were no licensed professionals even given a shot at it. No law firms, no architects, no anybody. Unless you were quote ‘locally, politically connected.’ In which case that’s a sore spot. And then also even some of the construction guys I know, they said, ‘now how come you had people in Boston working on the Big Dig who came all the way from New Hampshire, Vermont and Maine, but yet you had others within walking distance who couldn’t get a piece of that action.’ But I look at their account payables and it’s probably just a microcosm of the City of Boston’s. But you’ve got everything from food catering, you may have event planning, you may have gas and oil delivery. Because after all the gas tanks or the police cars got to get gas stuff from somewhere. So, it’s got to be some of the things out there that are not coming up for bid, that probably should be coming up for bid periodically.

And you're in a situation where, let's say from the standpoint of the big accounts, the 401K, the 457, the 403B. Okay, maybe they don't want to upset the apple cart. But then again, why not put out for bid a committee of people just to render professional second opinion. Making sure that these are the proper things that the employees should be putting their money into or encouraged to put money into. Making sure that the fees are reasonable, they're not being gouged. I mean you don't have to upset the apple cart to just be able to provide a professional second opinion." [#PT7]

3. Stereotypical attitudes. Five interviewees reported stereotypes that negatively affected small, disadvantaged businesses [#22, #31, #39, #41, #PT4]. For example:

- The Black American male owner of an MBE-certified construction company stated, "The challenge initially, it was when you show up on a job, they first look at you like, 'Can this guy even do what we ask him to do?' Because of color. There's not a lot of people of color do the things that I do, so sometimes that's what I get there. But I think we've come a long way, that my work has spoken quite a bit to clients to actually diffuse that." [#22]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, "I think that's a big one. Just in general, it's a big one. It's every time you walk in the door." [#31]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "It seems like they take that information. They're put there, and then they look at you. Like, almost like a substandard." [#39]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, "We're dealing with a customer right now. I'm considering even suing them right now. They take what they wanted out of the contract. And I'm just being honest. I had one of these companies where project manager was like, 'I don't want to work with no woman, especially no black woman.' And he made it difficult- And I got it in email. Then they tried to steal my employee that's been with me forever. I can tell you the stories. I ain't kidding. Right point blank." [#41]
- The representative of a goods and services company stated, "When they met me, the first thing the contractor said to me was, you know we talked for a little while and they said, 'Okay, so as soon as your boss is here...' I had already presented my card and you know, and he said, 'Excuse me. I thought, you know, [your name] is a common name. So, I had thought maybe perhaps it's somebody more in charge that...' You know, so I kind of smiled and said, 'Okay, that's fine.' You know, we started negotiating a contract and we got a lot of roadblocks." [#PT4]

4. Unfair denials of contracts and unfair termination of a contract. Five business owners and managers discussed if their firms had ever experienced unfair termination of a contract or denied the opportunity to work on a contract [#11, #37, #PT1, #PT4, #PT5]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, "I used to clean Boston City Hall. And I cleaned it for like 15 years. And the thing is, when I first won the contract, so I had to put up a bond. A bond says that you're qualified to do this work,

and that you have the capacity, you have the money, you financially... you can do this work. And so, then it comes down to who's the low bid. And so, I was the low bid. And so, they came back and said, 'The other companies said they don't know you and you're not big enough to do this job.' And so, they went through my buildings, the Jewelers Building. They had to inspect that. They had to check other sites, and they were going to not give me the job. So, I called up people. I called Joe Fiesta. So, I called an attorney who was really close to the mayor and said, 'This guy put up his bond. He was the low bid. You got to give him the job. If he fails, then you throw him out.' So, I got it in there. I was there for three years. They were so happy when I re-bid it and won it back. They were cheering in the office, right? They were clapping, because they were so happy that we kept it. Facility manager came to me and said, 'You need to slow down you're cleaning, because you're making me look bad.' He said, 'You're cleaning so much better than the person I had before you, that they're questioning why didn't I get this quality before?' And so, that's what I had to deal with. And so, we were there for 15 years. And guess who got it now? The company that I took it from, that was doing a lousy job, right? He's got it now. So, it came out to bid again a few months ago. So, I put my bid in. I have my 15 years of experience. And so, they came back and said, 'We're awarding it to the Southern company.' And so, I said, 'Okay.' But, normally, they will show you the numbers. They will show you the bidder results. They would say, 'Okay, the Nunely company bid 6 million, Done Right bid 5 million, XYZ company bid this.' Never showed the numbers. So, I'm like, 'What's going on? Why aren't you guys tell telling the bid results?' So, then they send me a letter saying, 'We're awarding it to AMPM. We're awarding to these companies.' 'Okay, that's fine. So, let me know what my numbers are.' So, they said, 'We're awarding it to this company, and we're awarding it to them for 1.72 million.' So, I said, 'Wait a minute.' And this, mind you, is after the City of Boston puts out in the news and the globe and the banner stating that by law they have to go to the low bid. And that's why minority companies are not winning the contracts, because they're not bidding it, right. So, they awarded it for 1.72. My bid was 1.65. And I'm going crazy. Like, 'What did you guys just do?' So, this is the most recent issue that we've had. Well, I went to a friend who knows the people at the mayor's office, and we sat down with them. And they said to me that, 'One of your other buildings that you do for the City was not as up to par as we'd like.' Which to me was really just an excuse to try to say, 'Hey, we have to cover ourselves, because we did something that we shouldn't have done.' But, that's what you see now. So, this is the thing, if I'm the size I am with no questions about my capacity to do this job, financially, everything else, and that's what's happening to me, then the poor other little guy who's really out there scratching and trying to get stuff, I could imagine what they're going through. So, for me, I can move on and say, 'Hey, I'll just go after the next contract,' avoiding the City and the stuff that they do. But other companies are like, 'Hey, that was a one chance that I had to get a good size job.'"[#11]

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "The state of Massachusetts issue I was talking about with telephone interpreting, I thought that was really unfair. Our company had been providing telephone interpreting services for years, particularly with the Department of Corrections and this is a lot of revenue each month. And every few years they open up the general contract, so they sent out bid notices, they had a new person come in and they sent out this really messy proposal and we spent time doing it and they asked for an update on one page, so we updated it and then when we

were awarded, we saw that we weren't awarded the telephone interpreting. And she's like, well, it wasn't filled out. And we were like, we know it was filled out when we sent it in so when I went back and looked at everybody that was approved, they were all large companies, no minority ones inside the state of Massachusetts. So, I went in and I met with the head of the Supplier Diversity Office and the people involved in it. That's when they all hid behind the contract. I was like, you say that you're trying to support your certified minority and women-owned businesses, but they didn't have a good process, and that eliminated us. And then they didn't try to correct it when it was done." [#37]

- The owner of an MBE-certified construction company stated, "I find that if there's a contract, if I'm getting close, there are so many different ways that they make sure you don't get that contract, but not in upfront legal ways. Kind of dodging around the back head of it. To be honest, most minorities like myself, we don't have the resources or the time to fight for those contracts." [#PT1]
- The representative of a goods and services company stated, "Well, I went the statehouse, and I was doing some work at night and one of the bigger guys out there didn't like the fact that I was there and all of a sudden it was that same thing." [#PT4]

5. Double standards. Four interviewees discussed whether there were double standards for small, disadvantaged firms [#12, #31, #33, #AV]. For example:

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "I mean when you hear MBE, you automatically, or folks, do think that they're less qualified or their prices may be higher. Yeah, prices may be higher because the cost of doing business is higher for a minority business or small disadvantaged business because of the history of discrimination and lack of access. So no, I don't have the same ability to finance at a lower interest rate than this white business that's been doing business for 20 years because they had access. Again, I find that, and I hear that, and I see if a minority contractor messes up or makes a little mistake, it's a big deal. Whereas, a white contractor can make that same mistake, and they're given a pass, and they're on to the next job. That I do see all the time. There is a double standard." [#12]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, "Originally, I had trouble because I'm only four feet, 10. I'm tiny. I weigh like 130. So, I look like, I'm just fragile looking. But I look fragile. And I look Asian, I'm very Asian looking even though I'm Mexican. And so, when I first started, it was very difficult to convince men to come work for me. And I was very aware of it. I had two options. I could try to be more manly or I could outsmart, talk the talk, so that they would have a level of comfort. And I decided that for me, it would come off better if I just talk technically and kept the conversation so technically based, that they would know that, well, yeah, she's tiny, but she knows her stuff." [#31]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, "Well that exists and it always will. So that's a matter of who you're working for and if they like you or not." [#33]
- A comment from a WBE professional services firm stated, "[There is] prejudice against women. Did not submit proposal through a binder." [#AV]

6. Discrimination in payments. Slow payment or non-payment by the customer or prime contractor was mentioned by one interviewee as barriers to success in both public and private sector work [#PT4]. For example:

- The owner of an MBE-certified construction company stated, “I’ve done things for the City of Somerville. I had to wait. One of our vendors had only had to wait 60, 70 days. I had to wait 200 days for payment on prevailing wage job at \$20,000 a week. You can imagine what that did to my payroll. I had to take all personal money, so it was always wait and catch up. But while you’re waiting to catch up, you miss opportunities because you don’t have the financing in place.” [#PT4]

7. Predatory business practices. Two business owners and managers commented about their experiences with predatory business practices [#41, #PT4]. For example:

- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “I’ve done it for 20 years now. I also had another company, one of the former companies that I was affiliated with, they had the same problem and they started from the 80s to the 90s to the early 2000 trying to grow their business in Boston. I mean let me put it this way, when they were doing the Big Dig, we put together a proposal launch. And our proposal, our solution went into the procurement entities and what we heard back is we didn’t get anything. But you know what? Somebody slapped somebody’s other logo on the proposal or copied it and it was our same solution, but it went to somebody else. So that’s how corrupt their procurement methods during that time was. Now it may have changed. Who knows? But if you’re a smart Black company, you don’t get the opportunities, you don’t even get the opportunities now.” [#41]
- The owner of an MBE-certified construction company stated, “I was basically indicted for something called insurance fraud. After the process going in, we found out there was really nothing that I did wrong. It ended up being, according to the insurance lady. Unfortunately, I think she’s, you know, they, that’s all a legal thing. But I constantly get those problems.” [#PT4]

8. Unfavorable work environment for minorities or women. Three business owners and managers commented about their experiences working in unfavorable environments [#33, #PT1, #PT4]. For example:

- The Black American male owner of an MBE- and SLBE- certified construction company stated, “Oh, this is construction, there’s always that. That’s how we talk to each other.” [#33]
- The owner of an MBE-certified construction company stated, “Violence in Boston public schools and in the City of Boston is not something that Boston seems to be controlling and it’s affecting us, and I want to know I’m already doing my business, and I’m doing it under extreme circumstances. Where’s my protection from the harassment that I’m facing?” [#PT1]
- The representative of a goods and services company stated, “We got things like my workers got threatened. I have a lot of Hispanic workers, some of the workers have been with me 15

years. And a lot of their workers were coming, and the guys were kind of being harassed and weird things were happening to equipment. They wouldn't let my guys access to the job. A lot of Hispanic slurs going around back and forth to my people by non-Hispanic people.” [#PT4]

9. ‘Good ol’ boy network’ or other closed networks. There were a number of comments about the existence of a ‘good ol’ boy’ network or other closed networks. Nineteen firms shared their thoughts [#4, #10, #11, #12, #18, #20, #27, #30, #31, #37, #38, #39, #40, #41, #PT1, #PT2, #PT3]. For example:

- The non-Hispanic white male owner of a majority-owned professional services firm stated, “So if you have a large company out there that has a primary vendor contract, they particularly, in my experience, is they send it to the same two or three agencies, even though they have 20 and 25 they have to work with. And as a small company, you end up spinning your wheels trying to get the actual RFP or the bid or the work, and it doesn't happen.” [#4]
- The Black American male owner of an MBE-certified goods and services firm stated, “Just access to opportunity, absolutely, then once you're in that access of opportunity, being with the real movers and shakers that can get deals done for you. And, as far as the City and state is concerned, just knowing that they're... because it's what we would call like a good old boy system in the print world, where people that have known each other for years, and it's not even racial more than it's, sort of, more knowing and old connections and good old boy, I call it, that you can't get in because of these strong relationships.” [#10]
- The Black American male owner of an MBE-certified goods and services firm stated, “But today, I would say even having the size, the market is still geared towards the relationships you have. They're there. I mean, they've always been like that, but today it seems a lot stronger to not what your qualifications are, it's who you know. And the thing is that that can cause barriers for people who... diverse... You know, because we don't have that relationship. My next-door neighbor is not the guy that owns the building downtown, that manages the building downtown. My cousin doesn't know the person who's the building manager. And that's the relationships that kind of open doors for other people, which doesn't always happen for, me. But I have after the 25 years, gotten to know a lot of people here who I can call and say, ‘Hey, I'm looking at this building.’ And they can say, ‘Well, I know somebody who manages that,’ or, ‘I know somebody who knows somebody who manages that.’ And that helps. And a lot of diverse companies can't do that. I mean, I think that they need to have people who are neutral, who are going to make their decisions on this stuff. Because when you have people who donated the most money to the mayor, when you get those phone calls, like, this guy just made a huge donation to the campaign, and they make a phone call to the people who are making the decisions, then the decision gets skewed. I mean, and that's the reality of it. I mean, we can sit here and act like that doesn't happen, but that's the reality, is that... it's people who are making the decision have to just kind of do it the way where they're not taking any cues from somebody else to say, ‘Hey, this is what you got to do.’” [#11]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “It's all about who you know, and whatever city state you're in. Say the Chief or the

Mayor said, 'Suffolk I want you to sit down with these five contractors and we want them on this next project,' then that's going to happen. Suffolk is going to look at those five contractors, sit in the room, and find out what they need to do business with these contractors. Again, a lot of these business deals and whatnot take place in someone's office. Not at a public meet-and-greet place with entry-level or mid-level folks. If you have folks in a position of authority saying that 'This is what needs to happen, and I'm watching this,' then people make it happen. My opinion." [#12]

- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "Well, that happens. That I won't deny. I think it's changing, but yeah." [#20]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, "Well I think that it's hard to separate that out from the fact that these are just people who have worked together. I mean, so it's hard to say that okay I've spent 25 years working with the same vendor and their crew. Is that bias because of my relationship or bias because of who they are or ... That would be hard to tease out, I think to know whether it was an old quote unquote old boys network type thing, or the fact is, these are people I know and trust." [#27]
- The non-Hispanic white male owner of a VBE-certified construction company stated, "So the good ole boy network and other closed networks are a big one as well. There's a huge amount of work that passes around in Boston by virtue of who you are, who you know, and who you've worked with. And it takes a long time to get into that group. What I hate, the big thing that I've seen is that minority and women-owned firms just don't have the access to connections that majority-owned firms do. It's still the big disparity." [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, "That I have experienced, I can tell you that I have from time to time. I've become aware that there was a meeting and I was not invited, whereas others were. And they tend to be the good old boy network. You hear about it, you know about it, and then you try to find a way to get as much information about what went on because you can't, I can't fight it all. I can't fight every single instance." [#31]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "I see that a lot of claims to be minority oriented now, but I find it more difficult to get a clique or to get into the city clique. because one thing, I don't play golf with none of those people on the other side. And I hate that, because I've been doing this for the past so many years, we have made millions in lose, millions and been in business. But whenever that dollar is green, certainly there is people out there to go ahead before you that show you don't have this information or have that, you don't... it's always a reason why you can't and the other ones, their friends, they drink with or play golf with can always get those jobs. It's just that I don't live in their zip code. I don't play golf where they play golf. I don't go to the same bars, but that doesn't mean we don't do better work than they do." [#39]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, "We tried through the years to educate the large primes, like the Booz Allen's and the Accenture's and the Deloitte's of the world on our capabilities, but as you can appreciate some of those large primes have their own short list of small businesses that they know and trust, so it's very hard to penetrate that market to

get yourselves on that list. I mean it's not easy and then you know as you can appreciate you've got some individuals from government, they leave government, they start up a firm and they bring everybody that they know with them. Unless you're on the inside it becomes a little bit challenging. And you know what's even harder is that we know there's this good old boy network, but women are very hard on one another. We girls need to stick together. We need to have a girl's network." [#40]

- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, "The City makes you think they're doing that [including minorities] but they're not. They try to go out and do the marketing and bringing in the minority's companies, but it shows in the number, it shows in the monies and the allocations. And then they only have a certain group of companies that they're familiar with. They don't allow no one to get in. They don't break that magic line where: We know these 20 companies; we're going to give all these work to these 20 companies. Meanwhile, you have a list of 2020 MBE, DBE, WBEs that don't get nothing. They're trying but they're not going to get a chance at the apple." [#41]
- A respondent in a public meeting hosted by the Black Market Association stated, "These departments... they need to bid, they need to make these bids and you know, there is a good old boys club or girls club where they're used to dealing with this certain, I guess, supplier/vendor. So now you have a minority-owned or a woman-owned business coming into pla ... how are they judging or how are they monitoring how fair that process has been? Where minority and woman-owned businesses can get the opportunity if they're used to ... and these are like, office managers who are used to going or dealing with a certain person that they're, you know, they've developed a friendship with, companies, how fair is that process going to be now that once a business is certified as a minority-owned or a woman-owned business, what, how are they monitoring that so that it's fair, so that these newly certified businesses get the opportunity to be able to ... be part of that bid?"[#PT1]
- A respondent in a public meeting hosted by the Black Market Association stated, "The real estate company that they use to lease off the units once they develop, and also sell the units that they've developed because when you have to get into that space, the first thing they say is that they already have their people in order to do it, and that leaves me out as a black woman, as a person that's black, and as a person that's a woman. So, it's double right there and it's just been very, very frustrating." [#PT1]
- A respondent from a public meeting in Dorchester stated, "We have to have a way that many companies, they already have people in there, they have contacts, they would have worked with the City, they have a connection, they get informed. Some of us that outside of the circle, that are not preview to that information as 60 days before or 90 days before. We usually get it like 15 days within 30 this week. So how can you prepare to compete when you're allowed, that it, you're... If you know of the projects in advance. There are many information that is required from you. So, if you have at let's say 90 days or in 60 days. So, we have now the opportunity to compete comparable with the people they already have the information through the back door. So, I think that's it." [#PT2]
- A respondent from a public meeting in Jamaica Plain stated, "I got a call from one of the City offices two weeks ago and they said, 'Well, we have our preferred caterer, but they're not available.' Oh, so I'm like second fiddle. So, what am I, the exclusive Roxbury caterer, and to

have somebody say to an entrepreneur, 'We have our preferred caterer.' So even the language, sometimes that's used in conversation. The City is just not aware of what they're saying." [#PT3]

- A respondent from a public meeting in Jamaica Plain stated, "I think from my belief is that the mayor probably doesn't know what's going on because he has that 30,000-foot view of everything, but on the ground there's a lot of political influence. There are a lot of players that come from out of state. There are a lot of people who are politically connected and are trying to chase after this money. That turned a lot of these politicians, former politicians somewhat, I can't say corrupt, but it certainly seems that way. So there seems to be, there are, there is a lack of communication also with the City in certain ways, and I don't think that they understand, or the mayor directly probably doesn't know what's going on with the underlings underneath him. And how they get swayed by other forces on the ground and they'll, if there's a big corporation that wants to do business in this space, they're like a bullet that comes in and they state they corrupt or, or sheep, everything around them. So, every time that they have the opportunity to compete with a smaller business, they're going to win. And they're going to shift the whole entire landscape around us. So if the mayor is truly interested in, in, inclusion and diversity in all the spaces that we're talking about, I think that he's going to definitely have to listen to the people directly, as opposed to his underlings who seem to be swayed by larger corporations and big businesses." [#PT3]

10. Resistance to use of MBE/WBEs by government, prime contractors, or subcontractors. Ten interviewees shared their experience with the government, prime or subcontractors showing resistance to using a certified firm [#10, #12, #20, #33, #39, #41, #PT1, #PT2, #PT3, #PT4]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, "We, you know, the City has a preferred minority vendor list and all this stuff that Kelly can tell you, for years, there's this sort of... in the department, like I told you, they don't even know, like, that there's a minority sort of initiative, or we need to make these numbers to make it better. So, there needs to be more knowledge about, you know, the process and how it's benefiting the City and befitting the economic situation for our community. Nothing other than not getting the phone call back or the response. You know, and then, you know, sort of not, you know, fighting it beyond that." [#10]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "for the most part, folks want to be able to count you towards credit in order to engage you. Well, there's a preference to use the woman-owned business, because again the relationship has already been established for years and years and now with the goals being for the most part combined. They may say that there's a ... No. A lot of times on the private work they say that there's a, say 15% MWBE goal. If you look at when the project shakes out, you'll see that for the most part that goal was achieved by women-owned businesses and not minority-owned businesses. Yeah, there still is a reluctance to go out and engage or learn about a minority-owned company, because it's just easier to if you could fill the goal with a woman business that you already know, then that's what you're going to do." [#12]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "I mean, the only, like I said, the only thing I see with that is that the percentages are

high, and some of these contractors don't have enough of, the resources aren't there, either, to fulfill these contracts at those percentages." [#20]

- The Black American male owner of an MBE- and SLBE- certified construction company stated, "Well, that's the case in hand with the City of Boston. When they eliminated minority participation and the State did too. I mean, you still have minority participation on like DCAMM jobs and highway jobs a little bit. But all of the City of Boston, all the Boston housing authority work, there is no minority quota. You give X amount of work to minorities. So that's the government putting all of us to the side." [#33]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "In our community we know that if that dollar is green, there is all kinds of reasons why we should not get it. When there's no money, there is cheap work, we ended up doing it if there's none. But really how hard, I try so hard to do a business with Northeastern. I don't know why it's so hard for companies like me that is maybe 10 blocks away from Northeastern to get a chance to do work with this big companies. It's because of my, being seen as minority, as the color of skin or being, I don't mean by having accent, the people that... those contracts, you know how people inside of this thing, they take care of one another. I believe that, I don't know how else should I put it? It is discrimination. It is racist, but I think, the City or this big organization that depend on our money or they claim that special, like Northeastern that is actually into our neighborhood, they could do a little better off doing economic development and trying to assist in create jobs, for people that's nearby. But you got somebody that will come from Rhode Island, New Hampshire or whatever, from the suburbs. And you're right here, right on the other side of the fence." [#39]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, "I've worked with different companies. We've had on the front end... To be honest with you I hired a lot of Caucasian men or Caucasian women to go in be the front line for me because I'm black, to soften the blow that the company is a black owned company. I can give you another scenario, okay. So, we did an excellent job, we took one of our clients. They were in last place in their organization to do the work. And they have 20 different other agencies that they have to work against. So, we come in. They all have the same level of performance. We come in and help bring the agency that was in fourth place or third place, last almost, to number two. We did that in one year because of the way we design the system, the policy. And at the time, we had a black project manager that helped us with this that knew the system. And he allowed to go through and look it up and everything else. However, the management team, the second you decide... They want to give us Caucasian female nurse that just got her masters. She don't know nothing about program management, let alone technology. And we got to work with her. And they moved the black program manager off to the side and said, 'Help her.' So, the bottom is in this scenario we ended up... She didn't have clue what she was doing. She couldn't interface with all of the different functions. She wanted to use my Caucasian employee, who's my chief of my architect. Want to pay me little to no money for him but use him as her program coordinator, to do all the activities. And I can't let that happen because she can't pay him. Her interaction with me was, she just basically came and says my company was beneath any company she's worked with. I mean come on. This is a Massachusetts dial, and I'm hearing this from a quote unquote, a large agency in

Massachusetts, where they're just coming out saying point blank: 'I don't want to work with a black owned company, let alone a woman-owned company.' Well anyway, the bottom line is, the performance on her when she took it over, she didn't do her deliverables, it caused a problem, the problem became an issue, the issue became a performance issue. They ended up closing up the contract because she couldn't perform on it, and they gave us hell for it. And it was not us, it's just that she had a problem working with a black company. That was the bottom line. So, female to female to male, it doesn't really matter. It's just there is a perception of minority companies can't perform, and they can. It's a perception that where black companies or companies of another ethnicity that are problematic for these... And it's really embedded in the agencies because the agencies got people in there that's been there 20, 30, 40 years. They might have some racist tendencies or biased towards companies, and they're not going to open their door. They're going to give to their cousin, Joe Slow. We had that happen to us too on another contract, where the company didn't even meet the qualifications, but they got the work because they were family. So, it's like I said, it starts at the procurement process and the procurement process has to be overseen by oversight. That's been my experience. If you install rules, compliance's, rules and follow them via a third party, and they're auditable and traceable, I think things will change. But until that happens which I've been voicing for 20 years in Massachusetts, openly and public, at forums and I don't have any problem doing that, whether I'm at the MBTA meeting or a governors' council meeting, or whatever, I will voice it. Because I hear the same stories over and over, and I see companies like me leaving Massachusetts, going elsewhere or going out of business." [#41]

- A respondent in a public meeting hosted by the Black Market Association stated, "Then there's just like a heavy disadvantage when it comes to these contracts. I probably emailed over 400 contractors trying to do business with them. At first, I just like went haywire and was like, I'm just going to do this over and over and over again and something's going to happen. But nothing happened. And I find that a lot of people, they're not open to doing business with MBEs for one reason or another. Maybe they were serviced poorly by an MBE in the past, maybe they already know a WVE. Maybe, for whatever reason. So, I feel like the City should make some kind of special consideration and instead of like being like, hey, you reach out on your own, you should take the businesses that are in risk of losing their contracts and pair them with." [#PT1]
- The owner of a WBE-certified professional services firm stated, "You know, you're forcing people into this quota system. It doesn't mean they don't like you. It doesn't mean they don't trust you. They forced to hire you and then they're resentful and then they're not, they're not really encouraged to hire you again. You know, because they had to hire you under this resentful apprentice, you know? So, I just, I don't, I don't know how, I feel schizophrenic about it. You know?" [#PT2]
- The representative of a construction company stated, "I get told no chicks in my machine shop, so language is a problem in my business too, as an engineer, as a machinist, as a metal worker, as a maker space, as a veteran, I get it. Let me show you some metal working, okay? I can keep up with the best of them. But no chicks in my machine shop? What does that? Okay. I don't need to be told that. Whatever black or color or not. I'm a chick, okay, and can cut metal. But I'll give you the tools, right, I don't need to be told no chicks in my machine

shop or the men are running the business and they don't want to see me because I'm female." [#PT3]

- The representative of a goods and services company stated, "If the City puts pressure that this code as a consultant, diversity consultant puts pressure. I get the contract. If that pressure isn't there, it consistently, over the last handful of years, I don't get opportunity. And so, I have seen that as a continuum, that it's sustainability, that it's a very difficult model to build a corporation with lack of sustainability. I often don't go after funding because I don't have a sustainable business model. So, I bought equipment, I'd love to buy more equipment, love to hire more people, folks. But this sustainable model, well, it's not present. I have hired mocks and they told me right from it you have higher reviews and some of our highest-paying customers. Go check it yourself. But my point is there is no reason for myself, or anyone like myself to be struggling that much in city properties and inner-city programs. This kind of beat up and we just think it's kind of the same old thing. So, I mean I'm not really speaking for anyone else here but me, we just got to concentrate our resources and I just don't feel that this is going to do anything to two little goals for MIFA [Massachusetts International Festival of the Arts]." [#PT4]

11. MBE/WBE/SBE fronts or fraud. Seven business owners and managers shared their experience with MBE/WBE/DBE/SBEs fronts or frauds [#12, #24, #31, #33, #41, #PT3]. For example:

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "Like I know someone who is a hairdresser that got certified as an iron worker or whatever. Something like that should hold up a red flag, send a red flag, to automatically send a red flag. That's obvious. If the person isn't at least working in that industry. And they don't have to be certified as a, say welder or anything like that, because I believe that you could manage a business that you're not doing that trade, but you can't be working in a totally different industry and run your business. I don't know how to fully answer that, because I don't know how to fully answer that, but that should send up a red flag. Women businesses being put in business by husbands, brothers, fathers. I say women, non-minority women. There's been a lot of that in the construction industry. Now, they've had these relationships, they've built these relationships. Many of them, now they're true WBEs, but they got there through fraudulent activity, and they've been able to build these relationships." [#12]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "The job with the City Parks Department [I worked on] was with a WBE landscaping firm, and I think it's a \$500,000 construction budget, and I think my portion of that project probably was about \$10,000 or \$11,000. It's a woman-owned business but you never see a woman, you know? And that's the only problem I have with the program is the way it can be. You can have somebody who is, you know, misrepresenting their company so they can get the certification. Frankly, I think that some women owned businesses want to get jobs using fraud, where somebody's spouse claims an ownership role that doesn't really exist. So, you've got a guy whose wife signed something that's out there competing with other folks. I think that's a huge obstacle." [#24]

- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “I will tell you that, for example, right now I’m writing a proposal and they want a Vietnam era business to be involved. They said, ‘We’re not going to make it a contractual obligation, we’re going to make it a goal. We would prefer that you have this’. I found one firm and that firm said to me, ‘We’re willing to do it for you, but we expect to be paid and we may or may not do it with our own people. We may be bringing in a non-Vietnam era firm, but they’ll work under our umbrella’. That doesn’t do anything for me, and it really doesn’t do anything for the Vietnam era of business other than the guy’s going to make money. It really becomes a pass-through. What I’m now going to be doing is writing a letter about why I will not be able to comply with that, and that occurs everywhere. It occurs with women, with racial minorities. I understand it because there’s just not that many out there, but I just can’t participate in that type of stuff.” [#31]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “You’ve got a lot of white men that bring their wife to the table and they own the business but they’re doing the work. And really compliance, and validation verification of those compliance’s, and then oversight. And do audits to manage and ensure that those companies that are woman-owned and others that are Caucasian or white, ensure that those white business owners are running the company. That’s the key thing because a lot of black companies or minority companies, they go to white owned, they go to woman-owned companies but are they really doing the work? Who is really behind it? Is it the men or is the women? Most of the time you going to find in that scenario it’s going to be the men.” [#41]
- A respondent from a public meeting in Jamaica Plain stated, “I have a small business, but the SDO or OSD is merging with an entity that, like I’m a plumber and I, I have my license and I’m the owner of the company, but say the way they’re doing it, the wife owns the company, but the husband’s a plumber. So, they’ll certify that company as a woman-owned business plumbing company, and I think it’s kind of not a fair playing game for women that are legitimately in business and they carry a license. Like OSD, you have to be the licensed plumber, but there’s an entity that the City’s merging with, because there’s a lot of woman power in this state, that are saying, okay, if she owns that business and her brother really drives the truck in the company and she has a woman-owned trucking company. So, I feel that that’s a challenge and they need to stand strong on it. The SBA is not following that protocol. But I was shocked when I went to an event two weeks ago that this entity acknowledged that if you’re certified by this entity, OSD will certify them too. Now this entity, you have to pay \$350 to become certified, okay? And that’s taking us out. So you’re going to have a lot of non-minorities be certified as minority, and woman-owned, and that’s really going to kick us out. There are a lot of women out there but they are non-minorities. Like this woman here, my competitor, she’s doing work cause she’s certified, never picked up a wrench. She does work at Pepsi Cola, Boyes, TJ X company, and all that stuff, and she won a big job in Roxbury and they try to tell me, ‘oh, she’s woman-owned’, and I said, ‘no’, and this person said, ‘well, you cut my knees off.’ I said, ‘well you’ve also put a pillow there’, because he found out that she was not certified when you was working there. Not at OSD but for some odd reason, because she got certified by that entity, she was credited. And you know, we got to make sure that that inclusion doesn’t affect us because there are a lot of

woman-owned businesses out there. You see them coming in the City milking it and the women that are really women running the jobs aren't getting the opportunities.” [#PT3]

- A respondent from a public meeting in Jamaica Plain stated, “She got the contract. She didn't, she doesn't even know, if I was to say analytics to her or cannibalization. She wasn't, she would even know how to spell it, whether know what it means. But she blanketed herself, she had other people that were men that were [knowledgeable] and so it's just, it's an, it's a, I don't know if it's an unconscious bias, but that's why I had asked the question, is Boston really going to do something? Because we have these meetings, and we have these things. Yeah, that's just what I wanted to share. I saw many businesses, that, using that a woman's name and then have guys doing the business.” [#PT3]

12. False reporting of MBE/WBE/SBE participation. Eleven business owners and managers shared their experiences with the “Good Faith Efforts” programs or experiences in which primes falsely reported certified subcontractor participation. Good Faith Efforts programs give prime contractors the option to demonstrate that they have made a diligent and honest effort to meet contract goals [#31, #33, #40, #41, #43, #AV, #PT2, #PT3, #PT4]. For example:

- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “There is a process known as the Letter of Intent, and the City and the state use them. What it says is for example, let's just use the Massport. Massport would say, ‘Who is going to build the new wing of the airport and it's going to be worth 100 million and 20% has to go to an MBE/WBE.’ So a contractor may call me and say, so we're going to do this and we want you to work with us and we want you to write up what you're going to do and give us a price and sign the letter of intent. So, I will sign the letter of intent, which is not a contract. It's a letter of intent. They win the contract, and I don't ever get to work, because they may find somebody who's willing to do it cheaper than I said I would do it. They may decide that well, what the heck? We got it already. We don't really ... We don't have anything that is contractually binding. So, you end up tying yourself to someone, working to help them get it and then you end up being left waiting. I understand that process very well because we used to have it in Massport. We used to have it at the highway department and there's no way to enforce it. So, you have a choice at that point and the choice is okay do I fight with this company? And they'll never ask me again and potentially I'll never get work from them and they'll bad mouth me, or I take my licks and say that's part of what- or I take my licks and say, ‘That's part of what the industry is like and go away until the next time’.” [#31]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “I have had people ask me, ‘Hey, I need to try to use you on a job. I'm low on a minority participation and I'll pay you some money.’ Just so he can get his paperwork right. I have had that happen.” [#33]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “I think it really comes down to ethics. There are a number of large primes, I'm not going to say who they are, who use the small business to win the contracts and then when they win the contracts, they don't actually give you any work share. You've done all of this work to help them win. They win the business and they cut you out of the deal. It's hard and as a small business you trust” [#40]

- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “If they need to have MBE, WBE, or some kind of DBE on a contract... What they did is, I went through this process where they would use our certification to get the deal and then we would get no work. And then they tried to put out some forms that they had to fill to guarantee the work, but there was never any oversight. So even though they won the work I would never see any work. And I must have did that a couple of companies, and I just stopped. It was not worth my time. Because you spend time and effort trying to develop the relationship. You help with the proposal. You do the certification... Falls on deaf ears. I've done a lot of bids that way. They were on Mass Bids, off of the Mass Commonwealth site as well. Contract vehicles that they offer, state contract vehicles. I had companies that say we'll give you 15%, 10% of the work scale but you've got to do all the work and we're going to keep 80%. I mean that's ridiculous. There's no monitoring of any kind. We couldn't even make money on those because if we were a sub, we would have to give it to the prime, or the prime would basically absorb all of the funding and there's no money to make any money, let alone put a body on the contract. So, I've been through a lot. And I know companies like myself, because we share in dialog and we talk, that have gone through the same stuff, and I'm sure you've heard about it.” [#41]
- The Native American male owner of an MBE- and DBE-certified construction company stated, “Minority mandate is not enforced (15%). Company fulfilled minority mandate; three days before start date, after contract was signed and specs done, the prime said, ‘we cannot hire you’.” [#43]
- A comment from a Black American MBE professional services firm stated, “Major claim needs to be more diligent in their effort to hire minority businesses.” [#AV]
- A respondent from a public meeting in Dorchester stated, “I said, what will happen to them if they don't meet the quota? And she said, ‘I don't know. I don't think anything’. I go, ‘well then why are they going to call me?’” [#PT2]
- A respondent from a public meeting in Jamaica Plain stated, “For example, I was part of the team that sat at the table with [this large project] and they were, one of the stipulations of bringing them here was that they were going to work with minority-owned businesses and women owned businesses, but when they got the contract, and we were supposed to, my company was supposed to be a third-party supplier, third party supplier for their social media. They just sent us an email and I have that email and I can show it to you where they said, ‘Oh we've decided to go another way. We no longer need your services.’ And that's, that is systemic. That has happened to me several times. Where in the beginning, almost like when they're writing a grant or they're writing a proposal, I'm there for these services, but then once they get the contract, there is no one that is accountable to make sure that they follow through on their word.” [#PT3]
- A female DVBE professional services firm stated, “They use you all year [as an VBE] or a veteran thing and they use, they find me. I don't know. I don't even know how I was found; I don't even know that I was used to win a veteran set-aside. They win the contract and then they go hire some other veterans, but they've used me because they're looking for that little needle in the haystack. The female [DVBE] that does engineering or machine work right? Then I'm like, I didn't even know that I was used to win a contract.” [#PT3]

- The owner of an MBE-certified construction company stated, “One of the other problems I would get was I’ll go in as a minority and they’re looking for MBE vendors, won’t get the job and then find out sometimes years later, you know.” [#PT4]
- A respondent from a public meeting in East Boston stated, “I run into people, I was part of a member of the Boston Builders Associations and they’ll say, geez, you did such and such project. I’ll say no, and they’ll say really that’s funny. They listed you as the minority that they used. So, they would use me, my minority status, on things that I had no idea it was going in. I also find there’s not really accountability around, subbing when you’re talking about the prime vendors, something small, where criteria is given, but then contracts are given and then are they doing any business locally? You know, that’s an issue, which I think that would be a big part for some of the smaller companies to get involved.” [#PT4]

13. Other forms of discrimination against minorities or women. Seven interviewees discussed various factors that affect entrance and advancement in the industry [#10, #12, #28, #31, #33, #PT1, #WT2]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “So, back from one of our big initiatives were to, you know, we said, we can’t be nice guys anymore. We had a meeting with the City on the mayor level with the mayor. And we sort of like, let him know, without holding back what was going on with the process of not only in my category but all categories of business vendors, minority and women vendors that are trying to do business, but most... We’re talking about Black business. And the reason why it’s so critical to say Black, because I had a big problem with lack in trying to fight for minority businesses, because even when I was doing the chamber, I was like, why are we pigeonholing ourselves? But, when I looked at the disparity report about Black business and what we’re not getting, it made me change my whole perspective on that, because there’s something really wrong in Massachusetts with the whole system of Black wealth. And, so on that point, I wanted it to be like a Minority Chamber of Commerce or Urban Chamber of Commerce, those were... But the time I got through it, that disparity report, and really digging into some of the deep issues, I was okay with Black Chamber of Commerce, or Black Economic Council. It’s important to say Black. Yeah. I think nowadays is more around ignorance, just not knowing and not understanding the consequences of diversity, you know, not understanding diversity and the whole principle of diversity, and business, and socializing. And so, you know, it impacts business who never sort of dealt with Black people, for whatever reason, that sort of realm of your life, you know, some people just don’t socialize in that life. Just not being ignorant. Just not, you know, being open minded to Black owned businesses and supporting. Why is it important to support Black business? You know, why it benefits your company from the employee on up, you know, diversity is important, and, understanding why you should spend some of your dollars to this cause, because look at this disparity report that outlines all the terrible things that happen as a result of dollars not coming into a specific community.” [#10]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “One of the challenges becomes that the minority business is not on the same equal footing as a non-minority woman-owned business. Because again, the cost of doing business, one of the challenges is there’s a higher cost of doing business, for the most part,

with a minority business than there is for a non-minority woman business. And so, who wants to pay that premium? That becomes another challenge.” [#12]

- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “I have a racial breakdown of employees of which I'm very proud because there's like 60% of us minority. I use that information to bolder people on the head when they say we can't find minorities for this kind of work. No, they're there. You may not want to pay for it, but they are there. In Texas I had 80% beginning with the project manager who was half Mexican American and half white. And then I had everybody else was Mexican American.” [#31]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “I can't honestly say that I think there was any involved anywhere lately. Years ago, seventies, possibly. Actually, definitely in the seventies. A lot in the eighties and even early nineties. But this last 20 years, here in the twenties, it's a thin line. It's hard to prove it, you know when somebody's not going to do something for you. Or somebody's going to give you a break.” [#33]
- A respondent in a public meeting hosted by the Black Market Association stated, “I would like to know what measures do you have, if at all in place, that will guarantee our safety as we band together on these issues. I know that I can fill up a room, and I know there's a lot of people that are looking for their answers, the same answers that you guys say that you guys say you're looking for. So, I want to know, when we come to you, and we tell you that you don't feel safe where we are, and we don't feel safe in order to be in business, because we feel that certain groups that are supposed to protect us, may view us as their competition and may be purposely stunting our growth. I want to know, are you prepared to protect us?” [#PT1]
- The female representative of an MBE- and WBE-certified goods and services company stated, “I've been looking for a space to conduct a youth enrichment program and the City will not help. Also, I've been trying to get in contact with someone about the problem the 'majority' people have giving opportunities to the 'minorities', no one is open to listen. I would like access to the same resources to build in my community.” [#WT2]

J. Insights Regarding Business Assistance Programs

Business owners and managers were asked about their views of potential race- and gender-neutral measures that might help all small businesses obtain work. Interviewees discussed various types of potential measures and, in many cases, made recommendations for specific programs and program topics.

1. Awareness of programs in general;
2. Technical assistance and support services;
3. On-the-job training programs;
4. Mentor/protégé relationships;
5. Joint venture relationships;
6. Financing assistance;

7. Bonding assistance;
8. Assistance in obtaining business insurance;
9. Assistance in using emerging technology;
10. Other small business start-up assistance;
11. Information on public agency contracting procedures and bidding opportunities;
12. Registration with public agencies;
13. Directories of potential subcontractors;
14. Pre-bid conferences;
15. Plan holder and other lists
16. Other agency outreach;
17. Streamlining/simplification of bidding procedures;
18. Unbundling contracts;
19. Price or evaluation preferences for small businesses;
20. Small business set-asides;
21. Mandatory subcontracting minimums;
22. Small business subcontracting goals; and
23. Formal complaint/grievance procedures;

1. Awareness of programs in general. Seventeen business owners discussed various programs and race- and gender-neutral programs they have experienced. Multiple business owners were unaware of any available programs for small business assistance [#10, #11, #12, #18, #20, #26, #27, #34, #35, #36, #37, #39, #PT1, #PT2, #WT5, #WT7, #WT8]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “So, there's City of Boston Minority, what is that called? Our city... So, there's SOMBA on the state level, or, what is it called now? New England Purchase, Minority Purchasing Council on the state level. On a city level, there's Office of Women and Minorities something. Then there's also... all of them I'm a part of in some way. There's another state level one. But there needs to be some sort of collusion of these organizations to sort of... they're all want and trying to do good. But they're all sort of... have their own sort of in... but they're not following up and making sure that vendors are getting, you know, the proper service and the proper notifications around opportunities for, you know, growth and business. How to grow your business, how to write a business plan, how to... They have a whole series. If you go online, they have a whole series about for small business. At the Bolling Center, you know, how to get contracts, how to get... Very good. So I would say only to that thing is to just promote it more into engaged... to figure out a system, how to get everybody knowledgeable about it, so that it could become a bigger, you know, entry to small business sort of, part of the boot camp process, or whatever for people want to. people are busy, you know, some of the times were odd, you know. Just, you know, early. People aren't off work. No, people, like

four o'clock, you know. So, it's sort of understand what your market you're going after. You're going after people that are looking for new opportunities, people that are already in business, so they sort of made the programming sort of general, and the time didn't match the pro- you know, like, I wouldn't do a new business development thing at four o'clock. You know, when people are at work. Move it back an hour or two, understanding people that get from work, traffic to come to you know, hear the speaker." [#10]

- The Black American male owner of an MBE-certified goods and services firm stated, "I did get into the ADA program with the SBA. And so, I got an APRO. I can't remember what year it was, but this was a program, a kind of set aside program, and it allows diverse companies to non-bid contracts. So, you really negotiate contracts if you're qualified through the work. So, I did a work with the Navy, GSA, a lot of FAA buildings. And so, that was a good steppingstone to get me into... to help me grow. A negotiated contract program." [#11]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "I actually had gone, myself and a colleague, to the City to talk to them about offering such services [back-end technical assistance]. They said that they do offer that to small businesses. Not just contractors, but mom-and-pop shops, stores, retail, hairdress, different types of businesses. But their thing is, they have thousands of technical assistance providers and thousands of businesses that get the technical assistance. And those thousands of consultants or technical service providers are bidding for those clients. That's not worth it to me, because I want to work with a company that has growth potential, that the City may say, 'Okay, we have a certain amount, 10,000, 20,000, 50,' whatever, 'Work with this business for the next year, or help this business to build its capacity by, let's do a strategic plan, like a really in depth.' I guess I would like to see 10 businesses be able to grow into 50 employees or 100 employees, as opposed to 1,000 grow and stay at two employees or five employees. So, a strategy to help businesses like that. I think that's a missing link here." [#12]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "I think the MWRA does a good job of breaking up large contracts to give MBE/WBEs an opportunity to grow their businesses." [#18]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "I'm a member of the Construction Industries of Massachusetts. So, I am involved with usually the guys that are the prime contractors. So, that's a lot of meetings, and dinners, and that sort of stuff. I've gone to a lot of the state outreach, especially in the beginning, when I first started. I did a lot of the outreach the state had set up, which wasn't really targeted to my industry. But I think, sometimes, I'd meet someone, at least. Another woman-owned business, and we can talk about, we might be in different industries, but what struggles we had. Stuff like that was always good. There's a group, Women in Construction, and that has a lot of, it's a lot of design type companies. But I've spoken with a lot of women that are involved in that. Again, I've gone to some of the networking events at the OSD office. Supplier Diversity. A lot of them are in Boston. I've been to some at the Roxbury Center. There's been a few there." [#20]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "The City has been pretty good every year with ... it's almost like a job fair, where contractors can go in and meet people from the various agencies. I think it kind of helps you

navigate things a little bit. In the end, I'm not sure it does any more to get additional business. You still have to go through the bid process, and if it's low bid it really doesn't matter what your relationship is with that agency. But at least in some cases it's helped navigate the process a little bit. Or at least to get your company name in front of those agencies that maybe you never had contact with before. The one that really comes to mind in the Boston Fire Department. And not that we've gotten any business from them, but we've seen more in the way of bid opportunities. So it's a good place to go out and meet and at least get your company name on a list. So if they are putting out an RFP then maybe you get some advanced notice. And that's been nice." [#26]

- The non-Hispanic white female representative of a majority-owned goods and services firm stated, "We've worked with the state, SDP, the Supplier Diversity Program. Yup. And we actually do quite a bit of work with them. I've gone to a couple of their seminars because we're looking for subs that we might be able to use. So they go, that's a good place to try and find some. Because they'll be there trying to get some information. We have encouraged some women owned businesses we know to make sure that they certify with the state, so that they have some opportunities. So I know the programs are there and the state offers them for free. So you just need to make the time to go and there's no charge for becoming certified, you just have to do a little bit of paperwork to get it done. So I mean I'm not aware of things sort of beyond that but we're definitely aware and we encourage people that we meet to certify if they have a business that can sell to businesses like us. Or directly to the City or state." [#27]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "We do some stuff with Northeastern, and through their co-op, so I guess that's, not that it builds business for us. But getting qualified employees, or at least the ability to try and make an offer to hire kids off of school that, they've worked for you for a bit. I guess that's probably the closest thing to an outside helpful business program." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well, my former partner never took advantage of any programs except certification that I can recall, and that is a great program for women and minorities. I know that there are other small business programs out there, but at this stage of semi-retirement, I'm not trying to promote the company and keep it going much longer." [#35]
- The Black American male owner of an MBE-certified construction company stated, "My experience is that the City does not do enough outreach for their business classes. Many times, I find out about classes after the fact." [#36]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "Tufts University is doing a lot to help minority and women-owned businesses, and they've done a really good job, in supporting their vendors." [#37]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "I feel like every time I'm always going to these workshops, training, to all programs that takes money so you can train and train in workshop. I'm tired of going to another certification, another workshop. I want the contract, we got to hear, how do we give this people a contract, but no, all these organization are getting State and federal money to actually, again, just to train you. When will we ever graduate and get a damn contract? I just

got tired of going to all of these meetings that we go to know and all this program. All of these classes and certifications, all of that, that we go to all of that, but then we don't have no contracts. We should be talking how do we bring contracts to this companies and what level, and discuss get to half a dozen of these companies and work with them until you get them to the next level." [#39]

- A respondent in a public meeting hosted by the Black Market Association stated, "The City has a TA fund, so technical assistance fund, that gives business support for free." [#PT1]
- A respondent from a public meeting in Dorchester stated, "One of the things I find though, is that people just don't know. They don't know what's going on. You know, you look at like the voting numbers. For example on Tuesday. It was very low and people are like, "Oh, I didn't know that today was election day." Right? So, I think a great portion of this is actually on the community. To be really involved... You have people like people who grow, who will help you get your business set up and I've met them, these people, one on one, they're at least involved, they come to wherever you are to make sure you get your factory set up and you know, all these other things. But, I just think there's going to become a point in time where the community is going to have to reach government, and you're going to have to come together or else the [disparity] is going to continue. You know, we could always look at the contracts that are available, in the process, you know, to attain such contracts. But I think some of the [onus] has to be on [us, the] people, so whether that's [getting the word out or] initiation doing a better job at getting the word out but, you know, I just feel like people that are a bit more engaged want because, you know, I started here, at the offices at home development at the kick off to pathways, well pathways is a contract that was a six week program. I was going though, basically every Thursday, for six weeks straight. The City provided some specific training to position the business to go from say like no business with the City to positioning it to get in line to do business with the City. And the turnout was low, I think on the fourth night, [a woman] from the small business administration, she came, and she spoke on these new cafe nights at Roxbury and she said 35 people in fact will show up well when they didn't it [went poorly]. It's like 200 people and it's a stranger and that's an example of people not showing up. I don't want to point people out or say who is not showing up and who is but we kind of know, right? We kind of know so I think there's a lot of different issues that's preventing people from actually taking advantage of what's out there." [#PT2]
- The female owner of an MBE- and DBE-certified professional services firm stated, "I want to thank both OSD and SDO offices, they have been extremely helpful and supportive in getting our firm launched. They have been invaluable for our company." [#WT5]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "Being hired as an Independent Contractor through my consulting agency, from other consulting agencies who won contracts with the City showed me just how much diversity is lacking. I worked with the owner of Retail Visioning, who was awarded funds through the aforementioned program [Business Technical Assistance] and on one occasion, an African American business owner wanted to work with me rather than the consultant due to her not being able to understand diversity and what the client wanted. The client felt the consultant didn't know anything about "black hair products or black businesses." I agreed via the photos and ads the consultant advised via an implementation plan. There are

not enough women of color or people of color to assist small business owners with marketing tools, thus why I launched my boutique consulting agency so I could give back my experience and education to those businesses who need the help but lack the financial resources. Business owners want a consultant who is relatable, who understands diverse products and services, and throughout my experience being hired as an Independent Contractor for other consultants, the lack of diversity is apparent." [#WT7]

- Written testimony submitted to BBC stated, "The information available to business owners should be more clear and available online (as opposed to emailing on how to start the process). For example, for the restore program, it only applies to businesses in on the street level, but technical assistance can be to anyone." [#WT8]

2. Technical assistance and support services. Ten business owners and managers thought technical assistance and support services are helpful for small and disadvantaged businesses [#12, #25, #26, #32, #35, #36, #37, #40, #44, #PT3]. Comments included:

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "There's a lot of focus from the agencies and the construction managers to have these very high-level technical assistance classes, which are great because it gets you in the room with the decision-makers. It helps you to create relationships. Where you may not otherwise have those relationships with other businesses like yours. You hear about the challenges and opportunities that you have with businesses that may be on your level. Again, you do take away some tidbits from the larger construction managers and how they do business. However, these small businesses don't have the resources to put it into process within their business. So, they can't execute. They'll learn it, but they can't really execute because they don't have the resources. As a community, we keep investing money or funds to technical assistance, high level, when what these businesses really need are back office services. They need an accountant to come in and help them with their bookkeeping, or their requisitions, or pulling their financial statements together so that they could present it to the bank for financing or bonding. Help with project management or estimating someone who can ... If I'm a small company, and I am estimating a project, I may not have someone to bounce my estimate off of. So, I'm relying on myself to be right, so I don't have that review process. Again, there's a lot of money thrown year after year, month after month on a high-level technical assistance. But what I find in my experience, is that the businesses really need help with the back office infrastructuring and growing their capacity there. Pressing, as far as, I would say the accounting and finance, because that leads to bonding and loans. And again, estimating and project management, because those are two key areas that can really put you under. If you underestimate a job, or if it's not run properly or not watched. So being able to capture your job costs adequately and knowing what's your production is. Those type of things. That's what I would say are the two key areas. Because some businesses, they feel that as long as there is cash flowing, that they're making money. The cash will flow until it stops flowing, and you could be losing money, but if you have 10 projects, it's not catching up until you're down to maybe three projects. That's when you realize that you haven't been making money at all, because now the cash is getting tight because you no longer have 10 checks coming in. You only have three. Just being able as an owner to understand that. Again, these larger companies that offer the technical assistance

or even that agencies, they don't have folks that deal in the weeds like that. That's what folks really need is folks who are going to get in the weeds with them." [#12]

- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, "Technical assistance would be beneficial to all minority and minority-owned firms." [#32]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Technical assistance in the areas of budgeting and finance would be very helpful." [#35]
- The Black American male owner of an MBE-certified construction company stated, "These programs would be number one for me in helping my company. The technical assistance is very important, and my experience is that the City does not do enough outreach for their business classes. Many times, I find out about classes after the fact." [#36]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I can go to the Center for Women Enterprises (CWE) for those type of services. Oh, you know what, my friend, is doing something through the City of Boston that helps small Main Street businesses and minority businesses. That has been fabulous because the City of Boston is paying for that service, and she's a marketing consultant. So, the businesses she's working with would not be able to afford her, but she's been able to really give some guidance and marketing strategies to them. I think that's been phenomenal." [#37]
- A respondent from a public meeting in Jamaica Plain stated, "When I sat down with them [the City] initially, they said they'd provide IT, we're going to have somebody to set up QuickBooks, so that you can have the back end of the house ready to go. And by the way, here's some money too, which is good. But sometimes you need more administrative support. So, the things that were promised did not materialize. Yet, it was part of the hook that got me to open up. And when I circle back and I said, 'These were the things that were in the agreement that just didn't happen.' 'We're going to get to it, we're going to get to it.' And they're trying to make it right. But if you have something that hooks a person, you should stick to that." [#PT3]

3. On-the-job training programs. Eight business owners and managers thought on-the-job training programs are helpful for small and disadvantaged businesses. Support varied across industries [#10, #29, #32, #34, #38, #40, #44, #AV]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, "Better start with a high school kids. I'm sorry to say that, but we need to start the pipeline now. Madison Park, you know, a trade school in our city that just doing a poor job at you know, they have over 26 different careers that people can go into at Madison Park. Yeah, it's from hairdresser all the way to electrical technicians and all your union stuff. From Carpenter to... I mean, it's an unbelievable school. But again, education and preparing kids that might not want to go to a traditional school, and even printing. My company, we have a beautiful print facility, right inside Madison Park with million-dollar machines. Yes, nobody knows about it. Yeah, it's crazy. So, there's so much that needs to be done. And that's why you have this disparity report that's so terrible, because it's systemic." [#10]
- The Hispanic American owner of an uncertified MBE professional services firm stated, "The more training the better. There's never enough training." [#29]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, “Actually, I started out here as a co-op about, I guess 25 years ago. I worked here through my co-op at Northeastern. The owner is a Northeastern grad and has heavily relied upon the Northeastern co-op system to get new employees.” [#34]
- The Hispanic American male owner of an uncertified MBE construction firm stated, “I would essentially be interested in finding out more about these potential initiatives, especially something like bonding and on-the-job training would be helpful, because I didn't initially plan on being a business owner. I figured I was just going to work for a company as an electrician. Then the economy fell apart and I couldn't find any work for years. I'm never letting that happen again. Certainly, if those items you named off are available, it would definitely be helpful, especially if it were little or no cost. These are things that are being proposed to make things easier for the smaller people like us to get work, so I say yes these would be extremely helpful.” [#38]
- A comment from a Black American owned WBE and MBE goods and services firm stated, “Looking to induce/install a training program for students.” [#AV]

4. Mentor/protégé relationships. Eleven business owners and managers thought mentor/protégé relationships are helpful for small and disadvantaged businesses or participate in unofficial mentoring relationships with other firms [#3, #12, #26, #29, #30, #36, #37, #40, #45, #PT1, #WT5]. For example:

- The non-Hispanic white male owner of a majority-owned construction firm stated, “If they had mentor programs, that would be very helpful, but I also have seen all of the unions now have a much larger diverse work group. Probably 35 years ago, you'd be lucky to see one woman electrician, even maybe two. Now all of the unions decided to have more women and many more minorities coming into the unions, and hopefully once these guys and gals get the trade under their belt and some experience and maybe a little bit of oomph, they can start their own businesses and then succeed from there.” [#3]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “So if I were a major contractor and I wanted to help, I lended personnel to help someone do a bid, and that bid, they ended up losing money on that project. Now, do I have some sort of liability there? I think the liability issue would have to be examined. But yeah, I think that they're, again, I'm a strong proponent of mentor protege relationships. If you have a quantifiable outcome that you're looking for, and maybe I don't know if the City could recommend something like that. That the mentor protege and then some quantifiable results. what do we want to see from this relationship? The small contractor identifies the areas they feel they need help in. Again, the willingness from the general contractor to help. But again, the exposure of any liability from the construction manager or large contractor is going to want to know that they don't have any responsibility if something happens.” [#12]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “We've got those programs through our trade association, so I don't see it being helpful to us.” [#26]

- The non-Hispanic white male owner of a VBE-certified construction company stated, “Mentor/protégé relationships would be good for small businesses and MBEs/WBEs.” [#30]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “I think both of these would be helpful to small MBE/WBE businesses. There’s a huge mentor/protégé relationship offered through the CWE that is offered to M/WBES. I was assigned a mentor company, Blue Cross Blue Shield, and they thoughtfully pulled together a team of three people who met with me. I can’t remember the frequency, but we set goals at the beginning. It was a formalized mentorship focused on what services we provide, and what we want to accomplish through this mentorship.” [#37]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “I think that’s always a good thing to have in place.” [#40]
- A respondent in a public meeting hosted by the Black Market Association stated, “I don’t know if you have couples here, is to become couples to guide us, where are... When we’re going to be subcontractors, because that’s the only way to go in, especially in construction, because they require all these years of experience. It can help us to match with the big contractors, so we will be able to grow in that way. It has happened to me at the state level. It has happened at all the startup companies that never thought they would work for me again, [are] working for me. But I would like it if that would [continue] and I would like to see it more [with the City]. If I can match other companies, to match with other big companies, which they carry insurance, which they can pay the bonds, which they can do all that, to be a subcontractor for them. But that is really important. Otherwise, we never going to [grow]. I’m going to be out of work, always.” [#PT1]
- The female owner of an MBE- and DBE-certified professional services firm stated, “Another would be to have a cohort get together/ meeting – mixing established with new companies – a form of mentoring system.” [#WT5]

5. Joint venture relationships. Thirteen business owners and managers thought joint venture relationships are helpful for small and disadvantaged businesses or had successful experiences with joint ventures [#3, #4, #15, #25, #26, #27, #31, #32, #33, #37, #44, #45, #PT6]. For example:

- The non-Hispanic white male owner of a majority-owned construction firm stated, “I definitely think joint venture is huge. I think if you have a small MBE, WBE, or veteran business, if they can mentor with a larger company and possibly make relationships there. Because the problem is more in the private sector with MBE, WBE, and veterans that these larger companies have zero requirements for them and, of course, the cities and towns and not even like more of the big cities have the requirements. The little cities, little towns, and municipalities really don’t. I think that it has to start with the governor to say to every city and town, ‘You’ve got to put some set aside. You have to because we need to prop these businesses up that normally wouldn’t be propped up by no fault of their own.’” [#3]
- The non-Hispanic white female representative of a majority-owned construction company stated, “I think it would be great to have the City encourage joint venture partnerships. I

hope that this study that you're doing shines a bright light on that because you need companies of certain size to do projects in the tens of millions. You can't have [our company] you know, running a \$30 million project. But if it's a partnership then the company can get larger contracts, capacity, and financial growth that it doesn't have the capacity to do." [#15]

- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "I don't have much experience with that, but I think that might be an area where could be helpful. But I am not really sure how it would work, so I can't comment on it, having no experience." [#26]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, "Yes. But keep in mind, there are those that will benefit from it because they have the size and the resources. And then there's what I call the incubator ones, but they're not ready for it. It would have to be somebody who's on your level or maybe larger, that you could joint venture with. And it's hard to joint venture because you got to put up money, you got to put up your records, you got to put up information that you take you traditionally don't share with other firms. So that's one of the equators that has, one of the equations that has to be factored in." [#31]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, "With regard to Joint venture relationships, I don't know how useful that would be for me, but I think it would be beneficial for other MWBE firms." [#32]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "I would love to have a joint venture opportunity. I had one years ago, and it was so helpful. I think both of these would be helpful to small MBE/WBE businesses" [#37]
- The Black American female owner of an uncertified MBE- and WBE-professional services firm stated, "And I was saying that this could also pose a problem because what happens is the reason why we're minority, is because we're not getting the contracts. So, if you have 51% of your company that is owned, you can then go out and get another male, black, white or whomever can afford to do the contract that you want to do. So, if that contract is like \$2 million, you can go to, arguments sake, Jane Doe and say, 'I need help.' And then, that person can then add to the company and then that helps push the person forward to be able to receive contracts." [#PT6]

6. Financing assistance. Six business owners and managers thought financing assistance can be helpful for small and disadvantaged businesses [#29, #33, #40, #44, #WT3, #WT11]. For example:

- The Hispanic American owner of an uncertified MBE professional services firm stated, "I mean, like if we're bidding on a contract it's probably with the City and they're going to pay 120 days late, I'd probably want to talk to someone about that." [#29]
- goods and services company stated, "City's Ec[onomic] Dev[elopment] Dep[artment]'s creative use of CDBG is a step in the right direction to provide more flexibility/opportunities for lending." [#WT3]

- Written testimony submitted to BBC stated, “The best ideal tangible solution to create an equal level playing field for disadvantaged citizens is for governing policymakers to provide more inclusive grant funding programs for motivated lower income minorities and establish more accessible community-economic development opportunities for aspiring low/moderate income minorities to purchase vacant idle land parcels affordably from governing rural and urban city jurisdictions. Can you please explain why there aren’t any fair share equitable grand funding programs available to help motivated lower income individuals and minorities? The current system for allocating financial grants is discriminatory towards lower income American citizens’ (especially minorities). The City of Boston has a diverse population of residents but the issue of equitable participation still remains a serious problem, and this matter can only be resolved through providing the equal access for aspiring minorities to receive grants, and creating equal opportunities for lower income individuals to purchase small vacant land parcels from the Department of Neighborhood Development (DND).” [#WT11]

7. Bonding assistance. Five business owners and managers thought bonding assistance can be helpful for small and disadvantaged businesses [#3, #15, #24, #36, #38]. For example:

- The non-Hispanic white male owner of a majority-owned construction firm stated, “I think that they could have the City of Boston or they could have focus groups where they bring in a bunch of small businesses to go and meet with people in the bonding business and the banking business, and try to get these relationships started. It really needs to be mandated from the state capitol of any state to just say, ‘Look, these are the numbers that we want to reach and we’re going to press you to reach them,’ and once that happens the bankers and the insurance people will know. They will knock on the doors of MBEs and WBEs and say, ‘Geez, you know something, we understand that you have this contract or that contract. Can we work with you on it? Is there anything that you need that we can help you with?’” [#3]
- The non-Hispanic white female representative of a majority-owned construction company stated, “The ones that directly relate to [us] is bonding assistance. The company hired me to help build [the firm] as a consultant in lieu of an employee, and I didn’t come cheap. One of my key responsibilities is to focus on building the bonding capacity. and it did take me about two years to build this. We’ve had to also incur expenses by joining Dun and Bradstreet so that we could monitor why his credit score were coming back the way they were, which is preventing us from getting the bonding that we need to get more public contracts, so I would say that getting help to build bonding capacity is a key benefit for small and M/WBE businesses to get work with the City of Boston.” [#15]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “It could be helpful with bonding.” [#24]
- The Black American male owner of an MBE-certified construction company stated, “I think the bonding assistance would be a big, big help for minority businesses.” [#36]
- The Hispanic American male owner of an uncertified MBE construction firm stated, “I would essentially be interested in finding out more about these potential initiatives, especially something like bonding and on-the-job training would be helpful, because I didn’t initially plan on being a business owner. I figured I was just going to work for a company as an electrician. Then the economy fell apart and I couldn’t find any work for years. I’m never

letting that happen again. Certainly, if those items you named off are available, it would definitely be helpful, especially if it were little or no cost. These are things that are being proposed to make things easier for the smaller people like us to get work, so I say yes these would be extremely helpful.” [#38]

8. Assistance in obtaining business insurance. Two business owners and managers thought assistance in obtaining business insurance can be helpful for small and disadvantaged businesses [#37, #40]. For example:

- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “Not for us, but it would be helpful to other small businesses.” [#37]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “I would say any assistance is always, I think, appreciated.” [#40]

9. Assistance in using emerging technology. Seven business owners and managers thought assistance in using emerging technology can be helpful for small and disadvantaged businesses [#26, #29, #32, #33, #34, #44, #45]. For example:

- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “Yeah. If they allowed it, that would be helpful and it would also save us a lot of time as well.” [#26]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “Yeah. Anything to do with bidding, I’d love to learn more about.” [#29]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “Electronic permitting was helpful. Electronic bidding is helpful, as well. Anything that you can do electronically and save the copying and binding, the helps, and facilitates things. Keeps costs down, as well.” [#34]
- The Hispanic American male owner of an uncertified MBE construction company stated, “Yes, that would be extremely beneficial to my company and other MBEs trying to get work with public agencies.” [#45]

10. Other small business start-up assistance. Business owners and managers shared thoughts on other small business start-up assistance programs. Two owners agreed that start-up assistance is helpful [#10, #PT2]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “I think, again, you know, you gotta do your homework and understand, I think. So, maybe more education around financial fiduciary responsibility and owning the business to vendors, so that they understand the things you need to have. You got to have your taxes in order, you got to have a good lawyer, and a good accountant, as a part of your team, and be ready to have, you know, at least two years of business experience with all of those, you know, tax requirements there to show growth, and just all the sort of... I suggest, like some sort of boot camp for small business, new business owners, you know, doesn't take a lot. But it's something. That's what I think certification does. So, it sort of says that this person

knows the basic things to be in business and to be a good vendor. Yeah, yeah, they have programs. So I mean, connecting should be no problem. With connecting. We have right in the Bolling Building a tremendous Small Business Development Center I think the City's been doing a good job, because they've been on TV with that program, with the City and the Small Business Development Center, and all the great courses and stuff that." [#10]

- A respondent from a public meeting in Dorchester stated, "I think that between forcing these companies to do business with us and then us waiting for this business to come to us, there's something missing in the middle here. It's that piece that means teaching people business skills, how to write proposals, where to be at the right time, at the right place, and hitting the pavement and never giving up and I can't tell you how many times I've sat in my car, cried, fixed my makeup, walked into a pizza place and said, I own a pest control company. You probably don't need me, but if you ever do, here's my card and got back into my car and drove to another place, day after day after day." [#PT2]

11. Information on public agency contracting procedures and bidding

opportunities. Nineteen business owners and managers provided their thoughts on information from public agencies contracting procedures and bidding opportunities, noting its accessibility online. Others were unaware of how to access that information, and thought the information is helpful for small and disadvantaged businesses [#4, #14, #25, #26, #28, #29, #31, #35, #37, #40, #44, #45, #AV, #PT2, #PT3, #WT3]. For example:

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "A lot of times these RFPs go out and a lot of people don't even know about them to bid on them. If I got an ability to talk to procurement office, I'd like to talk to them and ask them, 'When do the RFPs go out? It's usually on an annual basis. And what are the steps to try to get on that listing of primary sub vendors? There's usually protocols that have to be done, certain insurance information, certain indemnities, certain information to [check] backgrounds,' so forth, so forth." [#4]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, "At least for the companies that the City has done business with, to be able to put out some type of advanced notice. Even if it's not, 'Here's the bid opportunity,' at least an advanced notice to say, 'The Boston Fire Department is going to be releasing an RFP and it's going to be released on such and such a day.' So at least we can anticipate it, because it's not always easy to find on the websites." [#26]
- The Hispanic American owner of an uncertified MBE construction company stated, "I'm pretty much self-taught guy. And I've never really had the opportunity to do any type of municipality work, although I would never... I just don't really... I've never bid on anything like that. You know what I mean? I really don't know how. I don't really know much about it. Some of my friends do it. They tell me it's pretty easy. I just, I don't know. I just never have. I kind of need somebody to teach me the permitting process and how the government works. And I would probably be inclined to do that, to do some work. Yeah. I would love to do that. I would love to bid on some. But like I said, someone would have to show me how to do the bidding process, because I don't really... Between my wife and I, we could figure it out. But it would be a lot easier if there was somebody there give us a start, you know?"[#28]

- The Hispanic American owner of an uncertified MBE professional services firm stated, “If I was bidding on a contract with [the City], I’d love to talk to someone who’s done it before.” [#29]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “I would say to you that that’s important to have. A lot of firms that are in business, do not know how to prepare bids. And there should be an ongoing agreement between some college in the City that says, ‘hey, let’s have every six weeks, an hour on how to prepare bids.’ People who don’t know how to prepare the bid and how to break it down into what I call a text explanation of the bid, you’re not going to get selected because you’re leaving the interpretation to the reader, who’s going to award the work. And if he can’t understand what you’re adding to your bid or how you’re going to use it, you’re not going to get that work. And we traditionally, when we prepare a price, a cost proposal, I submit a pie. I submit labor breakdowns. I submitted by regions and traveled; I keep everything because I don’t want the reader to interpret what I wrote. It can cost me the contract. But then I learned by going to MIT, that if we could teach it to the young guy, who’s just trying to go from building houses to building 10 houses, and he needs to work with the City, learning how to do those bids is critical.” [#31]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I also think it would be helpful for outreach programs to educate MBE/WBEs and small businesses about the process before bids are issued.” [#35]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “I reach out to the diversity people in the City, but I never feel like they’re much help. So, if you could have a diversity mentor that could help you with the RFP process, then I think that would be very helpful. Maybe it’s a class, a seminar, or written information.” [#37]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “I would love to find out how I can get contracts with Boston public agencies.” [#44]
- A comment from a majority-owned goods and services firm stated, “Trying to work with them [the City], but it has been hard for them to get in contact with the right person for those decisions.” [#AV]
- A comment from a majority-owned goods and services firm stated, “Just difficult to get to the right people. Some of the people may think it’s a great idea and they feel they might be getting to the wrong people to make the decisions. Would be good to have more forums to maybe be represent Boston.” [#AV]
- A respondent from a public meeting in Dorchester stated, “Do you know how to bid for a job? It took me 10 years to figure out really how to bid a job and be profitable about it and not care from the lowest person. This is what I need to make money. But I had to learn those skills by trial and error. Trial and error, trial and error. Why don’t we have something in the middle where there’s a group to go to or say this is how you’re going to determine what’s profitable. It doesn’t matter what anybody else is charging and that is what you need to be profitable and give us some real business skills and just instead of giving these business owners a bad taste in their mouth.” [#PT2]

- A respondent from a public meeting in Dorchester stated, “I think for me that was the most important take away from the active system contracting series. They actually helped you figure out how to do it but if you never knew how to do it actually just told you there is a process that exists.” [#PT2]
- A respondent from a public meeting in Jamaica Plain stated, “And then I feel like there's a bit of a merry-go-round with the certification process and once you're certified, how do you find the contracts? There's really no resource that we can pull into and say, Hey, who do I talk to for X, Y, and Z? It's, it's always a merry-go-round around.” [#PT3]
- A respondent from a public meeting in Jamaica Plain stated, “Winning state bids and compliancy bids, there's no guideline, that you go to high school, college, Oh, you're going to go take this course. It's going to teach you how to do this. There's none of that in this industry. So therefore, it's like, do you know the right answers? You can have the right question, but would be false information, so winning state bids, it don't even start with that.” [#PT3]
- The owner of a WBE-certified goods and services company stated, “City procurement staff need better/clearer definitions for lowest bid- when lowest QUALIFIED bid is permitted, and how this is defined... City should be allowing preference for City-based, minority and women-owned businesses.” [#WT3]

12. Registration with public agencies. Eleven business owners and managers thought online registration with public agencies as a potential bidder is helpful for small and disadvantaged businesses. Most noted that online registration is considered essential to bid on public projects [#14, #19, #25, #26, #27, #32, #40, #44, #45, #PT1, #PT7]. For example:

- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “I think it would be useful if the City and its public agencies would replicate the State’s electronic central registry of bid opportunities so that MBE/WBE firms are aware of opportunities to compete for contracts as primes and subs.” [#14]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “With regard to our company, the City would be a big potential market for us, so the online registration, vendor fairs and other outreach would be a perfect way for us to connect with the right city representatives”[#19]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “Well it would be helpful and we don't see it with the City of Boston, but we see it with a lot of other cities. For instance, in Somerville, in Medford, in Brookline, you can register and then when an RFP comes out, or before it comes out, you are notified and you are given an invitation to bid. The City of Lawrence, you register ... I get notices on bids I have no interest in because I don't install playgrounds, but at least I know if something comes out I'm going to see it.” [#26]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “We do that already, yeah. If we become aware that there's another portal for it, we sign up.” [#27]

- A respondent in a public meeting hosted by the Black Market Association stated, “So my complaint is I think one of the biggest barriers to success is around these web portals and these web platforms and how they're designed. It's just not user friendly. The user interface makes no sense. There should be a higher degree of investment as far as making a usable interface. Like there are user interface specialists and user experience specialists in the City up the wazoo. There's no excuse to look like 1995 in the interface. There's absolutely no reason. And at the end of the day is a true barrier to act is because, not only that, you're going in and out of several different core platforms rather than being a consolidated experience. So I can only imagine if English is your second language. Pray for you. I truly do pray for you because it makes no sense.” [#PT1]
- The Black American male owner of an MBE-certified professional services firm stated, “City, I don't even know how you register as a vendor.” [#PT7]

13. Directories of potential subcontractors. Ten business owners and managers thought a hard copy of electronic directories of potential subcontractors would be helpful for small and disadvantaged businesses. Multiple firms knew how to access that information through the City's website, while others did not know how to access that information [#2, #3, #15, #25, #27, #31, #37, #40, #44, #45]. For example:

- The non-Hispanic white male representative of a majority-owned professional services firm stated, “Sometimes if you know somebody or some organization that can bring to the table what they're looking for, great. But if don't, you got to stop and go looking. It would be great if there was some guidance saying, ‘Here's a phone book.’ You It would be great to say, ‘Here's a phone book of candidates that you might want to hook up with that that we're interested in and that you need someone to do with you.’ So rather than just a blind, do I know a guy who knows a guy, that'd be better to say, ‘Okay, here's the list. We can start with this list.’ And maybe only one of them actually is appropriate, but at least we have a list. We can start making phone calls. Even without a recommendation, just a list. And probably the recommendation wouldn't be all that useful in that what one person may consider someone really easy to work with, somebody else may not, so better to just go in with no preconceived notions and talk to them. There was something along those lines on the federal side back in the '90s and early 2000s. Maybe it's still there. I haven't seen it. Where when the government announced a program, I think this may have just been DARPA, but I thought it was really smart. So, the government announces a program, ‘Hey, we need industrial grade purple widgets. And here's our request for proposals for whatever the project is to make the widgets.’ There was a section where you could sign yourself up and basically tell other people, ‘Look, I can't do the whole project, but I'm really, really good at the metallurgy required. And so if you need a guy who's really, really good at the metal part of the widget, here's my contact information. And here's why I think I'm good.’ And the government just let anybody put up there on the secondary list of, ‘Look, if you want to be a part of the programming, you know that you can't do the whole thing yourself, put your name up there, put what your company does up there. And when other people come and look, if they think you're the right partner, they'll reach out to you.’ [It] was great. I used it more than once. It's like, ‘We don't have a guy who knows AI for this kind of a problem. Look, there's somebody posting. That's exactly what they do. Oh, great. Let's call them.’ So, if Boston put up say a request for something, and there was a, or even separate from a

request, if there was just an index, you sign yourself up. The only thing the City does is validate that you are a real company. Yeah. This guy's for real, he's not a poser. He has a legit company, blah, blah. And then you put in what you do and what it is that would make you interesting to somebody who might want to partner with you. Like, 'I'm a minority-owned business.' Or, 'I have a long history of working in this part of Boston. And I know everybody.' Or 'I'm certified in 15 different ways of doing underground repair work. And you're going to need someone like that for projects.' Whatever it is that you want to say that promotes you, so that when somebody says, 'Look, I need a buddy, preferably who's in this [field].'" [#2]

- The non-Hispanic white male owner of a majority-owned construction firm stated, "The list is substantial around MBEs and WBEs." [#3]
- The non-Hispanic white female representative of a majority-owned construction company stated, "I think it would be great if the City of Boston maintains a list of women or minority-owned certified firms similar to what the state does and what they do. You know what their trade is that they perform so that they can get better opportunities, because I have used that list for every big project that [our firm] does. You know, people like there's a woman-owned firm and we know her now. So we use her all the time. [The owner] is not only a woman, but she's also a minority. You know, we got her from that state list years ago and now we use her. So definitely that is a great example of a program that is beneficial to all small businesses, including M/WBEs." [#15]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Yeah, I think, that could be helpful if we were to get a job with, let's say, with the DPW to do something on their fueling facilities, yes. Subbing out if there was any kind of preferential treatment to companies, we could certainly work with that." [#25]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, "Yes, the state offers the one. They have a list on their website, so we've gone there from time to time to try and find a right, hey we need a new landscaping company, let's see who's on the list." [#27]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, "There's ad agencies and printers and all sorts of agents, you know, content writers that meet. They do the prime proposal and we've been called in. So, for example, somebody was doing a bid, for the City of Boston, and they called us in and they said, Hey, do you want to be a subcontractor for the translation? We provided them a bunch of information. So, whoever won that may not have had a relationship with our company, but how could I find them? You know, or how could the City guide them to minority businesses or women owned businesses? That could be that subcontractor list. That would be huge because again, it's an introduction to other prime contractors." [#37]

14. Pre-bid conferences. Ten business owners and managers thought pre-bid conferences where subs and primes meet are helpful for small and disadvantaged businesses to network and develop relationships with project managers and primes. Many firms explained that for large projects, such meetings are mandatory [#18, #24, #25, #26, #27, #31, #34, #40, #44, #45]. For example:

- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “[I] definitely think public agency outreach would be beneficial so that subs and primes can meet.” [#18]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I think the pre-bid conferences, even if virtual so you could meet primes, or lists of, of small businesses that are interested in being subs would be really helpful.” [#24]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “Well most of the pre-bid conferences that we get involved in are usually to meet and get a list of what’s included in the bid. And to get an idea of what condition the properties are in.” [#26]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “Oh, those are very helpful. A lot of, I’d say most of the public projects have bid conferences, pre-bid conferences that we attend.” [#34]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “Yes, it would be great to meet larger companies who I may be able to work with.” [#44]

15. Plan holder and other lists. Four 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. [#24, #26, #37, #45] For example:

- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Lists of, of small businesses that are interested in being subs would be really helpful.” [#24]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “Having a list would be helpful. I’m sure there’s, for instance, construction companies. I’m sure there’s companies out there that we’re not aware of that require our services. We know of most of the larger ones and the ones that we’ve got relationships with, but some of the smaller ones, or some that may be an offshoot of a larger company. Maybe a commercial construction company has a small residential arm that we’re not aware of. So, having a list of those types of companies might be helpful to us.” [#26]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “I love it because then I can form relationships with other potential bidders, and they get to know me and then I can pull them in on other potential opportunities. But, just doing a vendor fair and going to those, I’ve gotten kind of tired of those because nobody ever knows what translation is or who the buyers are. And so even if I follow up, I don’t hear back from them. So, it’s marketing and message and content writing and translation, you know, to form more deeper relationships. That can all be done virtually. I think it would be good to build a database of MBE/WBE certified businesses in the state of Massachusetts.” [#37]
- The Hispanic American male owner of an uncertified MBE construction company stated, “It would be good to meet these people.” [#45]

16. Other agency outreach. Seventeen business owners and managers thought other agency outreach could be helpful for small and disadvantaged businesses. Many shared their

experiences with the City's outreach efforts [#10, #12, #15, #22, #25, #26, #27, #29, #30, #31, #33, #39, #40, #44, #PT1, #PT2]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, "You reap what you sow. What you put in is what you're going to get out. You put in a little, and you get a little bit out. So, I found the times that I've put in a lot, like just networking and going, yeah, the connections happen. And I've recently have put in a lot with respect to City of Boston, and I've gotten a couple of bids, and like somebody told somebody, and now you know, I'm doing a couple of more jobs in the City. So, if there was a way to make that process work faster for me, at, sort of a one stop that really works like, two or three times a year with the proper heads in that room. Yeah, or, maybe even once a week, like that thing, you know, that you can go as sort of like an open door to department heads, like something open door, Mondays or Tuesdays, and you know that to us for certain amount of hours, call up, make an appointment, you can go right through that, instead of waiting every four months for, you know, this event to happen, you can do it on a regular basis, because I'm quite sure they have free time." [#10]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "The eBlasts, people respond to them. I think that just really, we have to show something different. I don't think the information isn't getting to folks. But somehow it has to be communicated. It has to result in something quantifiable, and it hasn't. Like these things that we have, they seem to keep you busy like you're doing business, but you're not getting any business. So, you're running from this public event, like all of these different public events. And you're not getting any work out of it. So, folks don't want to participate in these things anymore, because they're like, 'Oh, nothing's going to happen with that.' I think that it's important to not just have that event but set something quantifiable around that event. Like, 'This is what we want to have happen from this event. We're going to identify at least three contractors, or two, or whatever, and make A, B and C happen.' Then at least those two contractors or three contractors will be able to say, 'I went to that event, and this is what I got from it.' But you don't hear that a lot of times. Because it's there, the event, and wow, and then it just goes away, and nothing happens. If the City's goal is to bring in more participation, or have folks participate in these workshops or whatever, then there has to be some type of strategy designed on outcome. Not just how many people attended the event. How many people benefited from that event? And a strategy to make that happen. That's the piece that I think that's missing. Because we heard that again today, also just what I call the justified skepticism. One guy said, 'Hey, no more band aids here. Been there done that.'"[#12]
- The non-Hispanic white female representative of a majority-owned construction company stated, "The vendor fairs are really key and really important, but they also cost money. If you want to be an exhibitor that's a couple thousand dollars. You could meet big General Contractors, but if you wanted to do this you would have to put it in your budget. But I feel like there are, yeah, these are really, really important because sometimes you can meet staff at city agencies that you've been working with over email, you know, for a year or two years or three years and you never met them in person, and you can meet everybody else in that office." [#15]

- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “With regard to our company, the City would be a big potential market for us, so the online registration, vendor fairs and other outreach would be a perfect way for us to connect with the right city representatives.” [#19]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “Well, that would be good if it were like the DPW, or Boston Water and Sewer. Those would be the agencies that we would be interested in, yes.” [#25]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “I think the City could come up with a way to connect people, connect firms and owners together. That would be very useful for us. I suspect that it will be for most other companies also.” [#30]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, “The Northeastern does it like every year and sometimes, Harvard and all this come to do diversity workshops. Then they have all these people, procurements people come in, but yet who actually does the bids are not there. It's just the PR people that come to this workshop, is not actually the people that let out bids to the contractors. So, if you go there mostly for the PR role for like conforming to the status of do, but the actual people that send bids out and like the project managers or the maintenance managers, all those people, they don't go to those things. So, like it's just formalities and things that they're supposed to do, the follow up. That after a while we get tired of this mumbo-jumbo just creating an image. You firm people, you come out here, you chase your work and forget this. I find it more like, after a while, I find it that it a lot of just show off format, following up the protocol, but it doesn't turn out much where you actually, if you don't meet actually the people that are requesting for proposals, I think you need to go there and try to maybe a hangout near to this place or find their phone numbers through a friend or through a friend or to other people instead of this.” [#39]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “It would be beneficial to meet agency representatives.” [#44]
- A respondent in a public meeting hosted by the Black Market Association stated, “So what I'm suggesting, to take back to the team, is that we have workshops here [at the Black Market], we get people registered here, they get lists here inside of this space and get opportunities to come and have someone from the City, TA, technical assistance, sit with them with laptops and go through the process of what this looks like after. I take the list that [you] said is going to be disclosed comes forward, so that they can actually have an idea of what their business could potentially do in regards to becoming a vendor.” [#PT1]
- A respondent in a public meeting hosted by the Black Market Association stated, “When we have these classes and these forums that you're talking about having, I think they all should be put on social platforms or maybe even YouTube so that we can have the classes eventually go onto YouTube for those who cannot make it, who cannot physically close their businesses for three to four hours to work on, to fill out these applications and these forms.” [#PT1]
- A respondent from a public meeting in Dorchester stated, “They have these state meetings on school street in downtown Boston—who in their right minds are going to go to

downtown Boston at noon time? Or even 9 O'clock in the morning, where are you going to park? It's going to take me two hours to get there from Quincy. They don't have one of these seminars or meetings in the [South Shore]. Nothing in Quincy, Braintree or Milton, anywhere in my area. So I'll have to go to Boston. It will take me two and a half hours to get through Quincy to downtown Boston. I just can't do it. Like when you're self-employed, you don't have that kind of time. You know? So, I mean, they have to do more webinars, they have to do more information.” [#PT2]

17. Streamlining/simplification of bidding procedures. Twelve business owners and managers thought streamlining/simplification of bidding procedures would be helpful for small and disadvantaged businesses [#10, #18, #25, #29, #34, #37, #40, #44, #45, #AV, #WT3, #WT7]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “If you're in a market for, you know, vendors that want to do business with the department, just to make that process easier. And knowing that, you know, if you are certified, because that's you know, you can walk into that office not wasting anybody's time because you know that you got the goods and services that someone wants, and that you certified to do it. And there may be, potentially a deal there. Because nothing's given, you gotta be able to do it and come in at the right price.” [#10]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “The electronic bidding process would be very helpful because the cost of preparing proposals is a heavy financial burden for MBE/WBEs.” [#18]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “I mean, the faster I can get those bids out, the better chances I have.” [#29]
- A comment from a non-Hispanic white WBE goods and services firm stated, “The paperwork applying for quotes and following up with things is a lot.” [#AV]
- The owner of a WBE-certified goods and services company stated, “Paperwork required for bids is inconsistent across departments, often redundant, and confusing—[they] need to find ways to simplify, make more consistent across departments.” [#WT3]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “I submitted a proposal a few years ago to become a small business consultant through the City of Boston’s Small Business Technical Assistance program. My proposal was rejected due to not clearly identifying ‘measures,’ which I thought I laid out according to my business brand/model as a consultant. It was really tough to lay out proposed measures without knowing who the client is or would be in the future. I think this part of the proposal needs to be reexamined or not given that much emphasis in the awarding process, but the overall services being provided, the experience of the business owner proposing the service and how well the proposal is written. I am no stranger to RFPs.” [#WT7]

18. Unbundling contracts. Fifteen business owners and managers shared mixed thoughts on breaking up large contracts into smaller pieces. Many thought that it could be helpful for small and disadvantaged businesses, while others noted that it may increase the complexity of project

management for the City [#13, #14, #16, #18, #26, #29, #31, #34, #37, #38, #40, #44, #45, #PT2, #PT3]. For example:

- The non-Hispanic white male owner of a majority-owned construction company stated, “I think they should try to break up some of the bigger jobs to small portions like you said earlier. You have one big job, why do you need one big company? I agree that should be broken down into five companies. You could give five smaller companies work in the public sector.” [#13]
- The Black American representative of an MBE-, DBE-, and WBE-certified professional services firm stated, “With regard to restrictive contract specifications and bidding procedures, it would be beneficial if the City would bundle contracts into smaller dollar amounts and scopes so that a company like ours would have an opportunity to go after it as a prime. Breaking up contracts into smaller pieces.” [#14]
- The female representative of a Black American MBE-certified and uncertified WBE firm stated, “It might be useful to break up large contracts into smaller contracts to give small businesses a better shot.” [#16]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, “Breaking up large contracts so that MBE/WBEs can qualify to submit bids as a prime would be extremely beneficial.” [#18]
- The Hispanic American owner of an uncertified MBE professional services firm stated, “I mean, let's face it. If the Big Dig came back, there's no way I could bid on that whole project.” [#29]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “That would be really good for a lot of firms. A lot of firms would benefit from that.” [#31]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “Yeah. I think that helps. I think it'd probably be helpful for the municipalities, as well.” [#34]
- The Hispanic American male owner of an uncertified MBE construction firm stated, “I'll tell you the thing that you brought up about breaking contracts up into small pieces. I think that's brilliant. I think that's a great idea that a small guy like me can go and do a week's worth of work and charge \$10,000 or \$8,000 or \$2,000 would be extremely helpful in growing my company. The lack of opportunities such as these holds me back from hiring people and growing the company. So being able to go to a set project by myself, you know, that that's a big thing that I could get a foot in the door by not having to take a big piece of something.” [#38]
- A respondent from a public meeting in Dorchester stated, “All of a sudden out of the blue, I get this \$24,000 contract and I need seven people to do the job. And I'm like, I can't even do this job. It's too big. So how am I supposed to get this work? So it was just, it was just such a disconnect for so many years between me and the City.” [#PT2]

- A respondent from a public meeting in Jamaica Plain stated, “You put out the bid, that’s great, But, if it’s a huge bid and we can’t partner with anybody, we need a smaller bid that we can take on and kind of be able to bid on.” [#PT3]

19. Price or evaluation preferences for small businesses. Thirteen business owners and managers thought price or evaluation preferences for small and local businesses are helpful [#14, #15, #24, #25, #26, #31, #33, #34, #37, #40, #44, #45, #AV]. For example:

- The non-Hispanic white male owner of a majority-owned professional services firm stated, “The other obstacle is big firms have a much easier time out-competing folks like me, and MBEs/WBEs. I would love to see some something done to also help us smaller firms whether or not women- or minority-owned, but I do definitely recognize it. I think should be on a tiered point system to increase opportunities.” [#24]
- The non-Hispanic white male representative of a WBE-certified goods and services firm stated, “Well I would certainly like to see preference given to disadvantaged businesses. And I don’t think that’s always the case.” [#26]
- A comment from a majority-owned construction firm stated, “Giving preference to local Boston based firms on bidding opportunities would be helpful for small businesses to compete with other large firms/companies.” [#AV]

20. Small business set-asides. Sixteen business owners and managers thought small business set-asides are helpful for small and disadvantaged businesses [#10, #25, #26, #29, #30, #31, #33, #35, #36, #37, #40, #41, #44, #45, #AV, #WT9]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “Absolutely. I think that’s what the City tried to do with, when I told you like, they picked 10 companies, and here’s the budget, and we’re going to, because they did it with me. And they said I was approved up to \$100,000 worth of business, so I thought this business was up to, and that you can bid on the jobs and... But, that thing didn’t work at all, I stopped getting the bids.” [#10]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “I think that small business set-asides are important.” [#30]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “I believe in that because that’s how I got my start.” [#31]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “Absolutely. Because I don’t know how to word this any way other than what I’ve already said. If there’s not set aside something for minorities that we can get a piece of, we won’t get a piece of anything. Oh, absolutely.” [#33]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I think the small business set aside is a good idea. I think this should be set aside as three categories. The first priority should be a set-aside for minority businesses, the second for woman-owned businesses, and the third for small businesses. So, I think it should be set aside for those three categories. They don’t have to be separate, but they should be set aside. I think that’s really helpful.” [#35]

- The Black American male owner of an MBE-certified construction company stated, “The small business preferences would be a good start for MBEs to cut down on the sizes of contracts, you know, spread it out a little bit more so that small businesses get an opportunity to grow.” [#36]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “That would help a lot. If they did something under 100, 150 thousand, or even 25, 40, 50 thousand. Small set asides. Have small business set asides like the federal government does, to give them a chance to get performance. Give them a chance to get in there. Also offer some type of training for that. Offer education. Some kind of small business training program for them for this procurement process.” [#41]
- A comment from a Subcontinent Asian American MBE professional services firm stated, “It's tough. It would be good if the agencies developed a plan specifically for small businesses. Smaller set aside contracts. It's difficult to compete against larger companies for prime contracts. Develop a program for smaller firms.” [#AV]
- The Subcontinent Asian American male owner of an MBE-certified professional services firm stated, “Maybe some of the contracts for smaller projects (say under \$20 million) could be set-aside for smaller MBW/WBE firms ONLY.” [#WT9]

21. Mandatory subcontracting minimums. Twelve business owners and managers shared their thoughts on mandatory subcontracting minimums. Many perceived mandatory subcontracting minimums as helpful for small and disadvantaged businesses, while others noted that industry specific requirements may be necessary [#3, #10, #27, #29, #31, #33, #34, #37, #39, #40, #44, #45]. For example:

- The non-Hispanic white male owner of a majority-owned construction firm stated, “I think that we need to help disadvantaged businesses. We need to help MBEs and WBEs and veterans. We really need to prop them up. When you prop them up, you prop everybody up. So, no, I definitely... Actually, I think that they should do more of that, not less.” [#3]
- The Black American male owner of an MBE-certified goods and services firm stated, “You know, so I know those sort of strategic alliances and partnership exists, because I know that, you know, these companies can win bids by you know, if they have more minority vendors on, they win points. So, the more minority vendors you have on a project, you gain points towards, I don't know what the process is, but, so there is incentive there for bigger contractors to do business with minority companies. So there again, I know the players involved and that I haven't connected with them.” [#10]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “That would be very difficult for us because like I described before, there's just not a lot that one, we don't really sub any of our core work at all. We do that all in-house so that would be very difficult, that would actually be a barrier for us.” [#27]
- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “It would be very helpful, but it must be a contractually obligated requirement because if you don't have it as an obligated, legally obligated contractual

requirement, contractors will give you a potential person and then not use them. That's the whole thing with the letter of intent." [#31]

- The Black American male owner of an MBE- and SLBE- certified construction company stated, "I used to do all of [a local firm's] landscaping. Now they do their own landscaping because pretty much, like I said, they don't need to fulfill a quota for landscaping or any other minority participation rules. So why sub it out and give money away when we can do it ourselves? Once they deleted the minority participation from the cities and towns, that pretty much made us all change where we are working and, or go out of business. I mean, unless they say ... pretty much it's short and sweet. Unless you say, 'Hey, give 5% of this workout out to minority women, minority men or women or whatever.' It's not going to happen. Why pay somebody to do something I can do? Now I don't blame general contractors, everybody's in the business to make money. But in the same token, when you eliminated that, you just put a whole bunch of minority companies out of business." [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Probably not for us, because we've kind of modeled our business as trying to have everything in-house. But, on a construction contract, I guess that would be helpful. Just spreading the work around." [#34]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "We had to be a sub of a sub. [Other] white folks got the job as a sub, then [had] to sub out to the minority so they can meet the minority [goal requirements]. So we were [the] third layer on the job that why wouldn't we be [the] second layer of the subs? But no, in between them, they gave it to this other group of white folks. And then, the white folks come and look for us, me now and my group, the locals to go and meet the requirement. So instead of working for a dollar [my firm] was working for 50 cents on the dollar." [#39]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified opportunities in the state of Georgia have all of those minimum requirements. There's a minimum of a 10% work share for every state of Georgia bid going to a small business. they also have expedited payment terms to that small business as part of contracted work." [#40]

22. Small business subcontracting goals. Thirteen business owners and managers thought small business subcontracting goals are helpful for small and disadvantaged businesses [#3, #4, #10, #12, #26, #29, #31, #32, #33, #37, #44, #45, #WT6]. For example:

- The non-Hispanic white male owner of a majority-owned construction firm stated, "The [City] do[es] sometimes, usually on larger projects. When they bid out larger projects, there's a certain percentage of it set aside for Boston residents and MBE and WBE, and actually even minorities on a workforce." [#3]
- The Black American male owner of an MBE-certified goods and services firm stated, "I think that there needs to be more opportunity and more oversight of the process. And, making sure that certain goals and benchmarks are achieved by these oversight organizations. And it should be some sort of report annually, that sort of monitors and award those companies that have done well with it, and ask those companies that have not to... how can you do better?" [#10]

- The Black American female owner of an MBE- and WBE-certified professional services firm stated, “Yeah, definitely. Because without them, there really isn't a lot of participation. There really isn't incentive for folks to, again people say, ‘If I'm not certified, they don't want to use my business,’ because everyone wants to be able to count. Outside of if there aren't any goals set, then I don't think there would be a reason or incentive to engage diverse company.” [#12]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, “That'd be good because then the other potential clients really look at this type of information and possibly offer contract opportunities.” [#32]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “The subcontracting goals would be a very good move.” [#44]
- The Black American male owner of an MBE-, DBE-, and SBE-certified professional services firm stated, “In spite our firm’s potential for making profound contributions to Boston’s lively development climate, we rarely see practical opportunities to participate in urban private and public development projects in the City. As a result, we have, in recent years, deemphasized the City as a focus for our business development activities. We recognize that the path of least resistance for the City is to package development projects in a way that promotes the involvement of large, aggregated consultant teams with a limited number of subconsultants. This approach is understandable because it offers conveniences to the City. However, to expand the participation of minority-owned firms, we would like to see the City work with the development community to put together development teams that include real, significant participation of local MBEs and other small and disadvantaged businesses. In particular, we would urge that concrete steps be taken to (1) structure large development projects in a way that expedites the involvement of small firms and (2) do more to incentivize large firms to involve small, local firms in the bid process.” [#WT6]

23. Formal complaint/grievance procedures. Twelve business owners and managers felt formal complaint and grievance procedures are helpful for small and disadvantaged businesses. Most firms stressed the need for confidentiality in these procedures [#11, #27, #29, #31, #33, #34, #46, #39, #40, #41, #44, #45]. For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “I could have done that [made a formal complaint], but I think that they would have dragged me through the mud. I think they would have made it seem like, here I am complaining, excuse me. A company who fairly lost the bid... I don't know. They, ‘Oh, your proposal wasn't good, and this and that.’ And it's like, ‘Come on guys. So, we all know what you're doing.’ And so, to me it was kind of a no-win situation. I didn't want deal with that, because it jeopardizes my bids with other companies. So, you don't want to get on the mayor’s [bad side]. You don't want to be an enemy of the mayor.” [#11]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “it would have to be anonymous. Yeah see that's the thing, so yeah you definitely, you would have to be anonymous because nobody is going to do that. Nobody is going to

complain because they do not want to lose the business. If it was anonymous and you could guarantee it, then that would be helpful.” [#27]

- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “I think that's important. But I also think that a lot of your businesses are going to think the way I think, which is, do I want to be complaining, with the reputation of being a disloyal complainer, not ready for prime time? Or do I swallow it and live another day?” [#31]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “I guess there's already one that you could contest any bid, on the public side. Again, we never really look into doing that, because if you weren't selected, muscling your way in is not going to be the best way to build a good relationship with the municipality.” [#34]
- The Black American male owner of an MBE-certified construction company stated, “The complaint/grievance process could work. It's just that something like that would have to be confidential. Otherwise, you could get locked out of the system completely.” [#36]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, “Within the City, there isn't a location where you can call and complain about a certain problem, an issue with a certain department, if you are in trouble. If you're in trouble or have a difficulty with a particular department, there isn't where to go and say, there is this miss judgment or a problem. This should be within the City of Boston, a board that you could bring certain issues through to make sure the program works, or the people that is out there, and the clique, or things like that. But that isn't.” [#39]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, “It might be helpful for smalls to know who the ... You know you get the naughty list; you know who are the clients you may want to avoid, not that you want to have a list like that, but ... Would be important to know that it's like the Better Business Bureau.” [#40]
- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “The complaint/grievance process would only work if it's confidential.” [#44]

K. Insights Regarding Race- and Gender-based Measures

Business owners and representatives shared their experience with the City's and the Commonwealth's certification and small business programs and provided recommendations for making it more inclusive. For example:

1. Experience with City and Commonwealth programs; and
2. Recommendations about race- and gender-based programs.

1. Experience with City and Commonwealth programs. Three business owners and representatives shared their experiences with City and Commonwealth programs [#10, #34, #35] For example:

- The Black American male owner of an MBE-certified goods and services firm stated, “Where they actually gave minority businesses some sort of contract, particularly with the printing

business, they gave us \$100,000 worth of business was promised or allocated. I don't know, they did it in a way that it was legal and that... and out of that, sort of, program that they developed, I probably got, like \$1,000 worth of business. It was an initiative that started, and it died. And I think if you research that, you'll find it, it ran. They picked a certain amount of minority vendors, of course, that you have to be through that process, you are qualified. They qualify you as a vendor that can do the business that they're asking for. And then, what they were supposed to do is every time a job or a bid came up that fit your category, they're supposed to let you know, what's going on. So that happened for a little while, then it dropped off. And, you know, communications were really bad because as the department changed, or changes within a department, you know, you had that... They'd lose sight of the program in general. So, the communication was lacking on that. So there needs to be some real oversight on those initiatives New England Minority Purchasing Council, Office of Women in Business, so it's been more inclusive, which meant less focus race base, more gender. So as a Black man though, we've just gotten lost in the sauce of understanding and things that are laser focused on, you know, Black business. Hence, you got BECMA, that whole story of how BECMA came about." [#10]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I wasn't until now. So, I'll do a quick Google search when we got off the phone and see what they have going." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Does the City have an office or a department whose function is to educate and inform small businesses, and M/WBE firms about contract opportunities? Okay. The fact that I'm not aware of this office speaks volumes about the City's need to improve their outreach and education of the public about what they have to offer. They need to make people aware that, the office exists not only for small business but especially for minorities and women. I'm sitting out here, and they have that office that's available to small businesses and I don't know about it, so it doesn't do me any good. Hopefully, that office is functioning in the manner of really helping small businesses. I'm just not aware of it. Maybe everybody else knows about it, but I don't know." [#35]

2. Recommendations about race- and gender-based programs. Interviewees provided other suggestions to the City and quasi-agencies about how to improve their certification programs [#1, #10, #12, #17, #18, #20, #22, #27, #28, #30, #31, #32, #33, #34, #36, #37, #38, #39, #40, #44, #45, #PT6, #WT3, #WT5, #WT9]. For example:

- The Black American male owner of an MBE-certified professional services firm stated, "I would say first put a platform in place for the city structure. That's first and foremost. You need to have some kind of, and I don't want to keep saying this all over again, but you're talking about business development and workforce development, and you have all these different places. Forget about all that. Put in place a physical location that actually stands for business development and workforce or workforce business development. At the center you have qualified, experienced former retired executives, people who have played this position, CEOs, upcoming entrepreneurs, entrepreneurs who have already been there or going through this, who can counsel, who can educate and get us to learn the methods that they've done. And then at that point we can build ourselves as potential small business

people, and then use their resources to reach out to these third party companies to say, hey, give this guy a shot now, give this company a shot now. And then look at the criteria and the status of saying, okay, this business or this company has been on this contract for this many years. How successful are they? Are they just going by, because their cousin or aunt is on this bid and they're just sucking up the money or are they really being some lucrative of it? If they're not, pull them off of it, put somebody else on it. Give other people a chance to do this work." [#1]

- The Black American male owner of an MBE-certified goods and services firm stated, "Get all the department heads in the room, let them know that this is a concern, and this is what you guys are working on, and how can we make that process better. So, do your little focus group with them, and then get a group of vendors like me and do that little focus group. And really, from there, it should be pretty easy, one to get sort of everybody in the room, and really assessing, you know, really what the needs are, and how we can do this better. And then, all the certification agencies, they all have some sort of, you know, from the Urban League, to the NAACP, they all know that this problem exists, but they're sort of like, everyone is fighting for their own piece of something. And then, the vendors, and we get lost in the process of all that. Fighting for the money to promote this thing. And then the sort of end user is confused. Don't know. And, you know, that's why we're having this conversation today, because it's a real problem. I just think that they need to be more sensitive to minority, and women businesses, and understanding the challenges that we all go through as business people, and just looking at us a little more, because a lot of us are very qualified to do the work, but we haven't built the good old boy network, sort of, with the vendors that they deal with. And with that, you know, lens on I think that it could get better. It's always a work in progress. I just think that there should be a special thing, just to reach out. Build the programs, and then a special system to reach out to women and minority businesses. That's all we ask for. We can't be treated differently other than reaching out to them. And so, once you reach out to us, there's so many other programs that can support us as business people from, you know, from SBA. Small Business Administration has so many different training and business development things. Just being able to from that entry point into the City, they can just redirect and let these businesses know the opportunities here, is some of the things that can help you with your path to success. It's very simple." [#10]
- The Black American female owner of an MBE- and WBE-certified professional services firm stated, "There are businesses here in Massachusetts and Boston particularly that can grow to the next level, but they need help. They need financial help. They need help with resources, as far as good people. They just don't know how to get there to that next level. If they had some assistance with being able to, again, someone going in looking at their business, figuring out a strategic plan, or setting, 'There's a strategic plan with these benchmarks, and these are the deficiencies within the business. This is what it's going to take to get there.' That, I think would be very helpful to businesses growing to the next level, and that you don't get a lot of that here. You don't get a lot of businesses growing to the next level. Of course, they would have to look at the history of the business, the longevity, how long it's been around. The need. Identify what the business needs. The potential for engagement. If, say a contractor or a construction manager is saying, 'Well, I have a million-dollar project, and I want to give it to this company, but I know that they are at capacity now.' They have these needs, and the City helps fill the gap somehow. I think

that that should be part of it. There's a potential contract that, but for the capacity of that small business, they would be able to participate on that contract. So those three components. Well, there are smaller contracts that could be let to smaller contractors. From what I understand, there are contracts under a certain threshold that could be negotiated as opposed to bid, from what I understand. I think that those types of contracts can help businesses to grow. Some type of internal incentive to the project managers or officers who let that work to engage more with minority businesses or new businesses. There should be an internal process to incentivize. I don't know if incentivize is the appropriate word, but folks need to know that. It shouldn't be the same contractors carving out, again, smaller contracts. Because I've heard that from a number of folks saying that the City refuses to split contracts. There are some that are very easy to do. Like there's some work that you can't realistically, you can't carve out, but there's others that are a slam dunk that you could just carve out for a smaller business to bid on. The City has to somehow create a platform in which smaller businesses can participate, smaller and local businesses and that hasn't happened. Supplies, I mean you can do it in construction. I think there are a lot of different areas and opportunity in construction that can be carved out on smaller projects. But yeah, especially like office supplies, all of those general condition type items. Again, I've heard from city fresh foods about the summer lunch program vs the winter lunch. But the City wouldn't carve something like that out. So, things like that. I guess more face time with decision-makers. Like in this city, there seems to be a very few folks that are allowed to prosper and do business. It seems to be the same folks over and over, and again with those relationships there has to be an intentional act on City of Boston personnel, whoever is assigned to that to bring more businesses into the fold. And unless there's an intentional face time engagement by folks who, again, are able to make decisions around potential for these businesses, it's going to be business as usual. That's what I think would help change the environment." [#12]

- The Black American male owner of an uncertified MBE construction firm stated, "He recommends the City of Boston increase awareness through snail and email, greater access to city programs and more outreach." [#17]
- The non-Hispanic white female owner of a WBE- and DBE-certified professional services firm stated, "In general, the City needs to establish policies that target MBW/WBEs and do special programs that include aggressive outreach, education about how the City system works, and provide small contract opportunities. Also, the bidding process and the bidding policies at Water and Sewer should be examined relative to looking at creative ways to provide opportunities for small minority and women owned businesses." [#18]
- The non-Hispanic white female owner of a WBE- and DBE-certified construction company stated, "I think they have to do, either maybe round table talks. I felt like, when I signed up with the state, and it was really when I got certified with the state, all of a sudden, I'm getting invited to go here and to do this, and a lot of networking opportunities. But no one really, and it guess it depends, and it's hard, but no one walks you through things you should be doing. From computer software, to networking your company, to financial things. There's no, you're kind of on an island. You have to figure it out on your own. And its trial and error, and you make mistakes. I don't know how you could have, but it'd be nice if you could have a peer group that could help you navigate. That's a large wish list." [#20]

- The Black American male owner of an MBE-certified construction company stated, “I strongly believe that if you go through the state data center and pull up all the MBEs and women-owned businesses and stuff like that, and just send out information to all of them, because to be quite honest with you, I didn't know all of this until some ways along. And I think the reason why I think the email was not the fact that I am on the state website or anything like that. I think it was sometime last year when I went to Boston Housing Authority and... Yeah. I think something like that. I think I went to the City to look at some few things, and I think that's how my information got out there, and I was able to get this. Or I saw something, a publication or something. I'm not quite sure. But some way, somehow, I stumbled across this pathway to contracting with the City and stuff like... So, I believe that there are a lot of people out there that don't know, and if they can make it accessible to as many as they can, I think that will go a long way.” [#22]
- The non-Hispanic white female representative of a majority-owned goods and services firm stated, “So my experience with dealing with some of the smaller businesses that we're trying to encourage to get certification is, they fear the government. And so, these certification processes, they're like, "Well how much business will I really get? And is it worth it? And I have to open up my books to the state," I'm not sure what the process is, but that's scary. Especially for some minority startup businesses in the Brazilian community is big in our area here. There is I think a fear factor or a ... Government's not a friendly face for a lot of these people. And so, I'm not sure how you overcome their belief that you're not really here to help me. That you're going to come in and you're going to look at my business and you're going to find fault and you're going to tell me what I'm not doing right. You know what I mean? And I think that's been a barrier for a lot of the smaller, the really smaller companies that are just getting started. Just want to try and ... It's that fear. And I don't know, maybe there needs to be a community advocate, somebody who is a trusted person in the community to help those people understand that the government wants to do business with you, we're not looking for reasons to make your life miserable. And that it's not a difficult process so I think it's probably really important to figure out who those influencers or folks are in those communities, to have them help advocate. Whether it's a trusted church leader or a community leader or somebody who's in touch with that population. To say, ‘This works, and you can benefit by it and the government's not looking to squash your effort here. So, I don't know, I mean to me, that's what I've bumped into. They go, ‘Oh yeah, I'll try it.’ But then they're like, ‘Oh.’ They have to come visit me or they're going to have to ... It's just, I don't know, they kind of lose interest at that point.” [#27]
- The Hispanic American owner of an uncertified MBE construction company stated, “You know, take a company like myself and maybe if you have somebody help me with the bidding process and we can go through and bid on some of the City stuff, that might interest me and just to get me on my way.” [#28]
- The non-Hispanic white male owner of a VBE-certified construction company stated, “What would really be helpful is if somebody could come out and say, here are the things you really need to do to get this kind of work. And I suspect that's certainly true of my firm and a lot of minority and women-owned businesses as well. It's just that when you look at all the paperwork that the City expects companies to read, it's very complicated, so we don't do it. It would be much easier if you can talk to City staff who will help you work your way through these things in order to get a contract.” [#30]

- The Hispanic American female owner of a WBE-, SLBE-, and MBE-certified professional services company stated, “I’m here, I want work. I’m like that old television program, I have gun, will travel.” [#31]
- The Asian Pacific American female owner of an uncertified MBE-, uncertified WBE-, and DBE-certified professional services firm stated, “So, the first thing for me is that they are thinking about this and so that’s good. I would also suggest that all information is posted on their website, public libraries and town halls. These tools would all be very helpful. I also think another thing that’s important is that it’s not just the talk, but there are some real opportunities out there leading to contract opportunities for companies like mine. I think that probably would be the hardest part. So, like having real opportunities rather just getting the word out but also to have some real contact opportunities out there for us, something that companies have the expertise to do.” [#32]
- The Black American male owner of an MBE- and SLBE- certified construction company stated, “So I mean, that’s the big thing for us where we don’t have opportunity to get any of this work because there are no opportunities. Unless we become general contractors, subcontractors have zero chance of picking up any of that type of work.” [#33]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, “Honestly, reaching out just like you did now, we get a lot of e-mails from municipalities. They have a mailing list that, if you can get on a mailing list and sending info out, rather than have to chase it down, if the stuff kind of comes out and if it’s in your inbox, you can choose to ignore it or you can move forward with it. I find that to be more helpful than, you just get caught up with doing your job. So, trying to chase things down on the web gets a little more difficult than if it’s just kind of presented to you on, even if it’s just a monthly type e-mail from the City. The central register is just, it’s an advertising requirement for all large municipal projects.” [#34]
- The Black American male owner of an MBE-certified construction company stated, “Well, I think in that aspect we need communication. First and foremost, with MBEs, the City must do a much better job of reaching out to MBEs, letting them know about the opportunities, such as bid opportunities that are available. I want to stress the importance of outreach and access to technical assistance training. Additionally, assistance to acquire bonds, acquire financing in order to get off the ground, and especially in construction, as a small business owner, as an MBE, it’s tough. So, give us the opportunity to compete. If we’re lagging behind financially in order to get off the ground, help us get up and running. It’s only been two years that I’m in business as an MBE, so access to opportunity is critical for my success. Access is the big challenge.” [#36]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “I’ve never even contacted the Equity and Inclusion office at the City of Boston. I think it would be great if the City put a mentor team together that could mentor and sponsor certified companies, so they get to know me as a business owner and then they would keep an eye out for opportunities within the City, and alert the MBE/WBE as soon as possible. The mentor could be somebody that would help me with RFPs. And the sponsor is somebody that could help me with identifying opportunities and making introductions. First of all, there’s so much that our company could add to the City of Boston with strategy and ways to do things and recommendations when it comes to translation and

interpretation. Secondly, we can't get our arms around who to contact to navigate the system in identifying what other City of Boston agencies might need our services. So, getting help from the City in figuring that out would be really helpful because as a small business owner, I've got to put every different functional hat on. It's not like I'm working for a big company and have an HR person, a contracts person. So, the easier the City makes it for MBE/WBES, and small businesses, the better. They should check out the mentor program at Blue Cross Blue Shield for ideas and research on broadening opportunities for MBE/WBES." [#37]

- The Hispanic American male owner of an uncertified MBE construction firm stated, "I mean, again, the thing that really rang a bell in my head was the breaking up of things into small pieces. I think that's the thing because a lot of people, minority, women, and non-minority businesses, it's somewhat irrelevant. You can't compete with these huge companies that have hundreds of millions of dollars in capital. There're very few people that can bid on these big projects because of their size, their manpower, their financial ability and the good ole boy network. I really think if you start breaking some of these contracts up, I really think that will spread out the work. I really think that's a great idea." [#38]
- The Black American male owner of an MBE-, SLBE-, SBE-, and 8(a)-certified construction firm stated, "The City itself has a lot of projects in here, but there is not a program that looks into the... Okay. This are the 20, 30 or 40 companies in... let's look my industry, like in construction that we have done for 20, 30 years, where we stuck into that one side, how I'd been to so many of those workshops and you go, they justify every year, how to spend the City or state money, but then there is no follow-up. There is not somebody you work with to say, okay, what projects that you're going after? Come to us. How do we help you obtain this project? Or how do we help the local companies have more grow capacity, which they'll become a more local general contractors with a bigger capacity? There are ways of doing it. Sometimes I feel like I should just let this go and go find a job within the City on this type of programs to actually maybe show what we go through on this other side." [#39]
- A representative of a Subcontinent Asian American uncertified WBE, MBE- and 8(a)-certified professional services firm stated, "I think it would be really helpful to have the City conduct reach out to small businesses and businesses of color to say, 'Hey, we have this program. We'd welcome your participation in it and in many ways to form a committee of smalls that could help maybe drive some of the best practices that could be put into place I just submitted a pretty significant bid in Georgia, and I do business in Texas, and Texas and Georgia both have minimum requirements for small businesses, so every bid that I submit I need to bring a small business partner to my team. I need to guarantee that I'm going to give them a 10% work share. Now, for me I always guarantee my small business more than 10%, because it's more attractive and a small business is providing services that I can't in that location. If the City of Boston would proactively identify some of the programs that we could participate in, that would be great. Again, we've never gotten a call from anybody in the state saying, 'Hey, you're based in Lowell, you're an 8(a), you've got great past performance,' no one has ever called us, ever. I mean, it would be great to have exposure to some of these opportunities." [#40]

- The Hispanic American male owner of an uncertified MBE goods and services firm stated, “We need more diversity in City contracts. Also, it would be great if the City offered more recycling and waste disposal contracts to minority firms.” [#44]
- The Hispanic American male owner of an uncertified MBE construction company stated, “I would say that the City should do more outreach. They just need to do something as simple as a Google search of MBE/WBE companies in the metro area and reach out like that so that people who want to work with the City but need information or help with preparing bid packages can make connections with the City. I would also say there are other ways to find companies. The Better Business Bureau is one example of an entity that will also confirm that their member companies are not schmucks, right, because there's a lot of them out there.” [#45]
- A respondent from a public meeting in Mattapan stated, “I also found too when we were looking at statistics in regard to minority women, as you guys know, minority women are divided by race. Caucasian, white or black and I was finding that it seems like more Caucasian women was receiving a higher percentage of contracts where we were only receiving anywhere from a half a percent to maybe 5%. So, I felt like that was a huge problem because I felt like it still opened the door up for more discrimination and maybe not directly, but if we don't address that particular problem then I think we're still going to have a problem as a whole.” [#PT6]
- The owner of a WBE-certified goods and services company stated, “Navigating City agency staff is enormously confusing. Businesses don't know who to talk to for what... need clearer, more transparent ways to navigate City processes and clearer understanding of who to talk to for what.” [#WT3]
- The female owner of an MBE- and DBE-certified professional services firm stated, “If there are suggestions that I can make it is to have a contact person that we can reach for questions or request for support - especially in the beginning.” [#WT5]
- The Subcontinent Asian American male owner of an MBE-certified professional services firm stated, “We will highly appreciate if some kind of MBE/WBE requirements, similar to Designer services, could be added to the Owner's Project Management (OPM) Services.” [#WT9]

L. Other Insights and Recommendations.

Other recommendations for the City, quasi-agencies, or other public agencies in the Boston area to enhance the availability and participation of small businesses.

Interviewees shared other insights or recommendations [#2, #10, #19, #21, #37, #41, #43, #AV, #PT3, #PT7]. For example:

- The non-Hispanic white male representative of a majority-owned professional services firm stated, “So, I used to be a professor. And the way I explained it to my students was sometimes you get a customer, you get farmer Jones, and farmer Jones wants to farm more fields per day. You invented the tractor, but farmer Jones has never even heard of a tractor. Farmer Jones only knows about horses. So, you're trying to explain what the tractor can do. And if you pick the wrong language, farmer Jones is going to judge you based n how much

fertilizer your tractor produces, how much hay your tractor eats, how many baby tractors you're going to get in a year. And so, he's going to judge your tractor as absolutely useless because you didn't stick to the core problem or he didn't tell you the core problem, which is he said he wanted a stronger horse. What he really wanted was to plow more field. If you don't clue into that, he doesn't know to tell you that because he doesn't even know there is a tractor. So, it's a tricky problem with new technology. You're trying to explain something to somebody, but they don't know about what you're explaining, because if they did, it wouldn't be new. So how do you figure out, what is their real problem? What are they trying to solve? Now, how do you explain what you're doing in a language where they get the point, and they can see how it would apply to their problem? There's no simple answer to that one. It's just you got to deal. So, with a city such as the City of Boston, because they probably need so much new technology, but they're not quite clear on what that is, it would be a whole lot easier if they could explain what their problems are than blindly going out with an RFP, hoping that they will magically come across what it is that they want? It's better to say, "Here's our problem or here's the results we're looking for. What can you do about it?" And then have people come to them and say, 'I can solve your problem this way. And this is why it would be a good idea.' It's a tricky one because sometimes they don't even know what it is, they really want because they're so focused on what they think is the answer. One fix is called the RFI. An RFI is request for information. Yeah. The government says, "Here's our basic problem. Tell us how you think you would fix it or if you have anything to help.' And the government's not promising any money. The government is saying, 'Look, tell us what you're capable of. And if we like what we hear, we'll be happy to have a conversation, and maybe even create an RFP. But first, we need to know what's possible out there. So, here's our basic problem. Tell us what you would do.' And those are pretty handy when the government is, they know they don't like any of the answers that they can think of, so they're hoping that somebody has some entirely new answer. On the proposer's side, it's annoying because you're writing a proposal for something that doesn't have any money, but hey, that's what you got to do. You got to communicate and tell people what you can do." [#2]

- The Black American male owner of an MBE-certified goods and services firm stated, "So this was sort of, one of those periods where I was depending on a city and state opportunities to help with giving me business. So, there was an opportunity to move down an area of Boston called Dudley Station. And everybody thought that this was going to be the biggest, you know, sort of growth area about 10 years ago. And there were grants, Yeah, there were grants to move down there, So, I took advantage of a grant. And let me tell you, it was the worst business decision ever, moving down to Dudley. There was no business down there at all. I opened like, a real Kinko's, sort of, one stop mailbox, had three or 400 mailboxes, you could print, you could... just a one stop office business solution, which is one of the needs that they found that was needed down in Dudley. So, I didn't last eight months there. I shut down. I wasn't ready to quit on it. Because I knew that there was definitely business in the printing and graphic design opportunity area, so I shut down at a huge loss, so one of my biggest loss ever. And because I had bought the machines and everything, it was just a mess. prior to this big meeting with the City, with Mayor Walsh, I mean, we actually sat down with him about this, and I think this is part of why this meeting is even happening. Because he, and BECMA we demanded, sort of, this meeting. We're not getting the business;

we're not getting the opportunities. What's going on with this system. And the mayor sounded, you know, kind of shocked about it. And I think that he is addressing it now in a very timely manner. In terms of when we first spoke to him, about four or five months ago, even less than that. But he's reacting to it, and I'm happy that we're having this discussion now. And it shows me that it's moving in the right direction. So, I'm building relationships and strictly going on the merits of just being a good business that can provide the service. I think, that can work in many ways. If we're all connected. I think with the City, though, I just think that a lot of the people that have the power to spend the dollars, don't understand the connection. They don't get it, like with, by giving it to this company, we're, one we're reaching the goal for the City of Boston, and it, you know, helping this disparity issue. I think it's going to work wonders if we understood this, and how we could make it work better.”
[#10]

- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “My only suggestion is that the City do more outreach so that companies like 3D Technology get a chance to connect with City representatives.” [#19]
- The non-Hispanic white male owner of a majority-owned goods and services firm stated, “I just hope that they're aware, I know they are, I just hope the City and the state and the country, got to be aware of what's going on with these small businesses. If we all fold, it's going to be horrible. That's just because of this crisis right now. That's my only fear. Small businesses are really dying right now, especially restaurants, but the good news is that we're no different than ... if I was going through this myself, it would be very painful, but the good news is, I am nowhere near alone on this. I don't know, the government doesn't know what they're doing, and I mean that in a nice way. I'm not being negative about it. This is a very crazy, unusual time that no one knows what the hell is going on, but I guess not. I just hope they watch that they don't give money to big businesses and just let us all small guys die.” [#21]
- The non-Hispanic white female owner of a WBE-certified professional services firm stated, “Right now, we're working for the Boston Public Schools, but then when we do a good job for them, how do we get the word around to other City of Boston agencies? Or how do we figure out who else at the City might need translation services and how do we leverage what we're doing, then help them be more strategic about it? That's our challenge with the City of Boston.” [#37]
- The Black and Native American female owner of an MBE-, WBE-, SLBE-, DBE-, and DVBE-certified professional services firm stated, “And really, truly if you can offer a company a real opportunity to go after a bid and qualify that's new to the game... Or not even knew. Take somebody's company who's been in five years. Okay, it takes five years for a business to at least a little bit of reputation but give them a shot. But you get over 2,000 or plus companies that's been in the data base, like me, 10, 15, 20 years and still trying. I just gave up like a lot of other companies that gave up and moved on or just closed up shop. I'm doing business in other states to keep my distance. I want to stay Massachusetts based. I pay my taxes. I do everything. Why can't I get work in Massachusetts?”[#41]
- The Native American male owner of an MBE- and DBE-certified construction company stated, “Eliminate corruption in the City’ referring to the Zoning Board of Appeals bribery scandal of 2019.” [#43]

- A respondent from the availability survey stated, “We want to bring better look and sound quality to corporate and government.” [#AV]
- The representative of a construction company stated, “I will say that I'm starting to see a change because I'm starting to see some help with myself and people are saying they really want to help me.” [#PT3]
- A respondent from a public meeting in Jamaica Plain stated, “The federal government does matchmaking. The City doesn't do any matchmaking events. We're small. We need a chance to build. Get us some low hanging fruits so we can prove our performance. What about our shop? There's a garage below and apartment above I'll live above my own shop because when I'm not downstairs working, I'm not upstairs sleeping, so how can we build a few garages below an apartment above? We don't have any of those. Right? Or a growing space below and an apartment above. You know what I mean? It's either retail... That's it. It's like retail is the only business in the City. People that make things that are invisible.” [#PT3]
- A respondent from a public meeting in Codman Square stated, “And so the rub, which your study is going to kind of touch on that, is that they always say you can't find any viable candidates. But you don't want us to start with a relationship HBCU. So of course, you're not going to find them because you're not really looking for them. So, to answer your question, do you think it will turn around, yeah. If you look for folks that are trying to do things like myself, like this gentleman here, and other people who have other micro businesses and you establish a relationship with them and you put them in a position to be able to take advantage of contracts.” [#PT7]

APPENDIX E.

Availability Analysis Approach

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Availability Analysis Approach

BBC Research & Consulting (BBC) used a *custom census* approach to analyze the availability of minority- and woman-owned businesses for construction, construction design, other professional services, support services, and goods and supplies prime contracts and subcontracts that the City of Boston (City), the Boston Housing Authority (BHA), the Boston Planning & Development Agency (BPDA), and the Boston Water and Sewer Commission (BWSC) (referred to together as *quasi-agencies*) awarded.¹ Appendix E expands on the information presented in Chapter 5 to further describe:

- A. Availability data;
- B. Representative businesses;
- C. Availability survey instrument;
- D. Survey execution; and
- E. Additional considerations.

A. Availability Data

BBC partnered with Customer Research International (CRI) and Davis Research to conduct telephone surveys with hundreds of business establishments throughout the *relevant geographic market area* for City and quasi-agency contracting, which BBC identified as Suffolk, Essex, Middlesex, Norfolk, and Plymouth counties in Massachusetts. Business establishments that CRI and Davis Research 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 the City and quasi-agencies awarded between July 1, 2014 and June 30, 2019 (i.e., *the study period*). The study team began the survey process by determining the work specializations, or *subindustries*, for each relevant City and quasi-agency 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 11,408 local business establishments that perform work that is relevant to City and quasi-agency contracting. The study team was able to successfully contact 3,682 of those business establishments (1,952 business establishments did not have valid phone listings). Of business establishments that the study team contacted successfully, 997 establishments completed availability surveys.

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

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, construction design, other professional services, support services, or goods and supplies work. Instead, BBC determined the types of work that were most relevant to City and quasi-agency 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, construction design, other professional services, support services, and goods and supplies that were most related to the contract and procurement dollars that the City and quasi-agencies awarded during the study period, and that BBC included as part of the availability analysis. The study team grouped those specializations into distinct *subindustries*, which are presented as headings in Figure E-1.

C. Availability Survey Instrument

BBC created an availability survey instrument to collect information from relevant business establishments located in the 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 construction design and other professional services establishments).²

Survey structure. The availability survey included 14 sections, and CRI and Davis Research 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 the City as the survey sponsor and describing the purpose of the study. (e.g., "The City is conducting a survey to develop a list of companies interested in providing construction-related services to the City of Boston and other public agencies.")

² BBC also developed fax and online versions of the survey instrument for business establishments that preferred to complete the survey in those formats.

Figure E-1.
Subindustries included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Construction			
Building construction		Electrical work	
15419905	Industrial buildings, new construction, nec	17310000	Electrical work
15420100	Commercial and office building contractors	17310202	Energy management controls
15420101	Commercial and office building, new construction	17310401	Access control systems specialization
15420103	Commercial and office buildings, renovation and repair	17310403	Fire detection and burglar alarm systems specialization
15420400	Specialized public building contractors		
15420406	School building construction	Excavation, wrecking, and land preparation	
15429903	Institutional building construction	16290400	Land preparation construction
17719904	Foundation and footing contractor	17940000	Excavation work
		17949901	Excavation and grading, building construction
Concrete work		Fencing, guardrails and signs	
17710000	Concrete work	17999912	Fence construction
17710200	Curb and sidewalk contractors		
17719901	Concrete pumping	Heavy construction	
Concrete, asphalt, and related products		16110000	Highway and street construction
29510201	Asphalt and asphaltic paving mixtures (not from refineries)	16110200	Surfacing and paving
29510204	Concrete, bituminous	16110204	Highway and street paving contractor
32710000	Concrete block and brick	16119901	General contractor, highway and street construction
32720303	Concrete products, precast, nec	16119902	Highway and street maintenance
32730000	Ready-mixed concrete	16220000	Bridge, tunnel, and elevated highway construction
50320100	Paving materials	16229901	Bridge construction
50320101	Asphalt mixture	16290000	Heavy construction, nec
50320504	Concrete mixtures	17710301	Blacktop (asphalt) work
50329904	Cement	49590100	Road, airport, and parking lot maintenance services
50329907	Sand, construction	Heavy construction equipment	
52110506	Sand and gravel	50820300	General construction machinery and equipment
Dam and marine construction		Insulation, drywall, masonry, and weatherproofing	
16290100	Dams, waterways, docks, and other marine construction	17419901	Bricklaying
16290110	Marine construction	17419907	Stone masonry
Electrical equipment and supplies		17420201	Acoustical and ceiling work
36259909	Industrial controls: push button, selector switches, pilot	17519901	Framing contractor
38220000	Environmental controls	Landscape services	
38240200	Mechanical and electromechanical counters and devices	07829903	Landscape contractors
50630000	Electrical apparatus and equipment		

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Mechanical contracting services		Roofing, siding, and flooring contractors (continued)	
17110000	Plumbing, heating, air-conditioning	17610000	Roofing, siding, and sheetmetal work
17110400	Heating and air conditioning contractors	17610100	Roofing and gutter work
17110401	Mechanical contractor	17610102	Roof repair
Other construction materials		17719903	Flooring contractor
28759901	Compost	Street cleaning	
50820302	Contractor's materials	49590102	Sweeping service: road, airport, parking lot, etc.
50830201	Garden machinery and equipment, nec	Trucking and moving	
50830203	Lawn machinery and equipment	42140000	Local trucking with storage
50850401	Fasteners, industrial: nuts, bolts, screws, etc.	42149901	Furniture moving and storage, local
52610100	Lawn and garden equipment	Water, sewer, and utility lines	
Other construction services		16230000	Water, sewer, and utility lines
16290301	Athletic field construction	16230200	Communication line and transmission tower construction
16290302	Golf course construction	16230203	Telephone and communication line construction
17990103	Playground construction and equipment installation	16230300	Water and sewer line construction
73899921	Flagging service (traffic control)	16230302	Sewer line construction
Painting, striping, and marking		16230303	Water main construction
17210200	Commercial painting	16239903	Pipe laying construction
17210303	Pavement marking contractor	16239906	Underground utilities contractor
Plumbing and HVAC supplies		17310302	Fiber optic cable installation
35850000	Refrigeration and heating equipment	49390000	Combination utilities, nec
50750000	Warm air heating and air conditioning	Windows and doors	
50750100	Air conditioning and ventilation equipment and supplies	17990610	Window treatment installation
Roofing, siding, and flooring contractors		32110305	Window glass, clear and colored
17529903	Carpet laying	50310307	Windows
17610000	Roofing, siding, and sheetmetal work	52110203	Garage doors, sale and installation
17610100	Roofing and gutter work		

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction Design		Engineering (continued)	
Architectural and design services		87110402	Civil engineering
07810201	Landscape architects	87120100	Architectural engineering
73891801	Design, commercial and industrial		
87120000	Architectural services	Environmental services	
Construction management		87489905	Environmental consultant
87419902	Construction management	Testing and inspection	
87420402	Construction project management consultant	73890211	Sewer inspection service
Developers and operative builders		73890200	Inspection and testing services
65529902	Land subdividers and developers, residential	Transportation planning services	
65529901	Land subdividers and developers, commercial	87420410	Transportation consultant
Engineering		87480204	Traffic consultant
87110000	Engineering services	87480200	Urban planning and consulting services
Other Professional Services		Human resources and job training services (continued)	
Advertising, marketing and public relations		82999917	Vocational counseling
87430000	Public relations services	IT and data services	
Business and market research services		73730000	Computer integrated systems design
73899953	Translation services	73730200	Systems integration services
87320100	Market analysis, business, and economic research	73730201	Local area network (LAN) systems integrator
Educational services		73740000	Data processing and preparation
87489902	Educational consultant	73749902	Data processing service
Human resources and job training services		73790100	Computer related maintenance services
73610100	Placement agencies	Other professional services	
73610102	Labor contractors (employment agency)	87429905	Management information systems consultant
Support Services		Dining services	
Catering and restaurants		58129906	Contract food services
58129903	Caterers	Equipment maintenance and repair	
Cleaning and janitorial services		17919903	Elevator front installation, Metal
73499902	Cleaning service, industrial or commercial	17969901	Elevator installation and conversion
73490101	Building cleaning service		

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Support Services (continued)			
Equipment maintenance and repair (continued)		Security systems services	
17969904	Machinery installation	73820000	Security systems services
76299904	Generator repair		
76990502	Engine repair and replacement, non-automotive	Transit services	
76992206	Hydraulic equipment repair	41110000	Local and suburban transit
76992210	Restaurant equipment repair	41110100	Bus transportation
76992501	Elevators: inspection, service, and repair	41190000	Local passenger transportation, nec
		41310000	Intercity and rural bus transportation
		41410000	Local bus charter service
Pest control		Vehicle maintenance and repair	
73420200	Pest control services	75389902	General truck repair
73420202	Exterminating and fumigating	75490100	Automotive maintenance services
73420203	Pest control in structures	75499903	High performance auto repair and service
Printing, copying, and mailing		Waste and recycling services	
27590000	Commercial printing, nec	49530100	Hazardous waste collection and disposal
73891706	Printing broker	49530200	Refuse collection and disposal services
		49530201	Garbage: collecting, destroying, and processing
		49530300	Nonhazardous waste disposal sites
		49539905	Recycling, waste materials
Security guard services			
73810105	Security guard service		
Goods and Supplies			
Automobiles		Cleaning and janitorial supplies (continued)	
50120000	Automobiles and other motor vehicles	50870304	Janitors' supplies
50120102	Automobiles	51690301	Detergents
50120200	Commercial vehicles	59999908	Cleaning equipment and supplies
50120208	Trucks, commercial	73590100	Home cleaning and maintenance equipment rental services
55119903	Trucks, tractors, and trailers: new and used		
55710000	Motorcycle dealers	Computers and peripherals	
		35770000	Computer peripheral equipment, nec
		50450000	Computers, peripherals, and software
		50450100	Computer peripheral equipment
		57340100	Computer peripheral equipment
		73730302	Value-added resellers, computer systems
Cleaning and janitorial supplies			
28410000	Soap and other detergents		
35890200	Commercial cleaning equipment		
50840901	Cleaning equipment, high pressure, sand or steam		
50870202	Laundry equipment and supplies		
50870300	Cleaning and maintenance equipment and supplies		

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Goods and Supplies (continued)			
Deicing chemicals		Other goods	
51691106	Salts, industrial	23990301	Banners, made from fabric
		28910200	Adhesives
Engineering equipment and precision instruments		28999902	Antifreeze compounds
50490106	Scientific instruments	28999943	Salt
50490108	Surveyor's instruments	50460300	Commercial cooking and food service equipment
		50460306	Restaurant equipment and supplies, nec
Food products, wholesale		50499903	Law enforcement equipment and supplies
20260106	Milk processing (pasteurizing, homogenizing, bottling)	50990100	Firearms and ammunition, except sporting
20519903	Bakery: wholesale or wholesale/retail combined	57319907	Radios, two-way, citizens band, weather, short-wave, etc.
51419901	Food brokers	59999917	Police supply stores
51430100	Milk		
59630103	Milk delivery	Petroleum and petroleum products	
59630200	Food services, direct sales	28690400	Fuels
		51720102	Gases, liquefied petroleum (propane)
Furniture		51720200	Engine fuels and oils
50210100	Office and public building furniture	51720203	Gasoline
50210106	Office furniture, nec	51720204	Lubricating oils and greases
50210107	Public building furniture, nec	59849903	Propane gas, bottled
57129904	Office furniture		
Industrial equipment and machinery		Recreation goods	
50850000	Industrial supplies	50910000	Sporting and recreation goods
50850600	Industrial tools	73590600	Party supplies rental services
Office equipment and supplies		Uniforms, apparels, and linen	
26530101	Boxes, corrugated: made from purchased materials	56990102	Uniforms
50440000	Office equipment	56990406	T-shirts, custom printed
50440203	Duplicating machines		
50440207	Photocopy machines	Vehicle parts and supplies	
51120000	Stationery and office supplies	37140000	Motor vehicle parts and accessories
51130000	Industrial and personal service paper	50130000	Motor vehicle supplies and new parts
51130100	Shipping supplies	50130100	Automotive supplies and parts
51139903	Paper, wrapping or coarse, and products	55310107	Truck equipment and parts
59430000	Stationery stores		
59630101	Bottled water delivery		

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 how to contact the correct business. CRI and Davis Research then followed up with the correct business based on the new contact information (see areas “X” and “Y” of the availability survey instrument).

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 A3c). 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 A4). The study team also asked business owners or managers where their businesses were headquartered (Question A5 and A6) and if their businesses were subsidiaries or affiliates of other businesses (Questions A7 and A8).

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 and Davis Research asked those questions in connection with prime contracts and subcontracts (Questions B1 and B2).³

7. Interest in future work. The surveyor asked about businesses about their interest in future work with the City and other government agencies. CRI and Davis Research asked those questions in connection with both prime contracts and subcontracts (Questions B3 through B6).⁴

8. Geographic area. The surveyor asked whether businesses perform work or serve customers in the Boston area (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).

³ Neither goods suppliers nor support services providers were asked questions about subcontract work.

⁴ Neither goods suppliers nor support services providers were asked questions about their interest in subcontract work.

11. Ownership. The surveyor asked whether businesses were at least 51 percent owned and controlled by minorities or women (Questions E1 through E3b). If businesses indicated that they were minority-owned, they were also asked about the race/ethnicity of the business's ownership (Questions E3a and E3b). The study team confirmed that information through several other data sources, including:

- The City's directory of certified businesses;
- The Commonwealth of Massachusetts Supplier Diversity Office directory of certified businesses;
- City and quasi-agency vendor data; and
- Information from other available certification directories and business lists.

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 with the City and other local government agencies and general insights about conditions in the local marketplace (Questions G1a and G1b). 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 and Davis Research conducted all availability surveys in 2020. 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. The surveying partners 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 11,408 business establishments that the study team attempted to contact for availability surveys and how that number resulted in the 3,682 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 and Davis Research attempted to contact were:

- Duplicate phone numbers (55 listings);
- Non-working phone numbers (1,528 listings); or
- Wrong numbers for the desired businesses (369 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:
2020 availability surveys.

	Number of Establishments
Beginning list	11,408
Less duplicate phone numbers	55
Less non-working phone numbers	1,528
Less wrong number/business	369
Unique business listings with working phone numbers	9,456
Less no answer	5,098
Less could not reach responsible staff member	660
Less language barrier	16
Establishments successfully contacted	3,682

Working phone numbers. As shown in Figure E-2, there were 9,456 business establishments with working phone numbers that CRI and Davis Research attempted to contact. The surveying partners were 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 5,098 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 660 establishments.
- The firm could not conduct the availability survey due to language barriers for 16 businesses.

Thus, CRI and Davis Research were able to successfully contact 3,682 business establishments.

Establishments included in the availability database. Figure E-3 presents the disposition of the 3,682 business establishments that CRI and Davis Research successfully contacted and how that number resulted in the 781 businesses that the study team included in the availability database and that the study team considered potentially available for City and quasi-agency work.

Establishments not interested in discussing availability for City and quasi-agency work. Of the 3,682 business establishments that the study team successfully contacted, 2,531 establishments were not interested in discussing their availability for City and quasi-agency 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 154 establishments. In total, 997 successfully contacted business establishments completed availability surveys.

**Figure E-3.
Disposition of
successfully
contacted business
establishments**

Source:
2020 availability surveys.

	Number of Establishments
Establishments successfully contacted	3,682
Less establishments not interested in discussing availability for work	2,531
Less unreturned fax/online surveys	154
Establishments that completed surveys	997
Less not a for-profit business	9
Less no interest in future work	175
Less line of work outside of study scope	16
Less multiple establishments	16
Establishments potentially available for entity work	781

Establishments available for City and quasi-agency 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 the City and quasi-agencies awarded during the study period. The study team excluded many of the business establishments that completed surveys from the availability database for various reasons:

- BBC excluded nine establishments that indicated that their organizations were not for-profit businesses.
- BBC excluded 175 establishments that reported they were not interested in either prime contracting or subcontracting opportunities with the City or other quasi-agencies.
- BBC excluded 16 establishments that indicated that their main lines of business were outside of the study scope.
- Sixteen 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 781 businesses that were considered potentially available for City and quasi-agency work.

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.⁵

- 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- 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 City and quasi-agency 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 City and quasi-agency 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 City and quasi-agency 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 City and quasi-agency work is that dividing a simple headcount of certified businesses by the total number of businesses does not account for business characteristics that are crucial to estimating availability accurately. The methodology that BBC used in this study takes a *custom census* approach to measuring availability and adds several layers of refinement to a simple headcount approach. For example, the availability surveys that the study team conducted provided data on qualifications, relative capacity, and interest in City and quasi-agency 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.

⁵ Neither goods nor non-professional services providers were asked questions about subcontract work.

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 the City 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 the Commonwealth of Massachusetts, the City, and quasi-agencies. 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 City and quasi-agency 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 City and quasi-agency contract data.

City and quasi-agency review. The City and quasi-agencies reviewed contract and vendor data that the study team collected and compiled as part of the study analyses and provided feedback regarding its accuracy.

Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Davis Research. We are calling on behalf of the City of Boston. This is not a sales call. The City is conducting a survey to develop a list of companies interested in providing construction-related services to the City of Boston and other public agencies, or who have provided construction-related services to the City in the past. The survey should take between 10 and 15 minutes to complete. Who can I speak with to confirm information about your firm's business characteristics and your firm's interest in working with public agencies?

[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 OR WHO HAVE WORKED WITH THE CITY OR LOCAL AGENCIES]

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. Is [new firm name] associated with [old firm name] in any way?

- 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. 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 A3c

2=No

98=(DON'T KNOW)

99=(REFUSED)

A3b. What would you say is the main line of business at [firm name/new firm name]?

[NOTE TO INTERVIEWER – IF RESPONDENT INDICATES THAT FIRM'S MAIN LINE OF BUSINESS IS "GENERAL CONSTRUCTION" OR GENERAL CONTRACTOR," PROBE TO FIND OUT IF MAIN LINE OF BUSINESS IS CLOSER TO BUILDING CONSTRUCTION OR HIGHWAY AND ROAD CONSTRUCTION.]

1=VERBATIM

A3c. What other types of work, if any, does your business perform?

[ENTER VERBATIM RESPONSE]

1=VERBATIM

97=(NONE)

A4. Is this the sole location for your business, or do you have offices in other locations?

1=Sole location – **SKIP TO A7**

2=Have other locations

98=(DON'T KNOW)

99=(REFUSED)

A5. Is this location the headquarters for your business, or is your business headquartered at another location?

1=Headquartered here – **SKIP TO A7**

2=Headquartered at another location

98=(DON'T KNOW)

99=(REFUSED)

A6. What is the city and state of your business' headquarters?

(ENTER VERBATIM CITY, ST)

1=VERBATIM

A7. 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**

A8. 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 government or public agencies in the Boston area as a prime contractor?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B4. Is your company *interested* in working with government or public agencies in the Boston area as a subcontractor, trucker/hauler, or supplier?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B5. Is your company *interested* in working with the City of Boston, specifically, in the future?

1= Yes – **SKIP TO C1**

2= No

98= (DON'T KNOW)

99=(REFUSED)

B6. Please tell me why your company is not interested in future work with the City of Boston?

[VERBATIM]

C1. Is your company able to do work or serve customers in the Boston area?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

D1. About what year was your firm established?

1=NUMERIC (1600-2020)

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, Asian, Cape Verdean, Hispanic, Native American, or Portuguese individuals. By this definition, is [*firm name / new firm name*] a minority-owned business?

1=Yes

2=No – **SKIP TO E4**

98=(DON'T KNOW) – **SKIP TO E4**

99=(REFUSED) – **SKIP TO E4**

E3a. Would you say that the minority group ownership of your company is mostly Black, Asian Pacific, Cape Verdean, Subcontinent Asian, Hispanic, Native American, or Portuguese?

1=Black – **SKIP TO F1**

2=Asian Pacific (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) – **SKIP TO F1**

3=Cape Verdean (persons whose origins are from Cape Verde) – **SKIP TO F1**

4=Hispanic (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish culture or origin, regardless of race)

5=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians) – **SKIP TO F1**

6=Subcontinent Asian (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka) – **SKIP TO F1**

7=Portuguese (persons of Portuguese origin) – **SKIP TO F1**

8=(OTHER - SPECIFY) _____

98=(DON'T KNOW)

99=(REFUSED)

E3b. Is the owner of Portuguese origin?

1=Yes

2=No

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 A4 = 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)

G1a. We're interested in whether your company has experienced barriers or difficulties related to working with, or attempting to work with, the city of Boston or local Boston area agencies. Do you have any thoughts to share?

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)

97=(NOTHING/NONE/NO COMMENTS)

98=(DON'T KNOW)

99=(REFUSED)

G1b. Do you have any additional thoughts to share regarding general marketplace conditions, starting or expanding a business in your industry, or obtaining work?

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)

97=(NOTHING/NONE/NO COMMENTS)

98=(DON'T KNOW)

99=(REFUSED)

G2. Would you be willing to participate in a follow-up interview about any of those issues?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

H1. Just a few last questions. What is your name?

1=VERBATIM

H2. What is your position at [*firm name / new firm name*]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

9=(OTHER - SPECIFY) _____

99=(REFUSED)

H3. At what email address can you be reached?

1= VERBATIM

Thank you very much for your participation. If you have any questions or concerns, please contact Sheryce Hearn, Deputy Director, Equity and Inclusion Unit for the City of Boston at 617-635-3449.

APPENDIX F.

Disparity Tables

Figure F-1. Table of Contents

Table	Time period	Characteristics				
		Contract area	Contract role	Contract size	State contract	Legal entity
F-2	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	N/A	No	N/A
F-3	07/01/14 - 06/30/17	All industries	Prime contracts and subcontracts	N/A	No	N/A
F-4	07/01/17 - 06/30/19	All industries	Prime contracts and subcontracts	N/A	No	N/A
F-5	07/01/14 - 06/30/19	Construction	Prime contracts and subcontracts	N/A	No	N/A
F-6	07/01/14 - 06/30/19	Construction design	Prime contracts and subcontracts	N/A	No	N/A
F-7	07/01/14 - 06/30/19	Other professional services	Prime contracts and subcontracts	N/A	No	N/A
F-8	07/01/14 - 06/30/19	Support services	Prime contracts and subcontracts	N/A	No	N/A
F-9	07/01/14 - 06/30/19	Goods and supplies	Prime contracts and subcontracts	N/A	No	N/A
F-10	07/01/14 - 06/30/19	All industries	Prime contracts	N/A	No	N/A
F-11	07/01/14 - 06/30/19	All industries	Subcontracts	N/A	No	N/A
F-12	07/01/14 - 06/30/19	All industries	Prime contracts	Large	No	N/A
F-13	07/01/14 - 06/30/19	All industries	Prime contracts	Small	No	N/A
F-14	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	N/A	Yes	N/A
F-15	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	N/A	No	BRA
F-16	07/01/14 - 06/30/19	All industries	Prime contracts and subcontracts	N/A	No	EDIC

Figure F-2.

Time period: 07/01/2014 - 06/30/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: Local

Agency: Boston Planning & Development Agency

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	636	\$52,083	\$52,083				
(2) Minority and woman-owned	113	\$12,191	\$12,191	23.4	17.4	6.0	134.7
(3) Non-Hispanic white woman-owned	73	\$11,388	\$11,388	21.9	9.9	12.0	200+
(4) Minority-owned	40	\$803	\$803	1.5	7.5	-6.0	20.5
(5) Asian American-owned	8	\$129	\$164	0.3	1.2	-0.9	25.7
(6) Black American-owned	19	\$287	\$367	0.7	3.3	-2.6	21.0
(7) Hispanic American-owned	11	\$213	\$272	0.5	2.8	-2.3	18.4
(8) Native American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(9) Unknown minority-owned	2	\$173					
(10) Minority and woman-owned (SLBE)	94	\$11,793	\$11,793	22.6			
(11) Non-Hispanic white woman-owned (SLBE)	59	\$11,050	\$11,050	21.2			
(12) Minority-owned (SLBE)	35	\$743	\$743	1.4			
(13) Asian American-owned (SLBE)	8	\$129	\$166	0.3			
(14) Black American-owned (SLBE)	19	\$287	\$372	0.7			
(15) Hispanic American-owned (SLBE)	7	\$158	\$205	0.4			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	1	\$169					

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 SLBEs were allocated to minority and SLBE 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: 07/01/2014 - 06/30/2016

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: Local

Agency: Boston Planning & Development Agency

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	201	\$20,112	\$20,112				
(2) Minority and woman-owned	31	\$5,912	\$5,912	29.4	14.9	14.5	197.7
(3) Non-Hispanic white woman-owned	12	\$5,644	\$5,644	28.1	8.4	19.6	200+
(4) Minority-owned	19	\$268	\$268	1.3	6.5	-5.1	20.7
(5) Asian American-owned	4	\$71	\$71	0.4	1.2	-0.8	29.8
(6) Black American-owned	8	\$15	\$15	0.1	2.2	-2.2	3.2
(7) Hispanic American-owned	7	\$183	\$183	0.9	3.0	-2.1	30.6
(8) Native American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(9) Unknown minority-owned	0	\$0					
(10) Minority and woman-owned (SLBE)	27	\$5,881	\$5,881	29.2			
(11) Non-Hispanic white woman-owned (SLBE)	11	\$5,643	\$5,643	28.1			
(12) Minority-owned (SLBE)	16	\$238	\$238	1.2			
(13) Asian American-owned (SLBE)	4	\$71	\$71	0.4			
(14) Black American-owned (SLBE)	8	\$15	\$15	0.1			
(15) Hispanic American-owned (SLBE)	4	\$153	\$153	0.8			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	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 SLBEs were allocated to minority and SLBE 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: 07/01/2016 - 06/30/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: Local

Agency: Boston Planning & Development Agency

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	435	\$31,971	\$31,971				
(2) Minority and woman-owned	82	\$6,279	\$6,279	19.6	19.0	0.7	103.6
(3) Non-Hispanic white woman-owned	61	\$5,744	\$5,744	18.0	10.8	7.2	166.9
(4) Minority-owned	21	\$534	\$534	1.7	8.2	-6.5	20.4
(5) Asian American-owned	4	\$58	\$85	0.3	1.3	-1.0	21.3
(6) Black American-owned	11	\$273	\$404	1.3	4.1	-2.8	31.2
(7) Hispanic American-owned	4	\$30	\$45	0.1	2.7	-2.6	5.1
(8) Native American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(9) Unknown minority-owned	2	\$173					
(10) Minority and woman-owned (SLBE)	67	\$5,912	\$5,912	18.5			
(11) Non-Hispanic white woman-owned (SLBE)	48	\$5,407	\$5,407	16.9			
(12) Minority-owned (SLBE)	19	\$505	\$505	1.6			
(13) Asian American-owned (SLBE)	4	\$58	\$87	0.3			
(14) Black American-owned (SLBE)	11	\$273	\$410	1.3			
(15) Hispanic American-owned (SLBE)	3	\$5	\$8	0.0			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	1	\$169					

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 SLBEs were allocated to minority and SLBE 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: 07/01/2014 - 06/30/2019

Contract area: Construction

Contract role: Prime contracts and subcontracts

Funding source: Local

Agency: Boston Planning & Development Agency

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	275	\$28,465	\$28,465				
(2) Minority and woman-owned	37	\$6,114	\$6,114	21.5	19.6	1.9	109.8
(3) Non-Hispanic white woman-owned	26	\$6,036	\$6,036	21.2	11.0	10.2	192.4
(4) Minority-owned	11	\$78	\$78	0.3	8.5	-8.3	3.2
(5) Asian American-owned	0	\$0	\$0	0.0	1.1	-1.1	0.0
(6) Black American-owned	6	\$18	\$19	0.1	2.8	-2.8	2.4
(7) Hispanic American-owned	4	\$55	\$59	0.2	4.4	-4.2	4.6
(8) Native American-owned	0	\$0	\$0	0.0	0.2	-0.2	0.0
(9) Unknown minority-owned	1	\$5					
(10) Minority and woman-owned (SLBE)	28	\$5,781	\$5,781	20.3			
(11) Non-Hispanic white woman-owned (SLBE)	22	\$5,764	\$5,764	20.2			
(12) Minority-owned (SLBE)	6	\$18	\$18	0.1			
(13) Asian American-owned (SLBE)	0	\$0	\$0	0.0			
(14) Black American-owned (SLBE)	6	\$18	\$18	0.1			
(15) Hispanic American-owned (SLBE)	0	\$0	\$0	0.0			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	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 SLBEs were allocated to minority and SLBE 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: 07/01/2014 - 06/30/2019

Contract area: Construction design

Contract role: Prime contracts and subcontracts

Funding source: Local

Agency: Boston Planning & Development Agency

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	73	\$10,686	\$10,686				
(2) Minority and woman-owned	8	\$540	\$540	5.1	19.2	-14.2	26.2
(3) Non-Hispanic white woman-owned	0	\$0	\$0	0.0	9.7	-9.7	0.0
(4) Minority-owned	8	\$540	\$540	5.1	9.5	-4.5	53.1
(5) Asian American-owned	0	\$0	\$0	0.0	2.2	-2.2	0.0
(6) Black American-owned	3	\$226	\$329	3.1	7.1	-4.0	43.5
(7) Hispanic American-owned	4	\$145	\$211	2.0	0.3	1.7	200+
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Unknown minority-owned	1	\$169					
(10) Minority and woman-owned (SLBE)	8	\$540	\$540	5.1			
(11) Non-Hispanic white woman-owned (SLBE)	0	\$0	\$0	0.0			
(12) Minority-owned (SLBE)	8	\$540	\$540	5.1			
(13) Asian American-owned (SLBE)	0	\$0	\$0	0.0			
(14) Black American-owned (SLBE)	3	\$226	\$329	3.1			
(15) Hispanic American-owned (SLBE)	4	\$145	\$211	2.0			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	1	\$169					

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 SLBEs were allocated to minority and SLBE 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: 07/01/2014 - 06/30/2019

Contract area: Other professional services

Contract role: Prime contracts and subcontracts

Funding source: Local

Agency: Boston Planning & Development Agency

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	52	\$4,668	\$4,668				
(2) Minority and woman-owned	25	\$178	\$178	3.8	15.2	-11.4	25.0
(3) Non-Hispanic white woman-owned	17	\$49	\$49	1.0	13.3	-12.2	7.9
(4) Minority-owned	8	\$129	\$129	2.8	2.0	0.8	140.7
(5) Asian American-owned	8	\$129	\$129	2.8	0.5	2.2	200+
(6) Black American-owned	0	\$0	\$0	0.0	1.1	-1.1	0.0
(7) Hispanic American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(8) Native American-owned	0	\$0	\$0	0.0	0.2	-0.2	0.0
(9) Unknown minority-owned	0	\$0					
(10) Minority and woman-owned (SLBE)	22	\$174	\$174	3.7			
(11) Non-Hispanic white woman-owned (SLBE)	14	\$45	\$45	1.0			
(12) Minority-owned (SLBE)	8	\$129	\$129	2.8			
(13) Asian American-owned (SLBE)	8	\$129	\$129	2.8			
(14) Black American-owned (SLBE)	0	\$0	\$0	0.0			
(15) Hispanic American-owned (SLBE)	0	\$0	\$0	0.0			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	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 SLBEs were allocated to minority and SLBE 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: 07/01/2014 - 06/30/2019

Contract area: Support services

Contract role: Prime contracts and subcontracts

Funding source: Local

Agency: Boston Planning & Development Agency

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	139	\$7,548	\$7,548				
(2) Minority and woman-owned	37	\$5,298	\$5,298	70.2	8.4	61.7	200+
(3) Non-Hispanic white woman-owned	24	\$5,241	\$5,241	69.4	3.8	65.6	200+
(4) Minority-owned	13	\$57	\$57	0.8	4.6	-3.9	16.3
(5) Asian American-owned	0	\$0	\$0	0.0	0.8	-0.8	0.0
(6) Black American-owned	10	\$44	\$44	0.6	1.5	-1.0	37.7
(7) Hispanic American-owned	3	\$13	\$13	0.2	2.3	-2.2	7.4
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Unknown minority-owned	0	\$0					
(10) Minority and woman-owned (SLBE)	35	\$5,297	\$5,297	70.2			
(11) Non-Hispanic white woman-owned (SLBE)	22	\$5,240	\$5,240	69.4			
(12) Minority-owned (SLBE)	13	\$57	\$57	0.8			
(13) Asian American-owned (SLBE)	0	\$0	\$0	0.0			
(14) Black American-owned (SLBE)	10	\$44	\$44	0.6			
(15) Hispanic American-owned (SLBE)	3	\$13	\$13	0.2			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	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 SLBEs were allocated to minority and SLBE 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: 07/01/2014 - 06/30/2019

Contract area: Goods and supplies

Contract role: Prime contracts and subcontracts

Funding source: Local

Agency: Boston Planning & Development Agency

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	97	\$715	\$715				
(2) Minority and woman-owned	6	\$62	\$62	8.7	10.9	-2.3	79.4
(3) Non-Hispanic white woman-owned	6	\$62	\$62	8.7	6.9	1.8	126.2
(4) Minority-owned	0	\$0	\$0	0.0	4.1	-4.1	0.0
(5) Asian American-owned	0	\$0	\$0	0.0	0.4	-0.4	0.0
(6) Black American-owned	0	\$0	\$0	0.0	2.5	-2.5	0.0
(7) Hispanic American-owned	0	\$0	\$0	0.0	1.1	-1.1	0.0
(8) Native American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(9) Unknown minority-owned	0	\$0					
(10) Minority and woman-owned (SLBE)	1	\$1	\$1	0.2			
(11) Non-Hispanic white woman-owned (SLBE)	1	\$1	\$1	0.2			
(12) Minority-owned (SLBE)	0	\$0	\$0	0.0			
(13) Asian American-owned (SLBE)	0	\$0	\$0	0.0			
(14) Black American-owned (SLBE)	0	\$0	\$0	0.0			
(15) Hispanic American-owned (SLBE)	0	\$0	\$0	0.0			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	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 SLBEs were allocated to minority and SLBE 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: 07/01/2014 - 06/30/2019

Contract area: All industries

Contract role: Prime contracts

Funding source: Local

Agency: Boston Planning & Development Agency

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	600	\$49,921	\$49,921				
(2) Minority and woman-owned	110	\$11,880	\$11,880	23.8	17.2	6.6	138.2
(3) Non-Hispanic white woman-owned	71	\$11,082	\$11,082	22.2	10.0	12.2	200+
(4) Minority-owned	39	\$797	\$797	1.6	7.2	-5.6	22.2
(5) Asian American-owned	8	\$129	\$164	0.3	1.2	-0.8	28.5
(6) Black American-owned	18	\$282	\$361	0.7	3.3	-2.5	22.2
(7) Hispanic American-owned	11	\$213	\$272	0.5	2.7	-2.1	20.3
(8) Native American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(9) Unknown minority-owned	2	\$173					
(10) Minority and woman-owned (SLBE)	91	\$11,482	\$11,482	23.0			
(11) Non-Hispanic white woman-owned (SLBE)	57	\$10,744	\$10,744	21.5			
(12) Minority-owned (SLBE)	34	\$738	\$738	1.5			
(13) Asian American-owned (SLBE)	8	\$129	\$167	0.3			
(14) Black American-owned (SLBE)	18	\$282	\$366	0.7			
(15) Hispanic American-owned (SLBE)	7	\$158	\$205	0.4			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	1	\$169					

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 SLBEs were allocated to minority and SLBE 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: 07/01/2014 - 06/30/2019

Contract area: All industries

Contract role: Subcontracts

Funding source: Local

Agency: Boston Planning & Development Agency

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	36	\$2,162	\$2,162				
(2) Minority and woman-owned	3	\$311	\$311	14.4	21.0	-6.6	68.4
(3) Non-Hispanic white woman-owned	2	\$306	\$306	14.2	6.3	7.8	200+
(4) Minority-owned	1	\$5	\$5	0.2	14.7	-14.5	1.6
(5) Asian American-owned	0	\$0	\$0	0.0	2.9	-2.9	0.0
(6) Black American-owned	1	\$5	\$5	0.2	5.6	-5.4	4.3
(7) Hispanic American-owned	0	\$0	\$0	0.0	6.1	-6.1	0.0
(8) Native American-owned	0	\$0	\$0	0.0	0.2	-0.2	0.0
(9) Unknown minority-owned	0	\$0					
(10) Minority and woman-owned (SLBE)	3	\$311	\$311	14.4			
(11) Non-Hispanic white woman-owned (SLBE)	2	\$306	\$306	14.2			
(12) Minority-owned (SLBE)	1	\$5	\$5	0.2			
(13) Asian American-owned (SLBE)	0	\$0	\$0	0.0			
(14) Black American-owned (SLBE)	1	\$5	\$5	0.2			
(15) Hispanic American-owned (SLBE)	0	\$0	\$0	0.0			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	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 SLBEs were allocated to minority and SLBE 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: 07/01/2014 - 06/30/2019

Contract area: All industries

Contract role: Prime contracts

Funding source: Local

Agency: Boston Planning & Development Agency

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	12	\$16,346	\$16,346				
(2) Minority and woman-owned	3	\$7,592	\$7,592	46.4	6.0	40.5	200+
(3) Non-Hispanic white woman-owned	3	\$7,592	\$7,592	46.4	3.5	43.0	200+
(4) Minority-owned	0	\$0	\$0	0.0	2.5	-2.5	0.0
(5) Asian American-owned	0	\$0	\$0	0.0	0.6	-0.6	0.0
(6) Black American-owned	0	\$0	\$0	0.0	1.7	-1.7	0.0
(7) Hispanic American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(8) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(9) Unknown minority-owned	0	\$0					
(10) Minority and woman-owned (SLBE)	3	\$7,592	\$7,592	46.4			
(11) Non-Hispanic white woman-owned (SLBE)	3	\$7,592	\$7,592	46.4			
(12) Minority-owned (SLBE)	0	\$0	\$0	0.0			
(13) Asian American-owned (SLBE)	0	\$0	\$0	0.0			
(14) Black American-owned (SLBE)	0	\$0	\$0	0.0			
(15) Hispanic American-owned (SLBE)	0	\$0	\$0	0.0			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	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 SLBEs were allocated to minority and SLBE 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: 07/01/2014 - 06/30/2019

Contract area: All industries

Contract role: Prime contracts

Funding source: Local

Agency: Boston Planning & Development Agency

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	588	\$33,575	\$33,575				
(2) Minority and woman-owned	107	\$4,288	\$4,288	12.8	22.7	-9.9	56.3
(3) Non-Hispanic white woman-owned	68	\$3,490	\$3,490	10.4	13.2	-2.8	78.8
(4) Minority-owned	39	\$797	\$797	2.4	9.5	-7.1	25.0
(5) Asian American-owned	8	\$129	\$164	0.5	1.4	-0.9	34.5
(6) Black American-owned	18	\$282	\$361	1.1	4.0	-2.9	26.9
(7) Hispanic American-owned	11	\$213	\$272	0.8	3.9	-3.1	20.6
(8) Native American-owned	0	\$0	\$0	0.0	0.2	-0.2	0.0
(9) Unknown minority-owned	2	\$173					
(10) Minority and woman-owned (SLBE)	88	\$3,890	\$3,890	11.6			
(11) Non-Hispanic white woman-owned (SLBE)	54	\$3,152	\$3,152	9.4			
(12) Minority-owned (SLBE)	34	\$738	\$738	2.2			
(13) Asian American-owned (SLBE)	8	\$129	\$167	0.5			
(14) Black American-owned (SLBE)	18	\$282	\$366	1.1			
(15) Hispanic American-owned (SLBE)	7	\$158	\$205	0.6			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	1	\$169					

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 SLBEs were allocated to minority and SLBE 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: 07/01/2014 - 06/30/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: State contracts

Agency: Boston Planning & Development Agency

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	155	\$556	\$556				
(2) Minority and woman-owned	33	\$106	\$106	19.1	41.6	-22.6	45.8
(3) Non-Hispanic white woman-owned	0	\$0	\$0	0.0	21.3	-21.3	0.0
(4) Minority-owned	33	\$106	\$106	19.1	20.3	-1.3	93.8
(5) Asian American-owned	19	\$57	\$57	10.2	0.0	10.2	200+
(6) Black American-owned	14	\$49	\$49	8.8	7.8	1.0	113.3
(7) Hispanic American-owned	0	\$0	\$0	0.0	11.5	-11.5	0.0
(8) Native American-owned	0	\$0	\$0	0.0	1.0	-1.0	0.0
(9) Unknown minority-owned	0	\$0					
(10) Minority and woman-owned (SLBE)	33	\$106	\$106	19.1			
(11) Non-Hispanic white woman-owned (SLBE)	0	\$0	\$0	0.0			
(12) Minority-owned (SLBE)	33	\$106	\$106	19.1			
(13) Asian American-owned (SLBE)	19	\$57	\$57	10.2			
(14) Black American-owned (SLBE)	14	\$49	\$49	8.8			
(15) Hispanic American-owned (SLBE)	0	\$0	\$0	0.0			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	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 SLBEs were allocated to minority and SLBE 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: 07/01/2014 - 06/30/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: Local

Agency: Boston Redevelopment Authority

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	265	\$29,772	\$29,772				
(2) Minority and woman-owned	47	\$1,105	\$1,105	3.7	22.4	-18.7	16.6
(3) Non-Hispanic white woman-owned	38	\$826	\$826	2.8	11.8	-9.0	23.5
(4) Minority-owned	9	\$279	\$279	0.9	10.6	-9.6	8.8
(5) Asian American-owned	3	\$42	\$112	0.4	1.6	-1.2	23.7
(6) Black American-owned	3	\$38	\$101	0.3	5.0	-4.7	6.7
(7) Hispanic American-owned	1	\$25	\$66	0.2	3.9	-3.7	5.7
(8) Native American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(9) Unknown minority-owned	2	\$173					
(10) Minority and woman-owned (SLBE)	44	\$984	\$984	3.3			
(11) Non-Hispanic white woman-owned (SLBE)	37	\$735	\$735	2.5			
(12) Minority-owned (SLBE)	7	\$249	\$249	0.8			
(13) Asian American-owned (SLBE)	3	\$42	\$131	0.4			
(14) Black American-owned (SLBE)	3	\$38	\$118	0.4			
(15) Hispanic American-owned (SLBE)	0	\$0	\$0	0.0			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	1	\$169					

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 SLBEs were allocated to minority and SLBE 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: 07/01/2014 - 06/30/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: Local

Agency: Economic Development and Industrial Corporation

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	354	\$20,870	\$20,870				
(2) Minority and woman-owned	62	\$11,066	\$11,066	53.0	10.9	42.1	200+
(3) Non-Hispanic white woman-owned	34	\$10,562	\$10,562	50.6	7.4	43.2	200+
(4) Minority-owned	28	\$505	\$505	2.4	3.5	-1.0	69.8
(5) Asian American-owned	4	\$69	\$69	0.3	0.8	-0.4	42.4
(6) Black American-owned	14	\$248	\$248	1.2	1.0	0.1	114.1
(7) Hispanic American-owned	10	\$188	\$188	0.9	1.5	-0.6	60.8
(8) Native American-owned	0	\$0	\$0	0.0	0.2	-0.2	0.0
(9) Unknown minority-owned	0	\$0					
(10) Minority and woman-owned (SLBE)	46	\$10,790	\$10,790	51.7			
(11) Non-Hispanic white woman-owned (SLBE)	21	\$10,315	\$10,315	49.4			
(12) Minority-owned (SLBE)	25	\$475	\$475	2.3			
(13) Asian American-owned (SLBE)	4	\$69	\$69	0.3			
(14) Black American-owned (SLBE)	14	\$248	\$248	1.2			
(15) Hispanic American-owned (SLBE)	7	\$158	\$158	0.8			
(16) Native American-owned (SLBE)	0	\$0	\$0	0.0			
(17) Unknown minority-owned (SLBE)	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 SLBEs were allocated to minority and SLBE 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.