2015-16 Ohio Public Authorities Disparity Study

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CHAPTER ES.
Executive Summary

The federal government requires transportation agencies to implement the Federal Disadvantaged Business Enterprise (DBE) Program if they receive U.S. Department of Transportation (USDOT) funds. The Federal DBE Program is designed to address potential discrimination against DBEs in the award and administration of USDOT-funded contracts. The Ohio Department of Transportation (ODOT) receives USDOT funds through the Federal Highway Administration (FHWA), and thus, must implement the Federal DBE Program. ODOT’s implementation of the Federal DBE Program is guided by regulations in 49 Code of Federal Regulations (CFR) Part 26, USDOT guidance, and relevant court decisions.

As part of its implementation of the Federal DBE Program, ODOT is required to:

- Set an overall goal for DBE participation in its FHWA-funded contracts;\(^1\) and
- Project the portion of its overall DBE goal to be met through race- and gender-neutral means, and if necessary, project the portion to be met through race- and gender-conscious means, such as contract-specific DBE goals.

ODOT must then submit its proposed implementation of the Federal DBE Program to USDOT for review and approval.

ODOT retained BBC Research & Consulting (BBC) and Exstare Federal Services Group (Exstare) (collectively referred to as the study team) to conduct a disparity study to help inform ODOT’s implementation of the Federal DBE Program. ODOT is also required to implement the State of Ohio’s Encouraging Diversity, Growth, and Equity (EDGE) Program. The EDGE Program is designed to encourage the participation of small, disadvantaged businesses in state contracting through the use of contract goals, mentoring programs, and other efforts. The 2015-16 ODOT Disparity Study can also be used to refine ODOT’s implementation of the EDGE program, as needed.

ODOT uses various measures to encourage the participation of minority- and woman-owned businesses, including race- and gender-neutral measures—which are designed to encourage the participation of all businesses—and race- and gender-conscious measures—which are designed to specifically encourage the participation of minority- and woman-owned businesses (e.g., using DBE contract goals).

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

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\(^1\) Although USDOT requires an agency to set its goal every three years, it is an annual goal. That is, the agency must monitor DBE participation in its USDOT-funded contracts every federal fiscal year (FFY). If DBE participation for a particular FFY is less than the overall DBE goal for that year, then the agency must analyze the reasons for the difference, and establish specific measures to address the difference and enable the agency to meet the goal in the next FFY.
The percentage of contracting dollars (including subcontract dollars) that minority- and woman-owned businesses received on transportation-related construction and professional services contracts that ODOT awarded between January 1, 2010 and December 31, 2014 (i.e., utilization); and

The percentage of transportation-related construction and professional services contracting dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of ODOT prime contracts and subcontracts (i.e., availability).

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

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

ODOT could use information from the study to help refine its implementation of the Federal DBE Program and the EDGE Program including setting an overall goal for the participation of DBEs and determining appropriate program measures to use to encourage the participation of minority- and woman-owned businesses.

The study team summarizes key information from the 2015-16 ODOT Disparity Study in five parts:

A. Local marketplace conditions;
B. Utilization and disparity analysis results;
C. Overall DBE goal;
D. Whether the DBE goal can be achieved through neutral means; and
E. Measures to implement the program.

A. Local Marketplace Conditions

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

- **Human capital** to assess whether minorities and women face any barriers related to education, employment, and gaining managerial experience in relevant industries;

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2 The study team considered businesses as minority- or woman-owned regardless of whether they were certified as a DBE through the Ohio Unified Certification program or as an EDGE business through the State of Ohio.
- **Financial capital** to assess whether minorities and women face any barriers related to wages, homeownership, personal wealth, and access to financing;

- **Business ownership** to assess whether minorities and women own businesses at rates that are comparable to that of non-Hispanic white men; and

- **Success of businesses** to assess whether minority- and woman-owned businesses have outcomes that are similar to those of businesses owned by non-Hispanic white men.

The study team’s analyses of marketplace conditions indicate that minorities, women, and minority- and woman-owned businesses face substantial barriers in Ohio. Existing research, as well as analyses that the study team conducted, indicate that race- and gender-based disparities exist in terms of acquiring human capital, accruing financial capital, owning businesses, and operating successful businesses. Participants in in-depth interviews, public hearings, and focus groups also identified a number of challenges related to forming or growing a business in Ohio. Many participants reported that access to capital and bonding requirements were the most significant challenge to business success in Ohio, and several participants reported experiencing discriminatory practices in the Ohio contracting community.

Barriers in the marketplace likely have important effects on the ability of minorities and women to start businesses in the Ohio industries relevant to the disparity study—construction and professional services—and operate those businesses successfully. Any difficulties that minorities and women face in starting and operating businesses may reduce their availability for ODOT work and may also reduce the degree to which they are able to successfully compete for ODOT contracts. In addition, the existence of barriers in the Ohio marketplace indicates that government agencies in the state are passively participating in race- and gender-based 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.

### B. Utilization and Disparity Analysis Results

Utilization and disparity analysis results, along with other pertinent information, are relevant to ODOT’s determination of whether it is appropriate to use race- or gender-conscious program measures to meet ODOT’s overall DBE goal. Courts have considered the existence of substantial disparities between utilization and availability for particular groups as inferences of discrimination in the local marketplace against those groups. In addition, that information is useful for ODOT to examine the effectiveness of the measures that it is currently using to encourage the participation of minority- and woman-owned businesses.

**Utilization results.** The study team measured the participation of minority- and woman-owned businesses in terms of *utilization*—the percentage of prime contract and subcontract dollars that minority- and woman-owned businesses received on ODOT prime contracts and subcontracts during the study period. Figure ES-1 presents the overall percentage of contracting

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3 According to some courts, entities that use race- or gender-conscious measures must limit the use of those measures to groups that have actually suffered discrimination or its effects (for details, see Chapter 2 and Appendix B).
dollars that minority- and woman-owned businesses received on transportation-related
construction and professional services contracts that ODOT awarded during the study period.
The darker portion of the bar represents the percentage of contracting dollars that certified
DBEs received during the study period. As shown in Figure ES-1, overall, minority- and woman-
owned businesses received 14.2 percent of the relevant contracting dollars that ODOT awarded
during the study period. The darker portion of the bar shows that about half of those contracting
dollars—7 percent—went to certified DBEs. The study team also examined the participation of
EDGE-certified businesses in ODOT contracting (6%).

Figure ES-1.
Participation of minority- and
woman-owned businesses

Notes:
The study team analyzed 21,799 prime contracts and
subcontracts.
The darker portion of the bar represents participation of
certified DBEs.
For more detail, see Figure F-2 in Appendix F.

Source:
ODOT contracting data.

Disparity analysis results. Although information about the participation of minority- and
woman-owned businesses in ODOT contracts is instructive on its own, it is even more instructive
when it is compared with the level of participation that might be expected based on the
availability of minority- and woman-owned businesses for ODOT work. As part of the disparity
analysis, the study team compared the participation of minority- and woman-owned businesses
in ODOT 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. The study team
expressed both participation and availability as percentages of the total dollars that a particular
group received for a particular set of contracts. The study team then calculated a disparity index
by dividing participation by availability and multiplying by 100.4 A disparity index of 100
indicates an exact match between participation and availability for a particular group for a
specific set of contracts (often referred to as parity). A disparity index of less than 100 may
indicate a disparity between participation and availability, and disparities of less than 80 are
described in this report as substantial.5 Disparity analysis results are described below.

4 For example, if actual participation of white woman-owned businesses on a set of contracts was 2 percent and the availability
of white woman-owned businesses for those contracts was 10 percent, then the disparity index would be 2 percent divided by
10 percent, which would then be multiplied by 100 to equal 20.

5 Several courts deem a disparity index below 80 as being “substantial” and have accepted it as evidence of adverse conditions
for minority- and woman-owned businesses. For example, see Rothe Development Corp v. U.S. Dept of Defense, 545 F.3d 1023,
1041; Eng'g Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d at 914, 923 (11th Circuit 1997);
Concrete Works of Cobo, Inc. v. City and County of Denver, 36 F.3d 1513, 1524 (10th Cir. 1994). See Appendix B for additional
discussion of those and other cases.
**All contracts.** Figure ES-2 presents disparity analysis results for all transportation-related construction and professional services contracts that ODOT awarded during the study period. The line drawn in the center of the graph shows a disparity index of 100, which indicates parity between participation and availability. For reference, a line is also drawn at a disparity index level of 80, because some courts use 80 as a threshold for what indicates a substantial disparity.

![Disparity indices by group](image)

As shown in Figure ES-2, overall, the participation of minority- and woman-owned businesses in contracts that ODOT awarded during the study period was substantially lower than what one might expect based on the availability of those businesses for that work. The disparity index of 79 indicates that minority- and woman-owned businesses considered together received approximately $0.79 for every dollar that they might be expected to receive based on their availability for the prime contracts and subcontracts that ODOT awarded during the study period.

- Black American-owned businesses, Asian Pacific American-owned businesses, and Hispanic American-owned businesses exhibited substantial disparities.
- Subcontinent Asian American-owned businesses, Native American-owned businesses, and white-woman owned businesses did not exhibit disparities.

**Specific sets of contracts.** The study team also conducted disparity analyses on select sets of ODOT contracts, including analyses of construction and professional services contracts and analyses of contracts with FHWA funding. Those disparity analysis results were very similar to the results for all contracts shown in Figure ES-2. Additional analyses are presented in Chapter 7, Chapter 8, and Appendix F.

**C. Overall DBE Goal**

According to 49 CFR Part 26, an agency is required to develop and submit an overall goal for DBE participation on its FHWA-funded contracts. The goal must be based on demonstrable evidence of the availability of DBEs relative to the availability of all businesses to participate on the agency’s USDOT-funded contracts. The agency must try to meet the goal using race- and gender-
neutral means and, if necessary, race- and gender-conscious measures (or a combination of both).\textsuperscript{6}

As specified in the Final Rule effective February 28, 2011, an agency is required to submit its overall DBE goal every three years. However, the overall DBE goal is an annual goal in that an agency must monitor DBE participation in its FHWA-funded contracts every FFY. If DBE participation for a particular FFY is less than the overall DBE goal for that year, then the agency must analyze the reasons for the difference and establish specific measures to address the difference and enable the agency to meet the goal in the next FFY.

ODOT must prepare and submit an overall DBE goal that is supported by information about the steps that it used to develop the goal. ODOT is required to develop a new goal for FFYs 2017 through 2019. The disparity study provides information that ODOT might consider as part of setting its new overall DBE goal.

Federal regulations require ODOT to establish its overall DBE goal using a two-step process:

1. Establish a base figure; and
2. Consider a step-2 adjustment.

**Establish a base figure.** Establishing a base figure is the first step in calculating an overall DBE goal for ODOT’s FHWA-funded transportation contracts. The study team calculated the base figure by measuring the availability of potential DBEs—that is, minority- and women-owned businesses that are DBE-certified or appear that they could be DBE-certified based on their ownership and annual revenue limits described in 13 CFR Part 121 and 49 CFR Part 26. The study team examined the availability of potential DBEs for FHWA-funded prime contracts and subcontracts that ODOT awarded during the study period. The study team’s approach to calculating ODOT’s base figure is consistent with relevant court decisions, federal regulations, and USDOT guidance.

The study team’s analysis indicates that the availability of potential DBEs for ODOT’s FHWA-funded transportation contracts is 15.6 percent. ODOT might consider 15.6 percent as the base figure for its overall goal for DBE participation.\textsuperscript{7}

**Considering a step-2 adjustment.** The Federal DBE Program requires that an agency consider a step-2 adjustment to its base figure as part of determining its overall DBE goal. Factors that an agency should assess in determining whether to make a step-2 adjustment include:

- Current capacity of DBEs to perform agency work, as measured by the volume of work DBEs have performed in recent years;
- Information related to employment, self-employment, education, training, and unions;

\textsuperscript{6} 49 CFR Sections 26.45, 26.51.

\textsuperscript{7} ODOT should consider whether the types, sizes, and locations of FHWA-funded contracts that the agency anticipates awarding in the time period that the goal will cover will be similar to the types of FHWA-funded contracts that the agency awarded during the study period.
- Any disparities in the ability of DBEs to get financing, bonding, and insurance; and
- Other relevant data.\(^8\)

Taken together, the quantitative and qualitative evidence that the study team collected as part of the disparity study may support a step-2 adjustment to the base figure as ODOT considers setting its overall DBE goal.

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

- ODOT might adjust its base figure upward to account for barriers that women face in owning businesses in the local contracting industry. Such an adjustment would correspond to a “determination of the level of DBE participation you would expect absent the effects of discrimination.”\(^9\) Based on the business ownership analysis, ODOT might consider adjusting the base figure up to 20.4 percent.
- Evidence of barriers that affect minorities, women, and minority- and woman-owned businesses in obtaining financing, bonding, and insurance, and evidence that certain groups of minority- and woman-owned businesses are less successful than comparable businesses owned by non-Hispanic white men also supports an upward adjustment to ODOT’s base figure.

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

- ODOT must consider the volume of work DBEs have performed in recent years when determining whether to make a step-2 adjustment to its base figure. ODOT’s utilization reports for FFYs 2010 through 2014 indicated median annual DBE participation of 9.8 percent for those years, which is lower than the potential 15.6 percent base figure. USDOT’s “Tips for Goal-Setting” suggests that an agency can make a step-2 adjustment by averaging the base figure with past median DBE participation, yielding a base figure of 12.7 percent.
- The study team’s analysis of DBE participation on ODOT’s FHWA-funded contracts also indicates DBE participation (7.0%) that is lower than the base figure. If ODOT were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of the 15.6 percent base figure and the 7.0 percent DBE participation, yielding a potential overall DBE goal of 11.3 percent.

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

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\(^8\) 49 CFR Section 26.45
\(^9\) 49 CFR Section 26.45 (b).
D. Whether the DBE Goal Can be Achieved through Neutral Means

The Federal DBE Program requires ODOT to assess the percentage of its overall DBE goal that can be achieved through race- and gender-neutral measures, and if necessary, the percentage that can be achieved through race- and gender-conscious measures. USDOT offers guidance concerning how transportation agencies should project the portions of their overall DBE goals that will be met through race- and gender-neutral and race- and gender-conscious measures. USDOT suggests examining four general questions:

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

1. Is there evidence of discrimination within the local transportation contracting marketplace for any racial/ethnic or gender groups? As discussed in detail in Chapter 3, the study team examined conditions in the Ohio marketplace, including:

- Entry and advancement;
- Business ownership;
- Access to capital, bonding, and insurance; and
- Success of businesses.

There was quantitative evidence of disparities for minority- and woman-owned businesses overall, and for specific groups, concerning the above issues. As detailed in Chapter 7, minority- and woman- owned businesses exhibited a substantial disparity when considered together for ODOT contracts (disparity index of 79). Many courts have deemed disparity indices below 80 as being "substantial" and have considered the existence of substantial disparities for particular groups as inferences of discrimination in the local marketplace against those groups.

Qualitative information also indicated some evidence of discrimination affecting the local marketplace. However, some minority and woman business owners that the study team interviewed as part of the disparity study did not think their businesses had been affected by any race- or gender-based discrimination.

2. What has been the agency’s past experience in meeting its overall DBE goal? Figure ES-3 presents the participation of certified DBEs on ODOT transportation contracts in recent years, as reported by ODOT. As shown in Figure ES-5, ODOT has exceeded its DBE goals in recent years based on information provided by ODOT.
3. What has DBE participation been when the agency did not use race- or gender-conscious measures? ODOT applied race- and gender-conscious DBE contract goals to most FHWA-funded transportation contracts and EDGE goals to many state-funded contracts during the study period. However, during the study period, the agency did not use race- or gender-conscious DBE or EDGE goals on approximately $1.5 billion of relevant contracting. The study team examined whether DBE participation differed in ODOT prime and subcontracts that had DBE or EDGE goals applied to them and those that did not. Figure ES-4 shows that DBE participation in those contracts where DBE or EDGE goals were not applied (6.3%) was lower than in those contracts where DBE goals were applied (7.2%).

Figure ES-4.
Certified DBE participation in contracts that did not include race- or gender-conscious measures and contracts with DBE goals

Note:
The study team analyzed 4,803 prime contracts and subcontracts with no contract goals and 14,799 contracts and subcontracts with DBE goals.
For more detail, see Figure F-17 and F-18 Appendix F.

Source:
BBC Research & Consulting from ODOT contracting data.

The study team also conducted a disparity study for the Ohio Turnpike and Infrastructure Commission (the Commission) that used the same study period as ODOT’s study and a relevant geographic market area of Northern Ohio. The Commission awards transportation-related construction and professional services contracts similar in scope to those that ODOT awards and does not apply race- and gender-conscious goals to those contracts. DBE participation in those contracts was 2.8 percent. ODOT should note that the results of that study are tailored specifically to the Commission’s contracts and policies. Those contracts and policies may differ from those of ODOT.

4. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year? When ODOT is considering the extent to which it could meet its overall DBE goal through race- and gender-neutral measures, it will need to review race- and gender-neutral measures that are already in place as well as neutral measures that it has planned or that could be considered for future implementation. The
study team reviewed many of ODOT’s current and planned measures as well as those of other organizations in Ohio. There were also several recommendations that business owners and managers made related to those measures as part of in-depth anecdotal interviews, public hearings, and focus groups (for details, see Appendix E).

**E. Measures to Implement the Program**

Chapter 11 reviews USDOT requirements for implementation of the Federal DBE Program and identifies potential areas for further ODOT refinement. Three key potential areas of refinement are discussed below.

**Encourage firms to become DBE-certified.** Participation of certified DBEs would be higher if more minority- and woman-owned businesses that participate on, or are potentially available for, ODOT prime contracts and subcontracts would become DBE certified. For example, only 25 percent of the minority- and woman-owned businesses that the study team included in the availability database are certified as DBEs (as of first quarter 2015). Many businesses participating in in-depth interviews, public hearings, or focus groups commented on the DBE certification process. Although some business owners gave favorable comments about the DBE certification process, several business owners were highly critical about the difficulties and time requirements associated with certification. Some interviewees also commented on what they perceived to be a lack of oversight over the DBE certification program.

- It appears that many businesses and local agencies are confused about the multiple MBE, WBE, EDGE, and DBE programs that various Ohio agencies operate.
- Representatives of some minority- and woman-owned businesses reported that their companies were not DBE-certified because they perceived the process to be difficult or that there would be little benefit from certification.
- Some interviewees reported that obtaining certification in the proper North American Industry Classification System codes was confusing and presented a challenge to obtaining certification.

ODOT might consider more effectively communicating information about the Federal DBE Program, particularly information about the benefits of DBE certification. ODOT might also consider examining its staffing, training, and information systems to improve its implementation of the DBE certification process as well as other aspects of the Federal DBE Program. ODOT appears to follow federal regulations concerning DBE certification, which requires collecting and reviewing considerable information from program applicants. However, the agency might research other ways to make the certification process easier for potential DBEs.

**Need for separate accounting for participation of potential DBEs.** In accordance with guidance in the Federal DBE Program, the study team’s analysis of the overall DBE goal was based on the combination of DBEs that are currently certified and on minority- and woman-owned businesses that could potentially be certified. One reason that ODOT has not met its overall DBE goal in past years, and might not meet it in the future, is that its measurement of DBE participation only includes businesses that are DBE-certified, in accordance with federal regulations. Minority- and woman-owned businesses that are not DBE-certified are considered
in the overall DBE goal but are not counted in the participation reports that are used to measure whether ODOT has met its overall DBE goal.

USDOT permits agencies to explore whether one reason why they have not met their overall DBE goals is because they are not counting the participation of potential DBEs. USDOT might expect an agency to explore ways to further encourage potential DBEs to become DBE certified as one way of closing the gap between reported DBE participation and its overall DBE goal. In order to have the information to explore that possibility, ODOT might consider:

- Developing a system to collect information on the race/ethnicity and gender of the owners of all businesses—not just certified DBEs—that participate in ODOT contracts;
- Developing internal participation reports of minority- and woman-owned businesses (by race/ethnicity and gender) and of businesses currently and potentially DBE-certified (based on race/ethnicity and gender of ownership; annual revenue; and other factors such as whether the firm has been denied DBE certification in the past); and
- Continuing to track participation of certified DBEs on FHWA-funded contracts, per USDOT reporting requirements.

**Exploration of alternative approaches to current DBE contract goals program.** Some individuals participating in in-depth interviews, public hearings, and focus groups suggested that ODOT should explore new ways of implementing contracting procedures and the Federal DBE Program that better achieve the objective of further developing minority- and woman-owned businesses. Many participants reported that DBE contract goals encourage extensive efforts on the part of prime contractors and provide a mechanism through which minority- and woman-owned businesses can compete for contract opportunities. However, participants also identified a number of issues with ODOT's implementation of the Federal DBE Program and contracting procedures.

Issues that participants identified include the following:

- Lack of oversight and consistent leadership in implementing the Federal DBE Program;
- Challenges related to unbundling subcontract elements ahead of time into sizes suitable for DBEs, particularly for mega-projects;
- Difficulties associated with obtaining quotes from DBEs and including them in bid submissions in the final minutes before a bid deadline;
- Difficulties understanding project specifications and costly changes in specifications after contract award;
- Allegations that relatively few DBEs comprise most of the DBE participation; and
- Challenges related to understanding the Federal DBE Program and certification process.

Comments about ODOT contracting procedures and the Federal DBE Program included the following examples (for details, see Appendix E):
Several participants indicated that there is a lack of consistent leadership over ODOT’s Federal DBE Program. One participant cited high turnover in ODOT staff as a barrier for businesses to successfully understanding the program and working with the agency.

Some participants reported that prime contractors use perfunctory good faith efforts processes to comply with the program rather than to seek meaningful participation of DBEs on a project.

Some business owners indicated that ODOT’s bidding procedures presented a barrier to obtaining work with the agency. The owner of non-Hispanic white male-owned business said that ODOT did not provide a reasonable amount of time to review bid documents and project specifications during the bid period. Other participants indicated that ODOT’s bid website was difficult to navigate.

Some interviewees reported that front companies have been a barrier to legitimate DBEs.

Some interviewees indicated that changes to project specifications hurt small businesses. A representative of a non-Hispanic white male-owned business said that ODOT sometimes makes costly changes to project specifications after contract award. Those changes disproportionately affect small businesses.

Some owners of certified DBEs indicated that slow payments by both ODOT and prime contractors burden small businesses.

Some business owners reported that only a few DBEs get most of the work.

Some representatives of non-Hispanic white male-owned businesses and non-certified minority- and woman-owned businesses said that ODOT should eliminate the use of DBE contract goals. Some said that ODOT should consider using small business goals or other race- and gender-neutral efforts instead of using DBE contract goals.

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

**Next Steps**

The disparity study represents an independent analysis of information related to ODOT’s implementation of the Federal DBE Program. ODOT should review study results and other relevant information in connection with making decisions concerning its implementation of the Federal DBE Program.

Chapter 11 of the disparity study report provides additional information concerning program elements for ODOT’s consideration. USDOT periodically revises elements of (and regulations related to) the Federal DBE Program and issues guidance concerning implementation of the program. In addition, new court decisions provide insights related to the proper implementation of the Federal DBE Program. ODOT should closely follow such developments.
CHAPTER 1.
Introduction

The Ohio Department of Transportation (ODOT) is responsible for planning, building, maintaining, and operating the transportation and highway system throughout Ohio (except for the Ohio Turnpike). Because ODOT receives federal funds from the United States Department of Transportation (USDOT) through the Federal Highway Administration (FHWA), it is required to implement the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program is designed to address potential discrimination against DBEs in the award and administration of USDOT-funded contracts. In addition, as an Ohio state agency, ODOT is required to implement the State of Ohio’s Encouraging Diversity, Growth, and Equity (EDGE) Program. The EDGE Program is designed to encourage the participation of small, disadvantaged businesses in state contracting through the use of contract goals, mentoring programs, and other efforts.

ODOT retained BBC Research & Consulting (BBC) and Exstare Federal Services Group (Exstare) to conduct a disparity study to help evaluate the effectiveness of its implementations of the Federal DBE Program and the state’s EDGE Program and to evaluate business outcomes for minority- and woman-owned businesses. A disparity study examines whether there are any disparities between:

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

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

- The legal framework surrounding an agency’s 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 assistance programs that the agency currently has in place.

There are several reasons why a disparity study is useful to an agency that implements minority- and woman-owned business programs and other disadvantaged or small business programs:

- The types of research that are conducted as part of a disparity study provide information that is useful to an agency that is implementing such programs (e.g., refining policies, setting overall participation goals, enhancing outreach efforts).
A disparity study often provides insights into how to improve contracting opportunities for local small businesses, including many minority- and woman-owned businesses.

An independent, objective review of the participation of minority- and woman-owned businesses in an agency’s contracting is valuable to agency leadership and to external groups that may be monitoring the agency’s contracting practices.

State and local agencies that have successfully defended implementations of such programs in court have typically relied on information from disparity studies.

The study team introduces the 2016 ODOT disparity study in three parts:

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

A. Background

ODOT implements the Federal DBE Program and the State of Ohio's EDGE Program. The disparity study includes information that is relevant to refining ODOT’s implementations of both programs.

Federal DBE Program. The Federal DBE Program is a program designed to increase the participation of small businesses owned and controlled by socially and economically disadvantaged individuals, including minorities and women, in USDOT-funded contracts. As a recipient of USDOT/FHWA funds, ODOT establishes policies and procedures to comply with federal regulations to implement the Federal DBE Program.

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

The Federal DBE Program describes the steps an agency must follow in establishing its overall DBE goal. To begin the goal-setting process, an agency must develop a base figure based on demonstrable evidence of the availability of DBEs to participate in the agency’s USDOT-funded contracts. Then, after considering various, related factors, the agency can make an upward, downward, or no adjustment to its base figure as it determines its overall DBE goal (referred to as a “step-2” adjustment).

Projecting the portion of the overall DBE goal to be met through race- and gender-neutral means. The Federal DBE Program requires an agency to project the portion of its overall DBE goal

goal that it will meet through race- and gender-neutral measures and the portion that it will meet through any race-or gender-conscious measures. USDOT has outlined a number of factors for an agency to consider when making such determinations.2

The maximum feasible portion of an agency’s overall goal for DBE participation must be met through race- and gender-neutral means.3 Race- and gender-neutral means are measures that are designed to remove potential barriers for all businesses attempting to do work with the agency or measures specifically designed to increase the participation of small or emerging businesses (for examples of race- and gender-neutral measures, see 49 Code of Federal Regulations (CFR) Section 26.51(b)). If an agency can meet its goal solely through race- and gender-neutral means, it cannot implement race- or gender-conscious measures (i.e., measures specifically designed to increase the participation of minority- and woman-owned businesses or DBEs, such as DBE contract goals).

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

EDGE Program. The State of Ohio established the EDGE Program to address any potential discrimination in awarding or providing contracts, services, benefits, and opportunities to disadvantaged Ohio-based businesses.4 As part of the program, the state establishes participation goals for state agencies, boards, and commissions to encourage the participation of EDGE-certified businesses in state contracting. Those goals apply to supplies and services, professional services, information technology services, construction services, and professional design services contracts.

EDGE certification. Businesses may qualify for EDGE-certification if they are small businesses that have been in business at least one year prior to applying for EDGE certification (not applicable to joint venture applicants) and are owned and controlled by socially- and economically-disadvantaged U.S. citizens who are also Ohio residents, regardless of the race/ethnicity or gender of the owners. A business can qualify as being socially- and economically-disadvantaged by:

- Being located in a U.S. Census tract that qualifies as a disadvantaged area based on household income level, unemployment level, or poverty level;

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3 49 CFR Section 26.51.
Being owned and controlled by individuals who possess characteristics that may have
inhibited their business’ success such as race/ethnicity, gender, physical or mental
disabilities, residency in an isolated environment, or other relevant factors; or

Being owned and controlled by individuals who have a personal net worth that does not
exceed $250,000 at the time of program entry and that does not exceed $750,000 during
program participation.

**EDGE participation goals.** ODOT has established a 5 percent overall goal for the participation of
EDGE-certified businesses in its state-funded contracting. ODOT attempts to meet the overall
goal through a variety of different program measures, including EDGE contract goals. Prime
contractors bidding on contracts that include such goals must either meet the goals by making
subcontracting commitments to EDGE-certified businesses or by requesting “good faith efforts"
waivers. The State of Ohio reviews waiver requests and will grant waivers if prime contractors
demonstrate good faith efforts towards compliance with the goals. If prime contractors do not
meet the goals through subcontracting commitments or through approved waivers, then ODOT
may reject prime contractors’ bids.

**B. Study Scope**

The disparity study will help ODOT continue to strengthen its implementations of the Federal
DBE Program and the state’s EDGE Program for minority- and woman-owned business
participation in federally-funded and state-funded contracts. In addition, information from the
study will help ODOT implement the Federal DBE Program and the state’s EDGE Program in a
legally-defensible manner.

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

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

**EDGE businesses.** EDGE businesses are minority- and woman-owned businesses that are
specifically certified as such through the State of Ohio. Businesses seeking EDGE certification
with the State of Ohio are required to submit an application to the state. The application is available online and requires businesses to submit various information. The state reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information.

**DBEs.** DBEs are minority- and woman-owned businesses that are specifically certified as such through a Unified Certification Program (UCP). A determination of DBE eligibility includes assessing business’ gross revenues and business owners’ personal net worth (maximum of $1.32 million excluding equity in a personal residence and in the business). Some minority- and woman-owned businesses do not qualify as DBEs because of gross revenue or net worth requirements. Businesses owned by non-Hispanic white men can be certified as DBEs if those businesses meet the requirements in 49 CFR Part 26.

Businesses seeking DBE certification in Ohio are required to submit an application to one of the Ohio UCP members, which includes ODOT and three other agencies. The application is available online and requires businesses to submit various types of information. ODOT reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information.

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

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

- Classifying those businesses as both minority-owned and woman-owned;

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

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

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

At the time of this study, the overall revenue limit for DBE certification was $23.98 million based on a three-year average of gross receipts. There were lower revenue limits for specific subindustries according to the U.S. Small Business Administration (SBA) small business size standards. Only a few minority- and woman-owned businesses appeared to have exceeded those revenue limits based on information that they provided as part of availability surveys. The revenue categories that the study team used to classify firms reflect recent changes to the Table of Small Business Size Standards published by the SBA.

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

Classifying minority woman-owned businesses with all other woman-owned businesses; and

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

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

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

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

Analyses in the disparity study. The disparity study examined whether there are any disparities between the participation and availability of minority- and woman-owned businesses on ODOT contracts. The study focused on state- and federally-funded construction and construction-related professional services contracts that ODOT awarded between January 1, 2010 and December 31, 2014 (i.e., the study period). During the study period, ODOT applied EDGE contract goals to many state-funded contracts and DBE goals to many federally-funded contracts.

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

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

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

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

**Marketplace conditions.** The study team conducted quantitative analyses of the success of minorities and women and minority- and woman-owned businesses in the local contracting industries. The study team compared business outcomes for minorities, women, and minority- and woman-owned businesses to outcomes for non-Hispanic white men and majority-owned businesses. In addition, the study team collected qualitative information about potential barriers that small businesses and minority- and woman-owned businesses face in Ohio through in-depth anecdotal interviews. Information about marketplace conditions is presented in Chapter 3, Appendix D, and Appendix E.

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

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

**Utilization analysis.** The study team analyzed contract dollars that ODOT spent with minority- and woman-owned businesses on contracts that the agency awarded between January 1, 2010 and December 31, 2014. Those data included information about associated subcontracts. Note that ODOT applied DBE and EDGE contract goals to many of those contracts. The study team analyzed utilization separately for businesses owned by specific minority groups and women and for different types of contracts. Results from the utilization analysis are presented in Chapter 6.

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

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5 Note that prime contractors—not ODOT—actually award subcontracts to subcontractors. However, for simplicity, throughout the report, the study team refers to ODOT as awarding subcontracts.
Further exploration of disparities. The study team explored additional disparities between the utilization and availability of minority- and woman-owned businesses on contracts that ODOT awarded during the study period. Those analyses included comparisons of results for subsets of ODOT contracts and examinations of bids and proposals for a representative sample of contracts. The study team presents the results of those analyses in Chapter 8.

Overall DBE goal. Based on information from the availability analysis and other research, the study team provided ODOT with information that will help the agency set its overall DBE goal, including the base figure and consideration of a step-2 adjustment. Information about ODOT's overall DBE goal is presented in Chapter 9.

Race- and gender-neutral measures. The study team reviewed information regarding evidence of discrimination in the Ohio contracting marketplace; analyzed ODOT's experience with meeting its overall DBE goals in the past; and provided information about ODOT's past performance in encouraging the participation of minority- and woman-owned businesses using race- and gender-neutral measures. Information from those analyses is presented in Chapter 10.

Implementation of the EDGE Program and the Federal DBE Program. The study team reviewed ODOT's contracting practices and the program measures that it uses as part of its implementation of the state's EDGE Program and the Federal DBE Program. The study team provided guidance related to additional program options and changes to current contracting practices. The study team's review and guidance is presented in Chapter 11.

C. Study Team Members

The study team was made up of five firms that, collectively, possess decades of experience related to conducting disparity studies in connection with the Federal DBE Program and state and local minority- and woman-owned business programs.

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

Exstare (co-prime consultant). Exstare is a Black American woman-owned disparity study and management consulting firm based in Alexandria, Virginia. Exstare shared overall responsibility for the study and performed many qualitative and other analyses.

Supplier Diversity Research. Supplier Diversity Research is a Black American woman-owned professional services firm based in Columbus, Ohio. Supplier Diversity Research conducted in-depth anecdotal interviews with Ohio businesses as part of the study team's qualitative analyses of marketplace conditions.

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

Holland & Knight. Holland & Knight is a law firm with offices throughout the country. Holland & Knight conducted the legal analysis that provided the basis for this study.
CHAPTER 2.
Legal Framework

As a United States Department of Transportation (USDOT) fund recipient, the Ohio Department of Transportation (ODOT) implements the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program is governed by 49 Code of Federal Regulations (CFR) Part 26 and related federal regulations. In addition, as an Ohio state agency, ODOT implements the Encouraging Diversity, Growth, and Equity (EDGE) Program. The EDGE Program is governed by Ohio Administrative Code (OAC) 123:2-16.1

Federal DBE Program

The Federal DBE Program is designed to increase the participation of small businesses owned and controlled by socially and economically disadvantaged individuals in an agency’s USDOT-funded contracts.2 As part of the Federal DBE Program, every three years, an agency is required to set an overall goal for DBE participation in its USDOT-funded contracts.3 Although an agency is required to set the goal every three years, the overall DBE goal applies to each year in the three-year period. An agency must either meet or show that they used good faith efforts to meet the DBE participation goal, annually. If DBE participation for a particular year is less than the overall DBE goal for that year, then the agency must analyze the reasons for the difference and establish specific measures to address the difference and enable the agency to meet the goal in the next year.

Definition of DBE. According to 49 CFR Part 26, a DBE is a for-profit small business that is at least 51 percent owned and controlled by one or more individuals who are socially and economically disadvantaged. The following groups (as defined in 49 CFR Part 26) are presumed to be socially and economically disadvantaged:

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

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

1 ODOT also implements the State of Ohio’s Minority Business Enterprise (MBE) Program. However, the MBE Program only applies to goods and other services contracts, which were not in the scope of this study.

2 BBC and Exstare consider a contract as USDOT-funded if it includes at least one dollar of USDOT funding.

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

Certification requirements. Businesses seeking DBE certification in Ohio are required to submit an application to one of the Ohio Unified Certification Program (UCP) members, which includes ODOT and three other agencies. The application is available online and requires businesses to submit various information including business name; contact information; tax information; a personal financial statement; work specializations; and race/ethnicity and gender of the owners. Each application is reviewed by a UCP agency for approval. The review process may involve on-site meetings and additional documentation to confirm certain information (e.g., personal assets or liabilities).

Measures to encourage DBE participation. The Federal DBE Program regulations require an agency to meet the maximum feasible portion of its overall DBE participation goal through the use of race- and gender-neutral measures. Race- and gender-neutral measures are measures designed to remove potential barriers for all businesses attempting to do work with the agency or measures specifically designed to increase the participation of small or emerging businesses, regardless of the race/ethnicity or gender of ownership.

If an agency cannot meet its overall goal for DBE participation solely through race- and gender-neutral means, then it is permitted to use race- and gender-conscious measures as part of its implementation of the Federal DBE Program. Race- and gender-conscious measures are measures specifically designed to increase the participation of DBEs, such as using DBE contract goals on individual USDOT-funded contracts. Prime contractors can meet DBE contract goals by being a DBE-certified firm that is the prime contractor itself or by making subcontracting commitments with certified DBE subcontractors at the time of bid. If prime contractors are unable to meet the DBE goals, they can submit a waiver request with evidence showing that they made all reasonable good faith efforts to meet the goals but could not do so. If prime contractors fail to meet DBE contract goals or fail to fulfill good faith efforts, ODOT may deem their bids unresponsive and may reject them.

There are several approaches that government agencies could use to implement the Federal DBE Program.

1. Using a combination of race- and gender-neutral and race- and gender-conscious measures with all certified DBEs. Many agencies, including ODOT, use a combination of race- and gender-neutral and race- and gender-conscious measures when implementing the Federal DBE Program, with all certified DBEs being considered eligible to participate in the race- and gender-conscious measures. Those agencies use various measures that are designed to encourage the participation of small and emerging businesses in its contracting. In addition, they also use DBE contract goals

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4 49 CFR Section 26.65(b).
5 City of Dayton; Greater Cleveland Regional Transit Authority; and Cleveland Hopkins International Airport.
6 49 CFR Section 26.51.
on individual contracts, and the participation of all certified DBEs—regardless of race/ethnicity or gender—count toward meeting those goals.

2. Applying race- and gender-conscious measures to only certain groups of certified DBEs considered eligible. Some agencies use race- and gender-conscious measures to limit DBE participation goals to certain racial/ethnic or gender groups based on evidence of those groups facing discrimination within the agencies’ respective relevant geographic market areas (underutilized DBEs, or UDBEs). For example, the California Department of Transportation (Caltrans) sets DBE contract goals for which only UDBEs—which does not include all DBE groups—are considered eligible. Caltrans counts the participation of all DBEs toward meeting its overall DBE goal, but only UDBE participation counts toward prime contractors meeting DBE contract goals on individual contracts. Caltrans determined which DBE groups were UDBEs in large part by examining results of disparity study results for individual racial/ethnic and gender groups. The Colorado Department of Transportation and the Oregon Department of Transportation, among other agencies, have implemented the Federal DBE Program in similar ways.

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

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

EDGE Program

The EDGE Program is designed to encourage the participation of small and emerging businesses in public contracting. The program includes various measures to assist economically and socially disadvantaged businesses to successfully participate in state contracting opportunities. Each year, the Director of the Ohio Department of Administrative Services (Ohio DAS) establishes an overall goal for the participation of EDGE-certified businesses in state-funded contracting. Those goals apply to supplies and services; professional services; information technology services; construction services; and professional design services contracts. The Ohio DAS established an overall EDGE goal of 5 percent for 2015 and for each year included in the study period (January 1, 2010 through December 31, 2014).

7 49 CFR Section 26.43.
8 BBC and Exstare consider a contract as state-funded if it is funded solely through state or local sources.
**Definition of EDGE-certified business.** An EDGE-certified business is a small, socially- and economically-disadvantaged business that has been certified as such by the Ohio DAS. A business can qualify as being socially– or economically-disadvantaged by:

- Being located in a U.S. Census tract that qualifies as a disadvantaged area based on household income level, unemployment level, or poverty level;
- Being owned and controlled by individuals who possess characteristics that may have inhibited their business’ success such as race/ethnicity; gender; physical or mental disabilities; residency in an isolated environment; or other relevant factors; or
- Being owned and controlled by individuals who have a personal net worth that does not exceed $250,000 at the time of program entry and that does not exceed $750,000 during program participation.

**Certification requirements.** A business can qualify for EDGE certification if it has been in business at least one year prior to applying for EDGE certification (not applicable to joint venture applicants) and is owned and controlled by U.S. citizens who are also Ohio residents, regardless of the race/ethnicity or gender of the owners. Businesses seeking EDGE certification are required to submit an application to the Ohio DAS’s Equal Opportunity Division. The application is available online and requires businesses to submit various information including business name, contact information, tax information, work specializations, and information about the business owners. The Ohio DAS reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information.

**EDGE contract goals.** As part of the State of Ohio’s EDGE Program, state agencies are required to implement measures to encourage the participation of EDGE-certified businesses in state contracting and procurement including the use of EDGE contract goals. State agencies are expected to apply participation goals on individual state-funded contracts to encourage the participation of EDGE businesses. EDGE contract goals may vary from contract to contract based on the availability of EDGE-certified businesses for particular work types and other factors. However, across all contracts in a particular year, the use of EDGE contract goals is intended to help state agencies meet the overall annual goals that the Ohio DAS sets.

ODOT currently uses EDGE contract goals on its state-funded construction and professional services contracts. Prime contractors can meet EDGE contract goals by being an EDGE-certified firm that is the prime contractor itself or by making subcontracting commitments with EDGE-certified subcontractors at the time of bid. If prime contractors are unable to meet the goal, they can submit an EDGE program waiver request with evidence showing that they made all reasonable good faith efforts to fulfill the goals but could not do so. If prime contractors fail to meet EDGE contract goals through subcontracting commitments or fail to fulfill good faith efforts, ODOT may deem their bids unresponsive and may reject them.

**Legal Standards**

ODOT’s use of DBE contract goals—and possibly its use of EDGE contract goals—on certain contracts is considered a race-and gender-conscious measure. The U.S. Supreme Court has
established that government programs that include race- and gender-conscious measures must meet the *strict scrutiny* standard of constitutional review.9 The two key U.S. Supreme Court cases that established the strict scrutiny standard for such measures are:

- The 1989 decision in *City of Richmond v. J.A. Croson Company*, which established the strict scrutiny standard of review for race-conscious programs adopted by state and local governments;10 and
- The 2005 decision in *Adarand Constructors, Inc. v. Peña*, which established the strict scrutiny standard of review for federal race-conscious programs.11

The strict scrutiny standard is extremely difficult for a governmental entity to meet. It 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 governmental entity 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 governmental entity must meet both the compelling governmental interest and the narrow tailoring components of the strict scrutiny standard. An agency’s program that fails to meet either component is unconstitutional.

**Compelling governmental interest.** A governmental entity must demonstrate a *compelling governmental interest* in remedying past identified discrimination in order to implement race- or gender-conscious measures. A governmental entity that is using race- or gender-conscious measures as part of a minority- or woman-owned business program has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. 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. Rather, they must assess discrimination within their own relevant market areas.12

In *City of Richmond v. J.A. Croson Company*, the U.S. Supreme Court held that, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” Lower court decisions since *City of Richmond v. J.A. Croson Company* have held that a compelling

9 Certain Federal Courts of Appeals apply the *intermediate scrutiny* standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail.
12 See e.g., *Concrete Works, Inc. v. City and County of Denver* (“Concrete Works I”), 36 F.3d 1513, 1520 (10th Cir. 1994).
governmental interest must be established for each racial/ethnic and gender group to which race- and gender-conscious measures apply.

Note that it is not necessary for a governmental entity itself to have discriminated against minority- or woman-owned businesses for it to act. In City of Richmond v. J.A. Croson Company, the Supreme Court found, “if [the governmental entity] could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry ... [i]t could take affirmative steps to dismantle such a system.”

Several minority- and woman-owned business programs that have used race- and gender-conscious measures have been challenged in court and have been found to be unconstitutional, because the evidence that the governmental entity produced was not sufficient to show a compelling governmental interest. For discussion of those and other cases, see Appendix B.

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

- The necessity of such measures and the efficacy of alternative, race- and gender-neutral measures;
- The degree to which the use of such measures is limited to those groups that actually suffer discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration, including the availability of waiver and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.¹³

Several minority- and woman-owned business programs that have used race- and gender-conscious measures have been challenged in court and have been found to be unconstitutional, because the evidence that the governmental entity produced was not sufficient to meet the narrow tailoring requirement. For discussion of those and other cases, see Appendix B.

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

¹³ See, e.g., See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1198-1199; Rothe, 545 F.3d at 1036; Western States Paving, 407 F3d at 993-995; Sherbrooke Turf, 345 F.3d at 971; Adarand VII, 228 F.3d at 1181; Eng'g Contractors Ass'n, 122 F.3d at 927 (internal quotations and citations omitted).
CHAPTER 3.
Marketplace Conditions

Federal Courts and the United States Congress have considered any 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. 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 their contracts. Passive participation 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.

The study team conducted quantitative and qualitative analyses to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in the Ohio construction, professional services, goods, and support services industries. The study team also examined the potential effects that any such barriers have on the formation and success of minority- and woman-owned businesses and on their participation in, and availability for, contracts that the Ohio Department of Transportation and the Ohio Turnpike and Infrastructure Commission award. The study team examined local marketplace conditions primarily in four areas:

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

Chapter 3 summarizes information about barriers that minorities, women, and minority- and woman-owned businesses face in Ohio and nationwide as well as the historical context for those barriers. The information in Chapter 3 comes from existing research in the area of race- and gender-based discrimination as well as from primary research that the study team conducted of current marketplace conditions. Additional quantitative and qualitative analyses of marketplace conditions are presented in Appendix D and Appendix E, respectively.
Historical Barriers

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.\(^7\),\(^8\),\(^9\),\(^10\) Similarly, many women were restricted to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement.\(^11\)

Minorities and women in Ohio faced similar barriers. In the 19th and early 20th centuries, many Black Americans in Ohio lived in impoverished, racially-segregated neighborhoods and were barred from local restaurants, municipal pools, and parks.\(^12\) In addition, racially-motivated violence and intimidation was also a common feature of Black American life in Ohio.\(^13\) Disparate treatment of minorities and women also extended into the labor market. For example, the study team’s analyses of census data indicate that only 16 percent of Ohio women were in the labor market in Ohio in 1930.

In the middle of the 20th century, many legal and workplace reforms opened up new opportunities for minorities and women. *Brown v. Board of Education, The Equal Pay Act, The Civil Rights Act*, and *The Women’s Educational Equity Act* outlawed many forms of race- and gender-based discrimination. Workplaces adopted formalized personnel policies and implemented programs to diversify their staffs.\(^14\) Those reforms increased diversity in workplaces and reduced—but did not eliminate—educational and employment disparities for minorities and women.\(^15\),\(^16\),\(^17\),\(^18\) 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 businesses.

**Incarceration.** Nationwide, minorities are far more likely to be incarcerated than non-Hispanic whites. Approximately one quarter of Black American men and one sixth of Hispanic American men will be incarcerated during their lifetimes.\(^19\) Incarceration rates for minorities in Ohio are similar to those for minorities nationwide. For example, Black Americans represent 12 percent of Ohio’s total population but 43 percent of the state’s incarcerated population.\(^20\) Incarceration and felony convictions are associated with a number of labor difficulties including difficulties finding jobs and slow wage growth.\(^21\),\(^22\) Because minorities exhibit such high incarceration rates, the associated labor-related barriers affect them to a greater degree than non-Hispanic whites.

**Residential segregation.** Residential segregation remains a problem for minorities nationwide. Minorities are more likely to live in poor, racially homogenous neighborhoods with relatively few jobs and inferior schools.\(^23\),\(^24\) Ohio has the eighth highest level of residential segregation in the nation. For example, more than two thirds of non-Hispanic whites in Ohio would have to move to a new neighborhood to eliminate racially-segregated neighborhoods in the state.\(^25\)
Family responsibilities. Women are often expected to handle a majority of family responsibilities. Time use studies indicate that women spend substantially more time on household labor and childrearing than men. At least partly for that reason, there are large disparities between women and men in terms of pay, business earnings, and other business outcomes.

Human Capital

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

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

Educational outcomes for minorities in Ohio are similar to those for minorities nationwide. In Ohio public schools, Black Americans and Hispanic Americans exhibit substantially higher dropout rates than non-Hispanic whites. In addition, the study team’s analyses of the Ohio labor force indicates that certain minority groups are far less likely than non-Hispanic whites to earn a college degree. Figure 3-1 presents the percentage of Ohio workers that have earned a four-year college degree by racial/ethnic and gender group. As shown in Figure 3-1, Black American, Hispanic American, and Native American workers in Ohio are substantially less likely than non-Hispanic white workers to have a four-year college degree.

Employment and management experience. An important precursor to business ownership and success is acquiring direct work and management experience in relevant industries. Any barriers that limit minorities and women from acquiring that experience could prevent them from starting and operating related businesses in the future.
**Figure 3-1.** Percentage of all workers 25 and older with at least a four-year degree, Ohio, 2008-2012

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 2008-2012 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

**Employment.** On a national level, prior industry experience has been shown to be an important indicator for business ownership and success. However, minorities and women are often unable to acquire relevant work experience. Minorities and women are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market. When employed, minorities and women are often relegated to peripheral positions in the labor market and to industries that exhibit already high concentrations of minorities or women. The study team’s analyses of the labor force in Ohio is largely consistent with those findings. Figures 3-2 and 3-3 present the representations of minority and women workers in various Ohio industries. As shown in Figures 3-2, the Ohio industries with the highest representations of minority workers are childcare, hair, and nails; public administration and social services; and healthcare. The Ohio industries with the lowest representations of minority workers are wholesale trade; construction; and extraction and agriculture.

Figure 3-3 indicates representations of women in Ohio industries that are similar to those of minorities. Whereas there are relatively high representations of women in childcare, hair, and nails; healthcare; and education there are relatively low representations of women in manufacturing; extraction and agriculture; and construction. Moreover, the study team found that 90 percent of women who work in the Ohio construction industry work in secretarial positions.

**Management experience.** Managerial experience is an essential predictor of business success. However, race- and gender-based discrimination remains a persistent obstacle to greater diversity in management positions. Nationally, minorities and women are far less likely than non-Hispanic white men to work in management positions. Similar outcomes appear to exist for minorities and women in Ohio. The study team examined the concentration of minorities and women in management positions in the Ohio construction, professional services, goods, and support services industries. Figure 3-4 presents those results.
Note: ** Denotes that the difference in proportions between minority workers in the specified industry and all industries is statistically significant at the 95% confidence level.

The representation of minorities among all Ohio workers is 11% for Black Americans, 3% for Hispanic Americans, 3% for other race minorities, and 17% for all minorities considered together.

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

Source: BBC Research & Consulting from 2008-2012 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/](http://usa.ipums.org/usa/).
**Figure 3-3.**
Percent representation of women in various industries in Ohio, 2008-2012

<table>
<thead>
<tr>
<th>Industry</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Childcare, hair, and nails (n=5,602)</td>
<td>91%**</td>
</tr>
<tr>
<td>Healthcare (n=35,464)</td>
<td>80%**</td>
</tr>
<tr>
<td>Education (n=25,815)</td>
<td>68%**</td>
</tr>
<tr>
<td>Professional services (n=36,299)</td>
<td>52%**</td>
</tr>
<tr>
<td>Retail (n=33,364)</td>
<td>52%**</td>
</tr>
<tr>
<td>Public administration and social services (n=19,575)</td>
<td>52%**</td>
</tr>
<tr>
<td>Other services (n=38,297)</td>
<td>47%**</td>
</tr>
<tr>
<td>Wholesale trade (n=7,841)</td>
<td>31%**</td>
</tr>
<tr>
<td>Transportation, warehousing, utilities, and communications (n=19,082)</td>
<td>29%**</td>
</tr>
<tr>
<td>Manufacturing (n=46,944)</td>
<td>28%**</td>
</tr>
<tr>
<td>Extraction and agriculture (n=3,211)</td>
<td>17%**</td>
</tr>
<tr>
<td>Construction (n=16,309)</td>
<td>9%**</td>
</tr>
</tbody>
</table>

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

The representation of women among all Ohio workers is 48%.

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 2008-2012 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/](http://usa.ipums.org/usa/).

As shown in Figure 3-4:

- Compared to non-Hispanic whites, smaller percentages of Black Americans and Hispanic Americans work as managers in the Ohio construction industry.
- A smaller percentage of women than men work as managers in the Ohio professional services industry.
- Compared to non-Hispanic whites, smaller percentages of Black Americans and Hispanic Americans work as managers in the Ohio goods and services industry.
Intergenerational business experience. Having a family member who owns a business and is working in that business is an important predictor of business ownership and business success. Such experiences help entrepreneurs gain access to important opportunity networks; obtain knowledge of best practices and business etiquette; and receive hands-on experience in helping to run businesses. However, at least nationally, minorities have substantially fewer family members who own businesses and both minorities and women have fewer opportunities to be involved with those businesses. That lack of experience makes it more difficult for minorities and women to subsequently start their own businesses and operate them successfully.

Financial Capital

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

Wages and income. Wage and income gaps between minorities and non-Hispanic whites and between women and men are well-documented throughout the country, even when researchers have statistically controlled for various factors unrelated to race and gender. 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. Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 84 percent the median hourly wage of men. Such disparities make it difficult for minorities and women to use employment wages as a source of business capital.

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

**Personal wealth.** Another important potential source of business capital is personal wealth. As with wages and income, there are substantial disparities between minorities and non-Hispanic whites and between women and men in terms of personal wealth.\textsuperscript{61, 62} For example, in 2010, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 5 percent and 1 percent, respectively, that of non-Hispanic whites. In addition, more than one-quarter of Black Americans and Hispanic Americans were living in poverty in 2010, substantially higher than the national average. 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.\textsuperscript{63}

![Figure 3-5. Mean annual wages among Ohio workers, 2008-2012](image)

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

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

**Source:**
BBC Research & Consulting from 2008-2012
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/](http://usa.ipums.org/usa/)

**Homeownership.** Homeownership and home equity have been shown to be key sources of business capital.\textsuperscript{64, 65} 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.\textsuperscript{66} 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.\textsuperscript{67, 68} 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.\textsuperscript{69, 70} 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.\textsuperscript{71, 72}

Minorities appear to face homeownership barriers in Ohio that are similar to those observed at the national level. The study team examined homeownership rates in Ohio for relevant racial/ethnic groups. As shown in Figure 3-6, all relevant minority groups in Ohio exhibit homeownership rates significantly lower than that of non-Hispanic whites.
**Figure 3-6. Home Ownership Rates in Ohio, 2008-2012**

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 2008-2012
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 Ohio. Consistent with national trends, homeowners of certain minority groups—Black Americans, Hispanic Americans, and Native Americans—own homes that, on average, are worth significantly less than those of non-Hispanic whites.

**Figure 3-7. Median home values in Ohio, 2008-2012**

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

Source:
BBC Research & Consulting from 2008-2012
ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa.

**Access to financing.** Minorities and women face many barriers in trying to access credit and financing, both for home purchases and for business capital. Researchers have often attributed those barriers to various forms of race- and gender-based discrimination that exist in credit markets.\(^{73, 74, 75, 76, 77, 78}\) The study team summarizes results related to difficulties that minorities, women, and minority- and woman-owned businesses face in the home credit and business credit markets.

**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.\(^ {79, 80, 81, 82, 83}\) Race- and gender-based barriers in home credit markets, as well as the recent foreclosure crisis, have led to decreases in homeownership among minorities and women and eroded their levels of personal wealth.\(^ {84, 85, 86, 87}\)

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 Ohio and the United States as a whole. As shown in Figure 3-8, Black Americans, Hispanic Americans, and Native Americans exhibit higher home loan denial rates than non-Hispanic whites when considering the United States as a whole. Both Black
Americans and Hispanic Americans also exhibit higher home loan denial rates than non-Hispanic whites when considering Ohio alone. In addition, the study team’s analyses indicate that certain minority groups in Ohio are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure D-15 in Appendix D).

**Business credit.** Minority- and woman-owned businesses face substantial difficulties accessing business credit. For example, researchers have shown that Black American-owned and Hispanic American-owned businesses are more likely to be denied business credit, even after accounting for various race- and gender-neutral factors. In addition, women are less likely to apply for credit and receive smaller loans. Without equal access to business capital, minority- and woman-owned businesses must rely more on personal finances for their business, which leaves them at a disadvantage when trying to start and operate successful businesses.

![Figure 3-8. Denial rates of conventional purchase loans for high-income households in Ohio and the United States, 2013](image)

**Business Ownership**

Nationally, there has been substantial growth in the number of minority- and woman-owned businesses over the past 40 years. For example, from 1975 to 1990, the number of woman-owned businesses increased by 145 percent, and the number of Hispanic American-owned businesses increased by nearly 200 percent. 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. In addition, although rates of business ownership have increased among minorities and women, they have been unable to penetrate all industries evenly. Minorities and women disproportionately own businesses in industries that require less human and financial capital to be successful and that already include large concentrations of individuals from disadvantaged groups.

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

- Hispanic Americans exhibit lower rates of business ownership than non-Hispanic whites in the Ohio construction industry. In addition, women exhibit lower rates of business ownership than men.
- Women exhibit lower rates of business ownership than men in the Ohio professional services industry.
- Black Americans, Hispanic Americans, and other race minorities exhibit lower rates of business ownership than non-Hispanic whites in the Ohio goods and services industry. In addition, women exhibit lower rates of business ownership than men.

The study team also conducted regression analyses to determine whether differences in business ownership rates between minorities and non-Hispanic whites and between women and men exist even after statistically controlling for various race- and gender-neutral factors such as income, education, and familial status. The study team conducted those analyses separately for each relevant industry. Figure 3-10 presents the race/ethnicity and gender factors that were significantly related to business ownership for each relevant industry.

**Figure 3-9.**
Business ownership rates in study-related industries in Ohio, 2008-2012

<table>
<thead>
<tr>
<th>Race/ethnicity</th>
<th>Construction</th>
<th>Professional Services</th>
<th>Goods &amp; Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black American</td>
<td>24.2 %</td>
<td>6.3 %</td>
<td>9.6 % **</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>17.4 **</td>
<td>7.1</td>
<td>7.5 **</td>
</tr>
<tr>
<td>Native American</td>
<td>26.0</td>
<td>0.0</td>
<td>19.6</td>
</tr>
<tr>
<td>Other minority group</td>
<td>31.4</td>
<td>6.5</td>
<td>3.6 **</td>
</tr>
<tr>
<td>Non-Hispanic white</td>
<td>26.4</td>
<td>11.3</td>
<td>13.9</td>
</tr>
</tbody>
</table>

**Figure 3-10.**
Statistically significant relationships between race/ethnicity and gender and business ownership in study-related industries in Ohio, 2008-2012

<table>
<thead>
<tr>
<th>Industry and Group</th>
<th>Coefficient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction</td>
<td>-0.4172</td>
</tr>
<tr>
<td>Women</td>
<td></td>
</tr>
<tr>
<td>Professional Services</td>
<td>-0.4286</td>
</tr>
<tr>
<td>Women</td>
<td></td>
</tr>
<tr>
<td>Goods &amp; Services</td>
<td></td>
</tr>
<tr>
<td>Black American</td>
<td>-0.1164</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>-0.2905</td>
</tr>
<tr>
<td>Other minority group</td>
<td>-0.4926</td>
</tr>
<tr>
<td>Women</td>
<td>-0.1179</td>
</tr>
</tbody>
</table>

Note: Asian-Pacific American, Subcontinent Asian American, and Other race minority were combined into the single category of “Other minority group” due to small sample sizes.

Source:
BBC Research & Consulting from 2008-2012 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/.

As shown in Figure 3-10, even after accounting for race- and gender-neutral factors:
- Being a woman was associated with lower rates of business ownership in construction;
- Being a woman was associated with lower rates of business ownership in professional services;
Being Black American, Hispanic American, and other race minority was associated with lower rates of business ownership in goods and services. In addition, being a woman was associated with lower rates of business ownership in goods and services.

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

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 moving from business ownership to unemployment than non-Hispanic whites and men. In addition, minority- and woman-owned businesses have been shown to be less successful than businesses owned by non-Hispanic whites and men using a number of different indicators such as profits, closure rates, and business size (but also see Robb and Watson 2012). The study team examined data on business closure, business receipts, and business owner earnings to further explore the success of minority- and woman-owned businesses in Ohio.

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

![Figure 3-11. Rates of business closure in Ohio, 2002-2006](image)

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

Note:
Data include only to non-publicly held businesses.
Equal Gender Ownership refers to those businesses for which ownership is split evenly between women and men.
Statistical significance of these results cannot be determined, because sample sizes were not reported.

Source:
Washington D.C.

Business receipts. The study team also examined data on business receipts to assess whether minority- and woman-owned businesses in Ohio earn as much as businesses owned by non-Hispanic whites or business owned by men, respectively. Figure 3-12 shows mean annual
receipts for Ohio business by the race/ethnicity and gender of owners. The data in Figure 3-12 indicates that in 2007 Black American-, Asian American-, Hispanic American-, and Native American-owned businesses in Ohio showed lower mean annual business receipts than businesses owned by non-Hispanic whites. In addition, woman-owned businesses in Ohio showed lower mean annual business receipts than businesses owned by men.

**Figure 3-12.**
Mean annual business receipts (in thousands) in Ohio, 2007

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


**Business owner earnings.** The study team analyzed business owner earnings to assess whether minorities and women in Ohio earn as much from the businesses that they own as non-Hispanic whites and men do. As shown in Figure 3-13, Black Americans and Hispanic Americans in Ohio earned less on average from their businesses than non-Hispanic whites earned from their businesses. In addition, women in Ohio earned less from their businesses than men earned from their businesses. The study team also conducted regression analyses to determine whether earnings disparities in Ohio exist even after statistically controlling for various race- and gender-neutral factors such as age, education, and family status. The results of those analyses indicated that being a woman was associated with substantially lower business owner earnings than being a man. The relationships between being minority and business earnings were not statistically significant (for details, see Figure D-30 in Appendix D).

**Figure 3-13.**
Mean business owner earnings in Ohio, 2008-2012

Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2012 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 2008-2012 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/.
Summary

The study team’s analyses of marketplace conditions indicate that minorities, women, and minority- and woman-owned businesses face substantial barriers nationwide and in Ohio. Existing research, as well as analyses that the study team conducted, indicate that race- and gender-based disparities exist in terms of acquiring human capital, accruing financial capital, owning businesses, and operating successful businesses. In many cases, there is evidence 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 race- and gender-based discrimination.

Barriers in the marketplace likely have important effects on the ability of minorities and women to start businesses in the Ohio industries relevant to the disparity study—construction and professional services—and operating those businesses successfully. Any difficulties that minorities and women face in starting and operating businesses may reduce their availability for government agency work and may also reduce the degree to which they are able to successfully compete for government contracts. In addition, the existence of barriers in the Ohio marketplace indicates that government agencies in the state are passively participating in race- and gender-based 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.
1. *Adarand VII*, 228 F.3d at 1167–76; see also *Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Midwest Fence Corp. v. U.S. DOT, Illinois DOT*, et al., 2015 WL 1396376, appeal pending.


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


CHAPTER 4.
Collection and Analysis of Contract Data

Chapter 4 provides an overview of the policies that the Ohio Department of Transportation (ODOT) uses to award contracts; the contracts that the study team analyzed as part of the disparity study; and the process that the study team used to collect relevant prime contract and subcontract data.¹ Chapter 4 is organized into seven parts:

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

A. Overview of Contracting Policies

ODOT is responsible for maintaining and regulating transportation and transportation-related infrastructure across the state of Ohio. The agency develops and implements policies, practices, and procedures to administer contracts associated with those responsibilities. ODOT's Division of Construction Management (Construction Division) is responsible for managing construction projects, and ODOT's Office of Consulting Services (Consulting Division) is responsible for managing construction-related professional services projects. ODOT's Division of Opportunity, Diversity, and Inclusion (ODI Division) is responsible for managing the Federal Disadvantaged Business Enterprise (DBE) Program and the Encouraging Diversity, Growth and Equity (EDGE) Program associated with construction and professional services projects.²

Construction Division. The Construction Division is responsible for awarding construction projects including construction and maintenance of the Ohio state highway system. The contracting policies that the Construction Division uses are governed by Ohio Revised Code, Title 55, Chapter 25 (ORC 5525). The Construction Division awards all contracts on a low-bid basis, and there are no dollar thresholds above or below which procurement policies change.

Prequalification. ORC 5525 requires contractors submitting bids for ODOT construction contracts to be prequalified in one or more work types relevant to the type of work that ODOT

¹The terms “contract” and “procurement” are used interchangeably in this report, unless otherwise noted.
²The Construction Division handled those responsibilities during the study period (January 1, 2010 through December 31, 2014). The Division of Opportunity, Diversity, and Inclusion was created on July 1, 2015.
requires. As part of the prequalification process, contractors must also provide information related to the financial health of their businesses. Subcontractors must also be prequalified for the types or work for which they receive subcontract agreements.3,4

Bid and award process. ODOT is required to advertise bid opportunities for two consecutive weeks in at least one newspaper available to the general public in the county in which the work is to be completed. If no such newspaper is available in the proposed county of work, then ODOT is required to publish bid notices in a newspaper in a county adjacent to the one in which the work is to be completed. Bid notices must include information about how to request project plans and specifications from ODOT. Bidders are required to file bid guaranties with their bids for amounts equal to five percent of their bids but no more than $50,000. ODOT is required to open and read all bids that it receives aloud at a designated time and place. ODOT then awards contracts to the lowest competent and responsible bidder and must notify the successful bidder via mail.

Consulting Division. The Consulting Division is responsible for awarding construction-related professional services contracts.5 The contracting policies that the Consulting Division uses are governed by Ohio Revised Code, Title 55, Chapter 26 (ORC 5526) and can be categorized into two general procurement categories: projects worth $40,000 or less and projects worth more than $40,000.

Purchases worth $40,000 or less. In general, ODOT can execute contracts worth $40,000 or less (exempt projects) without using a competitive procurement process. That is, the Consulting Division may directly select consultants for such projects without soliciting technical proposals.

Purchases worth more than $40,000. ODOT awards projects worth more than $40,000 using technical proposal procedures. For projects of that size, ODOT is required to post project notifications on its website. Project notifications must contain descriptions of selection processes that ODOT will use, pre-qualification requirements, estimated project costs, project schedules, and other relevant information. Interested consultants are then expected to submit letters of interest for the projects.

ODOT selects three consultants from the letters of interest that it receives and requires them to submit technical and price proposals. ODOT then evaluates technical proposals and ranks them according to the technical capabilities of the consultants. ODOT then enters into price negotiations with the highest ranked consultant. If the negotiations fail to result in an agreed upon fee, ODOT may enter into negotiations with the next highest ranked consultant. Once a fee is agreed upon, the State of Ohio’s Controlling Board reviews and approves the proposal, and it is then approved by ODOT’s Director.

3 Contractors working in environmental remediation and other specialty trades for which ODOT has not designated specific prequalification classes are exempt from the prequalification process.

4 ORC 5525.02; ORC 5525.06.

5 The terms “construction-related professional services” and “professional services” are used interchangeably in this report, unless otherwise noted.
**ODI Division.** The ODI Division is responsible for administering and managing ODOT’s participation in the Federal DBE Program and the EDGE Program. In coordination with other ODOT officials, the ODI Division establishes DBE participation goals for federally-funded construction and construction-related professional services contracts. The ODI Division also monitors and reports achievement of EDGE participation goals established by the Ohio Department of Administrative Services. The contracting policies that the ODI Division uses are governed by Federal DBE Program regulations contained in 49 CFR Part 26 for federally-funded contracts and by Ohio Administrative Code (OAC) 123:2-16 for state-funded projects.

**DBE and EDGE Goals.** As part of its implementation of the Federal DBE Program, ODOT applied DBE goals to many individual construction and construction-related professional services contracts to meet its overall goal for DBE participation on federally-funded projects. In addition, as part of its implementation of the State of Ohio’s EDGE Program, ODOT applied EDGE contract goals to many construction and construction-related professional contracts to meet its overall goal for EDGE business participation on state-funded projects.

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

The study team collected contracting and vendor data from ODOT’s Construction Division, Consulting Division, and subrecipient local agencies to serve as the basis for key disparity study analyses including the utilization, availability, and disparity analyses. The study team collected the most comprehensive data that were available on prime contracts and subcontracts that ODOT and subrecipient local agencies awarded during the study period (i.e., January 1, 2010 through December 31, 2014). The study team sought data that included information about prime contractors and subcontractors regardless of the race/ethnicity and gender of their owners or their statuses as certified DBEs, minority-owned business enterprises (MBEs), woman-owned business enterprises (WBEs), or EDGE businesses. The study team collected data on both construction and construction-related professional services prime contracts and subcontracts.

**Prime contract data collection.** ODOT provided the study team with electronic data on construction and construction-related professional services prime contracts that the agency awarded during the study period. The study team collected the following information about each relevant construction and construction-related professional services prime contract:

- Contract or project identification number;
- Description of work;
- Award date;
- Award amount;
- Amount paid-to-date, as available;
- Location of work;

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6 ODOT's overall DBE Participation goals during the study period were 7.0 percent for 2010 and 2011; 9.1 percent for 2012 and 2013; and 8.9 percent for 2014.

7 ODOT's overall EDGE business participation goals were 5.0 percent for each year during the study period.
- Prime contractor name; and
- Prime contractor identification number.

ODOT advised the study team on how to interpret the provided data including how to identify unique bid opportunities.

**Subcontract data collection.** ODOT also provided the study team with electronic data on subcontracts related to construction and construction-related professional services contracts that the agency awarded during the study period. The study team collected the following information about each relevant subcontract:

- Associated prime contract or project number;
- Amount awarded on the subcontract;
- Description of work;
- Subcontractor name; and
- Subcontractor identification number.

**Contracts included in study analyses.** The study team collected information on 3,527 prime contracts and 18,272 associated subcontracts that ODOT and subrecipient local agencies awarded during the study period in the areas of construction and construction-related professional services. The study team collected information on both FHWA- and state-funded contracts. Those contracts accounted for approximately $7.8 billion of ODOT contracting dollars during the study period. Figure 4-1 presents dollars by relevant contracting area for the prime contracts that the study team included in its analyses.

### Figure 4-1.
**Number of ODOT contracts included in the study**

<table>
<thead>
<tr>
<th>ODOT contracts</th>
<th>Number</th>
<th>Dollars (Thousands)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Construction contracts</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FHWA-funded</td>
<td>17,215</td>
<td>$6,547,597</td>
</tr>
<tr>
<td>State-funded</td>
<td>2,338</td>
<td>638,729</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>19,553</td>
<td>$7,186,326</td>
</tr>
<tr>
<td><strong>Professional services contracts</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FHWA-funded contracts</td>
<td>1,035</td>
<td>$345,355</td>
</tr>
<tr>
<td>State-funded</td>
<td>1,211</td>
<td>228,153</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>2,246</td>
<td>$573,508</td>
</tr>
<tr>
<td><strong>Total contracts</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FHWA-funded</td>
<td>18,250</td>
<td>$6,892,952</td>
</tr>
<tr>
<td>State-funded</td>
<td>3,549</td>
<td>866,882</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>21,799</td>
<td>$7,759,834</td>
</tr>
</tbody>
</table>

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

**Source:**
BBC Research & Consulting from ODOT contract data.
**Prime contract and subcontract amounts.** For each contract included in key analyses, the study team examined the dollars that ODOT 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 contract award amount to the prime contractor.
- If a contract included subcontracts, the study team calculated subcontract amounts as the total amount awarded to each subcontractor as part of the prime contract. The study team then calculated the prime contract amount as the total contract amount awarded less the sum of dollars awarded to all subcontractors.

**C. Collection of Vendor Data**

ODOT maintains a list of businesses that have worked with the agency on construction or construction-related professional services contracts. The study team compiled the following information on businesses that participated on ODOT construction or construction-related professional services contracts during the study period:

- Business name;
- Addresses and phone numbers;
- Ownership status (i.e., whether each business was minority- or woman-owned);
- Ethnicity of ownership (if minority-owned);
- DBE/MBE/WBE/EDGE certification status;
- Primary line of work;
- Business size;
- Year of establishment; and
- Additional contact information.

The study team relied on a variety of sources for that information, including:

- ODOT contract data;
- ODOT vendor lists;
- State of Ohio Unified Certification Program (UCP) DBE directory;
- State of Ohio EDGE certification list;
- City of Columbus Minority Registered Business Directory;
- City of Columbus Unified Minority Business Directory;
- City MBE/WBE directories;8

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8 City MBE/WBE directories include directories maintained by the cities of Cleveland, Dayton, and Toledo.
Ohio Turnpike Infrastructure and Commission DBE certification list;
- Small Business Administration certification and ownership lists, including 8(a) HUBZone and self-certification lists;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Telephone surveys that the study team conducted with business owners and managers as part of the utilization and availability analyses;
- Business websites; and
- Reviews that ODOT conducted of study information.

D. Relevant Geographic Market Area

The study team used ODOT’s contracting and vendor data to help determine the relevant geographic market area—the geographical area in which the agency spends the substantial majority of its contracting dollars and where the substantial majority of interested contractors and subcontractors that seek to do business with ODOT are located. The study team’s analysis showed that 93 percent of ODOT’s construction and construction-related professional services contracting dollars during the study period went to businesses located in Ohio, indicating that Ohio should be considered the relevant geographic market area for the study. The study team’s analyses—including the availability analysis and quantitative analyses of marketplace conditions—focused on Ohio.

E. Relevant Types of Work

For each prime contract and subcontract, the study team determined the prime and subcontractor’s subindustry that best characterized the business’s primary line of work (e.g., highway, street, and tunnel construction). The study team identified subindustries based on ODOT contract data; telephone surveys that the study team conducted with prime contractors and subcontractors; business certification lists; Dun & Bradstreet business listings; and other sources. The study team developed subindustries based in part on 8-digit D&B industry classification codes. Figure 4-2 presents the dollar amounts that the study team examined in the various construction and construction-related professional services subindustries that the study team included in its analyses.9

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9 Total construction and professional services contract dollars presented in Figure 4-2 differ from those presented in Figure 4-1. Figure 4-1 presents contract dollars based on the primary line of work of prime contractors, whereas Figure 4-2 presents total contract dollars based on the primary line of work of prime and subcontractors.
The study team combined related subindustries that accounted for relatively small percentages of total contracting dollars into “other construction services” and “other construction materials.” For example, the contracting dollars that ODOT awarded to contractors for “bricklaying” represented less than 1 percent of total ODOT contract dollars that the study team examined in the study. The study team combined “bricklaying” with other construction services subindustries that also accounted for relatively small percentages of total contracting 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 the study team did not include as part of its analyses, because they are not typically analyzed as part of disparity studies. The study team did not include contracts in its analyses that:

- Were classified in subindustries which often include property purchases, leases, or other pass-through dollars (e.g., real estate or right-of-way acquisition) ($26 million of associated contract dollars);
- Were classified in industries that were not directly related to transportation contracting (e.g., business consulting services) ($7.6 million of associated contract dollars);

<table>
<thead>
<tr>
<th>Industry</th>
<th>Total (in Thousands)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Construction</strong></td>
<td></td>
</tr>
<tr>
<td>Highway, street, and tunnel construction</td>
<td>$3,943,947</td>
</tr>
<tr>
<td>Bridge and elevated highway construction</td>
<td>1,573,180</td>
</tr>
<tr>
<td>Excavation, drilling, and earthmoving</td>
<td>279,907</td>
</tr>
<tr>
<td>Fencing, guardrails, and signs</td>
<td>225,549</td>
</tr>
<tr>
<td>Electrical work</td>
<td>204,857</td>
</tr>
<tr>
<td>Painting and striping</td>
<td>196,421</td>
</tr>
<tr>
<td>Concrete and related products</td>
<td>135,715</td>
</tr>
<tr>
<td>Construction materials</td>
<td>134,241</td>
</tr>
<tr>
<td>Water, sewer, and utility lines</td>
<td>105,564</td>
</tr>
<tr>
<td>Trucking, hauling, and storage</td>
<td>101,088</td>
</tr>
<tr>
<td>Structural steel construction</td>
<td>73,502</td>
</tr>
<tr>
<td>Landscape services</td>
<td>50,392</td>
</tr>
<tr>
<td>Other construction services</td>
<td>15,802</td>
</tr>
<tr>
<td>Electrical equipment and supplies</td>
<td>12,251</td>
</tr>
<tr>
<td>Heavy construction equipment</td>
<td>10,994</td>
</tr>
<tr>
<td><strong>Total construction</strong></td>
<td><strong>$7,063,411</strong></td>
</tr>
<tr>
<td><strong>Professional services</strong></td>
<td></td>
</tr>
<tr>
<td>Engineering and transportation planning</td>
<td>449,315</td>
</tr>
<tr>
<td>Environmental and geotechnical services</td>
<td>100,058</td>
</tr>
<tr>
<td>Construction management</td>
<td>85,615</td>
</tr>
<tr>
<td>Architectural and design services</td>
<td>43,026</td>
</tr>
<tr>
<td>Construction inspection</td>
<td>18,410</td>
</tr>
<tr>
<td><strong>Total professional services</strong></td>
<td><strong>$696,423</strong></td>
</tr>
<tr>
<td><strong>Total contracting</strong></td>
<td><strong>$7,759,834</strong></td>
</tr>
</tbody>
</table>
- Could not be classified into a particular subindustry ($481,000 of associated contract dollars); or
- ODOT awarded to government agencies or nonprofit organizations ($151,000 of associated contract dollars).

### F. Collection of Bid and Proposal Data

The study team conducted a case study analysis of bids and proposals for a sample of construction and construction-related professional services contracts that ODOT awarded during the study period. ODOT provided documents related to bid, proposal, and other related information to the study team for a sample of its contracts. The study team successfully collected and examined bid and proposal information for a sample of 100 construction and 50 construction-related professional services contracts that ODOT awarded during the study period. For details about the case study analysis, see Chapter 8.

### G. Agency Review Process

ODOT reviewed the study team’s prime contract and subcontract data during several stages of the study process. The study team met with ODOT staff to review the data collection process, information that the study team gathered, and summary results. ODOT staff also reviewed contract and vendor information. The study team incorporated ODOT’s feedback in the final contract and vendor data that the study team used as part of the disparity study.
CHAPTER 5.
Availability Analysis

The study team analyzed the availability of minority- and woman-owned businesses that are ready, willing, and able to perform on Ohio Department of Transportation (ODOT) transportation-related construction and professional services prime contracts and subcontracts. ODOT can use that and other information to help refine its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program and the State of Ohio’s Encouraging Diversity, Growth, and Equity (EDGE) Program. Chapter 5 describes the availability analysis in seven parts:

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

Appendix C provides supporting information related to the availability analysis.

A. Purpose of the Availability Analysis

The study team examined the availability of minority- and woman-owned businesses for ODOT prime contracts and subcontracts to inform the process of setting overall annual goals for DBE participation and to use as inputs in the disparity analysis. In the disparity analysis, the study team compared the percentage of ODOT contract dollars that went to minority- and woman-owned businesses during the study period (i.e., utilization) to the percentage of dollars that one might expect those businesses to receive based on their availability for specific types and sizes of ODOT prime contracts and subcontracts (i.e., availability). Comparisons between utilization and availability allowed the study team to determine whether any minority- or woman-owned business groups were underutilized during the study period relative to their availability for ODOT work.

B. Potentially Available Businesses

The availability analysis focused on specific areas of work (i.e., subindustries) related to the types of transportation-related construction and professional services prime contracts and subcontracts that ODOT and subrecipient local agencies awarded during the study period. The study team began the availability analysis by identifying the specific subindustries in which ODOT spends the majority of its contracting dollars (for details, see Chapter 4 and Appendix C) as well as the geographic areas in which the majority of the businesses with which ODOT spends those contracting dollars are located (i.e., the relevant geographic market area, which the study
team identified as the entire state of Ohio). The study team then developed a database of potentially available businesses through surveys with businesses located in the relevant geographic market area that do work within relevant subindustries. That method of examining availability is sometimes referred to as a custom census and has been accepted in federal court as a valid methodology for conducting availability analyses.

**Overview of availability surveys.** The study team conducted telephone surveys with business owners and managers to identify Ohio businesses that are potentially available for ODOT transportation-related construction and professional services prime contracts and subcontracts. The study team began the survey process by collecting information about business establishments from Dun & Bradstreet (D&B) Marketplace as well as vendor registration lists that ODOT and other local agencies maintain. The study team 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 ODOT and subrecipient local agencies awarded during the study period. The study team obtained listings on 7,005 Ohio businesses that do work related to those work specializations. The study team attempted availability surveys with all of those business establishments.

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

- Status as a private business (as opposed to a public agency or not-for-profit organization);
- Status as a subsidiary or branch of another company;
- Primary lines of work;
- Qualifications and interest in performing work for ODOT or other local government entities;
- Qualifications and 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;
- Year of establishment; and
- Race/ethnicity and gender of ownership.

Appendix C provides details about specific survey questions and an example of the availability survey instrument.

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

2 D&B Marketplace is accepted as the most comprehensive and complete source of business listings in the nation.
**Potentially available businesses.** The study team considered businesses to be potentially available for ODOT prime contracts or subcontracts if they reported having a location in Ohio and reported possessing all of the following characteristics:

- Being a private business (as opposed to a nonprofit organization);
- Having performed work relevant to ODOT transportation-related construction or professional services contracting;
- Having bid on or performed transportation-related construction or professional services prime contracts or subcontracts in either the public or private sector in Ohio in the past five years;
- Being able to perform work or serve customers in the geographical area in which the work took place; and
- Being qualified for and interested in work for ODOT or other state or local government entities.3

The study team also considered the following information about businesses to determine if they were potentially available for specific contracts that ODOT and subrecipient local agencies awarded during the study period:

- The largest contract they bid on or performed in the past five years; and
- The year in which they were established.

**C. Businesses in the Availability Database**

After conducting availability surveys with thousands of local businesses, the study team developed a database of information about businesses that are potentially available for ODOT transportation-related construction and professional services contracting work. Information from the database allowed the study team to develop a representative depiction of businesses that are ready, willing, and able to perform work for ODOT. Figure 5-1 presents the percentage of businesses in the study team's availability database that were minority- or woman-owned businesses. The information in Figure 5-1 reflects a simple head count of businesses with no analysis of their availability for specific ODOT contracts. Thus, it represents only a first step toward analyzing the availability of minority- and woman-owned businesses for ODOT work. The study team's analysis included 632 businesses that are potentially available for specific transportation-related construction and professional services contracts that ODOT and subrecipient local agencies awarded during the study period. As shown in Figure 5-1, of those businesses, 20.6 percent were minority- or woman-owned businesses.

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

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

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

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

1. For each contract element, the study team identified businesses in the availability database that reported that they:
   - Are qualified and interested in performing transportation-related construction or professional services work in that particular role for that specific type of work for ODOT;
   - Are able to serve customers in the geographical area in which the work took place;
   - Have bid on or performed work of that size in the past five years; and
   - Were in business in the year that ODOT awarded the contract.

<table>
<thead>
<tr>
<th>Race/Ethnicity and Gender</th>
<th>Number of Firms</th>
<th>Percent of Firms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black American-owned</td>
<td>27</td>
<td>4.3 %</td>
</tr>
<tr>
<td>Asian Pacific American-owned</td>
<td>5</td>
<td>0.8 %</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>3</td>
<td>0.5 %</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>8</td>
<td>1.3 %</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>8</td>
<td>1.3 %</td>
</tr>
<tr>
<td><strong>Total minority-owned</strong></td>
<td><strong>51</strong></td>
<td><strong>8.1 %</strong></td>
</tr>
<tr>
<td>White woman-owned</td>
<td>79</td>
<td>12.5 %</td>
</tr>
<tr>
<td><strong>Total minority-/woman-owned</strong></td>
<td><strong>130</strong></td>
<td><strong>20.6 %</strong></td>
</tr>
<tr>
<td><strong>Total majority-owned firms</strong></td>
<td><strong>502</strong></td>
<td><strong>79.4 %</strong></td>
</tr>
<tr>
<td><strong>Total firms</strong></td>
<td><strong>632</strong></td>
<td><strong>100.0 %</strong></td>
</tr>
</tbody>
</table>
2. The study team then counted the number of minority- and woman-owned businesses (separately by race/ethnicity), woman-owned businesses, and businesses owned by non-Hispanic white men in the availability database that met the criteria specified in Step 1.

3. The study team translated the numeric availability of businesses for the contract element into percentage availability.

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

**Improvements on a simple head count of businesses.** The study team used a custom census approach to calculating the availability of minority- and woman-owned businesses for ODOT work rather than using a simple head count of minority- and woman-owned businesses (e.g., simply calculating the percentage of all local construction and professional services businesses that are minority- or woman-owned). There are several important ways in which the study team’s custom census approach to measuring availability is more precise than completing a simple head count.

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

![Figure 5-2. Example of an availability calculation for an ODOT subcontract](image)

On a contract that ODOT awarded in 2014, the prime contractor awarded a subcontract worth $56,073 for highway and street work. To determine the overall availability of minority- and woman-owned businesses for that subcontract, the study team identified businesses in the availability database that:

- Were in business in 2014;
- Indicated that they performed highway and street work;
- Reported bidding on work of similar or greater size in the past;
- Reported being able to work or serve customers in the geographical area where the contract was performed;
- Reported qualifications and interest in working as a subcontractor on ODOT or other local entity projects.

The study team found 129 businesses in the availability database that met those criteria. Of those businesses, 32 were minority- or woman-owned businesses. Thus, the availability of minority- and woman-owned businesses for the subcontract was 25 percent (i.e., 32/129 X 100 = 25).

*If 90 percent of an agency's contracting dollars is spent on heavy construction and 10 percent on trucking, the agency would calculate the percentage of heavy construction businesses that are [minority- or woman-owned] and the percentage of trucking businesses that are [minority- or woman-owned], and weight the first figure by 90 percent*
and the second figure by 10 percent when calculating overall [minority- and woman-owned business] availability.4

The study team took type of work into account by examining 47 different subindustries related to transportation-related construction and professional services as part of estimating availability for ODOT work.

Qualifications and interest in relevant prime contract and subcontract work. The study team collected information on whether businesses are qualified and interested in working as prime contractors, subcontractors, or both on ODOT transportation-related construction and professional services work (in addition to considering several other factors related to ODOT prime contracts and subcontracts such as contract types, sizes, and locations):

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

Relative capacity of businesses. The study team considered the size—in terms of dollar value—of the prime contracts and subcontracts that a business bid on or received in the previous five years (i.e., relative capacity) when determining whether to count that business as available for a particular contract element. The study team considered whether businesses had previously bid on or received at least one contract of an equivalent or greater dollar value. The study team’s approach is consistent with many recent, key court decisions that have found relative capacity measures to be important to measuring availability (e.g., Associated General Contractors of America, San Diego Chapter vs. California Department of Transportation, et al.,5 Western States Paving Company v. Washington State DOT,6 Rothe Development Corp. v. U.S. Department of Defense,7 and Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County8).

Dollar-weighted results. The study team examined availability on a contract-by-contract basis and then dollar-weighted the results for different sets of contract elements. Thus, the results of relatively large contract elements contributed to overall availability estimates more than those of relatively small contract elements. The study team’s approach is consistent with USDOT’s “Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program,” which suggests a dollar-weighted approach to calculating availability.

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7 Rothe Development Corp. v. U.S. Department of Defense, 545 F.3d 1023 (Fed. Cir. 2008).
E. Availability Results

The study team estimated the availability of minority- and woman-owned businesses for the 21,799 transportation-related construction and professional services prime contracts and subcontracts that ODOT and subrecipient local agencies awarded between January 1, 2010 through December 31, 2014. Figure 5-3 presents overall dollar-weighted availability estimates by racial/ethnic and gender group for those contracts.

Overall, the availability of minority- and woman-owned businesses for ODOT transportation-related construction and professional services contracts is 18 percent. Woman-owned businesses (8.3%) and Black American-owned businesses (7.1%) exhibited the highest availability percentages among all groups. Note that availability estimates varied when the study team examined different subsets of those contracts (for availability results for specific contract sets, see Appendix F). Assuming that the mix of the types, sizes, and locations of the contracts that ODOT awards in the future are similar to that of the contracts that the agency awarded during the study period, one might expect 18 percent of ODOT's contracting dollars to go to minority- and woman-owned businesses based on their availability for that work.

F. Base Figure for Overall DBE Goal

Establishing a base figure is the first step in calculating an overall goal for DBE participation in ODOT's Federal Highway Administration (FHWA)-funded transportation contracts. The study team calculated the base figure using the same availability database and approach described above except that calculations only included potential DBEs—that is, minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 Code of Federal Regulations Part 26, regardless of actual certification—and only included FHWA-funded prime contracts and subcontracts. The study team's approach to calculating ODOT's base figure is consistent with:

- Court-reviewed methodologies in several states, including Washington, California, Illinois, and Minnesota;
- Instructions in The Final Rule effective February 20, 2014 that outline revisions to the Federal DBE Program; and

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: 2015 availability analysis.

### Table 5.3

<table>
<thead>
<tr>
<th>Race/Ethnicity and Gender</th>
<th>Utilization Benchmark (Availability %)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black American-owned</td>
<td>7.1 %</td>
</tr>
<tr>
<td>Asian Pacific American-owned</td>
<td>0.8 %</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>0.3 %</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>0.9 %</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>0.7 %</td>
</tr>
<tr>
<td>Total minority-owned</td>
<td>9.7 %</td>
</tr>
<tr>
<td>White woman-owned</td>
<td>8.3 %</td>
</tr>
<tr>
<td>Total minority/woman-owned</td>
<td>18.0 %</td>
</tr>
</tbody>
</table>

9 The study team considered a contract to be FHWA-funded if it included at least one dollar of FHWA funding.
- USDOT's "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program."

For details about ODOT's overall DBE goal, see Chapter 9.

**Base figure for FHWA-funded contracts.** The study team's availability analysis indicates that the availability of potential DBEs for ODOT's FHWA-funded transportation contracts is 15.6 percent. ODOT might consider 15.6 percent as the base figure for its overall goal for DBE participation, assuming that the types, sizes, and locations of FHWA-funded contracts that the agency awards in the time period that the goal will cover are similar to the types of FHWA-funded contracts that the agency awarded during the study period.

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

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

In addition, the study team's analyses for calculating the base figure only included FHWA-funded prime contracts and subcontracts. The calculations for the overall availability of minority- and woman-owned businesses included both FHWA- and state-funded transportation prime contracts and subcontracts.

**Additional steps before ODOT determines its overall DBE goal.** ODOT must consider whether to make a step-2 adjustment to the base figure as part of determining its overall DBE goal. Step-2 adjustments can be upward or downward, but there is no requirement for ODOT to make a step-2 adjustment as long as the agency can explain what factors it considered and why no adjustment was warranted. Chapter 9 discusses factors that ODOT might consider in deciding whether to make a step-2 adjustment to the base figure.

**G. Implications for Any DBE Contract Goals**

If ODOT determines that the use DBE contract goals is appropriate in the future, it might use information from the availability analysis when setting any contract-specific DBE goals. It might also use information from a current DBE directory, a current bidders list, or other sources that could provide information about the availability of MBE/WBEs to participate in particular contracts. The Federal DBE Program provides agencies that use DBE contract goals with some flexibility in how they set those goals. DBE goals on some contracts might be higher than the overall DBE goal. DBE goals on other contracts might be lower than the overall DBE goal. In
addition, there may be some FHWA-funded contracts for which setting DBE contract goals would not be appropriate.
CHAPTER 6.
Utilization Analysis

Chapter 6 presents information about the participation of minority- and woman-owned businesses in construction and professional services contracts that the Ohio Department of Transportation (ODOT) awarded between January 1, 2010 and December 31, 2014. (Chapter 4 provides additional information about data collection and methodology related to the utilization analysis.) Chapter 6 is organized in two parts:

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

A. Overview of Utilization Analysis

The study team measured the participation of minority- and woman-owned businesses in ODOT contracting in terms of utilization—the percentage of prime contract and subcontract dollars that ODOT awarded to minority- and woman-owned businesses during the study period. For example, if 5 percent of ODOT prime contract and subcontract dollars went to woman-owned businesses on a particular set of contracts, utilization of woman-owned businesses for that set of contracts would be 5 percent. The study team measured the participation of all minority- and woman-owned businesses regardless of certification. The study team also measured participation separately for minority- and woman-owned businesses that were certified as Disadvantaged Business Enterprises (DBEs); and disadvantaged businesses that were certified as Encouraging Diversity, Growth, and Equity (EDGE) businesses (regardless of race/ethnicity).

All minority- and woman-owned business, not only certified DBEs. Per United States Department of Transportation (USDOT) regulations, ODOT prepares DBE utilization reports for FHWA based on information only about certified DBEs. ODOT does not track the participation of minority- and woman-owned businesses that are not DBE-certified for those reports. In contrast, the study team’s utilization analysis includes the participation of all minority- and woman-owned businesses, regardless of whether they are certified as DBEs. The study team included minority- and woman-owned businesses that:

- Are currently DBE-certified;
- May have once been DBE-certified and graduated (or let their certifications lapse); and
- Are not eligible for certification or have never been certified.

The study team provides utilization results for all minority- and woman-owned businesses and separately for minority- and woman-owned businesses that were DBE-certified during the study period.¹

¹ Businesses that are owned and operated by socially- and economically-disadvantaged non-Hispanic white men can become certified as DBEs. BBC identified one DBE-certified business that was owned by non-Hispanic white men that participated on ODOT contracts during the study period.
**FHWA- and state-funded contracts.** USDOT requires ODOT to prepare DBE participation reports only for its FHWA-funded transportation contracts. Thus, ODOT reports the participation of certified DBEs only for those contracts. The study team analyzed the participation of minority- and woman-owned businesses in both FHWA- and state-funded ODOT contracts.

**B. Utilization Analysis Results**

Figure 6-1 presents the overall percentage of contracting dollars that minority- and woman-owned businesses received on construction and professional services contracts that ODOT awarded during the study period (including both prime contracts and subcontracts). The darker portion of the bar represents the percentage of contracting dollars that certified DBEs received during the study period. As shown in Figure 6-1, overall, minority- and woman-owned businesses received 14.2 percent of the relevant contracting dollars that ODOT awarded during the study period. The darker portion of the bar shows that 7 percent of relevant contracting dollars went to certified DBEs. The study team also examined the participation of EDGE-certified businesses in ODOT contracting. Six percent of relevant contracting dollars went to EDGE-certified businesses.

In addition, the study team examined participation in ODOT contracting separately for each relevant racial/ethnic and gender group. Those results are presented in Figure 6-2. Overall, Black American-owned businesses and white woman-owned businesses exhibited higher levels of participation on ODOT contracts than all other groups (2.2% for Black American-owned businesses and 9.7% for white woman-owned businesses).

**Figure 6-1. Participation of minority- and woman-owned businesses**

Notes:
The study team analyzed 21,799 prime contracts and subcontracts.
The darker portion of the bar represents participation of certified DBEs.
For more detail, see Figure F-2 in Appendix F.

Source:
ODOT contracting data.

Further analysis revealed that, in many cases, a relatively small number of businesses accounted for relatively large percentages of minority-owned business participation in ODOT contracting during the study period:

- A Black American-owned highway and street construction business received 19 percent of the total dollars that went to Black American-owned businesses (approximately $36 million of $197 million);
- A Hispanic American-owned trucking business received 32 percent of the total dollars that went to Hispanic American American-owned businesses (approximately $5.8 million of $18 million);
- A Subcontinent Asian American-owned traffic signal and electrical business received 38 percent of the total dollars that went to Subcontinent Asian American-owned businesses (approximately $37 million of $97 million);
- An Asian-Pacific American-owned asphalt construction business received 19 percent of the total dollars that went to Asian-Pacific American-owned businesses (approximately $5.6 million of $29 million); and
- A Native American-owned concrete supplier received 57 percent of the total dollars that went to Native American-owned businesses (approximately $36 million of $63 million).

Figure 6-2.
Participation of minority- and woman-owned businesses by group

<table>
<thead>
<tr>
<th>Minority-/Woman-owned</th>
<th>Total</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black American-owned</td>
<td>$197,253</td>
<td>2.2 %</td>
</tr>
<tr>
<td>Asian Pacific American-owned</td>
<td>29,227</td>
<td>0.3</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>96,959</td>
<td>1.1</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>17,772</td>
<td>0.2</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>62,777</td>
<td>0.7</td>
</tr>
<tr>
<td>White woman-owned</td>
<td>879,504</td>
<td>9.7</td>
</tr>
<tr>
<td><strong>Total minority-/woman-owned</strong></td>
<td><strong>$1,283,491</strong></td>
<td><strong>14.2 %</strong></td>
</tr>
<tr>
<td>Majority-owned</td>
<td>7,763,299</td>
<td>85.8</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$9,046,790</strong></td>
<td><strong>100.0 %</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>DBEs</th>
<th>Total</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black American-owned</td>
<td>$125,413</td>
<td>1.4 %</td>
</tr>
<tr>
<td>Asian Pacific American-owned</td>
<td>19,158</td>
<td>0.2</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>51,071</td>
<td>0.6</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>8,110</td>
<td>0.1</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>23,701</td>
<td>0.3</td>
</tr>
<tr>
<td>White male-owned</td>
<td>4,774</td>
<td>0.1</td>
</tr>
<tr>
<td>White woman-owned</td>
<td>401,697</td>
<td>4.4</td>
</tr>
<tr>
<td><strong>Total DBE</strong></td>
<td><strong>$633,923</strong></td>
<td><strong>7.0 %</strong></td>
</tr>
<tr>
<td>Non-DBE</td>
<td>8,412,867</td>
<td>93.0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$9,046,790</strong></td>
<td><strong>100.0 %</strong></td>
</tr>
</tbody>
</table>

Information about the participation of minority- and woman-owned businesses is instructive on its own, but it is even more instructive when it is compared with the participation that one might expect based on the availability of minority- and woman-owned businesses for ODOT work. The study team presents such comparisons as part of the disparity analysis in Chapter 7.
CHAPTER 7.
Disparity Analysis

The disparity analysis compared the participation of minority- and woman-owned businesses on contracts that the Ohio Department of Transportation (ODOT) awarded between January 1, 2010 and December 31, 2014 (i.e., the study period) to what those businesses might be expected to receive based on their availability for that work. The analysis focused on construction and professional services contracts. Chapter 7 presents the disparity analysis in five parts:

A. Overview of disparity analysis;
B. Overall disparity analysis results;
C. Disparity analysis results for FHWA-funded contracts;
D. Disparity analysis results for state-funded contracts; and
E. Statistical significance of disparity analysis results.

A. Overview of Disparity Analysis

As part of the disparity analysis, the study team compared the actual participation of minority- and woman-owned businesses in ODOT prime contracts and subcontracts with the percentage of contract dollars that minority- and woman-owned businesses might be expected to receive based on their availability for that work. The study team made those comparisons for each relevant racial/ethnic and gender group. The study team reports disparity analysis results for all ODOT contracts considered together and separately for different sets of contracts (e.g., prime contracts and subcontracts).

The study team expressed both actual participation and availability as percentages of the total dollars associated with a particular set of contracts, making them directly comparable (e.g., 5% participation compared with 4% availability). The study team then calculated a disparity index to help compare participation and availability across relevant racial/ethnic and gender groups and across different sets of contracts. A disparity index of 100 indicates a match between actual participation and availability.

\[
\text{Disparity Index} = \frac{\% \text{ actual participation}}{\% \text{ availability}} \times 100
\]

For example, if actual participation of woman-owned businesses on a set of contracts was 2 percent and the availability of woman-owned businesses for those contracts was 10 percent, then the disparity index would be 2 percent divided by 10 percent, which would then be multiplied by 100 to equal 20. In this example, woman-owned businesses would have actually received 20 cents of every dollar that they might be expected to receive based on their availability.
availability (referred to as \textit{parity}). A disparity index of less than 100 indicates a disparity between participation and availability, and disparities of less than 80 are described in this report as \textit{substantial}.\textsuperscript{1} Figure 7-1 describes how the study team calculates disparity indices.

The disparity analysis results that the study team presents in Chapter 7 summarize detailed results tables provided in Appendix F. Each table in Appendix F presents disparity analysis results for a different set of ODOT contracts. For example, Figure F-2 in Appendix F reports disparity analysis results for all ODOT contracts that the study team examined as part of the study—that is, transportation-related construction and professional services prime contracts and subcontracts that ODOT awarded during the study period. Appendix F includes analogous tables for different subsets of contracts, including those that present results separately for:

- Construction and professional services;
- Prime contracts and subcontracts;
- Contracts awarded in different study period years; and
- Large and small prime contracts.

The heading of each table in Appendix F provides a description of the subset of contracts that the study team analyzed for that particular disparity analysis table.

A review of Figure 7-2 helps to introduce the calculations and format of all of the disparity analysis tables in Appendix F.\textsuperscript{2} As illustrated in Figure 7-2, the disparity analysis tables present information about each relevant racial/ethnic and gender group (as well as about all businesses) in separate rows:

- “All businesses” in row (1) pertains to information about all businesses owned by non-Hispanic white men (i.e., majority-owned businesses) and all minority- and woman-owned businesses considered together.
- Row (2) provides results for all minority- and woman-owned businesses, regardless of whether they were certified as Disadvantaged Business Enterprises (DBEs) or as Encouraging Diversity, Growth, and Equity (EDGE) businesses.
- Row (3) provides results for all woman-owned businesses, regardless of whether they were certified as DBEs or EDGE businesses.
- Row (4) provides results for all minority-owned businesses, regardless of whether they were certified as DBEs or EDGE businesses.

\textsuperscript{1} Many courts have deemed disparity indices below 80 as being “substantial” and have accepted them as evidence of adverse conditions for minority- and woman-owned businesses (e.g., see \textit{Rothe Development Corp v. U.S. Dept of Defense}, 545 F.3d 1023, 1044; \textit{Ency Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County}, 122 F.3d at 914, 923 (11th Circuit 1997); and \textit{Concrete Works of Colo., Inc. v. City and County of Denver}, 36 F.3d 1513, 1524 (10th Cir. 1994)). See Appendix B for additional discussion of those and other cases.

\textsuperscript{2} Figure 7-2 is identical to Figure F-2 in Appendix F.
- Rows (5) through (10) provide results for businesses of each individual minority group, regardless of whether they were certified as DBEs or EDGE businesses.

The bottom half of Figure 7-2 presents utilization results for businesses that were certified as DBEs. The study team does not report availability or disparity analysis results separately for certified businesses.
## Figure 7-2.
Example of a disparity analysis table from Appendix F (identical to Figure F-2 in Appendix F)

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
<td>21,799</td>
<td>$7,759,834</td>
<td>$9,046,790</td>
<td>14.2</td>
<td>18.0</td>
<td>-3.8</td>
<td>78.8</td>
</tr>
<tr>
<td>(2) Minority- and woman-owned</td>
<td>7,490</td>
<td>$1,080,091</td>
<td>$1,283,491</td>
<td>14.2</td>
<td>18.0</td>
<td>-3.8</td>
<td>78.8</td>
</tr>
<tr>
<td>(3) Woman-owned</td>
<td>5,473</td>
<td>$748,968</td>
<td>$879,504</td>
<td>9.7</td>
<td>8.3</td>
<td>1.5</td>
<td>117.7</td>
</tr>
<tr>
<td>(4) Minority-owned</td>
<td>2,017</td>
<td>$331,123</td>
<td>$403,988</td>
<td>4.5</td>
<td>9.7</td>
<td>-5.3</td>
<td>45.8</td>
</tr>
<tr>
<td>(5) Black American-owned</td>
<td>954</td>
<td>$171,738</td>
<td>$197,253</td>
<td>2.2</td>
<td>7.1</td>
<td>-4.9</td>
<td>30.9</td>
</tr>
<tr>
<td>(6) Asian Pacific American-owned</td>
<td>227</td>
<td>$23,841</td>
<td>$29,227</td>
<td>0.3</td>
<td>0.8</td>
<td>-0.5</td>
<td>41.1</td>
</tr>
<tr>
<td>(7) Subcontinent Asian American-owned</td>
<td>317</td>
<td>$70,817</td>
<td>$96,959</td>
<td>1.1</td>
<td>0.3</td>
<td>0.8</td>
<td>200+</td>
</tr>
<tr>
<td>(8) Hispanic American-owned</td>
<td>170</td>
<td>$11,223</td>
<td>$17,772</td>
<td>0.2</td>
<td>0.9</td>
<td>-0.7</td>
<td>21.0</td>
</tr>
<tr>
<td>(9) Native American-owned</td>
<td>278</td>
<td>$48,695</td>
<td>$62,777</td>
<td>0.7</td>
<td>0.7</td>
<td>0.0</td>
<td>104.8</td>
</tr>
<tr>
<td>(10) Unknown minority-owned</td>
<td>71</td>
<td>$4,807</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(11) DBE-certified</td>
<td>3,811</td>
<td>$545,818</td>
<td>$633,923</td>
<td>7.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(12) Woman-owned DBE</td>
<td>2,795</td>
<td>$355,241</td>
<td>$401,697</td>
<td>4.4</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(13) Minority-owned DBE</td>
<td>997</td>
<td>$185,803</td>
<td>$227,452</td>
<td>2.5</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(14) Black American-owned DBE</td>
<td>601</td>
<td>$110,110</td>
<td>$125,413</td>
<td>1.4</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(15) Asian-Pacific American-owned DBE</td>
<td>144</td>
<td>$16,265</td>
<td>$19,158</td>
<td>0.2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(16) Subcontinent Asian American-owned DBE</td>
<td>143</td>
<td>$33,810</td>
<td>$51,071</td>
<td>0.6</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(17) Hispanic American-owned DBE</td>
<td>56</td>
<td>$6,645</td>
<td>$8,110</td>
<td>0.1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(18) Native American-owned DBE</td>
<td>53</td>
<td>$18,974</td>
<td>$23,701</td>
<td>0.3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(19) Unknown minority-owned DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(20) White male-owned DBE</td>
<td>19</td>
<td>$4,774</td>
<td>$4,774</td>
<td>0.1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(21) Unknown DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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 and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: Disparity Analysis.
Utilization results. Each disparity analysis table includes the same columns and rows:

- Column (a) presents the total number of prime contracts and subcontracts (i.e., contract elements) that the study team analyzed as part of the contract set. As shown in row (1) of column (a) of Figure 7-2, the study team analyzed 21,799 contract elements. The value presented in column (a) for each individual racial/ethnic and gender group represents the number of contract elements in which businesses of that particular group participated (e.g., as shown in row (5) of column (a), Black American-owned businesses participated in 954 prime contracts and subcontracts).

- Column (b) presents the dollars (in thousands) that were associated with the set of contract elements. As shown in row (1) of column (b) of Figure 7-2, the study team examined approximately $7.8 billion for the entire set of contract elements. The dollar totals include both prime contract and subcontract dollars. The value presented in column (b) for each individual racial/ethnic and gender group represents the dollars that the businesses of that particular group received on the set of contract elements (e.g., as shown in row (5) of column (b), Black American-owned businesses received $172 million).

- Column (c) presents the dollars (in thousands) that were associated with the set of contract elements after adjusting those dollars for sampling weights for contract elements that local agencies awarded and businesses that the study team identified as minority-owned or as DBEs, but for which specific race/ethnicity information was not available. The dollar totals include both prime contract and subcontract dollars.

- Column (d) presents the utilization percentage of each racial/ethnic and gender group as a percentage of total dollars associated with the set of contract elements. The study team calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage (e.g., for Black American-owned businesses, the study team divided $197 million by $9 billion and multiplied by 100 for a result of 2.2%, as shown in row (5) of column (d)).

Availability results. Column (e) of Figure 7-2 presents the availability of each relevant racial/ethnic and gender group for all contract elements that the study team analyzed as part of the contract set. Availability estimates, which are represented as a percentage of the total contracting dollars associated with the set of contracts, serve as benchmarks against which to compare utilization results for specific groups for specific sets of contracts (e.g., as shown in row (5) of column (e), the availability of Black American-owned businesses is 7.1%).

Differences between utilization and availability. The next step in analyzing whether there was a disparity between the participation and availability of minority- and woman-owned businesses is to subtract the utilization percentage from the availability percentage. Column (f) of Figure 7-2 presents the percentage point difference between utilization and availability for each relevant racial/ethnic and gender group. For example, as presented in row (5) of column (f) of Figure 7-2, the participation of Black American-owned businesses in ODOT contracts was 4.9 percentage points less than their availability.
**Disparity indices.** It is sometimes difficult to interpret absolute percentage differences between participation and availability. Therefore, the study team also calculated a disparity index for each relevant racial/ethnic and gender group, which measured actual participation relative to availability and served as a metric to compare any disparities across different groups and different sets of contracts. The study team calculated disparity indices by dividing the utilization percentage for each group by the availability percentage for each group and multiplying by 100. Smaller disparity indices indicate greater disparities (i.e., a greater degree of underutilization).

Column (g) of Figure 7-2 presents the disparity index for each relevant racial/ethnic and gender group. For example, as reported in row (5) of column (g), the disparity index for Black American-owned businesses was approximately 31, indicating that Black American-owned businesses actually received approximately $0.31 for every dollar that they might be expected to receive based on their availability for prime contracts and subcontracts that ODOT awarded during the study period.

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

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

**B. Overall Disparity Analysis Results**

The study team used the disparity analysis results from Figure 7-2 to assess any disparities between the participation of minority- and woman-owned businesses in prime contracts and subcontracts that ODOT awarded during the study period and their availability for that work. Figure 7-3 presents disparity indices for all relevant racial/ethnic and gender groups considered together and separately for each group. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. Disparity indices 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, because some courts use 80 as a threshold for what indicates a substantial disparity.

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3 A particular racial/ethnic or gender group could show a utilization percentage greater than 0 percent but an availability percentage of 0 percent for many reasons, including the fact that one or more businesses that participated in ODOT contracts during the study period were out of business at the time that the study team conducted availability surveys.
Figure 7-3. Disparity indices by group

Note:
The study team analyzed 21,799 prime contracts/subcontracts.
For more detail, see Figure F-2 in Appendix F.

Source:
Availability and utilization analyses.

As shown in Figure 7-3, overall, the participation of minority- and white woman-owned businesses in contracts that ODOT awarded during the study period was substantially lower than what one might expect based on the availability of those businesses for that work. The disparity index of 79 indicates that minority- and white woman-owned businesses considered together received approximately $0.79 for every dollar that they might be expected to receive based on their availability for the prime contracts and subcontracts that ODOT awarded during the study period.

- Three groups exhibited disparity indices substantially below parity—Black American-owned businesses (disparity index of 31), Asian-Pacific American-owned businesses (disparity index of 41), and Hispanic American-owned businesses (disparity index of 21).
- Three groups did not exhibit disparities—white woman-owned businesses (disparity index of 118), Subcontinent Asian American-owned businesses (disparity index of 200+), and Native American-owned businesses (disparity index of 105). A single vendor accounted for a substantial share of dollars that went to Subcontinent American-owned businesses (approximately $37 million of $96 million). The majority of dollars that went to Native American-owned businesses (approximately $36 million of $62 million) went to a single Native American-owned business.

C. Disparity Analysis Results for FHWA-funded Contracts

ODOT is a recipient of Federal Highway Administration (FHWA) funds, and the vast majority of contracts that ODOT awarded during the study period were FHWA-funded. ODOT awarded those contracts using policies and practices that are part of its implementation of the Federal DBE Program including the use of DBE contract goals. Figure 7-4 presents disparity analysis results for the FHWA-funded contracts that ODOT awarded during the study period to help assess the effectiveness of the agency’s implementation of the Federal DBE Program.

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4 The study team considered a contract to be FHWA-funded if it included at least one dollar of FHWA funding.
As shown in Figure 7-4, overall, the participation of minority- and white woman-owned businesses in FHWA-funded contracts that ODOT awarded during the study period was substantially lower than what one might expect based on the availability of those businesses for that work. The disparity index of 78 indicates that minority- and white woman-owned businesses considered together received approximately $0.78 for every dollar that they might be expected to receive based on their availability for the FHWA-funded prime contracts and subcontracts that ODOT awarded during the study period.

- Three groups exhibited disparity indices substantially below parity—Black American-owned businesses (disparity index of 30), Asian-Pacific American-owned businesses (disparity index of 36), and Hispanic American-owned businesses (disparity index of 23).
- Three groups did not exhibit disparities—white woman-owned businesses (disparity index of 118), Subcontinent Asian American-owned businesses (disparity index of 200+), and Native American-owned businesses (disparity index of 102).

D. Disparity Analysis Results for State-funded Contracts

ODOT implements the State of Ohio’s EDGE Program to award its state-funded contracts including the use of EDGE contract goals. Figure 7-5 presents disparity analysis results for the state-funded contracts that ODOT awarded during the study period to help assess the effectiveness of ODOT’s implementation of the State of Ohio’s EDGE Program. As shown in Figure 7-5, overall, the participation of minority- and white woman-owned businesses in state-funded contracts that ODOT awarded during the study period was lower than what one might expect based on the availability of those businesses for that work. The disparity index of 83 indicates that minority- and white woman-owned businesses considered together received approximately $0.83 for every dollar that they might be expected to receive based on their availability for the state-funded prime contracts and subcontracts that ODOT awarded during the study period.

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5 The study team considered a contract to be state-funded if it did not include any federal funding.
Three groups exhibited disparity indices substantially below parity—Black American-owned businesses (disparity index of 41), Asian-Pacific American-owned businesses (disparity index of 66), and Hispanic American-owned businesses (disparity index of 10).

Three groups did not exhibit disparities—white woman-owned businesses (disparity index of 116), Subcontinent Asian American-owned businesses (disparity index of 200+), and Native American-owned businesses (disparity index of 127).

E. Statistical Significance of Disparity Analysis Results

Statistical significance tests allow researchers to test the degree to which they can reject random chance as an explanation for any observed quantitative differences. In other words, a statistically significant difference is a difference that one can consider to be reliable or real. Random chance is the factor that researchers consider most in determining the statistical significance of results that are based on population samples. As part of the availability analysis, the study team attempted to contact every business in the relevant geographic market area that Dun & Bradstreet (D&B) identified as doing business within relevant subindustries (for details, see Chapter 5). Attempting to contact every relevant business mitigated many of the concerns associated with random chance in population sampling as they may relate to the study team’s availability estimates. In addition, the utilization analysis was based on what amounted to a population of contracts. Therefore, one might consider any disparities between participation and availability that the study team identified to be statistically significant. The study team nonetheless used independent tests to assess the statistical significance of disparity analysis results to be consistent with industry standards.

Monte Carlo analysis. The study team used a computational algorithm that relies on repeated, random simulations to examine the statistical significance of disparity analysis results. That approach is referred to as a Monte Carlo method. The analyses that the study team completed as part of the disparity study were well-suited for using Monte Carlo analysis to test statistical significance. Monte Carlo analysis was appropriate for that purpose, because, among the contracts that ODOT awarded during the study period, there were many individual chances for businesses to win prime contracts and subcontracts, each with a different payoff (i.e., each with a different dollar value). Figure 7-6 provides additional information about how the study team used a Monte Carlo method to test the statistical significance of disparity analysis results.
It is important to note that Monte Carlo simulations may not be necessary to establish the statistical significance of results, and it may not be appropriate to use with very small populations of businesses.

**Figure 7-6. Monte Carlo Analysis**

The study team began the Monte Carlo analysis by examining individual contract elements. For each contract element, the study team’s availability database provided information on individual businesses that are available for that contract element based on type of work, contractor role, contract size, and location of the work. The study team assumed that each available business had an equal chance of winning that contract element. For example, the odds of a woman-owned business receiving that contract element were equal to the number of woman-owned businesses available for the contract element divided by the total number of businesses available for the contract element. The Monte Carlo simulation then randomly chose a business from the pool of available businesses to win the contract element.

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

The output of the Monte Carlo simulations represents the number of simulations out of 1 million that produced a utilization result that was equal or below the actual observed utilization result for each racial/ethnic and 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 the study team considered that disparity index to be statistically significant at the 95 percent confidence level. If that number was less than or equal to 50,000 (i.e., 5.0% of the total number of simulations), then the study team considered that disparity index to be statistically significant at the 90 percent confidence level.

**Results.** The study team identified substantial disparities for minority- and white woman-owned businesses combined on all construction and professional services contracts considered together (see Table F-2 in Appendix F). That is key results, as the contracts examined include a large number of contracts that included race- and gender-conscious measures (i.e., contract goals).

The study team applied Monte Carlo analysis to those disparity analysis results. Figure 7-7 presents the results from the Monte Carlo simulations as they relate to the statistical significance of disparities that the study team observed for minority- and white woman-owned businesses. The Monte Carlo analysis indicates that the results for all groups showing substantial disparities on all construction and professional services contracts combined (i.e., minority- and woman-owned businesses considered together; minority-owned businesses considered together; Black American-owned businesses; Asian Pacific American-owned businesses; and Hispanic American-owned businesses) were statistically significant at the 95 percent confidence level.
### Figure 7-7.
Monte Carlo simulation results for disparity analysis results

<table>
<thead>
<tr>
<th>Race/Ethnicity and Gender</th>
<th>Disparity Index</th>
<th>Number of simulation runs out of one million that replicated observed utilization</th>
<th>Probability of observed disparity occurring due to &quot;chance&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total minority-woman-owned</td>
<td>79</td>
<td>7</td>
<td>&lt;0.1 %</td>
</tr>
<tr>
<td>White woman-owned</td>
<td>118</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Total minority-owned</td>
<td>46</td>
<td>0</td>
<td>&lt;0.1 %</td>
</tr>
<tr>
<td>Black American-owned</td>
<td>31</td>
<td>0</td>
<td>&lt;0.1 %</td>
</tr>
<tr>
<td>Asian Pacific American-owned</td>
<td>41</td>
<td>0</td>
<td>&lt;0.1 %</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>200 +</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>21</td>
<td>1</td>
<td>&lt;0.1 %</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>105</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

**Note:** Numbers rounded to nearest tenth of 1 percent.
Numbers may not add to totals due to rounding.

**Source:** Availability and utilization analyses.
CHAPTER 8.
Further Exploration of Disparities

As presented in Chapter 7, the study team observed substantial disparities between the participation and availability of various groups of minority- and woman-owned businesses when considering all ODOT transportation contracts together and when considering Federal Highway Administration (FHWA)-funded contracts separately. Five areas of questions provide a framework for further exploration of the disparities that the study team observed between the participation and availability of minority- and woman-owned businesses in ODOT contracts:

A. Are there disparities for relevant contracting areas?
B. Are there disparities for prime contracts and subcontracts?
C. Are there disparities for different time periods?
D. Are there disparities for large and small prime contracts?
E. Do bid/proposal processes explain any disparities for prime contracts?

Answers to those questions may be relevant as ODOT considers how to refine its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program and the State of Ohio’s Encouraging Diversity, Growth, & Equity (EDGE) Program. Answers to those questions may also help ODOT identify the specific racial/ethnic and gender groups, if any, that might be included in any future race- or gender-conscious program measures that the agency decides to use.

A. Are there Disparities for Relevant Contracting Areas?

The study team examined disparity analysis results separately for transportation-related construction and professional services contracts that ODOT awarded during the study period. That information might help ODOT refine its implementation of the Federal DBE Program and the State of Ohio’s EDGE Program for particular contracting areas. Figure 8-1 presents disparity indices for all relevant racial/ethnic and gender groups separately for construction and professional services. Overall, minority- and woman-owned businesses exhibited substantial disparities for construction contracts and disparities for professional services contracts.

- Three minority groups exhibited substantial disparity indices below parity on construction contracts — Black American-owned businesses (disparity index of 33), Asian Pacific American-owned businesses (disparity index of 22), and Hispanic American-owned businesses (disparity index of 53).
- Subcontinent Asian American-owned businesses (disparity index of 200+) and Native American-owned businesses (disparity index of 105) did not exhibit disparities on construction contracts.
- Two minority groups exhibited substantial disparities on professional services contracts — Black American-owned businesses (disparity index of 18) and Hispanic American-owned businesses (disparity index of less than 1).
Asian Pacific American-owned businesses (disparity index of 200+), Subcontinent American-owned businesses (disparity index of 200+), and Native American-owned businesses (disparity index of 106) did not exhibit disparities on professional services contracts.

White woman-owned businesses did not exhibit disparities for construction or professional services contracts (disparity index of 114 for construction contracts; disparity index of 187 for professional services contracts).

**Figure 8-1. Disparity indices for construction and professional services**

<table>
<thead>
<tr>
<th>Group</th>
<th>Construction</th>
<th>Professional Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minority/Woman</td>
<td>79</td>
<td>81</td>
</tr>
<tr>
<td>White woman</td>
<td>33</td>
<td>114</td>
</tr>
<tr>
<td>Black American</td>
<td>18</td>
<td>200</td>
</tr>
<tr>
<td>Asian Pacific</td>
<td>22</td>
<td>200</td>
</tr>
<tr>
<td>Subcontinent Asian</td>
<td></td>
<td>200</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>53</td>
<td>105</td>
</tr>
<tr>
<td>Native American</td>
<td>106</td>
<td>106</td>
</tr>
</tbody>
</table>

Note: The study team analyzed 19,553 construction contracts and 2,246 professional services contracts. For more detail, see Figures F-3 and F-4 in Appendix F.

Source: Availability and utilization analyses.

**B. Are there Disparities for Prime Contracts and Subcontracts?**

The study team examined disparity analysis results separately for prime contracts and subcontracts to assess whether minority- and woman-owned businesses exhibited different outcomes based on their roles as either prime contractors or subcontractors during the study period. Figure 8-2 presents disparity indices for all relevant racial/ethnic and gender groups separately for prime contracts and subcontracts. Overall, minority- and woman-owned businesses exhibited substantial disparities for prime contracts, and three minority groups exhibited disparities for subcontracts.

- With the exception of Subcontinent Asian American-owned businesses (disparity index of 200+), all minority- and woman-owned groups exhibited substantial disparities for prime contracts — Black American-owned businesses (disparity index of 4), Asian Pacific American-owned businesses (disparity index of 26), Hispanic American-owned businesses (disparity index of 9), Native American-owned businesses (disparity index of 28), and white woman-owned business (disparity index of 77).

- Subcontinent Asian American-owned businesses did not exhibit a disparity for prime contracts (disparity index of 200+). Nearly 45 percent of the dollars that went to Subcontinent Asian American-owned businesses for prime contracts went to a single Subcontinent Asian American-owned business (approximately $22 million of $49 million).
Asian Pacific American-owned businesses (disparity index of 61) and Hispanic American-owned businesses (disparity index of 43) exhibited substantial disparities for subcontracts. Black American-owned businesses (disparity index of 89) exhibited a disparity for subcontracts, but that disparity was not substantial.

Subcontinent Asian American-owned businesses (disparity index of 200+), Native American-owned businesses (disparity index of 154), and white woman-owned businesses (disparity index of 156) did not exhibit disparities for subcontracts.

Figure 8-2. Disparity indices for prime contracts and subcontracts

Note:
The study team analyzed 3,527 prime contracts and 18,272 subcontracts.
For more detail, see Figures F-7 and F-8 in Appendix F.

Source:
Availability and utilization analyses.

C. Are there Disparities for Different Time Periods?

The study team examined disparity analysis results separately for two separate time periods—January 1, 2010 through December 31, 2011 (early study period) and January 1, 2012 through December 31, 2014 (late study period). That information might help ODOT determine whether there were different outcomes for minority- and woman-owned businesses as the country moved further and further from the economic downturn that began in 2008. Figure 8-3 presents disparity indices for all relevant racial/ethnic and gender groups separately for the early and late study periods. Overall, minority- and woman-owned businesses exhibited substantial disparities for contracts awarded during both early and late study periods.

- Three minority groups exhibited substantial disparities on contracts awarded during the early study period — Black American-owned businesses (disparity index of 27), Asian Pacific American-owned businesses (disparity index of 55), and Hispanic American-owned businesses (disparity index of 21).
- Those same three minority groups exhibited also substantial disparity indices below parity on contracts awarded during the late study period — Black American-owned businesses (disparity index of 33), Asian Pacific American-owned businesses (disparity index of 35), and Hispanic American-owned businesses (disparity index of 21).
- Native American-owned businesses exhibited a disparity on contracts awarded during the late study period, but that disparity was not substantial (disparity index of 90).
White woman-owned businesses did not exhibit disparities on contracts awarded in either the early or late study periods (disparity index of 124 for early contracts; disparity index of 115 for late contracts).

**Figure 8-3. Disparity indices for early and late study period**

*Note:* The study team analyzed 4,722 contracts in the early study period and 17,077 contracts in the late study period. For more detail, see Figures F-5 and F-6 in Appendix F.

*Source:* Availability and utilization analyses.

**D. Are there Disparities for Large and Small Prime Contracts?**

The study team compared disparity analysis results for "large" prime contracts and "small" prime contracts that ODOT awarded during the study period to assess whether contract size affected disparity analysis results for prime contracts. "Large" prime contracts were defined as construction contracts worth more than $2 million and professional services contracts worth more than $500,000. "Small" prime contracts were defined as construction contracts worth $2 million or less and professional services contracts worth $500,000 or less. Figure 8-4 presents disparity indices for all relevant racial/ethnic and gender groups separately for large and small prime contracts. Overall, minority- and woman-owned businesses exhibited substantial disparities for both small and large prime contracts.

- With the exception of Subcontinent Asian American-owned businesses (disparity index of 200+), all minority- and woman-owned groups exhibited substantial disparities for small prime contracts — Black American-owned businesses (disparity index of 3), Asian Pacific American-owned businesses (disparity index of 24), Hispanic American-owned businesses (disparity index of 35), Native American-owned businesses (disparity index of 30), and white woman-owned business (disparity index of 78).

- Black American-owned businesses (disparity index of 5), Hispanic American-owned businesses (disparity index of less than 1), Native American-owned businesses (disparity index of less than 1), and white woman-owned business (disparity index of 77) exhibited substantial disparities for large prime contracts. Native American-owned businesses had very low availability for large prime contracts and were awarded no large prime contracts during the study period.

- Subcontinent Asian American-owned businesses (disparity index of 200+) and Asian Pacific American-owned businesses (disparity index of 200+) did not exhibit disparities for large
prime contracts. Asian Pacific American-owned businesses had very low availability for large prime contracts, and one Asian Pacific American-owned business accounted for all of the contract dollars that were awarded to Asian Pacific American-owned businesses on large prime contracts.

**Figure 8-4. Disparity indices for large and small prime contracts**

Note: The study team analyzed 850 large prime contracts and 2,677 small prime contracts. For more detail, see Figures F-9 and F-10 in Appendix F.

Source: Availability and utilization analyses.

### E. Do Bid/Proposal Processes Explain Any Disparities for Prime Contracts?

The study team completed a case study analysis to assess whether characteristics of ODOT’s bid and proposal evaluation processes help to explain any of the disparities that the study team observed for prime contracts. The study team analyzed bid and proposal information from samples of the contracts that ODOT awarded during the study period.

**Construction.** The study team examined bid information for a sample of 100 construction contracts that ODOT awarded during the study period. In total, ODOT received 445 bids for those contracts.

**Number of bids from minority- and woman-owned businesses.** Minority- and woman-owned businesses submitted 23 of the 445 bids (5%) that the study team examined:

- One bid (less than 1% of all bids) came from a minority-owned business; and
- Twenty-two bids (5% of all bids) came from woman-owned businesses (7 different businesses).

As part of availability surveys, the study team asked construction business owners and managers to indicate whether their companies compete as prime contractors on public contracts. Of the business owners and managers that indicated that their companies compete as prime contractors, 5 percent represented minority-owned businesses and 15 percent represented woman-owned businesses. Those percentages were higher than the percentage of minority- and woman-owned businesses that submitted bids on ODOT construction contracts during the study period.
Success of bids. The study team also examined the percentage of bids that minority- and woman-owned businesses submitted that resulted in contract awards. As shown in Figure 8-5, 0 percent of the bids that minority-owned businesses submitted resulted in contract awards, which was substantially lower than the percent of bids that majority-owned businesses submitted that resulted in contract awards. Of the bids that woman-owned businesses submitted, 16 percent resulted in contract awards, lower than the percent of bids that majority-owned businesses submitted that resulted in contract awards.

![Figure 8-5. Percentage of bids on construction contracts that resulted in contract awards](image)

Note: Based on analysis of 445 bids on 100 contracts.
Source: ODOT contracting data.

Professional services. The study team examined proposal information for a sample of 50 professional services contracts that ODOT awarded during the study period. In total, ODOT received 587 bids for those contracts.

Number of bids from minority- and woman-owned businesses. Minority- and woman-owned businesses submitted 130 of the 587 bids (22%) that the study team examined:

- One hundred and eight bids (18% of all bids) came from minority-owned businesses (16 different businesses); and
- Twenty-two bids (4% of all bids) came from woman-owned businesses (7 different businesses).

Of the professional services business owners and managers that indicated in availability surveys that their companies are interested in competing as prime contractors on public contracts, 17 percent represented minority-owned businesses and 17 percent represented woman-owned businesses. Those percentages were lower than the percentage of minority-owned businesses that submitted bids on ODOT construction contracts during the study period but higher than the percentage of woman-owned businesses that submitted bids.

Success of bids. The study team also examined the percentage of bids that minority- and woman-owned businesses submitted that resulted in contract awards. As shown in Figure 8-6, 10 percent of the bids that minority-owned businesses submitted resulted in contract awards, which was slightly higher than the percent of bids that majority-owned businesses submitted that resulted in contract awards. Of the bids that woman-owned businesses submitted, 9 percent resulted in contract awards, slightly lower than the percent of bids that majority-owned businesses submitted that resulted in contract awards.
Figure 8-6. Percentage of bids on professional services contracts that resulted in contract awards

Note:
Based on analysis of 587 bids on 50 contracts.
Source:
ODOT contracting data.

![Bar chart showing percentage of bids on professional services contracts](image)
CHAPTER 9.
Overall DBE Goal

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

ODOT must prepare and submit a Goal and Methodology document to FHWA that presents its overall DBE goal that is supported by information about the steps that the agency took to develop the goal. ODOT last developed an overall DBE goal for FHWA-funded contracts for federal fiscal years (FFYs) 2014 through 2016. The agency established an overall DBE annual participation goal of 8.9 percent. ODOT indicated to FHWA that it planned to meet the goal through the use of a combination of race- and gender-neutral and race- and gender-conscious program measures.

ODOT is required to develop a new goal for FFYs 2017 through 2019. Chapter 9 provides information that ODOT might consider as part of setting its new overall DBE goal. Chapter 9 is organized in two parts that are based on the two-step process that 49 Code of Federal Regulations (CFR) Part 26.45 outlines for agencies to set their overall DBE goals:

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

A. Establishing a Base Figure

Establishing a base figure is the first step in calculating an overall goal for DBE participation in ODOT’s FHWA-funded transportation contracts. As presented in Chapter 5, potential DBEs—that is, minority- and women-owned businesses that are DBE-certified or appear that they could be DBE-certified based on their ownership and annual revenue limits described in 13 CFR Part 121 and 49 CFR Part 26—might be expected to receive 15.6 percent of ODOT’s FHWA-funded prime contract and subcontract dollars based on their availability for that work. ODOT might consider 15.6 percent as the base figure for its overall DBE goal if it anticipates that the types, sizes, and locations of FHWA-funded contracts that the agency awards in the future will be similar to the FHWA-funded contracts that it awarded during the study period (January 1, 2010 through December 31, 2014).
Figure 9-1 presents the construction and professional services components of the base figure for ODOT’s overall DBE goal. The availability estimates presented in Figure 9-1 are based on the availability of potential DBEs for FHWA-funded prime contracts and subcontracts. The overall base figure reflects a weight of 0.95 for construction contracts and 0.05 for professional services contracts based on the volume of dollars of FHWA-funded contracts that ODOT awarded during the study period. If ODOT expects that the relative distributions of FHWA-funded construction and professional services contract dollars will change substantially in the future, the agency might consider applying different weights to the corresponding base figure components. ODOT might also consider evaluating whether the types, sizes, and locations of the FHWA-funded contracts that it awards will change substantially in the future.

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

<table>
<thead>
<tr>
<th>Potential DBEs</th>
<th>Availability Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Construction</td>
</tr>
<tr>
<td>Black American-owned</td>
<td>6.4 %</td>
</tr>
<tr>
<td>Asian Pacific American-owned</td>
<td>0.7%</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
<td>0.1%</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>0.4%</td>
</tr>
<tr>
<td>Native American-owned</td>
<td>0.5%</td>
</tr>
<tr>
<td>White woman-owned</td>
<td>7.2%</td>
</tr>
<tr>
<td>Total potential DBEs</td>
<td>15.2 %</td>
</tr>
<tr>
<td>Industry weight</td>
<td>95%</td>
</tr>
</tbody>
</table>

Note: Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals. See Figures F-20, F-21, and F-22 in Appendix F for corresponding disparity results tables.

Source: Availability analysis.

**B. Considering a Step-2 Adjustment**

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

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

The study team completed an analysis of each of the above step-2 factors. Much of the information that the study team examined was not easily quantifiable but is still relevant to ODOT as it determines whether to make a step-2 adjustment.

¹ 49 CFR Section 26.45.
1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. The United States Department of Transportation’s (USDOT’s) “Tips for Goal-Setting” suggests that agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years. USDOT further suggests that agencies should choose the median level of annual DBE participation for those years as the measure of past participation:

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

Figure 9-2 presents past DBE participation based on information provided by ODOT. According to ODOT’s report, median DBE participation on FHWA-funded contracts from FFYs 2010 through 2014 was 9.8 percent.

<table>
<thead>
<tr>
<th>Year</th>
<th>DBE Participation</th>
<th>Annual DBE Goal</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>8.14%</td>
<td>7.0%</td>
<td>1.1%</td>
</tr>
<tr>
<td>2011</td>
<td>11.0</td>
<td>10.0</td>
<td>1.0</td>
</tr>
<tr>
<td>2012</td>
<td>9.54</td>
<td>9.1</td>
<td>0.4</td>
</tr>
<tr>
<td>2013</td>
<td>9.8</td>
<td>9.1</td>
<td>0.7</td>
</tr>
<tr>
<td>2014</td>
<td>10.4</td>
<td>8.9</td>
<td>1.5</td>
</tr>
</tbody>
</table>

The information about past DBE participation supports a downward adjustment to ODOT’s base figure. If ODOT were to use the approach that USDOT outlined in “Tips for Goals Setting” based on Uniform Reports of DBE Awards/Commitments and Payments, the overall goal would be the average of the 15.6 percent base figure and the 9.8 percent median past DBE participation, yielding a potential overall DBE goal of 12.7 percent.

The study team’s analysis of DBE participation on ODOT’s FHWA-funded contracts indicates DBE participation (7.0%) that is lower than the base figure.³ If ODOT were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of the 15.6 percent base figure and the 7.0 percent DBE participation, yielding a potential overall DBE goal of 11.3 percent.

2. Information related to employment, self-employment, education, training, and unions. Chapter 3 summarizes information about conditions in the local contracting industry for minorities, women, and minority- and woman-owned businesses. Additional information


³ The study team’s analysis of DBE participation varies slightly from DBE participation as reported on ODOT’s Uniform Reports to FHWA for a number of reasons, including the exclusion of particular contract elements in key analyses, as reported in Chapter 4; and a business that, while historically DBE certified through ODOT, was not considered DBE certified based on additional information collected about that business.
about quantitative and qualitative analyses of conditions in the local marketplace are presented in Appendices D and E. The study team’s analyses indicate that there are barriers that certain minority groups and women face related to human capital, financial capital, business ownership, and business success in the Ohio transportation contracting industry. Such barriers may decrease the availability of minority- and woman-owned businesses to obtain and perform the FHWA-funded contracts that ODOT awards, which supports an upward step-2 adjustment to ODOT’s base figure.

Although it may not be possible to quantify the cumulative effects that barriers in human capital, financial capital, and business success may have on the availability of minority- and woman-owned businesses in the local contracting industry, the effects of barriers in business ownership can be quantified. The study team used regression analyses to investigate whether race/ethnicity and gender are related to rates of business ownership among workers in the local contracting industry. The regression analyses allowed the study team to examine those relationships while statistically controlling for various race- and gender-neutral personal characteristics including education and age. (Appendix D provides detailed results of the study team’s business ownership regression analyses.)

The regression analyses revealed that, even after accounting for various race- and gender-neutral personal characteristics, being a woman was associated with a lower likelihood of owning construction and professional services businesses compared to being a man. Being a minority was not associated with a lower likelihood of owning construction and professional services businesses after statistically controlling for race- and gender-neutral factors. However, that result does not necessarily indicate that minorities have the same opportunities to own businesses in the local support services industry as non-Hispanic white men (for example, see the qualitative analyses of marketplace conditions in Appendix E).

The study team analyzed the impact that barriers in business ownership would have on the base figure if women owned businesses at the same rate as comparable non-Hispanic white men. The results of that analysis—sometimes referred to as a but for analysis, because it estimates the availability of minority- and woman-owned businesses but for the effects of race- and gender-based discrimination—are presented in Figure 9-3. The analysis included the same contracts that the study team analyzed to determine the base figure (i.e., FHWA-funded construction and professional services prime contracts and subcontracts that ODOT awarded during the study period). The study team made but for adjustments to the availability of woman-owned businesses for construction and professional services and then combined those results in a dollar-weighted manner. The weights for each industry were based on the proportion of FHWA-funded contract dollars that ODOT awarded in each industry during the study period (i.e., a 0.95 weight for construction and a 0.05 weight for professional services). In that way, the study team determined a potential adjustment to ODOT’s base figure that attempted to account for race- and gender-based barriers in business ownership in the local contracting industry.
Figure 9-3.
Potential step-2 adjustment considering disparities in the rates of business ownership

<table>
<thead>
<tr>
<th>Industry and group</th>
<th>a. Current availability</th>
<th>b. Disparity index for business ownership</th>
<th>c. Availability after initial adjustment*</th>
<th>d. Availability after scaling to 100%</th>
<th>e. Components of base figure**</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Construction</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1) Black American</td>
<td>6.4 %</td>
<td>n/a</td>
<td>6.4 %</td>
<td>6.0 %</td>
<td></td>
</tr>
<tr>
<td>(2) Asian Pacific American</td>
<td>0.7</td>
<td>n/a</td>
<td>0.7</td>
<td>0.7</td>
<td></td>
</tr>
<tr>
<td>(3) Subcontinent Asian American</td>
<td>0.1</td>
<td>n/a</td>
<td>0.1</td>
<td>0.1</td>
<td></td>
</tr>
<tr>
<td>(4) Hispanic American</td>
<td>0.4</td>
<td>n/a</td>
<td>0.4</td>
<td>0.4</td>
<td></td>
</tr>
<tr>
<td>(5) Native American</td>
<td>0.5</td>
<td>n/a</td>
<td>0.5</td>
<td>0.5</td>
<td></td>
</tr>
<tr>
<td>(6) White woman</td>
<td>7.2</td>
<td>55</td>
<td>13.1</td>
<td>12.4</td>
<td></td>
</tr>
<tr>
<td>(7) Potential DBEs</td>
<td>15.2 %</td>
<td>n/a</td>
<td>21.2 %</td>
<td>20.0 %</td>
<td>18.9 %</td>
</tr>
<tr>
<td>(8) All other businesses ***</td>
<td>84.8</td>
<td>n/a</td>
<td>84.8</td>
<td>80.0</td>
<td></td>
</tr>
<tr>
<td>(9) Total firms</td>
<td>100.0 %</td>
<td>n/a</td>
<td>106.0 %</td>
<td>100.0 %</td>
<td></td>
</tr>
<tr>
<td><strong>Professional Services</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(10) Black American</td>
<td>6.1 %</td>
<td>n/a</td>
<td>6.1 %</td>
<td>5.7 %</td>
<td></td>
</tr>
<tr>
<td>(11) Asian Pacific American</td>
<td>0.9</td>
<td>n/a</td>
<td>0.9</td>
<td>0.8</td>
<td></td>
</tr>
<tr>
<td>(12) Subcontinent Asian American</td>
<td>0.4</td>
<td>n/a</td>
<td>0.4</td>
<td>0.4</td>
<td></td>
</tr>
<tr>
<td>(13) Hispanic American</td>
<td>8.9</td>
<td>n/a</td>
<td>8.9</td>
<td>8.4</td>
<td></td>
</tr>
<tr>
<td>(14) Native American</td>
<td>0.8</td>
<td>n/a</td>
<td>0.8</td>
<td>0.8</td>
<td></td>
</tr>
<tr>
<td>(15) White woman</td>
<td>5.0</td>
<td>44</td>
<td>11.4</td>
<td>10.7</td>
<td></td>
</tr>
<tr>
<td>(16) Potential DBEs</td>
<td>22.1 %</td>
<td>n/a</td>
<td>28.5 %</td>
<td>26.8 %</td>
<td>1.4 %</td>
</tr>
<tr>
<td>(17) All other businesses</td>
<td>77.9</td>
<td>n/a</td>
<td>77.9</td>
<td>73.2</td>
<td></td>
</tr>
<tr>
<td>(18) Total firms</td>
<td>100.0 %</td>
<td>n/a</td>
<td>106.4 %</td>
<td>100.0 %</td>
<td></td>
</tr>
<tr>
<td>(19) Total</td>
<td>15.6 %</td>
<td>n/a</td>
<td>106.4 %</td>
<td>20.4 %</td>
<td></td>
</tr>
</tbody>
</table>

Note: Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals due to rounding.
* Initial adjustment is calculated as current availability divided by the disparity index.
** Components of the base figure were calculated as the value after adjustment and scaling to 100 percent, multiplied by the percentage of total FHWA-funded contract dollars in each industry (construction = 0.95; professional services= 0.05).
*** All other businesses included majority-owned businesses and minority- and woman-owned businesses that were not potential DBEs.

Source: BBC Research & Consulting.

The rows and columns of Figure 9-3 present the following information from the study team's but for analysis:

a. **Current availability.** Column (a) presents the current availability of potential DBEs by racial/ethnic and gender and by industry as also presented in Figure 9-1. Each row presents the percentage availability for each racial/ethnic and gender group. Combined, the current availability of potential DBEs for ODOT’s FHWA-funded contracts is 15.6 percent, as shown in row (19) of column (a).

b. **Disparity indices for business ownership.** The study team simulated business ownership rates if non-Hispanic white women owned businesses at the same rate as non-Hispanic white men who share similar race- and gender-neutral personal characteristics. The study
team then calculated a business ownership disparity index for women by dividing the observed business ownership rate by the simulated business ownership rate and then multiplying the result by 100. Values of less than 100 indicate that, in reality, the group is less likely to own businesses than what would be expected for non-Hispanic white men who share similar personal characteristics. Column (b) presents disparity indices related to business ownership for non-Hispanic white women. For example, as shown in row (6) of column (b), non-Hispanic white women own construction businesses at 55 percent of the rate that they would be expected to own construction businesses if they were non-Hispanic white men with similar personal characteristics.

c. **Availability after initial adjustment.** Column (c) presents availability estimates by racial/ethnic and gender group and by industry after initially adjusting for statistically significant disparities in business ownership rates. The study team calculated those estimates by dividing the current availability in column (a) by the disparity index for business ownership in column (b) and then multiplying by 100. Note that the study team only made adjustments for non-Hispanic white women, because they represent the only group that is significantly less likely than similarly-situated non-Hispanic white men to own businesses.

d. **Availability after scaling to 100 percent.** Column (d) shows adjusted availability estimates that the study team re-scaled so that the sum of the availability estimates equaled 100 percent for each industry. The study team re-scaled the adjusted availability estimates by taking each group’s adjusted availability estimate in column (c) and dividing it by the sum of availability estimates shown under “Total firms” in column (c)—in row (9) for construction and row (18) for professional services—and multiplying by 100. For example, the scaled availability estimate for non-Hispanic white women-owned construction businesses shown in row (6) of column (d) was calculated in the following way: \( \frac{13.1\%}{106\%} \times 100 = 12.4\% \).

e. **Components of goal.** Column (e) shows the component of the total base figure attributed to the adjusted availability of minority- and woman-owned businesses for each industry. The study team calculated each component by taking the total availability estimate shown under “Potential DBEs” in column (d)—in row (7) for construction and row (16) for professional services—and multiplying it by the proportion of total FHWA-funded contract dollars for which each industry accounts (i.e., 0.95 for construction and 0.05 for professional services). For example, the study team used the 20 percent shown in row (7) of column (d) for construction and multiplied it by 0.95 for a result of 18.9 percent (see row (7) of column (e)). The values in column (e) were then summed to equal the overall base figure adjusted for barriers in business ownership—20.4 percent, as shown in the bottom row of column (e).

Based on information related to business ownership alone, ODOT might consider adjusting the base figure upward to 20.4 percent.

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

The study team’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 Ohio do not have the same access to those business inputs as non-Hispanic white
men and businesses owned by non-Hispanic white men (for details, see Chapter 3 and Appendices D and E). Any barriers to obtaining financing, bonding, and insurance might limit opportunities for minorities and women to successfully form and operate businesses in the Ohio transportation contracting marketplace. Any barriers that minority- and woman-owned businesses face in obtaining financing, bonding, and insurance would also place those businesses at a disadvantage in competing for ODOT’s FHWA-funded prime contracts and subcontracts. Thus, information from the disparity study about financing, bonding, and insurance also supports an upward step-2 adjustment to ODOT’s base figure.

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

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

Evidence from disparity studies conducted within the jurisdiction. USDOT suggests that federal aid recipients also examine evidence from disparity studies conducted within their jurisdictions when determining whether to make step-2 adjustments to their base figures. The study team also conducted a disparity study for the Ohio Turnpike and Infrastructure Commission (the Commission) that used the same study period as ODOT’s study and a relevant geographic market area of Northern Ohio. The Commission awards transportation-related construction and professional services contracts similar in scope to those that ODOT awards and does not apply race- and gender-conscious goals to those contracts.

As shown in Figure 9-4, the minority- and woman-owned businesses exhibited substantial disparities for both construction and professional services contracts that the Commission awarded. ODOT should review results from the Commission’s disparity study when determining its overall DBE goal. However, ODOT should note that the results of that study are tailored specifically to the Commission’s contracts and policies. Those contracts and policies may differ in many important respects from those of ODOT.

4 49 CFR Section 26.45.
Summary. Taken together, the quantitative and qualitative evidence that the study team collected as part of the disparity study may support a step-2 adjustment to the base figure as ODOT considers setting its overall DBE goal. As noted in USDOT’s “Tips for Goal-Setting:"

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

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

- ODOT might adjust its base figure upward to account for barriers that women face in owning businesses in the local contracting industry. Such an adjustment would correspond to a “determination of the level of DBE participation you would expect absent the effects of discrimination.”

- Evidence of barriers that affect minorities, women, and minority- and woman-owned businesses in obtaining financing, bonding, and insurance, and evidence that certain groups of minority- and woman-owned businesses are less successful than comparable businesses owned by non-Hispanic white men also supports an upward adjustment to ODOT's base figure.

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

- ODOT must consider the volume of work DBEs have performed in recent years when determining whether to make a step-2 adjustment to its base figure. ODOT’s reports for FFYs 2010 through 2014 indicated median annual DBE participation of 9.8 percent for

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6 49 CFR Section 26.45 (b).
those years, which is lower than its base figure. USDOT’s “Tips for Goal-Setting” suggests that an agency can make a step-2 adjustment by averaging the base figure with past median DBE participation.

- The study team’s analysis of DBE participation on ODOT’s FHWA-funded contracts also indicates DBE participation (7.0%) that is lower than the base figure. If ODOT were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of its base figure and the 11.3 percent DBE participation.

USDOT regulations clearly state that an agency such as ODOT is required to review a broad range of information when considering whether it is necessary to make a step-2 adjustment—either upward or downward—to its base figure. However, Tips for Goal-Setting states that an agency such as ODOT is not required to make an adjustment as long as it can explain what factors it considered and can explain its decision in its Goal and Methodology document.
CHAPTER 10. Program Measures

The Ohio Department of Transportation (ODOT) uses a combination of race- and gender-neutral measures and race- and gender-conscious measures to increase the participation of minority- and woman-owned businesses in its contracting. ODOT uses those measures as part of its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program and the State of Ohio’s Encouraging Diversity, Growth, and Equity (EDGE) Program. Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses or all small businesses in an entity’s contracting. Participation in such measures is not limited to minority- and woman-owned businesses or to certified DBEs or EDGE businesses. In contrast, race- and gender-conscious measures are measures that are designed to specifically increase the participation of minority- and woman-owned businesses in an entity's contracting (e.g., using DBE goals on individual contracts).

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

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

The United States Department of Transportation (USDOT) offers guidance concerning how a transportation agency should project the portion of its overall DBE goal that it will meet through race- and gender-neutral and race- and gender-conscious measures including the following:

- USDOT’s “Official FAQs on DBE Program Regulations (49 CFR 26),” which addresses factors for federal aid recipients to consider when projecting the portions of their overall DBE goals that they will meet through the use of race- and gender-neutral measures;

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1 49 CFR Section 26.51.
USDOT’s “Tips for Goal-Setting,” which suggests factors for federal aid recipients to consider when making such projections; and

Federal Highway Administration (FHWA) template for how it considers approving DBE goal and methodology submissions includes a section on projecting the percentage of overall DBE goals to be met through race- and gender neutral and race- and gender-conscious measures. Figure 10-1 presents an excerpt from that template.

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

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

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

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

As presented in Chapter 3 as well as in Appendices D and E, the study team examined conditions in the Ohio marketplace related to human capital, financial capital, business ownership, and the success of businesses. There is substantial quantitative evidence of disparities for minority- and woman-owned businesses overall and for specific groups concerning the above issues. Qualitative information also indicated evidence of discrimination affecting the local marketplace. However, some minority and woman business owners that the study team interviewed as part of

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4 To assess that question, USDOT guidance suggests evaluating (a) DBE participation as prime contractors if DBE contract goals did not affect utilization, (b) DBE participation as prime contractors and subcontractors for agency contracts without DBE goals, and (c) overall utilization for other state/local or private sector contracting where contract goals were not used.
the disparity study did not think that their businesses had been affected by any race- or gender-based discrimination. ODOT should review the information about marketplace conditions presented in this report as well as other information it may have when considering the extent to which it can meet its overall DBE goal through race- and gender-neutral measures.

Additionally, as shown in Chapter 7, minority- and woman-owned businesses exhibited a substantial disparity when considered together for ODOT contracts (disparity index of 79). Many courts have deemed disparity indices below 80 as being “substantial” and have considered the existence of substantial disparities for particular groups as inferences of discrimination in the local marketplace against those groups.

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

Figure 10-2 presents the participation of certified DBEs in ODOT's federally-funded transportation contracts in recent years, as reported by ODOT. Based on information about DBE attainment provided by ODOT, the agency has exceeded its overall DBE goal in recent years. In federal fiscal years (FFYs) 2010 through 2014, DBE attainment on FHWA-funded contracts exceeded ODOT’s overall DBE goal by an average of 0.9 percentage points. ODOT applied race- and gender-conscious DBE contract goals to many FHWA-funded transportation contracts during those years.

<table>
<thead>
<tr>
<th>FFY</th>
<th>DBE Attainment</th>
<th>Annual DBE Goal</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>8.14%</td>
<td>7.0%</td>
<td>1.1%</td>
</tr>
<tr>
<td>2011</td>
<td>11.0</td>
<td>10.0</td>
<td>1.0</td>
</tr>
<tr>
<td>2012</td>
<td>9.54</td>
<td>9.1</td>
<td>0.4</td>
</tr>
<tr>
<td>2013</td>
<td>9.8</td>
<td>9.1</td>
<td>0.7</td>
</tr>
<tr>
<td>2014</td>
<td>10.4</td>
<td>8.9</td>
<td>1.5</td>
</tr>
</tbody>
</table>

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

ODOT applied race- and gender-conscious DBE contract goals to most FHWA-funded transportation contracts and EDGE goals to many state-funded contracts during the study period (January 1, 2010 through December 31, 2014). However, during the study period, the agency did not use race- or gender-conscious program measures on approximately $1.5 billion of relevant contracting. Figure 10-3 presents the participation of certified DBEs on contracts where no goals were applied and where DBE goals were applied. DBE participation in those contracts where DBE goals were not applied (6.3%) was lower than in those contracts where DBE goals were applied (7.2%).
The study team also conducted a disparity study for the Ohio Turnpike and Infrastructure Commission (the Commission). The Commission awards transportation-related construction and professional services contracts similar in scope to those that ODOT awards and does not apply race- and gender-conscious goals to those contracts. The study team examined construction and professional services contracts awarded by the Commission from January 1, 2010 through December 31, 2014. DBE participation in those contracts was 2.8 percent. ODOT might consider 2.8 percent as the percent of the agency’s overall DBE goal to be met through race- and gender-neutral measures. However, ODOT should note that the results of that study are tailored specifically to the Commission’s contracts and policies. Those contracts and policies may differ in important respects from those of ODOT.

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

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

**ODOT’s race- and gender-neutral measures.** ODOT uses several race- and gender-neutral measures to encourage the participation of small businesses—including minority-, woman-owned and disadvantaged businesses—in its contracting. ODOT uses the following types of race- and gender-neutral measures as part of its implementations of the Federal DBE Program and/or State of Ohio’s EDGE Program:

- Small Business Enterprise (SBE) program;
- Advocacy and outreach efforts;
- Technical assistance programs;
- Mentor-protégé program; and
- Prompt payment policies.

**Small Business Enterprise (SBE) Program.** ODOT’s DBE Program includes an SBE Program component to facilitate competition by small businesses—including DBEs. The SBE Program fosters small business participation by ensuring that ODOT’s prequalification requirements do not hinder small businesses’ abilities to compete for ODOT work and that contracts are not unjustifiably bundled. ODOT’s SBE program also includes a small business set-aside component that restricts competition on certain federally-funded construction and construction-related contracts to only small businesses, regardless of the gender and ethnicity of the owners.\(^5\)

**Advocacy and outreach efforts.** ODOT uses various advocacy and outreach efforts—including project meetings; matchmaking events; participation in trade fairs; and email and website communications—to target new, small, and disadvantaged businesses.

**Project meetings.** For large construction projects, ODOT hosts one-on-one meetings with new, small, and disadvantaged businesses to discuss specific contracting and project details. During those meetings, ODOT contract specialists and project managers are available to discuss and clarify any questions that businesses have about the project or ODOT’s contracting process.

**Matchmaking events.** ODOT hosts matchmaking events designed to build relationships between prime contractors and consultants and certified DBE and EDGE businesses. Matchmaking events are also used to establish relationships between prime contractors and subcontractors for specific large construction projects.

**Communications.** ODOT uses its website to provide information about contracting opportunities, special events, and how to do business with the agency. All bidding documents for ODOT projects are online and available at no charge to any potential prime, subcontractor, material supplier, or other interested parties. ODOT also contacts new, small, and disadvantaged businesses through email to communicate upcoming events.

**Technical assistance programs.** ODOT hosts events designed to provide DBEs and other small businesses with assistance in the areas of networking, technology, business development, and training on how to do business with ODOT. ODOT also offers reimbursements for various expenses—including technical training, tuition, and books—associated with business development programs that DBEs can apply for through ODOT’s Supportive Services Program (SSP).

**Mentor-protégé program.** ODOT’s DBE Program includes a mentor-protégé program designed to match DBEs with a mentor business. ODOT’s mentor-protégé program is designed to assist DBEs in enhancing business and trade skills and overcoming barriers related to the size or volume of work, financing, and bonding. Mentor-protégé partnerships typically last two years.

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\(^5\) Contracts with cost estimates not to exceed $2 million.
**Prompt payment policies.** ODOT has policies in place to help ensure prompt payment to both prime contractors and subcontractors. Ohio state law requires state entities to pay prime contractor invoices within 30 days of receipt, but ODOT typically pays prime contractors within two weeks of receiving and approving an invoice. ODOT also enforces state-mandated prompt payment processes that require prime contractors to pay their subcontractors within 10 days of receiving payment from state entities.

**Other entities’ program measures.** In addition to the race- and gender-neutral measures that ODOT currently uses, there are a number of race- and gender-neutral programs that other entities in Ohio use to encourage the participation of minority- and woman-owned businesses. Figure 10-4 provides examples of those programs.
### Neutral Remedies

#### Advocacy and Outreach

The Ohio Contractors Association (OCA), a statewide business and trade association, is dedicated to providing support, unity, and leadership to its membership. The OCA has nine chapters across the state, each led by a volunteer Executive Committee. The organization represents all contractors in the industry—union and non-union, large shops and small shops—as a resource of expert assistance with labor and employment issues, among others. OCA also offers training, business conferences, and advocacy on industry matters.

The Ohio Minority Supplier Development Council (OMSDC), an affiliate of the National Minority Supplier Development Council (NMSDC), is dedicated to providing a direct link between Minority Business Enterprises (MBEs) and its Corporate Members. Since 1972, OMSDC has worked diligently to grow value-driven partnerships between their certified MBEs and their Corporate Members. OMSDC’s focus is to assist the development and maintenance of effective corporate supplier diversity programs. OMSDC hosts several annual events including the Ohio MSDC Supplier Diversity Exchange.

Dominion is one of the nation’s largest producers and transporters of energy with offices in Virginia, North Carolina, and Eastern Ohio. Dominion is committed to doing business with woman-owned, minority-owned, service-disabled veteran-owned, HUBZone, veteran-owned, and other disadvantaged businesses in the communities where Dominion provides service. Dominion has been a member of the Northern Ohio Minority Supplier Development Council (NOMSDC) since its inception in the 1980s. Currently, Dominion serves on the NOMSDC’s Board of Directors.

#### Technical Assistance

Technical assistance programs are available throughout Ohio. Those programs primarily provide general information and assistance for business start-ups and growing businesses. Examples of general support providers include Small Business Development Centers of Ohio (SBDC) and the U.S. Small Business Administration (SBA). The SBDC network is the premier technical assistance program for Ohio’s small businesses. The network is provided through a partnership between the Ohio Development Services Agency; the U.S. Small Business Administration; and selected Ohio chambers of commerce, colleges and universities, and economic development agencies.

Some large organizations that offer trade-specific classes and seminars are the Associated General Contractors of Ohio and the American Council of Engineering Companies of Ohio.

#### Capital, Bonding, and Insurance

Bonding programs offering bonding and finance assistance and training have become more popular. Programs such as the SBA Bond Guarantee Program provide bid, performance, and payment bond guarantees for individual contracts. SBA district offices in Cleveland and Columbus provide financial assistance for new or existing businesses through guaranteed loans made by area banks and non-bank lenders. The USDOT Bonding Assistance Program also provides bonding assistance in the form of bonding fee cost reimbursements for DBEs performing transportation work.

The Ohio Development Services Agency partners with community-based non-profit organizations to host regional Minority Business Assistance Centers (MBAC). The centers provide important services including technical assistance; professional consulting; assistance obtaining contract opportunities; and access to capital and bonding assistance.

#### Mentor-Protégé Programs

Ohio Department of Development, Division of Minority Business Affairs, administers the EDGE Mentor-Protégé Program. The mentor-protégé program brings publicly recognized business leaders into a working relationship with certified EDGE businesses. The purpose of the program is to increase opportunities for participating businesses to improve their operations, build business alliances, develop joint ventures and promote their businesses.

The Construction Employers Associations (CEA) also offer a mentor protégé program, created in partnership with the Contractors Assistance Association. CEA’s provides complementary contractor and business education as well as one-on-one technical and professional assistance in areas that include safety, accounting, and legal.

The Cleveland Clinic’s mentor-protégé program requires its construction managers and architects to build professional relationships with small, minority- or woman-owned firms to develop business skills and exposure to the nuances of hospital construction.
CHAPTER 11.
Program Implementation

Chapter 11 reviews information relevant to the Ohio Department of Transportation's (ODOT's) implementation of specific components of the Federal Disadvantaged Business Enterprise (DBE) Program for Federal Highway Administration (FHWA)-funded contracts. Regulations presented in 49 Code of Federal regulations (CFR) Part 26 and associated documents offer agencies guidance related to implementing the Federal DBE Program. Key requirements of the program are described below in the order that they are presented in 49 CFR Part 26.1

Reporting to DOT – 49 CFR Part 26.11 (b)

ODOT must periodically report DBE participation in its FHWA-funded contracts to the United States Department of Transportation (USDOT). ODOT recently began tracking DBE and non-DBE participation through the Civil Rights and Labor (CRL) system. Prime contractors are required to upload DBE participation commitments at the time of contract award and regularly update information related to payments made to both DBE and non-DBE subcontractors throughout the entirety of the contract in the CRL system. ODOT follows up with prime contractors and regularly audits the CRL system to ensure its accuracy. ODOT uses the total amount of those payments recorded in the CRL system to calculate DBE participation. Based on that information, ODOT prepares Uniform Reports of DBE Awards or Commitments and Payments, which it reports to USDOT. ODOT plans to continue to collect and report that information in the future using the same approach.

Bidders List – 49 CFR Part 26.11 (c)

As part of its implementation of the Federal DBE Program, ODOT must develop a bidders list of businesses that are available for its contracts. The bidders list must include the following information about each available business:

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

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

Information from availability surveys. As part of the availability analysis, the study team collected information about local businesses that are potentially available for different types of

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1 Because only certain portions of the Federal DBE Program are discussed in Chapter 11, ODOT should refer to the complete federal regulations when considering its implementation of the program.
ODOT prime contracts and subcontracts. ODOT should consider using that information to augment its current bidders list.

**Maintaining comprehensive vendor data.** In order to effectively track the participation of minority- and woman-owned businesses on its contracts, ODOT should consider continuing to improve the information that it collects on the ownership status of businesses that participate in its contracts, including both prime contractors and subcontractors. Not only should ODOT consider collecting information about DBE status, but it should also consider obtaining information on the race/ethnicity and gender of business owners, regardless of certification status. As appropriate, ODOT can use business information that the study team collected as part of the 2015-16 disparity study to augment its vendor data.

**Prompt Payment Mechanisms – 49 CFR Part 26.29**

ODOT’s prompt payment requirements appear to comply with Ohio state law and with federal regulations in 49 CFR Part 26.29. ODOT is required to make payments to prime contractors within 30 days of receiving an invoice. Prime contractors are then required to pay subcontractors no later than 10 days after receiving payment from ODOT. Qualitative information that the study team collected through in-depth interviews, public hearings, and focus groups revealed that some businesses are dissatisfied with how promptly they receive payment on Ohio government contracts. ODOT should consider maintaining the efforts it makes to ensure prompt payment to both prime contractors and subcontractors.

**DBE Directory – 49 CFR Part 26.31**

ODOT offers a directory on its website of all DBE-certified businesses, searchable by business name, industry code, industry type, and geographical location. ODOT might consider working to increase awareness of the DBE directory so that prime contractors are better aware of qualified DBE subcontractors. In addition, ODOT currently publicizes bid and solicitation information on its website. ODOT should consider linking that information to information about qualified DBEs, so that when prime contractors become aware of contracts in which they might be interested, they are also notified of qualified DBEs who might be interested in participating in those contracts as subcontractors.

**Overconcentration – 49 CFR Part 26.33**

Agencies implementing the Federal DBE Program are required to report and take corrective measures if they find that DBEs are so overconcentrated in certain work areas as to unduly burden non-DBEs working in those areas. Such measures may include, but are not limited to:

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

ODOT’s policy states that if overconcentration occurs, the agency will obtain approval from USDOT to develop appropriate measures to address it. Once approved, the measures will then become part of ODOT’s implementation of the Federal DBE program.
The study team investigated potential overconcentration on ODOT contracts and identified two subindustries in which certified DBEs accounted for 50 percent or more of total subcontract dollars for the study period, based on contract data that the study team received from ODOT—structural steel construction (51%) and trucking, hauling, and storage (51%).

Because the above figures are based only on subcontract dollars, they do not include work that prime contractors self-performed in those areas. If the study team had included self-performed work in those analyses, the percentages for which DBEs accounted would likely have decreased.

Business Development Programs – 49 CFR Part 26.35 and Mentor-Protégé Programs – 49 CFR Appendix D to Part 26

Business Development Programs (BDPs) are programs that are designed to assist DBE-certified businesses in developing the capabilities to compete for work independent of the DBE Program. As part of a BDP, or separately, agencies may establish a mentor-protégé program, in which a non-DBE or another DBE serves as a mentor and principal source of business development assistance to a protégé DBE. ODOT offers technical assistance, BDPs, and mentor-protégé programs to specifically develop the capabilities of DBEs through its Supportive Services Program (SSP). ODOT also offers reimbursements for various expenses—including technical training, tuition, and books—associated with various BDPs that DBEs can apply for through the SSP. ODOT should consider maintaining the efforts it makes and tailoring them to the needs of developing businesses.


The Final Rule effective February 28, 2011, revised requirements for monitoring the work that prime contractors commit to DBE subcontractors at contract award (or through contract modifications) and enforcing that it is actually performed by those DBEs. USDOT describes the requirements in 49 CFR Part 26.37(b). The Final Rule states that prime contractors can only terminate DBEs for “good cause” and with written consent from the awarding agency. In addition, 49 CFR Part 26.55 requires agencies to only count the participation of DBEs that are performing commercially useful functions (CUFs) on contracts toward meeting DBE contract goals and overall DBE goals. ODOT should consider reviewing the requirements set forth in 49 CFR Part 26.37(b), 49 CFR Part 26.55, and in The Final Rule to ensure that its monitoring and enforcement mechanisms are appropriately implemented and consistent with federal regulations and best practices. ODOT monitors the participation of DBE and non-DBE subcontractors through the entirety of a contract using the CRL system. In the event that a prime terminates a subcontractor, they are required to submit a written letter to ODOT affirming “good cause.”


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

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

ODOT primarily fosters small business participation through the following means:

- Evaluation of ODOT prequalification requirements to ensure that all prequalification requirements are necessary and do not hinder small businesses’ abilities to become prequalified or bid as prime contractors.
- Analysis of contracts to ensure that they are not unjustifiably bundled. In determining whether a contract is unjustifiably bundled, ODOT considers the level of risk associated with unbundling contracts and the ability to create stand-alone projects that are within work areas having a significant pool of available small businesses.
- Use of set asides for bid opportunities with cost estimates not to exceed $2 million for small businesses.

Chapter 10 of the report outlines many of ODOT’s current and planned race- and gender-neutral measures and provides examples of measures that other organizations in Ohio have implemented. ODOT should review that information and consider implementing measures that the agency deems to be effective. ODOT should also review legal and budgetary issues in considering different measures.

**Prohibition of DBE Quotas and Prohibition of Set-asides for DBEs Unless in Limited and Extreme Circumstances – 49 CFR Part 26.43**

DBE quotas are prohibited under the Federal DBE Program, and DBE set-asides can only be used in extreme circumstances. ODOT does not currently use DBE quotas or set-asides in any way as part of its implementation of the Federal DBE Program.

**Setting Overall DBE Goals – 49 CFR Part 26.45**

In the Final Rule effective February 28, 2011, USDOT changed how often agencies that implement the Federal DBE Program are required to submit overall DBE goals. As discussed in Chapter 1, agencies such as ODOT now need to develop and submit overall DBE goals every

\[2 \text{ 49 CFR Part 26.39(a).}\]
three years. That change was effective as of March 5, 2010. Chapter 9 uses data and results from the disparity study to provide ODOT with information that could be useful in developing its next overall DBE goal submission.

Analysis of Reasons for not Meeting Overall DBE Goal – 49 CFR Part 26.47(c)

Another addition to the Federal DBE Program made under The Final Rule effective February 28, 2011 requires agencies to take the following actions if their DBE participation for a particular fiscal year is less than their overall goal for that year:

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

Based on information about DBE attainment provided by ODOT, the agency has exceeded its DBE goal in recent years. In FFYs 2010 through 2014, DBE attainment made on FHWA-funded contracts exceeded its overall DBE goal by an average of less than one percentage point.

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

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

Other steps to evaluate how ODOT might better meet its overall DBE goal. Analyzing the participation of potential DBEs is one step among many that ODOT might consider taking when examining any differences between DBE participation and its overall DBE goal. Based on a

3 Note that minority- and woman-owned businesses that could be DBE-certified but that are not currently certified are counted as part of calculating the overall DBE goal. However, the participation of those businesses is not counted as part of ODOT’s DBE participation reports.
comprehensive review, ODOT must establish specific steps and milestones to correct the problems it identifies in its analysis and to enable it to better meet its overall DBE goal in the future.⁴

**Maximum Feasible Portion of Goal Met through Neutral Program Measures – 49 CFR Part 26.51(a)**

As discussed in Chapter 10, ODOT must meet the maximum feasible portion of its overall DBE goal through the use of race- and gender-neutral program measures. ODOT must project the portion of its overall DBE goal that could be achieved through such measures. The agency should consider the information and analytical approaches presented in Chapter 10 when making such projections.

**Use of DBE Contract Goals – 49 CFR Part 26.51(d)**

The Federal DBE Program requires agencies to use race- and gender-conscious measures—such as DBE contract goals—to meet any portion of their overall DBE goals that they do not project being able to meet using race- and gender-neutral measures. Based on information from the disparity study and other available information, ODOT should assess whether the use of DBE contract goals is necessary in the future to meet any portion of its overall DBE goal.

USDOT guidelines on the use of DBE contract goals, which are presented in 49 CFR Part 26.51(e), include the following guidance:

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

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

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

Several minority- and woman-owned businesses commented that race- and gender-conscious measures help their businesses get their “foot in the door” with prime contractors and present an opportunity for their businesses to compete for contracting opportunities.

Some interviewees suggested that race- and gender-conscious measures should only apply to those groups that experience discrimination. Some interviewees also suggested that the use of DBE contract goals should be eliminated altogether.

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


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


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

ODOT requires contractors to submit good faith efforts documentation and written confirmation in the event that bidders’ efforts to include sufficient DBE participation were unsuccessful. In deciding whether to accept good faith efforts, ODOT considers the quality, quantity, and intensity of the different kinds of efforts that bidders made. The efforts should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet a contract goal. Perfunctory efforts are not considered good faith efforts. However, determining the sufficiency of bidders’ good faith efforts is at the agency’s discretion, and using quantitative formulas is not required. ODOT is in the process of establishing a dedicated committee to evaluate good faith efforts documentation.

Several individuals participating in in-depth interviews, public hearings, and focus groups made comments related to good faith efforts. In general, many minority- and woman-owned businesses indicated that prime contractors often fail to make genuine efforts to use minority- and woman-owned businesses.
Several participants indicated that the current race- and gender-conscious measures do not have incentives for prime contractors to make anything more than perfunctory good faith efforts in order to comply with the program. Prime contractors are not incentivized to seek meaningful participation of minority- and woman-owned businesses on projects.

Several minority- and woman-owned businesses indicated that prime contractors have listed their businesses on project bids—sometimes without their knowledge—with no intention of actually using them on those projects but only to meet goals at the time of award.

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

**Counting DBE Participation – 49 CFR Part 26.55**

49 CFR Part 26.55 describes how agencies should count DBE participation and evaluate whether bidders have met DBE contract goals. Federal regulations also give specific guidance for counting the participation of different types of DBE suppliers and trucking companies. Section 26.11 discusses the Uniform Report of DBE Awards or Commitments and Payments. As discussed above, ODOT should consider developing procedures and databases to consistently track participation of minority- and woman-owned businesses and potential DBEs in the contracts that the agency awards. Such measures will help the agency track the effectiveness of its efforts to encourage DBE participation. If applicable, ODOT should also consider collecting important information regarding any shortfalls in annual DBE participation including preparing participation reports for all minority- and woman-owned businesses (not just those that are DBE-certified). ODOT should consider collecting and using the following information:

- Databases that the study team developed as part of the disparity study;
- Contractor/consultant registration documents from businesses working with ODOT as prime contractors or subcontractors including information about the race/ethnicity and gender of their owners;
- Prime contractor participation on agency contracts;
- Reports on the participation of certified DBEs in FHWA-funded contracts as required by the Federal DBE Program;
- Subcontractor participation data (for all tiers and suppliers) for all businesses regardless of race/ethnicity, gender, or certification status;
- Invoices for prime contractors and subcontractors;
- Descriptions of the areas of contracts on which subcontractors worked; and
- Subcontractors’ contact information and committed dollar amounts from prime contractors at the time of contract award.

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

**DBE Certification – 49 CFR Part 26 Subpart D**

ODOT is one of four agencies responsible for DBE certifications in the state of Ohio. ODOT maintains all of the DBE certification records for the state of Ohio through the Unified Certification Program (UCP) system. ODOT’s certification process is designed to comply with 49 CFR Part 26 Subpart D. As ODOT continues to work with DBE-certified businesses, the agency should consider ensuring that it continues to certify all groups that the Federal DBE Program presumes to be socially and economically disadvantaged in a manner that is consistent with federal regulations.

Many business owners and managers participating in in-depth interviews, public hearings, and focus groups commented on the DBE certification process. Some business owners felt that the certification process was reasonable and relatively easy. However, other business owners were highly critical about the certification process. A number of business owners reported that the process was difficult to understand and very time consuming. Appendix E provides other perceptions of business owners that have considered DBE certification or that have gone through the certification process.

ODOT appears to follow federal regulations concerning DBE certification, which requires collecting and reviewing considerable information from program applicants. However, the agency might research other ways to make the certification process easier for potential DBEs.

**DBE Program Compliance Review**

The FHWA conducted a compliance review of ODOT’s DBE Program in December 2014 and identified a number of deficiencies in ODOT’s implementation of the DBE Program that gave FHWA reasonable cause to find ODOT’s DBE Program in noncompliance with 49 CFR 26.103(c). ODOT has since entered into a conciliation agreement with FHWA that details a number of actions that ODOT must take in order for the agency’s DBE Program to come into compliance with FHWA, including:

- Establishing a clear line of authority and responsibility for the DBE Program administrator;
- Establishing operating procedures for the program’s implementation;
- Providing adequate training to ODOT staff responsible for carrying out the DBE Program;
- Establishing mechanisms for more accurately monitoring DBE participation and ensuring prompt payments to subcontractors; and
- Various additional actions.

Since January 2015, ODOT has made several refinements to its DBE Program in order to come into compliance with FHWA. ODOT should carefully review that conciliation agreement and continue to implement modifications to the agency’s DBE Program as needed to remain in compliance with FHWA.
Monitoring Changes to the Federal DBE Program

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

Appendix A defines terms that are useful to understanding the 2016 Ohio Department of Transportation Disparity Study report. The following definitions are only relevant in the context of this report.

Anecdotal Information

Anecdotal information includes personal qualitative accounts and perceptions of specific incidents—including any incidents of discrimination—told from individual interviewees’ or public hearing and focus group participants’ perspectives.

Availability Analysis

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

Business

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

Business Establishment

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

Business Listing

A business listing is a record in the Dun & Bradstreet database (or other database) of business information. A Dun & Bradstreet record is considered a listing until the study team determines that the listing actually represents a business establishment with a working phone number.

Consultant

A consultant is a business performing a professional services contract.

Contract

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

Contract Element

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

A contractor is a business performing a construction contract.

Control

Control means exercising management and executive authority of a business.

Disadvantaged Business Enterprise (DBE)

A DBE is a small business that is certified as such by a Unified Certification Program agency. The business must be at least 51% owned and controlled by one or more individuals who are socially and economically disadvantaged as defined in the Federal DBE Program Regulations (49 CFR Part 26). The following groups are presumed to be socially and economically disadvantaged according to 49 CFR Part 26:

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

A determination of economic disadvantage includes assessing business’ gross revenues and business owners’ personal net worth (maximum of $1.32 million excluding equity in a personal residence and in the business seeking certification). Some minority- and woman-owned businesses do not qualify as DBEs because of gross revenue or net worth requirements. Businesses owned by non-Hispanic white men can be certified as DBEs if those businesses meet the requirements in 49 CFR Part 26.

Disparity

Disparity is a difference or gap between an actual outcome and some benchmark. In this report, the term “disparity” refers to a difference between the participation, or utilization, of a specific group of businesses in Ohio Department of Transportation contracting and the availability of those businesses for that work.

Disparity Analysis

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

Disparity Index

A disparity index is computed by dividing the actual participation, or utilization, of a specific group of businesses in Ohio Department of Transportation contracting by the availability of
those business 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).

**Encouraging Diversity, Growth & Equity (EDGE) Program**

The State of Ohio established the EDGE Program to address any potential discrimination in awarding or providing contracts, services, benefits, and opportunities to disadvantaged Ohio-based businesses. As part of the program, the state establishes participation goals for state agencies, boards, and commissions to encourage the participation of EDGE-certified businesses in state contracting. Those goals apply to supplies and services, professional services, information technology services, construction services, and professional design services contracts.

**EDGE-certified Businesses**

An EDGE-certified business is a small business that has been certified as such by the State of Ohio Department of Administrative Services. Businesses may qualify for EDGE-certification if they are small businesses that have been in business at least one year prior to applying for EDGE certification (not applicable to joint venture applicants) and owned and controlled by socially-and economically-disadvantaged U.S. citizens who are also Ohio residents, regardless of the race/ethnicity or gender of the owners. A business can qualify as being socially- and economically-disadvantaged by:

- Being located in a U.S. Census tract that qualifies as a disadvantaged area based on household income level, unemployment level, or poverty level;
- Being owned and controlled by individuals who possess characteristics that may have inhibited their business’ success such as race/ethnicity, gender, physical or mental disabilities, residency in an isolated environment, or other relevant factors; or
- Being owned and controlled by individuals who have a personal net worth that does not exceed $250,000 at the time of program entry and that does not exceed $750,000 during program participation.

**Enterprise**

An enterprise is an economic unit that could be a for-profit business or business establishment; a not-for-profit organization; or a public sector organization.

**Federal DBE Program**

The Federal DBE Program is a legislatively mandated program of the United States Department of Transportation that applies to recipients (such as ODOT) of federal-aid dollars that are expended on federally-funded contracts. Regulations for the Federal DBE Program are set forth in 49 CFR Part 26.
The U.S. Congress established the DBE program in 1982 to:

- Ensure nondiscrimination in the award and administration of DOT-assisted contracts;
- Help remove barriers to the participation of DBEs in DOT-assisted contracts, and
- Assist the development of firms that can compete successfully in the marketplace outside of the DBE program.

**Federal Highway Administration (FHWA)**

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

**Federally-funded Contract**

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

**Firm**

See “business.”

**Industry**

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

**Majority-owned Business**

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

**Minority**

A minority is an individual who identifies with one of the racial/ethnic groups presumed to be disadvantaged in the Federal DBE Program—Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and Subcontinent Asian Americans.

**Minority-owned Business**

A minority-owned business is a business with at least 51 percent ownership and control by individuals who identify themselves with one of the racial/ethnic groups presumed to be disadvantaged in the Federal DBE Program—Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and Subcontinent Asian Americans. A business does not have to be certified as a DBE or as an EDGE-certified business to be considered a minority-owned business. (The study team considered businesses owned by minority women as minority-owned businesses.)
Non-DBE
A non-DBE is a minority- or woman-owned business or a majority-owned business that is not certified as a DBE, regardless of the race/ethnicity or gender of the owner.

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

Ohio Department of Transportation (ODOT)
The Ohio Department of Transportation (ODOT) is responsible for planning, building, maintaining, and operating all state and federal roadways throughout Ohio, except for the Ohio Turnpike. It is also one of the Ohio Unified Certification Program agencies responsible for administering Federal DBE Program certification standards and procedures.

Ohio Unified Certification Program (UCP)
The Ohio UCP is a "one stop" certification process for the Federal DBE Programs in Ohio. Individuals seeking DBE certification of their small businesses in the State of Ohio can seek certification from one of four agencies: ODOT, Greater Cleveland Regional Transit Authority, City of Dayton, and Cleveland Hopkins International Airport. The Ohio UCP consolidates all DBE firms certified by the four different agencies into one centralized DBE Directory for USDOT funded contracts for airport, highways, and public transit.

Potential DBE
A potential DBE is a minority- or woman-owned business that is DBE-certified or appears that it could be DBE-certified based on revenue requirements specified in 49 CFR Part 26.

Prime Consultant
A prime consultant is a professional services firm that performed a prime contract for an end user, such as ODOT.

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

Prime Contractor
A prime contractor is a construction firm that performed a prime contract for an end user, such as ODOT.

Project
A project refers to a construction or professional services endeavor that ODOT bid out during the study period. A project could include one or multiple 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. Businesses owned by members of certain racial/ethnic groups might be eligible for such measures but not other businesses. Similarly, businesses owned by women might be eligible but not businesses owned by men. A DBE contract goal is one example of a race- and gender-conscious measure. Note that the term is more accurately “race-, ethnicity-, and gender-conscious measures.” However, for ease of communication, the study team uses the term “race- and gender-conscious measures.”

Race- and Gender-neutral Measures

Race- and gender-neutral measures are measures that are designed to remove potential barriers for all businesses attempting to do work with an entity or measures specifically designed to increase the participation of small or emerging businesses, regardless of the race/ethnicity or gender of ownership. Race- and gender-neutral measures may include assistance in overcoming bonding and financing obstacles; simplifying bidding procedures; providing technical assistance; establishing programs to assist start-up firms; and other methods open to all businesses, regardless of the race or gender of ownership. Note that the term is more accurately “race-, ethnicity-, and gender-neutral measures.” However, for ease of communication, the study team uses the term “race- and gender-neutral measures.”

Relevant Geographic Market Area

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

State-funded Contract

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

Statistically Significant Difference

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

Subconsultant

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

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

**Subcontractor**

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

**Subindustry**

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

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

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

**Utilization**

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

**Vendor**

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

**Woman-owned Business**

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

EXECUTIVE SUMMARY

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases regarding the 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 known as the Federal Disadvantaged Business Enterprise ("DBE") Program, and local minority and woman-owned business enterprise ("MBE/WBE") programs to provide a summary of the legal framework for the disparity study as applicable to the Ohio Department of Transportation (ODOT) and Ohio Turnpike and Infrastructure Commission (The Commission).

Appendix B begins with a review of the landmark United States Supreme Court decision in City of Richmond v. J.A. Croson. Croson sets forth the strict scrutiny constitutional analysis applicable in the legal framework for conducting a disparity study. This section also notes the United States Supreme Court decision in Adarand Constructors, Inc. v. Pena ("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, and participation in MBE/WBE/DBE programs and the Federal DBE Program.

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 or instructive to ODOT’s and the Commission’s disparity study and the strict scrutiny analysis. This analysis reviews cases in the Sixth Circuit Court of Appeals, which is the federal appellate court controlling on Ohio, and recent decisions from other federal courts in this area of the law.

The analysis also reviews recent federal cases that have considered the validity of the MBE/WBE/DBE Programs and the Federal DBE Program and a state government agency’s or a state DOT’s implementation of the DBE Program, including: Associated General Contractors of

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2 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs ("Federal DBE Program").


The analyses of these recent cases are instructive to ODOT and the Commission and the disparity study because they are the most recent and significant decisions by federal courts setting forth the legal framework applied to MBE/WBE/DBE Programs and to the Federal DBE Program and its implementation by state DOTs and recipients of federal financial assistance governed by 49 CFR Part 26. They also are applicable in terms of the preparation of MBE/WBE/DBE Programs and the DBE Program by ODOT submitted in compliance with the Federal DBE regulations.

For example, in Western States Paving, the United States intervened to defend the Federal DBE Program’s facial constitutionality, and, according to the Court, stated “that [the Federal DBE Program’s] race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present.” Accordingly, the USDOT has advised federal aid recipients that any use of race-conscious measures must be predicated on evidence that the

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5 Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al., 713 F.3d 1187, (9th Cir. April 16, 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., 713 F. 3d 1187, (9th Cir. April 16, 2013).


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


12 228 F.3d 1147 (10th Cir. 2000) ("Adarand VII").


17 Western States Paving, 407 F.3d at 996; see also Br. for the United States, at 28 (April 19, 2004).
recipient has concerning discrimination or its effects within the local transportation contracting marketplace.\(^{18}\)

In addition, in one of the most recent Federal Court of Appeals decisions at the time of this report, the Ninth Circuit Court of Appeals in \textit{AGC, San Diego Chapter, Inc. v. California DOT, et al.} held that Caltrans’ DBE Program is constitutional.\(^{19}\) The Court held that Caltrans’ DBE Program implementing the Federal DBE Program was constitutional and survived strict scrutiny by: (1) having a strong basis in evidence of discrimination within the California transportation contracting industry based in substantial part on the evidence from the Disparity Study conducted for Caltrans; and (2) being “narrowly tailored” to benefit only those groups that have actually suffered discrimination.\(^{20}\)

Two recent District Court decisions in \textit{Mountain West Holding}\(^{21}\) and \textit{M.K. Weeden}\(^{22}\) followed the AGC, \textit{SDC v. Caltrans} Ninth Circuit decision, and held as valid and constitutional Montana and Montana DOT’s DBE Programs implementing the Federal DBE Program.

In \textit{Midwest Fence Corp. v. U.S. DOT, Illinois DOT, Illinois State Toll Highway Authority}, the federal district court in Illinois, which is in the Seventh Circuit Court of Appeals, upheld the constitutionality and validity of the Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT and its DBE Program.\(^{23}\) The court also upheld the validity of the DBE Program adopted by the Illinois Toll Highway Authority, which does not receive federal funds. The Toll Highway Authority adopted its own DBE Program, which although it mirrored the Federal DBE Program, does not implement the Federal DBE Program.\(^{24}\)

\footnotesize
\begin{itemize}
\item \(^{18}\) DOT Guidance, available at 71 Fed. Reg. 14,775 and \url{http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm} (January 2006). Following \textit{Western States Paving}, the USDOT, in particular for agencies in states in the Ninth Circuit Court of Appeals, recommended the use of disparity studies by recipients of federal financial assistance to examine whether or not there is evidence of discrimination and its effects, and how remedies might be narrowly tailored in developing their DBE Program to comply with the Federal DBE Program. The USDOT suggests consideration of both statistical and anecdotal evidence. The USDOT instructs that recipients should ascertain evidence for discrimination and its effects separately for each group presumed to be disadvantaged in 49 CFR Part 26. USDOT Guidance, \textit{Id.} at 71 Fed. Reg. 14,775. The USDOT’s Guidance provides that recipients should consider evidence of discrimination and its effects. \textit{Id}. The USDOT’s Guidance is recognized by the federal regulations as “valid and binding, and constitutes the official position of the Department of Transportation” for states in the Ninth Circuit. \textit{Id.}, 49 CFR § 26.9.
\item \(^{19}\) \textit{Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT}, 713 F. 3d 1187, (9th Cir. April 16, 2013); \textit{Associated General Contractor of America, San Diego Chapter, Inc. v. California DOT}, U.S.D.C. E.D. Cal, Civil Action No:S:09-cv-01622, Slip Opinion (E.D. Cal. April 20, 2011) appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans’ DBE Program constitutional. \textit{Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.}, 713 F. 3d 1187, (9th Cir. April 16, 2013).
\item \(^{20}\) The District Court had held that the “Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry,” satisfied the strict scrutiny standard, and is “clearly constitutional” and “narrowly tailored” under \textit{Western States Paving} and the Supreme Court cases. \textit{Id.} \textit{Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT}, Slip Opinion Transcript of U.S. District Court at 42-56.
\item \(^{21}\) \textit{Mountain West Holding}, 2014 WL 6686734, appeal pending.
\item \(^{22}\) \textit{M.K. Weeden}, 2013 WL 4774517.
\item \(^{23}\) \textit{Midwest Fence}, 2015 W.L. 1396376 (N.D. Ill. March 24, 2015), appeal pending.
\item \(^{24}\) \textit{Id.}
\end{itemize}
The court in *Midwest Fence* held the Illinois DOT’s DBE Program that implemented the Federal DBE Program was constitutional.\(^{25}\) The court found that the Illinois DOT and the Toll Highway Authority followed the Seventh Circuit Court of Appeals’ decision in *Northern Contracting, Inc. v. Illinois*.\(^{26}\) The *Midwest Fence* decision by the district court has been appealed to the U.S. Court of Appeals for the Seventh Circuit, which appeal is pending at the time of this report.\(^{27}\)

Also, recently the Seventh Circuit Court of Appeals in Illinois in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, upheld the implementation of the Federal DBE Program by the Illinois DOT.\(^{28}\) The court held Dunnet Bay lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting* decision because there was no evidence IDOT exceeded its authority under federal law.\(^{29}\)

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


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.\(^{30}\) 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."\(^{31}\) 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

\(^{25}\) *Id.*

\(^{26}\) *Id.*

\(^{27}\) *Id.*, see Seventh Circuit Court of Appeals, Docket No. 15-1827.

\(^{28}\) 2015 WL 4934560 (7th Cir. August 19, 2015).

\(^{29}\) *Id.*


\(^{31}\) 488 U.S. at 500, 510.
subcontractors. 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.

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond was misplaced. There is no doubt, the Court held, that “[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination” under Title VII., 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.”

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 "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." 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.

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." 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.”

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

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32 488 U.S. at 480, 505.
33 488 U.S. at 507-510.
36 488 U.S. at 502.
37 Id.
38 488 U.S. at 509.
39 Id.
take action to end the discriminatory exclusion."40 "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.”41

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 ensuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”42


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 *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 by recipients of federal funds.

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

The following provides an analysis for the legal framework focusing on recent key cases regarding the Federal DBE Program and state and local MBE/WBE programs, and their implications for a disparity study. The recent decisions involving the Federal DBE Program are instructive to ODOT, the Commission, and the disparity study because they concern the strict scrutiny analysis and legal framework in this area, and implementation of the DBE Program by recipients of federal financial assistance (like ODOT) based on 49 CFR Part 26.

1. **The Federal DBE Program**

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.43 Subsequently, in 1998, Congress passed

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40 488 U.S. at 509.
41 *Id*.
42 488 U.S. at 492.
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 1998-2003.44

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 2009.45 In July 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act ("MAP-21").46

Recently on December 3, 2015, Congress passed the Fixing America’s Surface Transportation Act ("FAST Act"), which is the first long-term (five year) surface transportation authorization in ten years, since the passage of SAFE-TEA-LU in 2005.47

The Federal DBE Program provides requirements for federal aid recipients and accordingly how recipients of federal funds provided implement the Federal DBE Program for federally-assisted contracts. The federal government has determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not required to implement race- and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.48

The Federal DBE Program established responsibility for implementing the DBE Program to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE goal specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The Federal DBE Program outlines certain steps a state or local government recipient can follow in establishing a goal, and USDOT considers and must approve the goal and the recipient’s DBE program. 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 § 26.45.

Provided in 49 CFR § 26.45 are instructions as to how recipients of federal funds should set the overall goals for their DBE programs. In summary, the recipient establishes a base figure for relative availability of DBEs.49 This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient’s market.50 Second, the recipient must determine an

47 Pub.L. ______, H.R. 22, § 1101(b), December 3, 2015, ____ Stat ____.
49 49 CFR § 26.45(a), (b), (c).
50 Id.
appropriate adjustment, if any, to the base figure to arrive at the overall goal. 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. 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.

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goal can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.

A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented. A recipient of federal funds must establish a contract clause requiring prime contractors to promptly pay subcontractors in the Federal DBE Program (42 CFR § 26.29). The Federal DBE Program also established certain record-keeping requirements, including maintaining a bidders list containing data on contractors and subcontractors seeking federally-assisted contracts from the agency (42 CFR § 26.11). There are multiple administrative requirements that recipients must comply with in accordance with the regulations.

Federal aid recipients 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.

Fixing America’s Surface Transportation Act” or the “FAST Act” (December 3, 2015)

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

SEC. 1101. AUTHORIZATION OF APPROPRIATIONS.

(b) Disadvantaged Business Enterprises-

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51 Id. at § 26.45(d).
52 Id.
53 49 CFR § 26.45(b)-(d).
54 49 CFR § 26.51.
55 49 CFR § 26.51(b).
(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 woman-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.

(2) DEFINITIONS- In this subsection, the following definitions apply:

(A) SMALL BUSINESS CONCERN-

(i) IN GENERAL- The term `small business concern' means a small business concern (as the term is used in section 3 of the Small Business Act (15 U.S.C. 632)).

(ii) EXCLUSIONS- The term `small business concern' does not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals that have average annual gross receipts during the preceding 3 fiscal years in excess of $23,980,000, as adjusted annually by the Secretary for inflation.\(^{57}\)

Therefore, Congress in the FAST Act passed on December 3, 2015, has again 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 woman-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.

\(^{57}\) Pub.L. _____, H.R. 22, § 1101(b), December 3, 2015, ____ Stat. ____.
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.58

**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.59 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 woman-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.”60

Thus, Congress in MAP-21 determined based on testimony and documentation of race and gender discrimination that there is “a compelling need for the continuation of the” Federal DBE Program.61

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58 Id.
61 Id.

The United States Department of Transportation promulgated a new Final Rule on January 28, 2011, effective February 28, 2011, 76 Fed. Reg. 5083 (January 28, 2011) (“Final Rule”) amending the Federal DBE Program at 49 CFR Part 26. According to the United States DOT, the Rule increased accountability for recipients with respect to meeting overall goals, modified and updated certification requirements, adjusted the personal net worth threshold for inflation to $1.32 million dollars, provided for expedited interstate certification, added provisions to foster small business participation, provided for additional post-award oversight and monitoring, and addressed other matters.62

In particular, the Final Rule provided that a recipient’s DBE Program must include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently is actually performed by the DBEs to which the work was committed and that this mechanism must include a written certification that the recipient has reviewed contracting records and monitored work sites for this purpose.63

In addition, the Final Rule added a Section 26.39 to Subpart B to provide for fostering small business participation.64 The recipient’s DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, which must be submitted to the appropriate DOT operating administration for approval.65 The new Final Rule provided a list of “strategies” that may be included as part of the small business program, including establishing a race-neutral small business set-aside for prime contracts under a stated amount; requiring bidders on prime contracts to specify elements or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform; requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform; and to meet the portion of the recipient's overall goal it projects to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform and other strategies.66 The new Final Rule provided that actively implementing program elements to foster small business participation is a requirement of good faith implementation of the recipient’s DBE program.67

The Final Rule also provided that recipients must take certain specific actions if the awards and commitments shown on its Uniform Report of Awards or Commitments and Payments, at the end of any fiscal year, are less than the overall goal applicable to that fiscal year, in order to be regarded by the DOT as implementing its DBE program in good faith.68 The Final Rule set out

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62 76 F.R. 5083-5101.
63 See 49 CFR § 26.37, 76 F.R. at 5097.
64 76 F.R. at 5097, January 28, 2011.
65 Id.
66 Id. at 5097, amending 49 CFR § 26.39(b)(1)-(5).
67 Id. at 5097, amending 49 CFR § 26.39(c).
what action the recipient must take in order to be regarded as implementing its DBE program in good faith, including analyzing the reasons for the difference between the overall goal and its awards and commitments, establishing specific steps and milestones to correct the problems identified, and submitting at the end of the fiscal year a timely analysis and corrective actions to the appropriate operating administration for approval, and additional actions. The Final Rule provided a list of acts or omissions that DOT will regard the recipient as being in non-compliance for failing to implement its DBE program in good faith, including not submitting its analysis and corrective actions, disapproval of its analysis or corrective actions, or if it does not fully implement the corrective actions.

The Department stated in the Final Rule with regard to disparity studies and in calculating goals, that it agrees "it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (e.g., firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance."

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


On September 6, 2012, the Department of Transportation published a Notice of Proposed Rulemaking (NPRM) entitled, “Disadvantaged Business Enterprise: Program Implementation Modifications” in the Federal Register.\(^77\)

The USDOT noted the DBE Program was reauthorized in the Moving Ahead for Progress in the 21\(^{st}\) Century Act ("MAP-21"), Public Law 112-141 (enacted July 6, 2012), and that the Department believes this reauthorization is intended to maintain the status quo of the DBE Program.\(^78\)

The Final Rule amending the Federal DBE Program at 49 C.F.R. Part 26 provides substantial changes and additions to the implementation and administration of the Federal DBE Program regulations in three primary areas:

1. The Rule revises the Uniform Certification Application and reporting forms, establishes a uniform personal net worth form as part of the Uniform Certification Application, and provides for data collection required by the U.S. DOT statutory reauthorization, MAP-21;

2. The Rule revises the certification-related program provisions and standards; and

3. The Rule amends and modifies several program provisions, including: overall goal setting by recipients of federal funds, good faith efforts, guidance and submissions, transit vehicle manufacturers, counting for trucking companies, and program administration.\(^79\)

The new and revised forms include the U.S. DOT personal net worth form, a revised uniform application form and checklist, and a revised uniform report of awards or commitments, and payments. The new provisions include reporting requirements under MAP-21, adding a new provision authorizing summary suspensions of DBEs under certain circumstances, and new record retention requirements.\(^80\)

Several of the areas revised include:

- the size standard on statutory gross receipts has been increased for inflation;
- the ownership and control provisions have been amended, including a new rule examining whether there are any agreements or practices that give a non-disadvantage individual or firm a priority or superior right to a DBE’s profits, and setting forth an assumption of control when a non-disadvantaged individual who is a former owner of the firm remains involved in the operation of the firm;
- certification procedures and grounds for decertification are revised including the areas of prequalification, grounds for removal, summary suspension, and certification appeals;

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\(^{77}\) 77 F.R. 54952-55024 (September 6, 2012).

\(^{78}\) 77 F.R. 54952.

\(^{79}\) 79 F.R. 59566-59622 (October 2, 1014).

\(^{80}\) Id.
the overall goal setting obligations, including methodology and process, data sources to determine the relative availability of DBEs, and any step two adjustments by the recipient of federal funds to the base figure supported by evidence;

- the submission of good faith efforts as a matter of “responsiveness” or as a matter of “responsibility”, including reduction in number of days as to when the information of good faith efforts must be submitted either at the time of bid or after bid opening;

- guidance on good faith efforts, including examples of the kinds of actions that recipients may consider when evaluating good faith efforts by bidders and offerors;

- provisions relating to the replacing of DBEs; and

- counting of DBE participation, including trucking services and expenditures with DBEs for materials and supplies and related matters.81

In terms of forms and data collection, the new Rule attempts to simplify the Uniform Certification Application; establishes a new U.S. DOT personal net worth form to be used by applicants; establishes a uniform report of DBE awards or commitments and payments; captures data on minority woman-owned DBEs and actual payments to DBEs reporting; and provides for a new submission required by MAP-21 on the percentage of DBEs in the state owned by non-minority women, and men.82

The new Rule makes certain changes in connection with program administration, including: adding to the definitions of “immediate family members” and “spouse” domestic partnerships and civil unions; the retention of all records documenting a DBE’s compliance with the eligibility requirements, including the complete application package and subsequent reports; and adding to the provisions relating to the contract clause included in each DOT-assisted contract that obligates the contractor to comply with the DBE Program regulations in the administration of the contract, and specifying that failure to do so may result in termination of the contract or other remedies.83

The Rule also provides changes to the definitions in the federal regulations, including for the following terms: assets, business, business concern, business enterprise, contingent liability, liabilities, primary industry classification, principal place of business, and social and economically disadvantaged individual.84

**USDOT Order 4220.1 (February 5, 2014).**

USDOT Order 4220.1 is the USDOT’s Order on the Coordination and Oversight of the DBE Program. According to the USDOT, this Order clarifies the leadership roles and responsibilities of

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81 79 F.R. 59566-59622.
82 Id.
83 Id.
84 Id.
the various offices and Operating Administrations within the USDOT responsible for supporting and overseeing the implementation of the Federal DBE program. The Order further establishes a framework for coordination, overall policy development, and program oversight among these offices. The Order provides that the Departmental Office of Civil Rights will act as the lead office in the Office of Secretary for the DBE program. The Operating Administrations will continue to be the first points of contacts regarding, and primarily responsible for overseeing and enforcing, the day-to-day administration of the program by recipients.

The USDOT Order also establishes a framework for coordination, overall policy development, and program oversight among these offices. The Order provides that these offices will engage in systematic coordination regarding the administration and implementation of the DBE program by DOT recipients.

The Order sets forth specific programmatic responsibilities for the Departmental Office of Civil Rights, the rules and responsibilities of the General Counsel as Chief Legal officer of the USDOT, and the Office of Small and Disadvantaged Business Utilization within the Office of the Secretary. The Order clarifies rules and responsibilities for the Operating Administrations in their overseeing of the day-to-day administration of the Federal DBE program by recipients, providing training and technical assistance, maintaining current and up-to-date DBE websites and, taking appropriate actions to ensure program compliance.

The USDOT Order also establishes the DBE Oversight and Compliance Council that will facilitate collaboration, communication, and accountability among the DOT components responsible for the DBE program oversight, and assist in the formulation of policy regarding DBE program management and operation. The Order provides that the Office of the General Counsel established DBE Working Group, which generates rules changes and official DOT guidance, will continue to coordinate the development of formal and informal guidance and interpretations, and to ensure consistent and clear communications regarding the application and interpretation of DBE program requirements.

The USDOT Order 4220.1 may be found at: www.civilrights.dot.gov/disadvantaged-business-enterprise.

2. **Strict scrutiny analysis**

A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.\(^{85}\) In the event the Commission implements a MBE/WBE/DBE type program, and ODOT implements the Federal DBE Program, these programs are subject to the strict scrutiny analysis if they utilize race- and ethnicity-based measures.\(^{86}\) The strict scrutiny analysis is comprised of two prongs:

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\(^{85}\) *Croson*, 448 U.S. at 492–493; *Adarand Constructors, Inc. v. Pena (Adarand I)*, 515 U.S. 200, 227 (1995); See *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *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.

\(^{86}\) *Adarand I*, 515 U.S. 200, 227 (1995); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *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.
The program must serve an established compelling governmental interest; and

The program must be narrowly tailored to achieve that compelling government interest.87

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.88 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.89 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.90

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.91 The federal courts also have held that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).92

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87 Id.
88 Id.
89 See e.g., Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”), 36 F.3d 1513 (10th Cir. 1994).
90 Id.
91 N. Contracting, 473 F.3d at 721; Western States Paving, 407 F.3d at 991; Sherbrooke Turf, 345 F.3d at 969; Adarand VII, 228 F.3d at 1176; See Mountain West Holding, 2014 WL 666734, appeal pending.
92 Id. In the case of Rothe Dev. Corp. v. U.S. Dept. of Defense, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so “outdated” so as to provide an insufficient basis in evidence for the Department of Defense program (i.e., whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. Rothe considered the validity of race- and gender-conscious Department of Defense ("DOD") regulations (2006 Reauthorization of the 1207 Program). The decisions in N. Contracting, Sherbrooke Turf, Adarand VII, and Western States Paving held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in Rothe on August 10, 2007 issued its order denying plaintiff Rothe’s Motion for Summary Judgment and granting Defendant DOD’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. Rothe Devol. Corp. v. U.S. Dept. of Defense, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix [The Compelling Interest, 61 Fed. Reg. 26050 (1996)], the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in Sherbrooke Turf, Adarand VII, and Western States Paving in upholding the constitutionality of the Federal DBE Program – was "stale" as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision in Rothe below in Section C. See also the discussion below in Section G of the 2012 district court decision in DynaLantic Corp. v. U.S. Department of Defense, et al. 885 F.Supp.2d 237, [D.D.C.]. Recently, the district court in Rothe Development, Inc. v. U.S. Dept of Defense and U.S. S.B.A., 2015 WL 3536271 (D D.C. June 5, 2015), appeal pending in the United States Court of Appeals, District of Columbia Circuit, Docket Number 15-15176, upheld the constitutionality of the Section 8(a) Program on its face, finding the federal government’s evidence of discrimination provided a sufficient basis for the Section 8(a) Program. See the discussion of the 2015 decision in Rothe in Section G below.
Specifically, 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.”93 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).94 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.95

- **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.96

- **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.97

- **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.98

- **MAP-21.** In July 2012, Congress passed MAP-21 (see above), which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority-

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

94 See, e.g., Adarand VII, 228 F.3d at 1167 – 76; see also Western States Paving, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”).

95 Adarand VII, 228 F.3d at 1168-70; Western States Paving, 407 F.3d at 992; see Geyer Signal, Inc., 2014 WL 1309092; DynaLantic, 885 F.Supp.2d 237.

96 Adarand VII, at 1170-72; see DynaLantic, 885 F.Supp.2d 237.

97 Id. at 1172-74; see DynaLantic, 885 F.Supp.2d 237.

98 Advanced VII, 228 F.3d at 1174-75.
and woman-owned businesses seeking to do business in federally-assisted surface transportation markets," and that the continuing barriers "merit the continuation" of the Federal DBE Program.99 Congress also found 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 DBE Program.100

Burden of proof. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.101 If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.102 The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."103

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.104 It is well established that "remedying the effects of past or present racial discrimination" is a compelling interest.105 In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."106

Since the decision by the Supreme Court in Croson, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."107 "An inference of discrimination may be made by 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."108 Anecdotal

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100 Id. at § 1101(b)(1).
101 See AGC, SDC v. Caltrans, 713 F.3d at 1195; Rothe Development Corp. v. Department of Defense, 545 F.3d 1023, 1036 (Fed. Cir. 2008); N. Contracting, Inc. Illinois, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); Western States Paving Co. v. Washington State DOT, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); Sherbrooke Turf, Inc. v. Minnesota DOT, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); Adarand Constructors Inc. v. Slater ("Adarand VII"), 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); Eng’g Contractors Ass’n, 122 F.3d at 916; Monterey Mechanical Co. v. Wilson, 125 F.3d 702, 713 (9th Cir. 1997); 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).
102 Adarand VII, 228 F.3d at 1166; Eng’g Contractors Ass’n, 122 F.3d at 916.
103 See, e.g., Adarand VII, 228 F.3d at 1166; 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.
104 Id.; Western States Paving, 407 F.3d at 990; See also Majeske v. City of Chicago, 218 F.3d 816, 820 (7th Cir. 2000).
106 Croson, 488 U.S. at 500.
107 Midwest Fence, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), appeal pending; see, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1195-1200; Concrete Works of Colo. Inc. v. City and County of Denver, 36 F.3d 1513, 1522 (10th Cir. 1994).
108 Midwest Fence, 2015 W.L. 1396376 at *7, quoting Concrete Works; 36 F.3d 1513, 1522 (quoting Croson, 488 U.S. at 509).
evidence may be used in combination with statistical evidence to establish a compelling governmental interest.109

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.110 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.111 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.112

To successfully rebut the government’s evidence, a challenger must introduce “credible, particularized evidence” of its own that rebuts the government’s showing of a strong basis in evidence.113 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.114 Conjecture and unsupported criticisms of the government’s methodology are insufficient.115 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.116

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.’”117 It has been 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.118 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

109 Croson, 488 U.S. at 509; see, e.g., AGC, SDC v. Caltrons, 713 R.3d at 1196; Midwest Fence, 2015 WL 1396376 at *7, appeal pending.
112 Id.; Adarand VII, 228 F.3d at 1166.
113 See e.g., H.B. Rowe v. North Carolina DOT (4th Cir. 2010), 615 F.3d 233, at 241-242; Concrete Works, 321 F.3d 950, 959 (quoting Adarand Constructors, Inc. vs. Slater, 228 F.3d 1147, 1175 (10th Cir. 2000)); Midwest Fence, 2015 W.L. 1396376 at *7, appeal pending.
114 Id; See e.g., Engineering Contractors, 122 F.3d at 916; Contractors Association of E. Pa., Inc. v. City of Philadelphia, 6 F.3d 990, 1007 (3d Cir. 1993); Coral Construction, Co. v. King County, 941 F.2d 910, 921 (9th Cir. 1991).
115 Id.
116 H.B. Rowe, 615 F.3d 233, at 242; see Concrete Works, 321 F.3d at 991.
117 H.B. Rowe, 615 F.3d at 241, quoting Rothe Dev. Corp. v. Dept’ 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)].
118 H.B. Rowe Co., 615 F.3d at 241; see e.g., Concrete Works, 321 F.3d at 958.
prime contractors.\textsuperscript{119} It has been further held that the statistical evidence be “corroborated by significant anecdotal evidence of racial discrimination” or bolstered by anecdotal evidence supporting an inference of discrimination.\textsuperscript{120}

**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.\textsuperscript{121} “Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”\textsuperscript{122}

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.\textsuperscript{123} The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and woman-owned firms may raise an inference of discriminatory exclusion.\textsuperscript{124} However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.\textsuperscript{125}

Other considerations regarding statistical evidence include:

- **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE availability measures the relative number of MBE/WBEs and DBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.\textsuperscript{126} There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,\textsuperscript{127} "An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach."\textsuperscript{128}

\textsuperscript{119} *Croson*, 488 U.S. 509, see e.g., *H.B. Rowe*, 615 F.3d at 241.
\textsuperscript{120} *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., *AGC, San Diego v. Caltrans*, 713 F.3d at 1196.
\textsuperscript{121} See, e.g., *Croson*, 488 U.S. at 509; *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; *Adarand VII*, 228 F.3d at 1166.
\textsuperscript{123} *Croson*, 488 U.S. at 509; see *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *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.
\textsuperscript{124} See, e.g., *Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; see also *Western States Paving*, 407 F.3d at 1001.
\textsuperscript{125} *Western States Paving*, 407 F.3d at 1001.
\textsuperscript{126} See, e.g., *Croson*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995.
\textsuperscript{127} *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia* ("CAEP II"), 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 ("degree of specificity required in the findings of discrimination ... may vary.").
\textsuperscript{128} Id.
- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.\(^{129}\)

- **Disparity index.** An important component of statistical evidence is the “disparity index.”\(^{130}\) 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.”\(^{131}\)

- **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.\(^{132}\)

**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.\(^{133}\) But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.\(^{134}\) 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.\(^{135}\)

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;

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\(^{129}\) See *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *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.

\(^{130}\) *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 Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

\(^{131}\) See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *H.B. Rowe Co.*, 615 F.3d 233, 243-244; *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.

\(^{132}\) *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.

\(^{133}\) 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; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

\(^{134}\) See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng’g Contractors Ass’n*, 122 F.3d at 925-26; *Concrete Works, 36 F.3d at 1520; Contractors Ass’n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

\(^{135}\) *Concrete Works I*, 36 F.3d at 1520.
- 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.\textsuperscript{136}

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.\textsuperscript{137}

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;
- 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.\textsuperscript{138}

The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular recipient’s contracting and procurement market.\textsuperscript{139} The narrow tailoring requirement has several components.

\textsuperscript{136} See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1197; Northern Contracting, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), affirmed, 473 F.3d 715 (7th Cir. 2007); e.g., 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).

\textsuperscript{137} See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1197; 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; Mountain West Holding, 2014 WL 668734, appeal pending; 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).

\textsuperscript{138} See, e.g., AGC, SDC v. Caltrans, 713 F.3d at 1198-1199; Rothe, 545 F.3d at 1036; Western States Paving, 407 F3d at 993-995; Sherbrooke Turf, 345 F.3d at 971; Adarand VII, 228 F.3d at 1181; Eng’g Contractors Ass’n, 122 F.3d at 927 (internal quotations and citations omitted).

\textsuperscript{139} Western States Paving, 407 F3d at 995-998; Sherbrooke Turf, 345 F.3d at 970-71.
It should be pointed out that in the *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.”140 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.141 The Seventh Circuit Court of Appeals analyzed IDOT’s compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth in the federal regulations.142 The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).143 Accordingly, the Seventh Circuit Court of Appeals affirmed the district court’s decision upholding the validity of IDOT’s DBE program.144

The recent (August 19, 2015) Seventh Circuit Court of Appeals decision in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al* 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.145 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.146 The court found Dunnet Bay had not established sufficient evidence that IDOT’s implementation of the Federal DBE Program constituted unlawful discrimination.147

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-,

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140 473 F.3d at 722.
141 Id. at 722.
142 Id. at 723-24.
143 Id.
146 Id.
147 Id.
ethnicity-, or gender-conscious remedial action.\textsuperscript{148} Thus, the Ninth Circuit held in \textit{Western States Paving} that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.\textsuperscript{149}

In \textit{Western States Paving}, and in \textit{AGC, SDC v. Caltrans}, the Ninth Circuit 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.\textsuperscript{150}

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, the federal courts, which evaluated state DOT DBE Programs and their implementation of the Federal DBE Program, have held the following factors are pertinent:

\begin{itemize}
  \item Evidence of discrimination or its effects in the state transportation contracting industry;
  \item Flexibility and duration of a race- or ethnicity-conscious remedy;
  \item Relationship of any numerical DBE goals to the relevant market;
  \item Effectiveness of alternative race- and ethnicity-neutral remedies;
  \item Impact of a race- or ethnicity-conscious remedy on third parties; and
  \item Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.\textsuperscript{151}
\end{itemize}

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.”\textsuperscript{152} 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.”\textsuperscript{153}

\begin{thebibliography}{9}
\bibitem{148} \textit{Western States Paving}, 407 F.3d at 997-98, 1002-03; see \textit{AGC, SDC v. Caltrans}, 713 F.3d at 1197-1199.
\bibitem{149} \textit{Id.} at 995-1003. The Seventh Circuit Court of Appeals in \textit{Northern Contracting} stated in a footnote that the court in \textit{Western States Paving} “misread” the decision in \textit{Milwaukee County Pavers}. 473 F.3d at 722, n. 5.
\bibitem{150} 407 F.3d at 996-1000; \textit{See AGC, SDC v. Caltrans}, 713 F.3d at 1197-1199.
\bibitem{151} \textit{See}, e.g., \textit{AGC, SDC v. Caltrans}, 713 F.3d at 1198-1199; \textit{Western States Paving}, 407 F.3d at 998; \textit{Sherbrooke Turf}, 345 F.3d at 971; \textit{Adarand VII}, 228 F.3d at 1181; \textit{Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services}, 140 F.Supp.2d at 1247-1248.
\bibitem{152} \textit{Eng'g Contractors Ass'n}, 122 F.3d at 926 (internal citations omitted); \textit{See also Virdi v. DeKalb County School District}, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion); \textit{Webster v. Fulton County}, 51 F. Supp.2d 1354, 1380 (N.D. Ga. 1999), \textit{aff'd per curiam} 218 F.3d 1267 (11th Cir. 2000).
\end{thebibliography}
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.’”\(^{154}\)

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*\(^{155}\) 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.”\(^{156}\) The Court found that the District failed to show it seriously considered race-neutral measures.

The “narrowly tailored” analysis is instructive in terms of developing any potential legislation or programs that involve DBEs and implementing the Federal DBE Program, or in connection with determining appropriate remedial measures to achieve legislative objectives.

**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.\(^{157}\) 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.\(^{158}\)

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.”\(^{159}\)

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\(^{157}\) *See, e.g.*, *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Coral Constr.*, 941 F.2d at 923.

\(^{158}\) *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.

\(^{159}\) *Croson*, 488 U.S. at 509-510.
The federal regulations and the courts require that recipients of federal financial assistance governed by 49 CFR Part 26 implement or seriously consider race-, ethnicity-, and gender-neutral remedies prior to the implementation of race-, ethnicity-, and gender-conscious remedies. The courts have also found “the regulations require a state to ‘meet the maximum feasible portion of [its] overall goal by using race neutral means.”

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

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

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160 49 CFR § 26.51(a) requires recipients of federal funds to “meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation.” See, e.g., Adarand VII, 228 F.3d at 1179; Western States Paving, 407 F.3d at 993; Sherbrooke Turf, 345 F.3d at 972. Additionally, in September of 2005, the United States Commission on Civil Rights (the “Commission”) issued its report entitled “Federal Procurement After Adarand” setting forth its findings pertaining to federal agencies’ compliance with the constitutional standard enunciated in Adarand. United States Commission on Civil Rights: Federal Procurement After Adarand (Sept. 2005), available at http://www.usccr.gov. The Commission found that 10 years after the Court’s Adarand decision, federal agencies have largely failed to narrowly tailor their reliance on race-conscious programs and have failed to seriously consider race-neutral measures that would effectively redress discrimination.

161 See, e.g., Northern Contracting, 473 F.3d at 723 – 724; Western States Paving, 407 F.3d at 993 (citing 49 CFR § 26.51(a)).
Streamlining and improving the accessibility of contracts to increase small business participation.\(^{162}\)

49 CFR § 26.51(b) provides examples of race-, ethnicity-, and gender-neutral measures that should be seriously considered and utilized. The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”\(^{163}\)

In \textit{AGC, SDC v. Caltrans\textsuperscript{164}}, the Ninth Circuit rejected the assertion that the state DOT’s DBE program was not narrowly tailored because it failed to evaluate race-neutral measures before implementing race conscious goals, and said the law imposes no such requirement.\(^{165}\) The court held states are not required to independently meet this aspect of narrow tailoring, and instead concluded \textit{Western States Paving\textsuperscript{166}} focused on whether the federal statute sufficiently considered race-neutral alternatives.\(^{167}\) In \textit{AGC, SDC v. Caltrans\textsuperscript{164}}, the court found that narrow tailoring only requires “serious, good faith consideration of workable race-neutral alternatives.”\(^{166}\)

**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.\(^{168}\) For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;\(^{169}\) (2) good faith efforts provisions;\(^{169}\) (3) waiver provisions;\(^{170}\) (4) a rational basis for goals;\(^{171}\) (5) graduation provisions;\(^{172}\) (6) remedies only for groups for which there were findings of discrimination;\(^{173}\) (7) sunset provisions;\(^{174}\) and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.\(^{175}\)

\(^{162}\) See 49 CFR § 26.51(b); see, e.g., Croson, 488 U.S. at 509-510; \textit{N. Contracting}, 473 F.3d at 724; \textit{Adarand VII}, 228 F.3d 1179; 49 CFR § 26.51(b); \textit{Eng’y Contractors Ass’n}, 122 F.3d at 927-29.

\(^{163}\) \textit{Western States Paving}, 407 F.3d at 993.

\(^{164}\) \textit{AGC, SDC v. Caltrans}, 713 F.3d at 1199.

\(^{165}\) \textit{AGC, SDC v. Caltrans}, 713 F.3d at 1199.


\(^{167}\) \textit{Eng’y Contractors Ass’n}, 122 F.3d at 927.

\(^{168}\) \textit{CAEP I}, 6 F.3d at 1009; \textit{Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality (“AGC of Ca.”)}, 950 F.2d 1401, 1417 (9th Cir. 1991); \textit{Coral Constr. Co. v. King County}, 941 F.2d 910, 923 (9th Cir. 1991); \textit{Cone Corp. v. Hillsborough County}, 908 F.2d 908, 917 (11th Cir. 1990).

\(^{169}\) \textit{CAEP I}, 6 F.3d at 1019; \textit{Cone Corp}, 908 F.2d at 917.

\(^{170}\) \textit{CAEP I}, 6 F.3d at 1009; \textit{AGC of Ca.}, 950 F.2d at 1417; \textit{Cone Corp.}, 908 F.2d at 917.

\(^{171}\) \textit{Id.}

\(^{172}\) \textit{Id.}

\(^{173}\) \textit{AGC, SDC v. Caltrans}, 713 F.3d at 1198-1199; \textit{Western States Paving}, 407 F.3d at 998; \textit{AGC of Ca.}, 950 F.2d at 1417.

\(^{174}\) \textit{Peightal}, 26 F.3d at 1559.

\(^{175}\) \textit{Coral Constr.}, 941 F.2d at 925.
3. Intermediate scrutiny analysis

Certain federal Courts of Appeal, including the Sixth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs. The Sixth Circuit and other courts have interpreted this 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 a sufficiently important governmental interest or the achievement of that underlying objective.

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.

Intermediate scrutiny, as interpreted by the 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. The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.

The Eleventh Circuit has held that “[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.”

4. Pending Cases (at the time of this report)

Pending cases on appeal at the time of this report, which may potentially impact and be instructive to Ohio DOT and the Commission, include:

176 Equal Found. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997); See generally, AGC, SDC v. Caltrans, 713 F.3d at 1195; Western States Paving, 407 F.3d at 990 n. 6; Coral Constr. Co., 941 F.2d at 931-932 (9th Cir. 1991); 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); see also U.S. v. Virginia, 518 U.S. 515, 532 and n. 6 (1996)(“exceedingly persuasive justification.”)

177 Id.

178 Id. The Seventh Circuit Court of Appeals, however, in Builders Ass’n of Greater Chicago v. County of Cook, Chicago, did not hold there is a different level of scrutiny for gender discrimination or gender based programs. 256 F.3d 642, 644-45 (7th Cir. 2001). The Court in Builders Ass’n rejected the distinction applied by the Eleventh Circuit in Engineering Contractors.

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

180 122 F.3d at 929 (internal citations omitted.)

- **Midwest Fence Corporation v. United States Department of Transportation and Federal Highway Administration, the Illinois Department of Transportation, the Illinois State Toll Highway Authority, et al.** 2015 WL 1396376 (N.D. Ill, March 24, 2015), *appeal pending* in the U.S. Court of Appeals, Seventh Circuit, Docket Number 15-1827. (See Section E below.)


This list of pending cases is not exhaustive, but is illustrative of current pending cases that may impact MBE/WBE/DBE Programs, including state DOTs and recipients of federal funds implementing the Federal DBE Program.

**Ongoing review.** The above represents a brief summary of the legal framework pertinent to implementation of DBE, MBE/WBE, or race-, ethnicity-, or gender-neutral programs. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.
SUMMARIES OF RECENT DECISIONS

D. Recent Decisions Involving the Federal DBE Program and State or Local Government MBE/WBE Programs in the Sixth Circuit Court of Appeals

1. 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.


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. Pena (1995), citation omitted.) The Court noted that the decision in Keip was a more relaxed treatment accorded to equal protection challenges to state contracting disputes prior to Croson. Id. at 733-734.

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

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

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

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

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

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

The Court also concluded that even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court’s criteria. *Id.* at 736. “If MBEs comprise 10% 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).


The Plaintiffs-Appellants, Tennessee Asphalt Company, Tennessee Road Builders Association, and six highway construction subcontractors brought this lawsuit against the United States Department of Transportation, the Administrator of the Federal Highway Administration and the Tennessee Department of Transportation (TDOT). 942 F.2d at 970. The Plaintiffs-Appellants (“Tennessee Asphalt”) contended that TDOT applied a section of the Surface Transportation Assistance Act of 1982, which provided that not less than 10% of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals, in an unconstitutional manner. *Id.* The 1982 Surface Transportation Assistance Act (the “Act”) was a precursor of the current Federal DBE program located at 49 C.F.R. Part 26. The 1982 Act was located at 49 C.F.R. Part 23, Subpart D. *Id.*

In this appeal, Plaintiffs conceded the facial validity of this section of the Act and the federal regulations located at 49 C.F.R. Part 23, and limited their constitutional challenge to TDOT’s program as applied. *Id.* At 972. The Court stated Tennessee Asphalt argues, in effect, that TDOT’s adherence to the 10% “set-aside” prescribed by the Act without evidence of past discrimination by Tennessee, was an equal protection violation under the U.S. Supreme Court decision in *Croson*. *Id.* at 972.

The Plaintiffs also raised issues as to certain factors, Factors 6 and 7, added to Tennessee’s Special Provision that was incorporated into all TDOT federal-aid highway contracts with DBE subcontractor goals. *Id.* Factors 6 and 7 were additional illustrations of good faith factors to consider in achieving the established 10% goal of DBE participation. Plaintiffs argued Factors 6 and 7 “turned the DBE program in Tennessee into a far more race-conscious program than it had previously been. *Id.* at 972. Plaintiffs argued that the practical effect was to turn a “goal” program into a “quota”. *Id.*
The federal government and State of Tennessee defendants responded the State of Tennessee acted as the agent of the United States in applying Congressionally-mandated requirements to its highway construction programs that are carried out, in part, with federal financing. Id. at 972. They contended Factors 6 and 7 have no constitutional significance and do not violate the competitive bidding requirements of the Federal Highway Act. Id.

The Court applied its analysis based on the Croson decision in which Justice O'Connor, in a plurality opinion, made it clear, that based upon sufficient findings a state or political subdivision has the power "to eradicat[e] the effects of private discrimination within its own legislative jurisdiction." Id. at 974. Governmental entities, according to the Court, are not restricted to eradicating the effects only of their own discriminatory acts. Id.

The Court pointed out that the decision in Croson recognized that State and lesser units of local government are limited to remediying sufficiently identified past and present discrimination within their own spheres of authority. Id. at 974.

**State compliance with mandate of a federal scheme.** The Court concluded that Congress has the power to enact the Act, including its 10% set-aside requirement, employing its powers under Section 5 of the Fourteenth Amendment, and that Congress can legitimately use this "carrot and stick" approach to engage the states and their political subdivisions in its efforts to remedy society-wide discrimination. Id. at 975.

The Plaintiffs argued that Tennessee violated Section 1 of the Fourteenth Amendment by participating in this "federally-initiated preferential scheme" without making the "particularized findings" of discrimination required for a race-conscious program to be initiated by a state or local government. Id. at 975. The Court rejected the Plaintiffs' argument and stated that such an assertion was answered by the Seventh Circuit in Milwaukee County Pavers Ass’n v. Fielder, 922 F.2d 419 (7th Cir.), cert. denied, 500 U.S. 954 (1991). Id. The Court in Milwaukee County Pavers held the federal government can engage in affirmative action with a freer hand than states and municipalities can do, and one way it can do that is by authorizing states to do things they could not do without federal authorization. Id. at 975, quoting Milwaukee County Pavers, 922 F.2d at 423-424.

The Court in Tennessee Asphalt agreed with the Court in Milwaukee Pavers that the proper characterization of a state’s role under the Act is the basic question presented by these nonminority contractors’ appeal. Id. at 975. The Court noted that while it is true Tennessee may opt not to participate in the federal program at all, if the state decides to accept highway funds, it must meet the 10% DBE requirement, or fulfill the federal requirements for a variance by showing 10% participation is not possible despite good faith efforts. Id. at 975. In other words, the Court stated, contrary to the Plaintiffs’ assertions, Tennessee “has no discretion to either accept the 10% DBE requirement or apply for a variance. Rather, it may only apply for a variance by establishing under federal standards that it cannot comply with the 10% requirement.” Id. at 975.

Thus, the Court stated every aspect of participation in the Federal Highway Program is mandated by Congress. Id. at 975. And, according to the Court, since Congress can mandate state and local compliance with a set-aside program under its Section 5 power to enforce the
Fourteenth Amendment, “a state’s compliance with the mandates of a federal scheme is nothing more than compliance with federal law.” *Id.*

**No evidence of impermissible impact on “innocent” nonminority contractors.** The Court pointed out the district court noted the argument of the Plaintiffs that the highway construction industry has no private sector because highway contractors either work on public projects or have no work. *Id.* at 975. But, the district court found the nonminority subcontractors who submitted evidence had actually experienced continuing growth in their businesses in the years that Tennessee participated in the Congressionally-mandated set-aside program. *Id.* at 976.

The Court found that there is no evidence that “innocent parties” have suffered any greater hardship under Tennessee’s application of the Act than the contractors who are affected by the MBE program upheld by the U.S. Supreme Court in the *Fullilove* decision. *Id.* at 976. Because Plaintiffs did not adduce evidence of an impermissible impact on them and their fellow nonminority contractors sufficient to create a genuine issue of material fact, the district court properly granted the Defendants’ Motion for Summary Judgment. *Id.*

The Court rejected the Plaintiffs’ arguments with respect to good faith efforts Factors 6 and 7 adopted by TDOT in response to federal “urgings”, and held they do not impose any requirements on bidders beyond those imposed by the Act itself. *Id.* at 976. The Court stated these factors created no preference for DBEs beyond that created by the federal program. *Id.*

The Court also rejected Plaintiffs’ contention that these factors require bidders to satisfy the project goal regardless of their efforts to obtain DBE participation, finding that a bid may continue to be responsive solely by virtue of a bidder’s good faith efforts, and that the Factors merely emphasize what is required to meet this standard. *Id.* at 976.

In concluding, the Court held that its decision is controlled by the distinction between the limitations on efforts of states and their political subdivisions to employ race-conscious remedies to overcome the effects of past and present discrimination, and the broader power of Congress to address such problems on a nationwide basis. *Id.* at 976-977. The Court affirmed the judgment of the district court. *Id.*


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.


Nonminority contractor, Buddie Contracting, Ltd., brought this suit challenging the constitutionality of the minority and female business enterprise "set-aside" policies for awarding construction contracts by the Cuyahoga Community College District ("CCC"). 31 F. Supp.2d at 573. The CCC Minority Business Enterprise Program (MBE Program) provided that a prime contractor must award 10% of the value of a construction contract with CCC to MBE subcontractors unless that requirement is waived, at CCC’s discretion, upon a showing that the prime contractor, after a good faith effort, was unable to acquire the requisite MBE subcontractor. *Id.* at 574. The Court noted that the provision was not in practice used in that it appeared CCC adopted an informal rule against issuing waivers. *Id.* at 574, n.3.

The CCC also adopted a Female Business Enterprise Program Policy (FBE) in which a prime contractor was required to award 25% of the total value of a construction contract with CCC to FBEs. No waiver provision was included in that policy, and neither the FBE policy nor the MBE policy incorporated durational or geographic limitations. *Id.* at 574.

Plaintiff Buddie Contracting submitted a bid on a project that was the lowest bid, but it designated 3.7% of the total value of the contract as going to MBE subcontractors and 21% going to FBE subcontractors. *Id.* at 574. Despite Plaintiff's application for a waiver, its bid was rejected.
due to the failure to comply with the MBE participation policy, and the contract was awarded to the second lowest bidder. *Id.*

Plaintiff filed suit challenging the constitutionality of the MBE and FBE programs. *Id.* at 575. Both parties moved for partial summary judgment. *Id.*

**Compelling interest.** The district court first addressed the compelling interest prong of the strict scrutiny analysis. *Id.* at 581. Plaintiff argued that defendants did not have any evidence that demonstrates a significant statistical disparity between the the number of qualified minority or female owned contractors willing and able to perform a particular service and the number of such contractors actually engaged by CCC or CCC’s prime contractors. In response, Defendants conceded that there have been no studies specifically addressing past discrimination with respect to the current state legislation and/or CCC policies. *Id.* at 581. Defendants argued there was conclusive evidence that such substantiation exists because the Sixth Circuit Court of Appeals approved similar legislation in the past, noting the 1983 decision in *Ohio Contractors Association v. Keip* 713 F.2d 167 (6th Cir. 1983). *Id.* at 581.

The court disagreed with the Defendants' position for multiple reasons. First, the court found Defendants' reliance on *Keip* was misplaced because *Keip* was not decided under the strict scrutiny standard applied by the United States Supreme Court after the 1983 decision in *Keip*. *Id.* at 581. More importantly, the court stated that even if *Keip* could be said to have applied the correct standard, the evidence relied upon by that court in finding that there existed past discrimination which justified racial classifications was not relevant to the present case and could not justify CCC’s MBE policies enacted in 1994. *Id.* at 581. The court based this ruling on its finding those materials were too remote in time to establish the compelling interest. *Id.* at 581.

The court found the statistics used in *Keip* were not relevant as they were not the same in 1996 as they were in 1983. *Id.* The court said the proper question is whether past discrimination by the governmental entity seeking to establish the affirmative action plan is the direct cause of present day injury which is amenable to remediation. *Id.*

The court stated Defendants could not rely on the mere existence of the State of Ohio law to justify CCC’s racially based policy as the state statutes upon which it was based did not enjoy a presumption of validity since the presumption is not present when a state has enacted legislation whose purpose or effect is to create classes based upon racial criteria. *Id.* 581-582. Defendants contended that the existence of a compelling basis for the CCC MBE program was evidenced by two private studies in 1991 and 1992.

The Defendants had designated as their expert witness Dr. Ian Ayres to address the studies, and Dr. Ayres found the studies were not conclusive of the need for immediate remedial action to ameliorate the effects of past discrimination on the part of CCC. *Id.* at 582. Dr. Ayres stated that the studies could not survive strict scrutiny review because they did not adequately measure the availability of minority firms and because they did not allow for a narrowly-tailored remedy for whatever underutilization was found. *Id.* at 582. Dr. Ayres pointed out that the studies were based on a "crude 'head-counting' method" which assumes that if MBEs are X percent of all firms, they should receive X percent of all contracts. *Id.* at 582.
The court said this method of study fails to take into account the fact MBEs tend to be smaller firms that are not necessarily qualified to handle public construction contracts. *Id.* at 582. Although noting that the size of MBE firms may itself be due to discrimination, Dr. Ayres acknowledged that "reverse-causation from discrimination to variables such as firm age and size is a difficult problem that has no accepted solution in the economics profession, either as a matter of theory or empiricism." *Id.* 582. Moreover, the court said such reverse-causation is more than likely the result of societal discrimination that may have delayed the development of MBE firms thereby rendering them unqualified for bigger jobs, and skewing statistics to show disparity between large and small firms as disparity between minority and non-minority firms. *Id.* 582-583.

The court stated that while the studies indicated the existence of disparity based upon raw numbers of MBEs in proportion to all contractors and their respective percentage of public contracts, they were not dispositive of the issue of past racial discrimination, particularly by CCC which did not take part in the studies. *Id.* at 583. The court found that the studies did not show MBEs qualified and willing to undertake CCC construction contracts, but instead relied solely on disparity between all MBEs and the distribution of contract dollars to show discrimination, a mode of analysis that had been rejected by the Sixth Circuit in earlier decisions. *Id.* at 583. Thus, the court ruled Defendants failed to demonstrate a compelling need for the MBE program. *Id.*

**Narrowly tailored.** The court then found the second prong of the strict scrutiny analysis was not satisfied by the MBE program, and that the MBE program was not narrowly tailored. *Id.* 583. First, the court said that because there were not statistics showing how many MBEs were qualified and willing to undertaken CCC’s construction contracts, and no correlating studies showing how many of them receive such contracts or the percentage of the value of such contracts which go to MBEs, there was no relation between the scope of the injury and the extent of the remedy. *Id.* 583.

The Defendants had relied almost exclusively again on the Sixth Circuit's 1983 decision in *Keip* for their assertion that the policies at issue were narrowly tailored. *Id.* 583. The district court for the same reasons, relating to the compelling interest prong under strict scrutiny, found that reliance on *Keip* was misplaced. *Id.* The evidence of past discrimination relied on in *Keip*, besides being too remote for evidentiary value in this case, was not specific to the relevant market area of CCC. *Id.* Also, the court in *Keip*, did not apply the "narrowly tailored" prong of the strict scrutiny analysis as it has evolved in the years following the 1983 decision, specifically more recent cases establishing that before enacting a "set-aside" program the legislature must consider alternative remedies and ensure flexibility and limited duration. *Id.* at 583.

There was no evidence that CCC or the State of Ohio considered any race neutral alternative to the "set-aside" program, nor was there a time limit placed on the MBE program, which had been in place since 1982. *Id.* at 583. The court also stated there was no requirement in CCC’s MBE policy, which applies to several minority groups without specific findings of discrimination as to each, that in order to benefit from the program any MBE must demonstrate it has been the victim of past discrimination or it is otherwise economically disadvantaged. *Id.* at 583-584. For these reasons, the court ruled CCC’s MBE policy was not narrowly tailored.
**FBE Program.** The court ruled that the FBE “set-aside” program prevented Plaintiff from competing on equal footing. *Id.* at 584; But, since it was undisputed that Plaintiff was not denied the contract due to that aspect of Defendant's affirmative action program, and Plaintiff offered no evidence that in the future it was likely to seek a construction contract with CCC and be denied such contract for failure to satisfy the FBE policy, the court held Plaintiff did not have standing to challenge the FBE program. *Id.* at 584. Because Plaintiff had not presented evidence that its legally protected interest in competing on an equal footing was in imminent danger of being trampled, it did not have standing to challenge the FBE program. *Id.*

The court did note that the FBE program would also be held unconstitutional if Plaintiff had made the requisite showing to establish standing because there was no evidence to indicate that FBEs had been discriminated against in the past with respect to CCC or the State of Ohio construction contracts, and no information was presented indicating how many qualified FBEs exist in the relevant area, how many had sought and been refused contracts, or how many contract dollars they received. *Id.* at 584, n.18.

Therefore, the court held CCC's MBE policy was unconstitutional and granted Plaintiff partial summary judgment with respect to that issue, and denied Plaintiff's motion with respect to the FBE policy because it lacked standing.
E. Recent Decisions Involving the Federal DBE Program and its Implementation in Other Jurisdictions

There are several recent and pending cases involving challenges to the United States Federal DBE Program and its implementation by the states and their governmental entities for federally-funded projects. These cases could have a significant impact on the nature and provisions of contracting and procurement on federally-funded projects, including and relating to the utilization of DBEs. In addition, these cases provide an instructive analysis of the recent application of the strict scrutiny test to MBE/WBE- and DBE-type programs.

Recent Decisions in Federal Circuit Courts of Appeal


Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT's DBE Program discriminates on the basis of race. The district court granted summary judgment to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 2015 WL 4934560 at *1. (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. 2015 WL 4934560 at *1. 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 *2. 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 *3. 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 *3. 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 *3-1. 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 *5. 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 *5. Dunnet Bay did not achieve the goal of 22%, but three other bidders each met the DBE goal. Id. Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. Id. at *6. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. Id. at *6-9.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. Id. at *8, *17. 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 *9, *17. 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 *9. 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 *31. 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 *10. (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 *10. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. Id. at *13. 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.
ruled there was standing to challenge a program. Id. at *13. 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 *14. 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 28.

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 *15. 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.

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 *15. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. Id. at *16. 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. quoting, Northern Contracting, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay’s size. Id.

The court stated that Dunnet Bay did not establish causational or redressability. Id. at *17. 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. at *17.
In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at *17. 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 *17-18.

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 *18. 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 *19, 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 *19. 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 *20. 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 *20. 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 20.

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 *20. 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.*

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 *21. 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, including 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 21-22.

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 *22. The court said Dunnet Bay’s efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

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

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

The Associated General Contractors of America, Inc., San Diego Chapter, Inc., (“AGC”) sought declaratory and injunctive relief against the California Department of Transportation (“Caltrans”) and its officers on the grounds that Caltrans’ Disadvantaged Business Initial Enterprise (“DBE”) program unconstitutionally provided race-and sex-based preferences to African American, Native American-, Asian-Pacific American-, and woman-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 woman-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 woman-owned businesses should be
expected to receive 13.5% 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 woman-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 woman-owned firms, including female minorities, showing substantial disparities in the utilization of all woman-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 woman-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.

**A. 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*).

1. 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 woman-owned firms. *Id.* The Court found the disparity study “accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs.” *Id.* (*citing Western States, 407 F.3d at 1000*).

The Court also held: “Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, *see Croson*, 488 U.S. at 509,
and certainly Caltrans’ statistical evidence combined with anecdotal evidence passes constitutional muster.” *Id.* at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of “specific acts” of “deliberate” discrimination by Caltrans employees or prime contractors. *Id.* at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that “[t]he degree of specificity required in the findings of discrimination ... may vary.” *Id.* at 1197 (quoting *Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (*citing Croson*, 488 U.S. at 509). The Court rejected AGC’s argument that Caltrans’ program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.* The Court found that AGC’s argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out “patterns of discrimination.” *Id.* quoting *Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into “a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1197 quoting *Croson* 488 U.S. at 492.

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC’s argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at *9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the “good ol boy” network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have
identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id.* at 1198, citing *Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that every minority-owned business is discriminated against. *Id.* The Court concluded: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC’s contention that Caltrans’ evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC’s early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all woman-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.

2. **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 woman-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 woman-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.*

**B. 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.

**C. 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.

**D. 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.*

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

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's ("IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway
construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. Id. at 719. The district court granted the USDOT’s Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. Id. at 720. NCI also forfeited the argument that IDOT’s DBE program did not serve a compelling government interest. Id. The sole issue on appeal to the Seventh Circuit was whether IDOT’s program was narrowly tailored. Id.

IDOT typically adopted a new DBE plan each year. Id. at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. Id. The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). Id. The consultant then determined availability of minority- and woman-owned firms through analysis of Dun & Bradstreet’s Marketplace data. Id. This initial list was corrected for errors in the data by surveying the D&B list. Id. In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. Id. The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. Id. IDOT considered this, along with other data, including DBE utilization on IDOTs “zero goal” experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). Id. at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. Id.

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

In addressing the narrowly tailored prong with respect to IDOT’s DBE program, the court held that IDOT had complied. Id. The court concluded its holding in Milwaukee that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. Id. at 721-22. The court noted that the Supreme Court in Adarand Constructors v. Pena, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state’s application
of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit’s opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law “when the 10 percent federal set-aside was more mandatory”) was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes more clear now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id.* at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI’s collateral attack on the federal regulations was impermissible. *Id.* at 722.

The remainder of the court’s opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI’s arguments failed. *Id.* First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id.* NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id.* The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id.* at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled “Alternative Methods,” and states: “You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed 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.


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 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. \textit{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 \textit{supra}, which included contracts with affirmative action components. \textit{Id.} The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. \textit{Id.} The court also found the State conceded as much to the district court. \textit{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." \textit{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\%). \textit{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. \textit{Id.}

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. \textit{Id.} at 1001. The court found that WSDOT did not present any anecdotal evidence. \textit{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. \textit{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. \textit{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.


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 \textit{Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads}, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the federal regulations
governing the states’ implementation of the Federal DBE Program were narrowly tailored, and the state DOT’s implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and Gross Seed both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment’s Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads (“Nebraska DOR”) under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT’s and Nebraska DOR’s implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, Sherbrooke and Gross Seed argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side’s position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state’s implementation becomes relevant to a reviewing court’s strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government’s asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id.* The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-
conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id.* Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally-funded highway contracts. *See,* 49 CFR § 26.45(f)(1). The overall goal “must be based on demonstrable evidence” as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 CFR § 26.45(b). The number may be adjusted upward to reflect the state’s determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See,* 49 CFR § 26.45(d).

The state must meet the “maximum feasible portion” of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See,* 49 CFR § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 CFR § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods “[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination.” 49 CFR § 26.51(f).

Absent bad faith administration of the program, a state’s failure to achieve its overall goal will not be penalized. *See,* 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See,* 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See,* 49 CFR § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court’s narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, *citing Grutter v. Bollinger*, 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds $750,000.00 cannot qualify as economically disadvantaged. *See,* 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.;* 49 CFR § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See,* 49 CFR § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contacting markets. *Id.* at 972.
Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and Gross Seed also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, citing 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent woman-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).


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.

It is significant to note that the court in determining the Federal DBE Program is "narrowly tailored" focused on the current 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:

> you 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 held 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.

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.

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.

**Recent District Court Decisions**

8. **Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al., 2015 WL 1396376 (N.D. Ill, March 24, 2015), appeal pending in U.S. Court of Appeals, Seventh Circuit, Docket No. 15-1827.**

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. 2015 WL 1396376 at *7. 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 *7. 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. 2015 WL 1396376 at *7. 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 *8.* 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 *9.*

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 *9.* 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.

**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 *11. 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 woman-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id. at *11. 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. at *11.

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a “disparity index” for each study. *Id. at *11. 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 *12, 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. at *12.

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 *12. 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 N.H. (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 *12. 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.* 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 *13. 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 *13. 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 *13. 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 *13. 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 *13. 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 court said that the federal regulations, according to the court, contain provisions that seek to minimize the Program’s burden on non-DBEs. *Id.* at *13. 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. at *13.

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 *14. 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 *14.
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 *14.
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 *14. 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. 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 *14, 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. at *14.

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 *14. 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 *14. 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 *15. 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.* at *15. The court found that the 2011 study provided evidence to establish the disparity from which IDOT’s inference of discrimination primarily arises. *Id.* at *15.

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* 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.* 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 *15. 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.* 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 *15. 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 *15. 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 woman-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 *16. 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.*

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 *16. 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.* at *16. 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 *16. 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 *16. 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 *17. Prime contracts of varying sizes under $500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at *17. 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 *17 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 *17. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* at *17. 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. \textit{Id.} at *17. The court held that Midwest failed to make the showing in this case. \textit{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. \textit{Id.} at *17. 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. \textit{Id.} The court found that these are the methods the 2011 study adopted in calculating DBE availability. \textit{Id.}

The court said that the Seventh Circuit Court of Appeals approved the “custom census” approach as consistent with the federal regulations. \textit{Id.} at *17, citing to \textit{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. \textit{Id.} The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. \textit{Id.} at *17.

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 \textit{Northern Contract v. Illinois DOT}. \textit{Id.} at *18. 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. \textit{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.” \textit{Id.} at *18. 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.

**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. \textit{Id.} at *18. 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. \textit{Id.} The court found that Midwest did not show IDOT’s determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. \textit{Id.} at *18.

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. \textit{Id.} at *19. The court noted that it recognizes setting goals as a percentage of total

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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 at *19. 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 *19. 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 *19. 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 *19. 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. at *19. 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 *20. 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. 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 *20.

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 *20. 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 *20. 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 *20. 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. at *21. 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 *21. 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.*

Midwest attacked the Tollway’s 2006 study similar to how it attacked the other studies with regard to IDOT’s DBE Program. *Id. at *21. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id. at *21. 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 *21.

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 *22. 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 *22. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

The 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 *22.

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 *22. 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 *22. 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 *22. 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 *22.

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 *23. 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.* 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.* at *23.

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 *23. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants’ motion for summary judgment.

**Notice of Appeal.** At the time of this report, Midwest Fence Corporation has filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is pending.


**Factual and procedural background.** In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al., 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 decision in Western States, 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. Mountain West alleged that the disparity study was flawed, and the State did not have a strong basis in evidence. The State of Montana commissioned a disparity study, which was completed in 2009. 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 asserted 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.

Western States Paving Co. v. Washington DOT. The 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, 71 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The 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 Court stated the Ninth Circuit 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.” Id. at *2, quoting Western States, at 997-998. The Court in Mountain West also pointed out the Ninth Circuit 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, 2014 WL 6686734 at *2, quoting Western States, 407 F.3d at 998.

**MDT study.** The MDT obtained a firm to conduct a disparity study, which was completed in 2009. The 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 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 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 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 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 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 seeks 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, at *5.

The Court said that a state implementing the facially valid Federal DBE Program need not demonstrate an independent compelling interest for its implementation of the DBE Program because when Congress passed the relevant legislation it identified a compelling nationwide interest in remedying discrimination in the transportation contracting industry. *Id. at *4. In order to pass such scrutiny, the Court found a state need only demonstrate that its program is narrowly tailored. *Id. at *3, citing Western States, 407 F.3d 997.

The Court held that states can meet the evidentiary standard required by Western States if, looking at the evidence in its entirety, "the data shows 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.'" Mountain West, at *5, quoting AGC, San Diego v. California DOT, 713 F.3d at 1197. The Court in Mountain West said that the federal guidelines provide that narrow tailoring does not require a state to parse its DBE Program to distinguish between certain types of contracts within the transportation contracting industry. Mountain West, at *5, citing AGC, San Diego, 713 F.3d at 1199.

The Court in Mountain West, following AGC, San Diego, concluded that a state's implementation of the DBE Program need not require minority firms to attest to the fact that they have been discriminated against in the relevant jurisdiction because such a requirement is contrary to federal regulation, and thus would constitute "an impermissible collateral attack on the facial validity of the federal Act and regulations." Mountain West, at *5, quoting AGC, San Diego, at 1200.

Statistical evidence. The Court held that Montana's DBE program passes strict scrutiny. The Court found that Mountain West could not create a genuine dispute about the fact that the 2009 disparity study indicated significant underutilization of all minority groups in the award of professional services contracts in Montana's transportation contracting market. Mountain West, at *5. In addition, the Court found that Mountain West could not dispute that the study indicated significant underutilization of Asian Pacific Americans and Hispanic Americans in the award of contracts in business categories combined in Montana's transportation contracting market. *Id. Also, the Court found that Mountain West could not dispute that the study indicated
underutilization of nonminority women and business categories combined, and that the study
documented, through surveys and otherwise, significant anecdotal evidence of various forms of
discrimination in Montana's transportation contracting industry. Id.

The Court noted that Mountain West merely disputed the validity of the findings in the study and
argued that the methods the study used in gathering statistical and anecdotal evidence were
flawed. Id. at *6. The Court found that in mounting this attack on the study, Mountain West relied
entirely on the expert report of Dr. George "Lanoue" (sic), and that Mountain West only cited
by two pages in the report in which Dr. LaNoue opined that the table showing DBE utilization and
business categories combined was improperly calculated. Id.

Mountain West, the Court stated, provided no evidence indicating that the data showing
significant underutilization of all minority groups and professional services was invalid. Id. at *6.
In addition, the Court found contrary to the allegation by Mountain West, that the study
controlled for factors other than discrimination in calculating DBE utilization and adjusted its
calculation of the availability of DBE firms based on its control for factors other than
discrimination Id.

**Anecdotal evidence.** The Court said that the attack on the study did not diminish the fact the
study uncovered substantial anecdotal evidence of discrimination in Montana's transportation
contracting market, including evidence of a "good ole boy network." Id. at *6. The Court said that
in *AGC, San Diego*, the Ninth Circuit noted "federal courts and regulations have identified
precisely [the factors associated with good ole boy networks] as barriers that disadvantage
minority firms because of the lingering effects of discrimination." *Mountain West*, at *6, quoting
*AGC, San Diego*, at 1197-98.

In connection with the anecdotal evidence, the Court stated that Dr. LaNoue’s report merely
criticized the sample size of the responses obtained, and that Mountain West also contended the
anecdotal evidence is unreliable because Montana did not present affidavits in support of the
anecdotal evidence gathered. Id. at *6. Contrary to Mountain West’s assertions, the Court held
that nothing in *Western States* requires that anecdotal survey evidence gathered by a private
firm assisting a state in preparing its goal methodology to the state’s DBE program must be
supported by affidavits. *Mountain West*, at *6.

The Court concluded that Mountain West failed to create a genuine dispute that anecdotal
evidence indicates the existence of discrimination in Montana’s transportation contracting
industry. Id. at *6. The Court pointed out the Ninth Circuit held in *AGC, San Diego* that
"substantial statistical disparities alone would give rise to an inference of discrimination, and
certainly... statistical evidence combined with anecdotal evidence passes constitutional muster."
*Mountain West* at *6, quoting *AGC, San Diego*, 713 F.3d at 1196.

**Precipitous drop in utilization.** The Court in *Mountain West* also found that neither Dr. LaNoue’s
report nor any other evidence presented by Mountain West created a genuine dispute about the
fact DBE utilization in Montana’s transportation contracting industry dropped precipitously
after 2006 when Montana ceased using contract goals. *Mountain West* at *6. The Court found that
while the study indicated Montana should utilize DBEs at a rate of 5.83 percent, by 2010, DBE
utilization in Montana had fallen "dramatically" to 0.8 percent. Id. at *6. The Court held that this
undisputed fact “strongly supports [Defendants’] claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.” *Mountain West*, at *6, quoting *Adarand Contractors, Inc. v. Slater*, 228 F.3d 1147, 1174 (10th Cir. 2000).

**Conclusion and holding.** In sum, the Court held that MDT presented sufficient evidence to demonstrate evidence of discrimination in Montana’s transportation contracting industry. *Id.* at *7. The Court concluded that Montana’s DBE program is sufficiently narrowly tailored to address discrimination against only those groups that have actually suffered discrimination in the state’s transportation contracting industry based on the facts that (1) statistical evidence suggests that all minority groups in professional services are significantly underutilized, (2) there is evidence of an exclusive “good ole boy network” within the state contracting industry, and (3) DBE underutilization dramatically increased after 2006 when the State ceased using contract goals. *Id.* at *7.

Therefore, the Court held Montana’s DBE program survives such scrutiny by: (1) having a strong basis in evidence of discrimination within Montana’s transportation contracting industry; and (2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at *7.

The Court also held that Mountain West failed to create a genuine dispute relative to its claims regarding Montana’s DBE program during 2012-2014 when Montana and MDT utilized contract goals. *Id.* It follows then, according to the Court, that Mountain West’s claims for prospective, injunctive and declaratory relief also failed because Montana has currently ceased using contract goals and any potential utilization of contract goals will be based on a not-yet conducted disparity study. *Id.* Therefore, the Court ordered that Montana and MDT are entitled to summary judgment on all claims.

The decision of the District Court has been appealed by Mountain West to the U.S. Court of Appeals for the Ninth Circuit, Docket No. 14-36097. The decision was cross appealed by Montana to the Ninth Circuit, Docket No. 15-35003.


In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the Plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT’s implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT’s implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.
**Procedural background.** Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Intervenors requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Intervenors and the Plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the Plaintiffs did not contest the Federal Defendant-Intervenor’s Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in this case.

The Federal Defendants moved for summary judgment and the State Defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the Plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal Defendants and the State Defendants’ motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at *10) Additionally, Plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. Id. *10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are “reasonable.” Id.

**Constitutional claims.** The Court states that the “heart of Plaintiffs’ claims is that the DBE Program and MnDOT’s implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work.” Id. at *11. The Court noted that because DBEs are, by definition, small businesses, Plaintiffs contend they “simply cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work.” Id.

As a result, Plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. Id. Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non-DBEs in those areas
of work are forced to bear the entire burden of "correcting discrimination", while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id.*

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id.* Plaintiffs allege that the DBE Program is facially unconstitutional because it is “fatally prone to overconcentration” where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id.* at 11. Second, Plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is "reasonable" without defining a reasonable increase in cost. *Id.*

Plaintiffs also brought three as-applied challenges based on MnDOT’s implementation of the DBE Program. *Id.* at 12. First, Plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, Plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

A. Strict scrutiny. It is undisputed that strict scrutiny applied to the Court’s evaluation of the Federal DBE Program, whether the challenge is facial or as - applied. *Id.* at *12. Under strict scrutiny, a "statute’s race-based measures 'are constitutional only if they are narrowly tailored to further compelling governmental interests.'" *Id.* at *12, quoting *Grutter v. Bollinger,* 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id.* at *12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id.*

B. Facial challenge based on overconcentration. The Court says that in order to prevail on a facial challenge, the Plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at *12. The Court states that Plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id.* at *.

1. Compelling governmental interest. The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id.* *13, quoting *Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1165 (10th Cir. 2000). The Plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id.* at *13. In accessing the evidence offered in
support of a finding of discrimination, the Court concluded that Defendants have articulated a compelling interest underlying enactment of the DBE Program. Id.

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. Id. at *13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. Id. The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government’s evidence did not support an inference of prior discrimination. Id.

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. Id. at *13. But, the Court found that Plaintiffs did not raise any specific issues with respect to the Federal Defendants’ proffered evidence of discrimination. Id. *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. Id. *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. Id. at *14. Based on these studies, the Federal Defendants’ consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. Id. at *6.

The Federal Defendants’ consultant also described studies supporting the conclusion that there is credit discrimination against minority- and woman-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and woman-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 woman-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 nondiscriminatory 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.


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.


In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT;* 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and
its implementation of the Federal DBE Program, including an alleged unwritten "no waiver" policy, and claiming that the IDOT's program is not narrowly tailored.

**Motion to Dismiss certain claims granted.** IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT’s DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

**Motions for Summary Judgment.** Subsequent to the Court's Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT’s implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at *1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT’s DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project, was based upon Dunnet Bay’s race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

**Factual background.** Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to
do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

At the bid opening, Dunnet Bay’s bid was the lowest received by IDOT. Its low bid was over IDOT’s estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay’s DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay’s good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay’s bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at *9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at *23. IDOT further asserted that neither rejection of Dunnet Bay’s bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at *23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

**IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority.** The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government’s compelling interest in remedying the effects of pass discrimination in the national construction market." *Id.* at *26, quoting Northern Contracting Co., Inc. v. Illinois, 473 F.3d 715 at 720–21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority." *Id.* at *26, quoting Northern Contracting, Inc., 473 F.3d at 721. The Court held that accordingly, any "challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at *26, quoting Northern Contracting, Inc., 473 F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay’s challenges are foreclosed by Northern Contracting. *Id.* at *26.
The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at *26. The Court also concluded “because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting.*” *Id.* at *26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at *27.

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

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

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

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

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

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

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

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

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

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

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

\textbf{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. \textit{Id.} at *32. Any other federal claims, the Court held, were foreclosed by the \textit{Northern Contracting} decision because there is no evidence IDOT exceeded its authority under federal law. \textit{Id.} Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.

\textbf{Notice of Appeal.} At the time of this report, Dunnet Bay Construction Company has filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is pending.


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.

\textbf{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. \textit{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. \textit{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. \textit{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.

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 woman-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 [*citing 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.


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.


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.

16.  *Northern Contracting, Inc. v. Illinois, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), aff’d 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.


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 woman-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:

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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.


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. The remedy available to Western States remains for further adjudication and the case is currently pending.


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 an individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If
during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the Sherbrooke Turf court’s assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing, and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every woman and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of $16.6 million or less (at the time of this decision), and businesses whose owners’ personal net worth exceed $750,000.00 are excluded. 49 CFR § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 CFR § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in Sherbrooke Turf, that a recipient’s implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with Sherbrooke Turf that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient’s implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT’s DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government’s compelling interest. The court, therefore, denied the contractor plaintiff’s Motion for Summary Judgment and the Illinois DOT’s Motion for Summary Judgment.


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.

20. **Gross Seed Co. v. Nebraska Department of Roads, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), aff’d 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.


The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding
that the Federal DBE Program is constitutional. The district court addressed the issue of "random inclusion" of various groups as being within the Program in connection with whether the Federal DBE Program is "narrowly tailored." The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the "potentially invidious effects of providing blanket benefits to minorities" in part,

by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.).

The court rejected plaintiff's claim that the Minnesota DOT must independently demonstrate how its program comports with Croson's strict scrutiny standard. The court held that the "Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program." Id. at *11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, "relieves the state of any burden to independently carry the strict scrutiny burden." Id. at *11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 CFR Part 26 are implementing a Congressionally-required program and not establishing a local one. As such, the court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. Id.

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

Recent Decisions in Federal Circuit Courts of Appeal


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 woman-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 woman-owned business category that has demonstrated significant disparity in contract utilization" based on availability, as determined by the study. Id.

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

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

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

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

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 *quoting* Croson, 488 U.S. at 504 and Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986)(plurality opinion). The Court significantly noted that: “There is no ‘precise mathematical formula to assess the quantum of evidence that rises to the Croson ‘strong basis in evidence’ benchmark.’” 615 F.3d 233 at 241, *quoting* Rothe Dev. Corp. v. Department of Defense, 545 F.3d 1023, 1049 (Fed.Cir. 2008). The Court stated that the sufficiency of the State’s evidence of discrimination "must be evaluated on a case-by-case basis." *Id.* at 241. (internal quotation marks omitted).

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

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

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

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

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

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

**Statistical evidence.** The Court examined the State’s statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and woman-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 woman-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 woman 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 woman-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 woman ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. Id. These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. Id.

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than "vendor data." 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. Id. The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the
availability estimate failed because it could not demonstrate that the 2004 study’s availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state’s evidence,” and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, citing *Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

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

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

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

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

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

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

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

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. Id. at 249. The Court rejected plaintiffs’ argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. Id. at 249. It was noted that the samples of the minority groups were randomly selected. Id. The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. Id. at 249.
**Strong basis in evidence that the minority participation goals were necessary to remedy discrimination.** The Court held that the State presented a “strong basis in evidence” for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors.” 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State’s data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. Id. at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. Id. at 250.

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

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

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

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

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

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

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

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

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

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

**Burden on non-MWBE/DBEs.** The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money.
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.

**Woman-owned businesses overutilized.** The study's public-sector disparity analysis demonstrated that woman-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 Charlotte, 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 woman-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id.* at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id.* In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id.*

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

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

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

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

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

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


This recent case is instructive in connection with the determination of the groups that may be included in a MBE/WBE-type program, and the standard of analysis utilized to evaluate a local government's non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as "under-inclusive" (*i.e.*, those that exclude persons from a particular racial classification) are subject to a "rational basis" review, not strict scrutiny.

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 CFR § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race."
Id. at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise (“DBE”) under the federal regulations. Id.

However, unlike the federal regulations, the State of New York’s local minority-owned business program included in its definition of minorities “Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race.” The definition did not include all persons from, or descendants of persons from, Spain or Portugal. Id. Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. Id. at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of “Hispanic” was fatally under-inclusive. Id. at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis “allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program.” Id. at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. Id. at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of “Hispanic,” finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. Id. at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the “federal USDOT definition of Hispanic without at least making an independent assessment of discrimination against Hispanics of Spanish Origin in New York.” Id. Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. Id. at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York’s decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. Id. at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

3. Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc., 460 F.3d 859 (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.


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 minority- and woman-owned businesses. *Id.* The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id.*

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the “how to” booklet. *Id.* The Board also implemented the Minority Vendor Involvement Program (the “MVP”) which adopted the participation goals set forth in the Report. *Id.* at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id.* Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id.* Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id.* In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id.* In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the “District was only looking for ‘black-owned firms.’” *Id.* Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id.*

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*
The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. Id. at 267. The court first questioned whether the identified government interest was compelling. Id. at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. Id.

The court held the MVP was not narrowly tailored for two reasons. Id. First, because no evidence existed that the District considered race-neutral alternatives to “avoid unwitting discrimination.” The court found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.” Id., citing Grutter v. Bollinger, 539 U.S. 306, 339 (2003), and Richmond v. J.A. Croson Co., 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. Id. at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. Id. at 268.

Second, the court held that the unlimited duration of the MVP’s racial goals negated a finding of narrow tailoring. Id. “[R]ace conscious ... policies must be limited in time.” Id., citing Grutter, 539 U.S. at 342, and Walker v. City of Mesquite, TX, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. Id. at 268.

With respect to Virdi’s claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. Id. Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court’s grant of judgment on that issue. Id. at 269.

Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. Id.

The court reversed the district court’s order pertaining to the facial constitutionality of the MVP’s racial goals, and affirmed the district court’s order granting defendants’ motion on the issue of intentional discrimination against Virdi. Id. at 270.

5. 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 one of the only recent decisions to uphold 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 woman-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 woman-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 woman-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 woman-owned subcontractors because they believed those firms were not competent. *Id.*

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects but their applications were denied even though they met the prequalification requirements. *Id.*

Other MBE/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that they were required to do additional work not part of the subcontracting arrangement; and that they found it difficult to join unions and trade associations. *Id.* There was testimony detailing the difficulties MBE/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. *Id.*

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. *Id.* at 969-70.

**The legal framework applied by the court.** The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver’s evidence showed that there is pervasive discrimination. *Id.* at 970. The court, quoting *Concrete Works II*, stated that “the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination.” *Id.*
at 970, quoting Concrete Works II, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver’s initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that “approaching a prima facie case of a constitutional or statutory violation,” not irrefutable or definitive proof of discrimination. Id. at 97, quoting Croson, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver’s “evidence did not support an inference of prior discrimination and thus a remedial purpose.” Id., quoting Adarand VII, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. Id. at 971. Thus, Denver’s evidence did not suffer from the problem discussed by the court in Croson. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The Croson majority concluded that a “city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market.” Id. at 971, quoting Croson, 488 U.S. 503. Thus, the Court held Denver’s burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. Id.

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. Id., citing Croson, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. Id. at 972.

The court found Denver’s statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver’s evidence on that basis. Id.

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. Id. at 973. The court rejected the district court’s erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in Concrete Works II and the plurality opinion in Croson. Id. The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area.” Id., quoting Concrete Works II, 36 F.3d at 1529 (emphasis added). In Concrete Works II, the court stated that “we do not read Croson as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.” Id., quoting Concrete Works II, 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence
that it has become a passive participant in that discrimination. *Id.* at 973. Thus, Denver was not required to demonstrate that it is "guilty of prohibited discrimination" to meet its initial burden. *Id.*

Additionally, the court had previously concluded that Denver's statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that "local prime contractors" are engaged in racial and gender discrimination. *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529. Thus, the court held Denver's disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id.*

**The Court's rejection of CWC's arguments and the district court findings.**

**Use of marketplace data.** The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court's conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt*. *Id.* at 975. In *Shaw*, a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity's "interest in remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions." *Id.*, quoting *Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. "First, the discrimination must be identified discrimination." *Id.* at 976, quoting *Shaw*, 517 U.S. at 910. The City can satisfy this condition by identifying the discrimination, "‘public or private, with some specificity.’" *Id.* at 976, citing *Shaw*, 517 U.S. at 910, quoting *Croson*, 488 U.S. at 504 (emphasis added). The governmental entity must also have a "‘strong basis in evidence to conclude that remedial action was necessary.’" *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality's burden of producing strong evidence. *Id.* at 976.

In *Adarand VII*, the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67 ("[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus any findings Congress has made as to the entire construction industry are relevant." (emphasis added)). Further, the court pointed out in this case it earlier rejected the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to "the Denver MSA evidence of industry-wide
discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529. The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA” was relevant to Denver’s burden of producing strong evidence. *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

Consistent with the court’s mandate in *Concrete Works II*, the City attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.” *Id.* The City can demonstrate that it is a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, quoting *Croson*, 488 U.S. at 492.

The court rejected CWC’s argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.” *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded at the outset from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that existing MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City’s showing that it indirectly participates in industry discrimination. *Id.* at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that “despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial.” *Id.* at 977-78. In *Adarand VII*, the court concluded that this study, among other evidence, “strongly support[ed] an initial showing of discrimination in lending.” *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170, n. 13 (“Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination … supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded.”). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine
whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court’s criticism did not undermine the study’s reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in Adarand VII it took “judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects.” Id. at 978, quoting Adarand VII, 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, supra, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. Id. at 978.

The court held that the district court’s conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in Adarand VII. “[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.” Id. at 979, quoting Adarand VII, 228 F.3d at 1174.

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City’s burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. Id. at 979-80.

Variables. CWC challenged Denver’s disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm’s size has little effect on its qualifications or its ability to provide construction services and that MBE/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; MBE/WBEs are less capable of expanding because they are smaller and less experienced. Id. at 980.

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver’s argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that MBE/WBE construction firms are generally smaller and less experienced because of industry discrimination. Id. at 981. The lending discrimination and business
formation studies, according to the court, both strongly supported Denver's argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver's expert testified that discrimination by banks or bonding companies would reduce a firm's revenue and the number of employees it could hire. *Id.*

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for MBE/WBEs and concluded that the resulting disparities, "suggest[] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male-owned firms." *Id.* at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia*, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver's studies would decrease or disappear if the studies controlled for size and experience to CWC's satisfaction. Consequently, the court held CWC's rebuttal evidence was insufficient to meet its burden of discrediting Denver's disparity studies on the issue of size and experience. *Id.* at 982.

**Specialization.** The district court also faulted Denver's disparity studies because they did not control for firm specialization. The court noted the district court's criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id.* at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found relevant the testimony of the City's expert, that the data he reviewed showed that MBEs were represented "widely across the different [construction] specializations." *Id.* at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver's studies. *Id.* at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver's studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver's argument that firm specialization does not explain the disparities. *Id.* at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id.* at 983.
Utilization of MBE/WBEs on City projects. CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC’s argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC’s argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver’s evidence. Id. at 984.

Consistent with the court’s mandate in Concrete Works II, at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and "reflect[ed] the intended remedial effect on MBE and WBE utilization." Id. at 984, quoting Concrete Works II, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. Id. at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. Id. at 985.

The court rejected CWC’s argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver’s burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. Id. at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver’s position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. Id. at 987-88.

Anecdotal evidence. The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. Id. at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver’s witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. Id.

The court held there was no merit to CWC’s argument that the witnesses’ accounts must be verified to provide support for Denver’s burden. The court stated that anecdotal evidence is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions. Id.
After considering Denver's anecdotal evidence, the district court found that the evidence "shows that race, ethnicity, and gender affect the construction industry and those who work in it" and that the egregious mistreatment of minority and women employees "had direct financial consequences" on construction firms. *Id.* at 989, *quoting Concrete Works III*, 86 F. Supp. 2d at 1074, 1073. Based on the district court's findings regarding Denver's anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, unrebutted support for Denver's initial burden. *Id.* at 989-90, *citing Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it "brought the cold [statistics] convincingly to life").

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

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

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

The court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found Concrete Works did not challenge the district court's conclusion with respect to the second prong of Croson's strict scrutiny standard — *i.e.*, that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id.* at 992, *citing Concrete Works II*, 36 F.3d at 1531, n. 24.

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

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

This case is instructive to the disparity study because the decision highlights the evidentiary burden imposed by the courts necessary to support a local MBE/WBE program. In addition, the Fifth Circuit permitted the aggrieved contractor to recover lost profits from the City of Jackson, Mississippi due to the City's enforcement of the MBE/WBE program that the court held was unconstitutional.

The Fifth Circuit, applying strict scrutiny, held that the City of Jackson, Mississippi failed to establish a compelling governmental interest to justify its policy placing 15 percent minority participation goals for City construction contracts. In addition, the court held the evidence upon which the City relied was faulty for several reasons, including because it was restricted to the letting of prime contracts by the City under the City's Program, and it did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool in the City's construction projects. Significantly, the court also held that the plaintiff in this case could recover lost profits against the City as damages as a result of being denied a bid award based on the application of the MBE/WBE program.

8. **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 a woman 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.

9. **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”),
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 woman-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.
Recent District Court Decisions


In *H.B. Rowe Company v. Tippett, North Carolina Department of Transportation, et al.* ("Rowe"), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina “affirmative action” program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

**Background.** In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff’s bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff’s bid was rejected because of plaintiff’s failure to demonstrate “good faith efforts” to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff’s bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff’s good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT’s MWBE Program “largely mirrors” the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT’s MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippett. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.
March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants’ Motion to Dismiss or for Partial Summary Judgment, defendants’ Motion to Dismiss the Claim for Mootness and plaintiff’s Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants’ Motion to Dismiss or for partial summary judgment; denied defendants’ Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff’s Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff’s claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff’s claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also were held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the Ex Parte Young exception, plaintiff’s claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff’s claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff’s claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines “minority” as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender-based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants’ Motion to Dismiss Claim for Mootness as to plaintiff’s suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff’s pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff’s and the defendants’ Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the
MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

**December 9, 2008 Order of the District Court (589 F.Supp.2d 587).** The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women’s Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

**North Carolina’s MWBE program.** The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, et seq. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina’s MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program
which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A§ 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT "dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of 'good faith' attempts to do so." 589 F.Supp.2d 587.

**Compelling interest** The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in Croson made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina's road construction industry existed so as to require remedial action.
The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program’s suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, “based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination.” 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

**Narrowly tailored.** The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, quoting Belk v. Charlotte-Mecklenburg Board of Education, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court’s analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. Id. at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to “those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department.” § 136-28.4(c)(2). The court found that
plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. See 615 F3d 233 (4th Cir. 2010), discussed above.


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.


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.

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 then there was in contract construction." Id. Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. Id.

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.


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 woman-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.


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 African Americans, Hispanic Americans,
and for white 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.


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 rethinksthe 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).


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 woman-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.


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.
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 remediying 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 remediying 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.


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.


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).


This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation’s ("FDOT") program of “setting aside” certain highway
maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts "set aside" for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT’s claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities "supposedly willing and able to do road maintenance work," and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in "somebody's" discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

G. Recent Decisions and Authorities Involving Federal Procurement that may impact DBE and MBE/WBE Programs


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 relief upon by the district court in its ruling below included six
disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, citing to Rothe VI, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. Id.

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in Croson, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” 545 F.3d at 1037-1038, quoting Croson, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in W.H. Scott Constr. Co. v. City of Jackson, 199 F.3d 206 (5th Cir. 1999) that given Croson’s emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether Croson’s evidentiary burden is satisfied. 545 F.3d at 1038, quoting W.H. Scott, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference-or disparity-between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by Rothe. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, citing to Western States Paving v. Washington State Department of Transportation, 407 F.3d 983, 992 (9th Cir. 2005) and Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress “should be able to rely on the most recently available data so long as that data is reasonably up-to-date.” 545 F.3d at 1039. The Federal Circuit affirmed the district court’s conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertaining 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.


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 that 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, remediating 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-tailing mandate relates to the relationship between the government’s interest and the remedy it prescribes. Id.

Conclusion. The court concluded that plaintiff’s facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government’s racial classification, the purported need for remedial action is supported by strong and unrebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. Id. at *20.

Appeal pending at the time of this report. Plaintiff Rothe has appealed the decision of the district court to the United States Court of Appeals for the District of Columbia Circuit, which appeal is pending at the time of this report.


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. <em>DynaLantic</em>, 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). <em>DynaLantic</em>, 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. <em>DynaLantic at *5.</em>

**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.” <em>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.” <em>DynaLantic, at *9, quoting Sherbrooke, 345 F.3d 969.</em>

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.” <em>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. <em>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).</em>

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.” <em>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. <em>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. <em>DynaLantic, at *11, citing Western States Paving v. Washington State DOT, 407 F.3d 983, 991 (9th Cir. 2005).</em>

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. <em>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.

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BBC AND EXSTARE—FINAL REPORT  APPENDIX B, PAGE 211
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.


*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.
General Approach to Availability Analysis

The study team used a *custom census* approach to analyze the availability of minority- and woman-owned businesses for transportation-related construction and professional services prime contracts and subcontracts that the Ohio Department of Transportation (ODOT) awarded between January 1, 2010 through December 31, 2014. Appendix C expands on the information presented in Chapter 5 to describe the study team’s:

A. General approach to collecting availability information;
B. Development of the business establishments list;
C. Development of the survey instrument;
D. Execution of surveys; and
E. Additional considerations related to measuring availability.

A. General Approach to Collecting Availability Information

The study team attempted telephone surveys with thousands of business establishments in Ohio, which represents the *relevant geographic market area* for ODOT contracting. Business establishments that the study team surveyed were businesses with locations in Ohio that work in fields closely related to the types of contracts that ODOT awarded during the study period. The study team began the survey process by determining the subindustries for each relevant ODOT contract element and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries.¹ 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. Rather than drawing a sample of business listings from D&B, the study team attempted to contact every business establishment listed under relevant work specialization codes.²

As part of the telephone survey effort, the study team attempted to contact 7,005 business establishments in the local marketplace that do work that is relevant to ODOT contracting. That total included 5,958 construction establishments and 1,047 professional services establishments. The study team was able to successfully contact 3,217 of those establishments—52 percent of the establishments with valid phone listings (849 business establishments did not

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¹ D&B has developed 8-digit industry codes that provide more precise definitions of business specializations than the 4-digit Standard Industrial Classification (SIC) codes or the North American Industry Classification System (NAICS) codes that the federal government has prepared.

² Because D&B organizes its database by *business establishment* and not by "business" or "firm," The study team purchased business listings in that fashion. Therefore, in many cases, the study team purchased information about multiple locations of a single business and called all of those locations. The study team’s method for consolidating information for different establishments that were associated with the same business is described later in Appendix C.
have valid phone listings). Of business establishments that the study team contacted successfully, 1,684 establishments completed availability surveys.

B. Development of the Business Establishments List

The study team did not expect every business establishment that it contacted to be potentially available for ODOT work. In fact, for some subindustries, the study team anticipated that relatively few businesses would be available to perform that type of work for ODOT. The study team’s goal was to develop—with a high degree of precision—unbiased estimates of the availability of minority- and woman-owned businesses for the types of contracts that ODOT awarded during the study period.

In addition, the study team did not design the research effort so that the study team would contact every local business possibly performing construction or professional services work. To do so would have required the study team to include subindustries that are only marginally related or unrelated to the types of contracts that ODOT awarded during the study period. Moreover, some business establishments working in relevant subindustries may have been missing from corresponding D&B listings.

The study team determined the types of work involved in ODOT contracts by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. Figure C-1 lists the 8-digit work specialization codes within construction and professional services that the study team determined were most related to the contract dollars that ODOT awarded during the study period and that the study team considered as part of the availability analysis. The study team grouped those specializations into distinct subindustries, which are presented as headings in Figure C-1.

C. Development of the Survey Instrument

The study team drafted an availability survey instrument to collect business information from construction and professional services business establishments in Ohio. As an example, the survey instrument that the study team used with construction establishments is presented at the end of Appendix C. The study team modified the construction survey instrument slightly for use with professional services establishments in order to reflect terms more commonly used in professional services (e.g., the study team substituted the words “prime contractor” and “subcontractor” with “prime consultant” and “subconsultant”).3

Survey structure. The availability survey included 15 sections, and the study team attempted to cover all sections with each business establishment that they successfully contacted and that was willing to complete a survey. Surveyors did not know the race/ethnicity or gender of business owners when calling business establishments.

3 The study team also developed a fax and e-mail version of the survey instrument for business establishments that preferred to complete the survey in those formats.
Figure C.1.
Subindustries included in the availability analysis

<table>
<thead>
<tr>
<th>Industry Code</th>
<th>Industry Description</th>
<th>Industry Code</th>
<th>Industry Description</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Construction</td>
<td></td>
<td>Highway, street, and tunnel construction</td>
</tr>
<tr>
<td>1622-0000</td>
<td>Bridge, tunnel, and elevated highway construction</td>
<td>1611-0000</td>
<td>Highway and street construction</td>
</tr>
<tr>
<td>1622-9901</td>
<td>Bridge construction</td>
<td>1611-0200</td>
<td>Surfacing and paving</td>
</tr>
<tr>
<td></td>
<td>Concrete and related products</td>
<td>1611-0202</td>
<td>Concrete construction: roads, highways, sidewalks, etc.</td>
</tr>
<tr>
<td>2951-0201</td>
<td>Asphalt and asphaltic paving mixtures (not from refineries)</td>
<td>1611-0202</td>
<td>Highways and street paving contractor</td>
</tr>
<tr>
<td>3273-0000</td>
<td>Ready-mixed concrete</td>
<td>1611-0205</td>
<td>Resurfacing contractor</td>
</tr>
<tr>
<td>5032-0100</td>
<td>Paving materials</td>
<td>1622-9903</td>
<td>Tunnel construction</td>
</tr>
<tr>
<td>5032-0101</td>
<td>Asphalt mixture</td>
<td>1771-0000</td>
<td>Concrete work</td>
</tr>
<tr>
<td></td>
<td>Construction materials</td>
<td>1771-0301</td>
<td>Blacktop (asphalt) work</td>
</tr>
<tr>
<td>1423-0000</td>
<td>Crushed and broken granite</td>
<td>1795-9901</td>
<td>Concrete breaking for streets and highways</td>
</tr>
<tr>
<td>1442-0102</td>
<td>Construction sand mining</td>
<td></td>
<td>Landscape services</td>
</tr>
<tr>
<td>2892-0000</td>
<td>Explosives</td>
<td>0782-9903</td>
<td>Landscape contractors</td>
</tr>
<tr>
<td>7359-9912</td>
<td>Work zone traffic equipment (flags, cones, barrels, etc.)</td>
<td></td>
<td>Painted and striping</td>
</tr>
<tr>
<td></td>
<td>Electrical equipment and supplies</td>
<td>1721-0302</td>
<td>Bridge painting</td>
</tr>
<tr>
<td>3669-0206</td>
<td>Traffic signals, electric</td>
<td>1721-0303</td>
<td>Pavement marking contractor</td>
</tr>
<tr>
<td></td>
<td>Electrical work</td>
<td></td>
<td>Structural steel construction</td>
</tr>
<tr>
<td>1731-9903</td>
<td>General electrical contractor</td>
<td>1791-0000</td>
<td>Structural steel erection</td>
</tr>
<tr>
<td></td>
<td>Excavation, drilling, and earthmoving</td>
<td></td>
<td>Trucking, hauling, and storage</td>
</tr>
<tr>
<td>0711-0000</td>
<td>Soil preparation services</td>
<td>4212-0000</td>
<td>Local trucking, without storage</td>
</tr>
<tr>
<td>1629-0101</td>
<td>Caisson drilling</td>
<td></td>
<td>Water, sewer, and utility lines</td>
</tr>
<tr>
<td>1629-9902</td>
<td>Earthmoving contractor</td>
<td>1623-0000</td>
<td>Water, sewer, and utility lines</td>
</tr>
<tr>
<td>1794-9901</td>
<td>Excavation and grading, building construction</td>
<td>1623-0303</td>
<td>Water main construction</td>
</tr>
<tr>
<td>1795-0000</td>
<td>Wrecking and demolition work</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1799-0900</td>
<td>Building site preparation</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Fencing, guardrails, and signs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1611-0100</td>
<td>Highway signs and guardrails</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1611-0101</td>
<td>Guardrail construction, highways</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1799-9912</td>
<td>Fence construction</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
**Figure C-1.**
Subindustries included in the availability analysis (continued)

<table>
<thead>
<tr>
<th>Professional Services</th>
<th>Engineering and transportation planning</th>
<th>Environmental and geotechnical services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Architectural and design services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>0781-0203 Landscape planning services</td>
<td>8711-0400 Construction and civil engineering</td>
<td>0711-9906 Soil testing services</td>
</tr>
<tr>
<td>8712-0101 Architectural engineering</td>
<td>8711-0402 Civil engineering</td>
<td>8713-0000 Surveying services</td>
</tr>
<tr>
<td>Construction inspection</td>
<td>8742-0410 Transportation consultant</td>
<td></td>
</tr>
<tr>
<td>7389-0200 Inspection and testing services</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Construction management</td>
<td>Environmental and geotechnical services</td>
<td></td>
</tr>
<tr>
<td>8741-9902 Construction management</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8742-0402 Construction project management consultant</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: BBC Research & Consulting.
1. **Identification of purpose.** The surveys began by identifying ODOT as one of the survey sponsors and describing the purpose of the study (e.g., “developing a list of companies interested in construction, maintenance, or design on a wide range of highway and other state or local government transportation-related projects”).

2. **Verification of correct business name.** The surveyor verified that he or she had reached the correct business, and if not, inquired about the correct contact information for the correct business. When the business name was not correct, surveyors asked if the respondent knew how to contact the business. The study team, followed up with the desired company based on the new contact information (see areas “X” and “Y” of the availability survey instrument at the end of Appendix D).

3. **Verification of work related to relevant projects.** The surveyor asked whether the organization does work or provides materials related to construction, maintenance, or design on transportation-related projects (Question A1). Surveyors continued the survey with businesses that responded “yes” to that question.

4. **Verification of for-profit business status.** The surveyor asked whether the organization was a for-profit business as opposed to a government or not-for-profit entity (Question A2). Surveyors continued the survey with businesses that responded “yes” to that question.

5. **Confirmation of main lines of business.** Businesses confirmed their main lines of business according to D&B (Question A4a). If D&B’s work specialization codes were incorrect, businesses then described their main lines of business (Question A4b). After the survey was complete, as necessary, the study team coded new information on main lines of business into appropriate 8-digit D&B work specialization codes. Construction businesses also confirmed additional lines of business according to prequalification categories that ODOT uses (Question A4c).

6. **Sole location or multiple locations.** Because the study team surveyed business establishments and not businesses or firms, the surveyor asked business owners or managers if their businesses had other locations (Question A5) and whether their establishments were affiliates or subsidiaries of other businesses (Questions A6 and A7).

7. **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. The study team asked those questions in connection with both prime contracts and subcontracts (Questions B1 through B8).

8. **Qualifications and interest in future work.** The surveyor asked about businesses’ qualifications and interest in future work with state or local government agencies in Ohio. The study team asked those questions in connection with both prime contracts and subcontracts (Questions B9 through B14).

9. **Geographic areas.** The surveyor asked questions about the geographic regions within Ohio in which businesses serve customers (Questions C and C1a through C1e).

10. **Year established.** The surveyor asked businesses to identify the approximate year in which they were established (Question D1).
11. **Largest contracts.** The study team asked businesses to identify the value of the largest contract on which they had bid on or had been awarded during the past five years. The study team asked those questions for both prime contracts and subcontracts (Questions D2 through D4).

12. **Ownership.** The surveyor asked whether businesses were at least 51 percent owned and controlled by women and/or minorities. If businesses indicated that they were minority-owned, they were also asked about the race/ethnicity of their businesses’ ownership (Questions E1 through E3).

13. **Business revenue.** The surveyor asked several questions about the size of businesses in terms of their revenues. For businesses with multiple locations, the Business Revenue section also asked about their revenues and number of employees across all locations (Questions F1 through F3).

14. **Potential barriers in the marketplace.** The surveyor asked an open-ended question concerning general insights about conditions in the local marketplace (Question G1). In addition, the survey included a question asking whether respondents would be willing to participate in a follow-up interview about conditions in the local marketplace (Question G2).

15. **Contact information.** The survey concluded with questions about the participant’s name and position (Questions H1 and H2).

**D. Execution of Surveys**

The study team held internal planning sessions both in person and via telephone prior to conducting the availability surveys. The study team conducted all surveys in 2015. Customer Research International (CRI) programmed the surveys, conducted them via telephone, and provided the study team with weekly data reports. To minimize non-response, CRI made up to five attempts on different times of day and on different days of the week to successfully reach each business establishment. CRI attempted to survey an available company representative such as the owner, manager, chief financial officer, or other key official who could provide accurate and detailed responses to survey questions.

**Establishments that the study team successfully contacted.** Figure C-2 presents the disposition of the 7,005 business establishments that the study team attempted to contact for availability surveys and how that number resulted in the 3,217 establishments that the study team was able to successfully contact.
Non-working or wrong phone numbers. Some of the business listings that the study team purchased from D&B and that CRI attempted to contact were:

- Duplicate phone numbers (27 listings);
- Non-working phone numbers (669 listings); or
- Wrong numbers for the desired businesses (153 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.

Working phone numbers. As shown in Figure C-2, there were 6,156 business establishments with working phone numbers that the study team attempted to contact. The study was unsuccessful in contacting many of those businesses for various reasons:

- The study team could not reach anyone after five attempts at different times of the day and on different days of the week for 536 establishments.
- The study team could not reach a responsible staff member after five attempts at different times of the day on different days of the week for 2,220 establishments.
- The study team could not conduct the availability survey due to language barriers for 10 establishments.
- The study team sent hardcopy fax or e-mail availability surveys upon request but did not receive completed surveys from 173 establishments.

After taking those unsuccessful attempts into account, the study team was able to successfully contact 3,217 business establishments, or about 52 percent of establishments with valid phone listings.

Establishments included in the availability database. Figure C-3 presents the disposition of the 3,217 business establishments that the study team successfully contacted and how that
number resulted in the 632 businesses that the study team included in the availability database and that were considered potentially available for ODOT work.

Figure C-3. Disposition of successfully contacted business establishments

<table>
<thead>
<tr>
<th>Establishment Category</th>
<th>Number of Establishments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Establishments successfully contacted</td>
<td>3,217</td>
</tr>
<tr>
<td>Less establishments not interested in discussing availability for ODOT work</td>
<td>1,533</td>
</tr>
<tr>
<td>Establishments that completed interviews about firm characteristics</td>
<td>1,684</td>
</tr>
<tr>
<td>Less no relevant work</td>
<td>800</td>
</tr>
<tr>
<td>Less not a for-profit business</td>
<td>29</td>
</tr>
<tr>
<td>Less line of work outside scope</td>
<td>6</td>
</tr>
<tr>
<td>Less no interest in future work</td>
<td>93</td>
</tr>
<tr>
<td>Less no past bid/award</td>
<td>107</td>
</tr>
<tr>
<td>Less multiple establishments</td>
<td>17</td>
</tr>
<tr>
<td>Establishments available for ODOT work</td>
<td>632</td>
</tr>
</tbody>
</table>

Source: 2015 availability surveys.

Establishments not interested in discussing availability for ODOT work. Of the 3,217 business establishments that the study team successfully contacted, 1,533 establishments were not interested in discussing their availability for ODOT work. In total, 1,684 (52%) successfully contacted business establishments completed availability surveys.

Establishments available for ODOT work. The study team only deemed a portion of the business establishments that completed availability surveys as available for the prime contracts and subcontracts that ODOT awarded during the study period. The study team excluded many of the business establishments that completed surveys from the availability database for various reasons:

- The study team excluded 800 establishments that indicated that their businesses were not involved in relevant contracting work.
- Of the establishments that completed availability surveys, 29 indicated that they were not a for-profit business. The survey ended when respondents reported that their establishments were not for-profit businesses.
- The study team excluded 6 establishments that indicated that their businesses were involved in construction or professional services work but reported that their main lines of business were outside of the study scope.
- The study team excluded 93 establishments that reported not being qualified or interested in either prime contracting or subcontracting opportunities with ODOT or state or local government agencies in Ohio.
- The study team excluded 107 establishments that reported not having bid on or been awarded contracts within the past five years.
17 establishments represented different locations of the same businesses. Prior to analyzing results, the study team combined responses from multiple locations of the same business into a single data record.

After those exclusions, the study team compiled a database of 632 businesses that were considered potentially available for ODOT 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 that establishments of the same business reported (i.e., prime contractor or subcontractor) into a single response, again 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.
- Except when there were large discrepancies among individual responses regarding establishment dates, the study team used the earliest founding date that establishments of the same business provided. In cases of large discrepancies, the study team followed up with the business establishments to obtain accurate establishment date information.
- The study team 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).
- The study team considered the largest revenue total that any establishments of the same business reported as the business’ revenue cap (for purposes of determining status as a potential Disadvantaged Business Enterprise, or DBE).
- The study team coded businesses as minority- or woman-owned if the majority of its establishments reported such status.

**E. Additional Considerations Related to Measuring Availability**

The study team made several additional considerations related to its approach to measuring availability to ensure that its estimates of the availability of minority- and woman-owned businesses for ODOT work were as accurate as possible.

**Not providing a count of all businesses available for ODOT work.** The purpose of the availability analysis was to provide precise and representative estimates of the percentage of ODOT contracting dollars for which minority- and woman-owned businesses are available. The availability analysis did not provide a comprehensive listing of every business that could be available for ODOT work and should not be used in that way. Federal courts have approved the study team’s use of that approach to measuring availability. In addition, Federal regulations, such as the United States Department of Transportation’s (USDOT’s) “Tips for Goals Setting in..."
the Disadvantaged Business Enterprise (DBE) Program recommend similar approaches to measuring availability for agencies implementing minority- and woman-Owned business programs.4

**Not basing the availability analysis on certification directories, prequalification lists, or bidders lists.** Federal guidance, such as USDOT guidance for determining the availability of minority- and woman-owned businesses, recommends dividing the number of businesses in an agency’s certification directory by the total number of businesses in the marketplace, as reported in U.S. Census data. As another option, USDOT suggests using a list of prequalified businesses or a bidders list to estimate the availability of minority- or woman-owned businesses for an agency’s prime contracts and subcontracts. The primary reason why the study team rejected such approaches when measuring the availability of minority- and woman-owned businesses for ODOT work is that dividing a simple count of certified businesses by the total number of businesses does not provide the data on business characteristics that the study team desired for the disparity study. The methodology applied in this study takes a custom census approach to measuring availability and adds several layers of refinement to a simple head count approach. For example, the surveys provided data on qualifications, relative capacity, and interest in ODOT work for each business, which allowed the study team to take a more refined 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

**Using D&B lists as the sample frame.** The study team began its custom census approach of measuring availability with D&B business lists. D&B does not require businesses to pay a fee to be included in its listings—it is completely free to listed businesses. D&B provides the most comprehensive private database of business listings in the United States. Even so, the database does not include all establishments operating in Ohio:

- There can be a lag between formation of a new business and inclusion in D&B, meaning that the newest businesses may be underrepresented in the sample frame. Based on information from the study team’s survey effort, newly formed businesses are more likely to be minority- or woman-owned, suggesting that minority- and woman-owned businesses might be underrepresented in the final availability database.

- Although D&B includes home-based businesses, those businesses are more difficult to identify and are thus somewhat less likely than other businesses to be included in D&B listings. Small, home-based businesses are more likely than large businesses to be minority- or woman-owned, which again suggests that minority- and woman-owned businesses might be underrepresented in the final availability database.

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5 The study team used certification directories and other sources of information to confirm information about the race/ethnicity and gender of business ownership that it obtained from availability surveys.
The study team is not able to quantify the degree to which minority- and woman-owned businesses were underrepresented in the final availability database, if at all. However, estimates presented in the disparity study should be considered conservative estimates of the availability of minority- and woman-owned businesses. Note that there are no alternative business listings that would better address such issues.

**Selection of specific subindustries.** Defining subindustries based on specific work specialization codes (e.g., NAICS, SIC, or 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 the study team to include all businesses possibly doing work in relevant industries without conducting surveys with nearly every business 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 the 8-digit 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 main lines of business, they often gave broad answers. For those and other reasons, the study team collapsed many of the work specialization codes into broader subindustries to more accurately classify businesses in the availability database.

**Non-response bias.** An analysis of non-response bias 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 bias due to:

- Research sponsorship;
- Work specializations; and
- Language barriers.

**Research sponsorship.** Surveyors introduced themselves by identifying ODOT as one of the survey sponsors, 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 studies—the study team has found that identifying the sponsor substantially increases response rate.

**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 minority- and woman-owned 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 study team’s 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.

**Language barriers.** ODOT contracting documents are in English and are not in other languages. For that reason, the study team made the decision to only include businesses able to complete surveys in English in the availability analysis. Businesses unable to complete the survey due to language barriers represented less than one percent of contacted businesses.

**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. The study team explored the reliability of survey responses in a number of ways. For example:

- The study team reviewed data from the availability surveys in the context of information from other sources such as vendor information that the study team collected from ODOT and the Ohio Turnpike and Infrastructure Commission. For example, certification databases include data on the race/ethnicity and gender of the owners of businesses that are certified as minority-owned business enterprises, woman-owned business enterprises, or DBEs. The study team compared survey responses concerning business ownership with that information.

- The study team examined ODOT contract data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability surveys. The study team compared survey responses about the largest contracts that businesses won during the past five years with actual ODOT contract data.

- ODOT reviewed vendor data that the study team collected and compiled as part of the availability analysis and provided feedback regarding its accuracy.
ODOT Disparity Study — Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Customer Research International. We are calling on behalf of the Ohio Department of Transportation (ODOT) and the Ohio Turnpike and Infrastructure Commission.

This is not a sales call. ODOT and the Commission are developing a list of companies interested in construction, maintenance, or design on a wide range of highway and other state or local government transportation-related projects. This call should take between 5 and 15 minutes to complete. Who can I speak with to get the information that we need from your firm?

[AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS]

[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO EXISTING DATA ON COMPANIES INTERESTED IN WORKING WITH THE 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 A1
  2=NOT RIGHT COMPANY
  99=REFUSE TO GIVE INFORMATION – TERMINATE

Y1. What is the name of this firm?

  1=VERBATIM

Y2a. Is [new firm name] the same firm as [firm name] doing business under a new name?

  1=Yes, same firm doing business under a different name
  2=No, different firm – SKIP TO Y3
  98=No, does not have information – TERMINATE
  99=Refused to give information – TERMINATE

Y2b. Was [firm name] bought or sold, or did it change ownership?

  1=Yes, company bought/sold/changed ownership
  2=No, same ownership
  98=No, does not have information – TERMINATE
  99=Refused to give information – TERMINATE
Y3. Can you give me the complete address or city for [new firm name]?

(NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT:

. STREET ADDRESS
. CITY
. STATE
. ZIP
1=VERBATIM

Y4. Can you give me the name of the owner or manager of the new business?

(ENTER UPDATED NAME)

1=VERBATIM

Y5. Can I have a telephone number for him/her?

(ENTER UPDATED PHONE)

1=VERBATIM

Y6. Do you work for this new company?

1=YES
2=NO – TERMINATE

A1. First, I want to confirm that your firm does work or provides materials related to construction, maintenance, or design on transportation-related projects. Is that correct?

(NOTE TO INTERVIEWER – INCLUDES ANY WORK RELATED TO CONSTRUCTION, MAINTENENCE OR DESIGN SUCH AS BUILDING AND PARKING FACILITIES, PAVING AND CONCRETE, TUNNELS, BRIDGES AND ROADS AND OTHER TRANSPORTATION-RELATED PROJECTS. IT ALSO INCLUDES TRUCKING AND HAULING)

(NOTE TO INTERVIEWER - INCLUDES HAVING DONE WORK, TRYING TO SELL THIS WORK, OR PROVIDING MATERIALS)

1=Yes
2=No - TERMINATE
A2. Let me confirm that [firm name/new firm name] is a business, as opposed to a non-profit organization, a foundation, or a government office. Is that correct?

1=Yes, a business
2=No, other - TERMINATE

A4a. 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 A4c
2=No
98=(DON’T KNOW)
99=(REFUSED)

A4b. 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

A4c. Next, we’re interested in additional types of work that [firm name/new firm name] performs. Does your firm do work in the area of:

[READ, MULTIPUNCH]

1 = Highway, street, and tunnel construction?

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES PLACING OF AGGREGATE BASES; PAVING; APPLYING BITUMINOUS TREATMENTS; PAVING PLANNING, MILLING, AND SCARIFICATION; CONCRETE TEXTURING; SAWING; PAVEMENT REPLACEMENT; CONCRETE WORK; TUNNELING; AND SEALING OF CONCRETE SURFACES.]

2 = Excavation, grading, drainage, drilling, and demolition?

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES GRADING; PAVEMENT RUBBLIZING, BREAKING, AND PULVERIZING; CLEARING AND GRUBBING; BUILDING REMOVAL ROADWAY EXCAVATION AND EMBANKMENT CONSTRUCTION; MAJOR ROADWAY EXCAVATION; STRUCTURAL REMOVAL; HYDRODEMOLITION; CAISSON AND DRILLED SHAFT WORK; PILING; AND GAS, OIL, WATER WELL ABANDONMENTS.]
3 = Bridge and elevated highway construction?
[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES BRIDGE CONSTRUCTION; STUD WELDING; EXPANSIONS AND CONTRACTION OF JOINTS, JOINTS SEALERS, AND BEARING DEVICES; STRUCTURE REPAIRS; HEAT STRAIGHTENING; AND POST TENSIONING BRIDGE MEMBERS WORK.]

4 = Structural steel erection and repair?
[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES REINFORCING STEEL; STRUCTURAL STEEL ERECTION; AND STRUCTURAL STEEL REPAIRS.]

5 = Water, sewer, and utility lines?
[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES WORK RELATED TO DRAINAGE LINES AND SYSTEMS.]

6 = Painting, striping, and marking?
[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES STRUCTURAL STEEL PAINTING; WATERPROOFING; RAISED PAVEMENT MARKERS; AND REFLECTIVE PAVEMENT MARKINGS.]

7 = Fencing, guardrails, barriers, and signs?
[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES GUARDRAILS AND ATTENUATORS; SIGNING; AND FENCING.]

8 = Electrical work, lighting, and signal systems?
[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES HIGHWAY LIGHTING; STANDARD TRAFFIC SIGNALS; AND FIBER OPTIC CABLE INSTALLATION, SPLICING, TERMINATION, AND TESTING FOR TRAFFIC SIGNAL SYSTEMS AND INTELLIGENT TRANSPORTATION SYSTEMS.]

9 = Landscape and erosion control?
[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES SOIL STABILIZATION; TEMPORARY SOIL EROSION AND SEDIMENT CONTROL; TIEBACK INSTALLATION; EARTH RETAINING STRUCTURES; LANDSPACING; MOWING; AND HERBICIDAL SPRAYING.]

10 = Traffic control and flagging services?

11 = Trucking and hauling?

12 = Railroad track construction?

A5. Is this the sole location for your business, or do you have offices in other locations?

1=Sole location
2=Have other locations
98=(DON’T KNOW)
99=(REFUSED)
A6. Is your company a subsidiary or affiliate of another firm?

1=Independent – SKIP TO B1
2=Subsidiary or affiliate of another firm
98=(DON'T KNOW) – SKIP TO B1
99=(REFUSED) – SKIP TO B1

A7. What is the name of your parent company?

1=VERBATIM
98=(DON'T KNOW)
99=(REFUSED)

B1. Next, I have a few questions about your company’s role in doing work or providing materials related to construction, maintenance, or design. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a state or local government agency in Ohio?

1=Yes
2=No – SKIP TO B3
98=(DON'T KNOW) – SKIP TO B3
99=(REFUSED) – SKIP TO B3

B2. Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

1=Prime contractor
2=Subcontractor
3=Trucker/hauler
4=Supplier (or manufacturer)
98=(DON'T KNOW)
99=(REFUSED)

B3. During the past five years, has your company received an award for work on any part of a contract for a state or local government agency in Ohio?

1=Yes
2=No – SKIP TO B5
98=(DON'T KNOW) – SKIP TO B5
99=(REFUSED) – SKIP TO B5
B4. Were those awards to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

1=Prime contractor
2=Subcontractor
3=Trucker/hauler
4=Supplier (or manufacturer)
98=(DON'T KNOW)
99=(REFUSED)

B5. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a private sector organization in Ohio?

1=Yes
2=No – SKIP TO B7
98=(DON'T KNOW) – SKIP TO B7
99=(REFUSED) – SKIP TO B7

B6. Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

1=Prime contractor
2=Subcontractor
3=Trucker/hauler
4=Supplier (or manufacturer)
98=(DON'T KNOW)
99=(REFUSED)

B7. During the past five years, has your company received an award for work on any part of a contract for a private sector organization in Ohio?

1=Yes
2=No – SKIP TO B9
98=(DON'T KNOW) – SKIP TO B9
99=(REFUSED) – SKIP TO B9

B8. Were those awards to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

1=Prime contractor
2=Subcontractor
3=Trucker/hauler
4=Supplier (or manufacturer)
98=(DON'T KNOW)
99=(REFUSED)
B9. Please think about future construction, maintenance, or design-related work as you answer the following few questions. Is your company qualified and interested in working with the Ohio Department of Transportation as a prime contractor?

[NOTE TO INTERVIEWER: IF ASKED, “QUALIFIED” MEANS READY, WILLING, AND ABLE TO PERFORM WORK RELATED TO ODOT CONTRACTS.]

[NOTE TO INTERVIEWER: IF RESPONDENT ELABORATES ON WHY THEY ARE NOT QUALIFIED OR INTERESTED IN WORKING WITH ODOT, RECORD VERBATIM.]

1=Yes
2=No
98=(DON'T KNOW)
99=(REFUSED)

B10. Is your company qualified and interested in working with the Ohio Department of Transportation as a subcontractor, trucker/hauler, or supplier?

[NOTE TO INTERVIEWER: IF ASKED, “QUALIFIED” MEANS READY, WILLING, AND ABLE TO PERFORM WORK RELATED TO ODOT CONTRACTS.]

[NOTE TO INTERVIEWER: IF RESPONDENT ELABORATES ON WHY THEY ARE NOT QUALIFIED OR INTERESTED IN WORKING WITH ODOT, RECORD VERBATIM.]

1=Yes
2=No
98=(DON'T KNOW)
99=(REFUSED)

B11. Is your company qualified and interested in working with the Ohio Turnpike and Infrastructure Commission as a prime contractor?

[NOTE TO INTERVIEWER: IF ASKED, “QUALIFIED” MEANS READY, WILLING, AND ABLE TO PERFORM WORK RELATED TO ODOT CONTRACTS.]

[NOTE TO INTERVIEWER: IF RESPONDENT ELABORATES ON WHY THEY ARE NOT QUALIFIED OR INTERESTED IN WORKING WITH ODOT, RECORD VERBATIM.]

1=Yes
2=No
98=(DON'T KNOW)
99=(REFUSED)
B12. Is your company qualified and interested in working with the Ohio Turnpike and Infrastructure Commission as a subcontractor, trucker/hauler, or supplier?

[NOTE TO INTERVIEWER: IF ASKED, “QUALIFIED” MEANS READY, WILLING, AND ABLE TO PERFORM WORK RELATED TO ODOT CONTRACTS.]

[NOTE TO INTERVIEWER: IF RESPONDENT ELABORATES ON WHY THEY ARE NOT QUALIFIED OR INTERESTED IN WORKING WITH ODOT, RECORD VERBATIM.]

1=Yes
2=No
98=(DON'T KNOW)
99=(REFUSED)

B13. Is your company qualified and interested in working with cities, counties, or local transportation agencies as a prime contractor?

[NOTE TO INTERVIEWER: IF ASKED, “QUALIFIED” MEANS READY, WILLING, AND ABLE TO PERFORM WORK RELATED TO ODOT CONTRACTS.]

[NOTE TO INTERVIEWER: IF RESPONDENT ELABORATES ON WHY THEY ARE NOT QUALIFIED OR INTERESTED IN WORKING WITH ODOT, RECORD VERBATIM.]

1=Yes
2=No
98=(DON'T KNOW)
99=(REFUSED)

B14. Is your company qualified and interested in working with cities, counties, or local transportation agencies as a subcontractor, trucker/hauler, or supplier?

[NOTE TO INTERVIEWER: IF ASKED, “QUALIFIED” MEANS READY, WILLING, AND ABLE TO PERFORM WORK RELATED TO ODOT CONTRACTS.]

[NOTE TO INTERVIEWER: IF RESPONDENT ELABORATES ON WHY THEY ARE NOT QUALIFIED OR INTERESTED IN WORKING WITH ODOT, RECORD VERBATIM.]

1=Yes
2=No
98=(DON'T KNOW)
99=(REFUSED)
C1. Now I want to ask you about the geographic areas your company serves within Ohio. As you answer, think about whether your company could be involved in potential transportation-related projects throughout the entire state or only within specific regions. Is your company able to serve all of Ohio or only certain parts of the state?

1=All of the state— SKIP TO D1  
2=Only parts of the state  
98=(DON'T KNOW)  
99=(REFUSED)

C1a. Is your company able to do work or serve customers in any part of Northwestern Ohio, extending southeast from the Michigan and Indiana borders through the city of Lima and Wyandot and Hardin counties?

(NOTE TO INTERVIEWER – IF ASKED, NORTHWEST OHIO INCLUDES WILLIAMS, FULTON, LUCAS, OTTAWA, HENRY, WOOD, SANDUSKY, SENECA, DEFIANCE, PAULDING, PUTNAM, HANCOCK, WYANDOT, VAN WERT, ALLEN, AND HARDIN COUNTIES.)

1=Yes  
2=No  
98=(DON'T KNOW)  
99=(REFUSED)

C1b. Is your company able to do work or serve customers in any part of North Central Ohio, extending south from Ohio’s northern border through the Mansfield-Ashland-Bucyrus area and including the Cleveland-Elyria area?

(NOTE TO INTERVIEWER – IF ASKED, NORTH CENTRAL OHIO INCLUDES ERIE, LORAIN, HURON, MEDINA, CRAWFORD, RICHLAND, ASHLAND, WAYNE, CUYAHOGA, LAKE, AND GEAUGA COUNTIES.)

1=Yes  
2=No  
98=(DON'T KNOW)  
99=(REFUSED)
C1c. Is your company able to do work or serve customers in any part of Eastern Ohio, extending west from the Pennsylvania border between Ashtabula and Belmont counties through the New Philadelphia-Dover and Akron areas?

(NOTE TO INTERVIEWER – IF ASKED, EASTERN OHIO INCLUDES ASHTABULA, TRUMBULL, SUMMIT, PORTAGE, MAHONING, STARK, COLUMBIANA, HOLMES, TUSCARAWAS, CARROLL, HARRISON, JEFFERSON, AND BELMONT COUNTIES.)

1=Yes
2=No
98=(DON’T KNOW)
99=(REFUSED)

C1d. Is your company able to do work or serve customers in any part of Southwestern Ohio, extending south from the Dayton-Springfield-Sidney area through the Cincinnati-Wilmington area and east through the city of Chillicothe and Jackson and Lawrence counties?

(NOTE TO INTERVIEWER – IF ASKED, SOUTHWESTERN OHIO INCLUDES MERCER, AUGLAIZE, LOGAN, SHELBY, DRAKE, MIAMI, CHAMPAIGN, CLARK, MONTGOMERY, PREBLE, GREENE, BUTLER, WARREN, CLINTON, HAMILTON, CLERMONT, ROSS, HIGHLAND, PIKE, JACKSON, BROWN, ADAMS, SCIOTO, AND LAWRENCE COUNTIES.)

1=Yes
2=No
98=(DON’T KNOW)
99=(REFUSED)

C1e. Is your company able to do work or serve customers in any part of Southeastern or Central Ohio, extending northwest from the West Virginia border between Gallia and Monroe counties through the Columbus-Marion area?

(NOTE TO INTERVIEWER – IF ASKED, SOUTHEASTERN AND CENTRAL OHIO INCLUDES MARION, MORROW, KNOX, COSHOCTON, GUERNSEY, MUSKINGUM, LICKING, FAIRFIELD, PERRY, UNION, DELAWARE, FRANKLIN, MADISON, FAYETTE, PICKAWAY, MONROE, NOBLE, MORGAN, WASHINGTON, ATHENS, Hocking, Vinton, Meigs, and Gallia Counties.)

1=Yes
2=No
98=(DON’T KNOW)
99=(REFUSED)
D1. About what year was your firm established?

1=NUMERIC (1600-2015)
9998 = (DON'T KNOW)
9999 = (REFUSED)

D2. In rough dollar terms, what was the largest contract or subcontract that your company was awarded in during the past five years?

[NOTE TO INTERVIEWER – IF ASKED, INCLUDES EITHER PRIVATE SECTOR OR PUBLIC SECTOR]
[NOTE TO INTERVIEWER - INCLUDES CONTRACTS NOT YET COMPLETE]
[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]

1=$100,000 or less
2=More than $100,000 to $500,000
3=More than $500,000 to $1 million
4=More than $1 million to $2 million
5=More than $2 million to $5 million
6=More than $5 million to $10 million
7=More than $10 million to $20 million
8=More than $20 million to $50 million
9=More than $50 million to $100 million
10= More than $100 million to $200 million
11=$200 million or greater
97=(NONE)
98=(DON'T KNOW)
99=(REFUSED)

D3. Was that the largest contract or subcontract that your company bid on or submitted quotes for during the past five years?

1=Yes – SKIP TO E1
2=No
98=(DON'T KNOW) – SKIP TO E1
99=(REFUSED) – SKIP TO E1
D4. What was the largest contract or subcontract that your company bid on or submitted quotes for during the past five years?

[NOTE TO INTERVIEWER – IF ASKED, INCLUDES EITHER PRIVATE SECTOR OR PUBLIC SECTOR]

[NOTE TO INTERVIEWER – READ CATEGORIES IF NECESSARY]

1=$100,000 or less
2=More than $100,000 to $500,000
3=More than $500,000 to $1 million
4=More than $1 million to $2 million
5=More than $2 million to $5 million
6=More than $5 million to $10 million
7=More than $10 million to $20 million
8=More than $20 million to $50 million
9=More than $50 million to $100 million
10= More than $100 million to $200 million
11=$200 million or greater
97=(NONE)
98=(DON'T KNOW)
99=(REFUSED)

E1. My next questions are about the ownership of the business. A business is defined as woman-owned if more than half—that is, 51 percent or more—of the ownership and control is by women. By this definition, is [firm name / new firm name] a woman-owned business?

1=Yes
2=No
98=(DON'T KNOW)
99=(REFUSED)

E2. A business is defined as minority-owned if more than half—that is, 51 percent or more—of the ownership and control is Black American, Asian, Hispanic, Native American or another minority group. By this definition, is [firm name | new firm name] a minority-owned business?

1=Yes
2=No – SKIP TO F1
98=(DON'T KNOW) – SKIP TO F1
99=(REFUSED) – SKIP TO F1
E3. Would you say that the minority group ownership of your company is mostly Black American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, Native American, or another minority group?

1=Black-American
2=Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Common-wealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)
3=Hispanic American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)
4=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)
5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)
6=(OTHER - SPECIFY) _________________________
98=(DON’T KNOW)
99=(REFUSED)

F1. Dun & Bradstreet lists the average annual gross revenue of your company, just considering your location, to be [dollar amount]. Is that an accurate estimate for your company’s average annual gross revenue over the last three years?

1=Yes – SKIP TO F3
2=No
98=(DON’T KNOW) – SKIP TO F3
99=(REFUSED) – SKIP TO F3

F2. Roughly, what was the average annual gross revenue of your company, just considering your location, over the last three years? Would you say . . .

[READ LIST]

1=Less than $1 Million
2=$1 Million - $4.5 Million
3=$4.6 Million - $7 Million
4=$7.1 Million - $12 Million
5=$12.1 Million - $16.5 Million
6=$16.6 Million - $18.5 Million
7=$18.6 Million - $24 Million
8=$24.1 Million or more
98= (DON’T KNOW)
99= (REFUSED)
F3. [ONLY IF A5 = 2] Roughly, what was the average annual gross revenue of your company, for all of your locations over the last three years? Would you say . . .

[READ LIST]

1=Less than $1 Million 6=$16.6 Million - $18.5 Million
2=$1 Million - $4.5 Million 7=$18.6 Million - $24 Million
3=$4.6 Million - $7 Million 8=$24.1 Million or more
4=$7.1 Million - $12 Million 98= (DON'T KNOW)
5=$12.1 Million - $16.5 Million 99= (REFUSED)

G1. We’re interested in whether your company has experienced barriers or difficulties in Ohio associated with starting or expanding a business in your industry or with obtaining work. Do you have any thoughts to share on these topics?

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)
97=(NOTHING/NONE/NO COMMENTS)
98= (DON'T KNOW)
99= (REFUSED)

G2. Would you be willing to participate in a follow-up interview about any of those issues?

1=Yes
2=No
98= (DON'T KNOW)
99= (REFUSED)

H1. Just a few last questions. What is your name?

1=VERBATIM
H2. What is your position at [firm name / new firm name]?

1=Receptionist
2=Owner
3=Manager
4=CFO
5=CEO
6=Assistant to Owner/CEO
7=Sales manager
8=Office manager
9=President
10=(OTHER - SPECIFY) ________________
99=(REFUSED

Thank you very much for your participation. If you have any questions or concerns, please contact the Ohio Department of Transportation, The Office of Small & Disadvantaged Business Enterprise at telephone: (614) 466-3957 or Mark Musson at the Ohio Turnpike and Infrastructure Commission at telephone: (440) 234-2081.
APPENDIX D.
Marketplace Analyses

Figure D-1. Percentage of all workers 25 and older with at least a four-year degree, Ohio and the United States, 2008-2012

Note:
**+, ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level for the United States as a whole and Ohio, respectively.

Source:
BBC Research & Consulting from 2008-2012 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 D-1 indicates that, compared to Non-Hispanic white Americans working in Ohio, smaller percentages of Black Americans, Hispanic Americans, and Native Americans have four-year college degrees. In contrast, larger percentages of Asian Pacific Americans and Subcontinent Asian Americans have four-year college degrees. In addition, a larger percentage of women than men working in Ohio have four-year college degrees.
Figure D-2.
Percent representation of minorities in various industries in Ohio, 2008-2012

![Bar chart showing percent representation of Black American, Hispanic American, and Other Race Minority in various industries.]

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

The representation of minorities among all Ohio workers is 11% for Black Americans, 3% for Hispanic Americans, 3% for other race minorities, and 17% for all minorities considered together.

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

Source: BBC Research & Consulting from 2008-2012 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 D-2 indicates that the Ohio industries with the highest representations of minority workers are childcare, hair, and nails; public administration and social services; and healthcare. The Ohio industries with the lowest representations of minority workers are wholesale trade; construction; and extraction and agriculture.
**Figure D-3.**
Percent representation of women in various industries in Ohio, 2008-2012

![Bar chart showing the percentage representation of women in various industries in Ohio from 2008-2012.](image-url)

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

The representation of women among all Ohio workers is 48%.

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

Source: BBC Research & Consulting from 2008-2012 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/](http://usa.ipums.org/usa/).

Figure D-3 indicates that the Ohio industries with the highest representations of women workers are childcare, hair, and nails; healthcare; and education. The Ohio industries with the lowest representations of women workers are manufacturing; extraction and agriculture; and construction.
Figure D-4.  
Demographic characteristics of workers in study-related industries and all industries, Ohio and the United States, 2000

<table>
<thead>
<tr>
<th></th>
<th>Ohio</th>
<th></th>
<th></th>
<th>United States</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>All Industries</td>
<td>Construction</td>
<td>Professional Services</td>
<td>Goods &amp; Services</td>
<td>Construction</td>
<td>Professional Services</td>
</tr>
<tr>
<td></td>
<td>(n= 282,468)</td>
<td>(n= 17,881)</td>
<td>(n= 2,102)</td>
<td>(n= 17,547)</td>
<td>(n= 6,832,970)</td>
<td>(n= 58,221)</td>
</tr>
<tr>
<td>Race/ethnicity</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black American</td>
<td>9.8 %</td>
<td>4.8 % **</td>
<td>4.6 % **</td>
<td>8.2 % **</td>
<td>10.9 %</td>
<td>6.2 % **</td>
</tr>
<tr>
<td>Asian Pacific American</td>
<td>1.0</td>
<td>0.3 **</td>
<td>1.5</td>
<td>0.8</td>
<td>3.4</td>
<td>1.2 **</td>
</tr>
<tr>
<td>Subcontinent Asian American</td>
<td>0.4</td>
<td>0.1</td>
<td>0.8</td>
<td>0.8 **</td>
<td>0.7</td>
<td>0.2</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>1.7</td>
<td>2.0</td>
<td>1.4</td>
<td>1.3</td>
<td>10.7</td>
<td>15.0 **</td>
</tr>
<tr>
<td>Native American</td>
<td>0.6</td>
<td>0.8</td>
<td>0.5</td>
<td>0.7</td>
<td>1.2</td>
<td>1.6 **</td>
</tr>
<tr>
<td>Other race minority</td>
<td>0.2</td>
<td>0.2</td>
<td>0.1</td>
<td>0.1</td>
<td>0.4</td>
<td>0.4</td>
</tr>
<tr>
<td>Total minority</td>
<td>13.8 %</td>
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<td>8.9 %</td>
<td>12.0 %</td>
<td>Total minority</td>
<td>27.3 %</td>
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<tr>
<td>Non-Hispanic white</td>
<td>86.2</td>
<td>91.7 **</td>
<td>91.1 **</td>
<td>88.0 **</td>
<td>Non-Hispanic white</td>
<td>72.7</td>
</tr>
<tr>
<td>Total</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>Total</td>
<td>100.0 %</td>
</tr>
<tr>
<td>Gender</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Women</td>
<td>47.2 %</td>
<td>10.9 % **</td>
<td>23.5 **</td>
<td>24.9 **</td>
<td>Women</td>
<td>46.5 %</td>
</tr>
<tr>
<td>Men</td>
<td>52.8</td>
<td>89.1 **</td>
<td>76.5 **</td>
<td>75.1 **</td>
<td>Men</td>
<td>53.5</td>
</tr>
<tr>
<td>Total</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>Total</td>
<td>100.0 %</td>
</tr>
</tbody>
</table>

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

Source: BBC Research & Consulting from 2000 U.S. Census 5% sample 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 D-4 indicates that in 2000 there were smaller percentages of Black Americans, Asian Pacific Americans, and women working in the Ohio construction industry than in all industries considered together. There were smaller percentages of Black Americans and women working in the Ohio professional services industry than in all industries considered together. There were smaller percentages of Black Americans and women working in the Ohio goods and services industry than in all industries considered together.
Figure D-5.
Demographic characteristics of workers in study-related industries and all industries, Ohio and the United States, 2008-2012

<table>
<thead>
<tr>
<th>Race/ethnicity</th>
<th>Ohio All Industries (n=292,072)</th>
<th>Construction (n=16,369)</th>
<th>Professional Services (n=2,312)</th>
<th>Goods &amp; Services (n=16,626)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black American</td>
<td>11.4 %</td>
<td>6.2 % **</td>
<td>4.5 % **</td>
<td>10.0 % **</td>
</tr>
<tr>
<td>Asian Pacific American</td>
<td>1.3</td>
<td>0.4 **</td>
<td>1.6</td>
<td>1.0 **</td>
</tr>
<tr>
<td>Subcontinent Asian American</td>
<td>0.7</td>
<td>0.1 **</td>
<td>1.4 **</td>
<td>1.6 **</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>2.7</td>
<td>3.3 **</td>
<td>1.7 **</td>
<td>2.4</td>
</tr>
<tr>
<td>Native American</td>
<td>0.5</td>
<td>0.6</td>
<td>0.1 **</td>
<td>0.5</td>
</tr>
<tr>
<td>Other race minority</td>
<td>0.1</td>
<td>0.1</td>
<td>0.1</td>
<td>0.1</td>
</tr>
<tr>
<td>Total minority</td>
<td>16.8 %</td>
<td>10.7 %</td>
<td>9.2 %</td>
<td>15.8 %</td>
</tr>
<tr>
<td>Non-Hispanic white</td>
<td>83.2</td>
<td>89.3 **</td>
<td>90.8 **</td>
<td>84.2 **</td>
</tr>
<tr>
<td>Total</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>100.0 %</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Gender</th>
<th>Ohio All Industries (n=292,072)</th>
<th>Construction (n=16,369)</th>
<th>Professional Services (n=2,312)</th>
<th>Goods &amp; Services (n=16,626)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Women</td>
<td>48.1 %</td>
<td>9.2 % **</td>
<td>24.5 % **</td>
<td>24.5 % **</td>
</tr>
<tr>
<td>Men</td>
<td>51.9</td>
<td>90.8 **</td>
<td>75.5 **</td>
<td>75.5 **</td>
</tr>
<tr>
<td>Total</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>100.0 %</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Race/ethnicity</th>
<th>United States All Industries (n=7,600,739)</th>
<th>Construction (n=496,841)</th>
<th>Professional Services (n=79,152)</th>
<th>Goods &amp; Services (n=443,572)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black American</td>
<td>11.9 %</td>
<td>6.0 % **</td>
<td>5.1 % **</td>
<td>10.2 % **</td>
</tr>
<tr>
<td>Asian Pacific American</td>
<td>4.3</td>
<td>1.6 **</td>
<td>5.7</td>
<td>3.8 **</td>
</tr>
<tr>
<td>Subcontinent Asian American</td>
<td>1.2</td>
<td>0.2 **</td>
<td>1.8 **</td>
<td>2.7 **</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>15.2</td>
<td>23.7 **</td>
<td>7.5 **</td>
<td>17.5</td>
</tr>
<tr>
<td>Native American</td>
<td>1.1</td>
<td>1.4 **</td>
<td>0.8 **</td>
<td>0.9</td>
</tr>
<tr>
<td>Other race minority</td>
<td>0.2</td>
<td>0.2</td>
<td>0.2</td>
<td>0.3</td>
</tr>
<tr>
<td>Total minority</td>
<td>34.0 %</td>
<td>33.1 %</td>
<td>21.1 %</td>
<td>35.3 %</td>
</tr>
<tr>
<td>Non-Hispanic white</td>
<td>66.0</td>
<td>66.9 **</td>
<td>78.9 **</td>
<td>64.7 **</td>
</tr>
<tr>
<td>Total</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>100.0 %</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Gender</th>
<th>United States All Industries (n=7,600,739)</th>
<th>Construction (n=496,841)</th>
<th>Professional Services (n=79,152)</th>
<th>Goods &amp; Services (n=443,572)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Women</td>
<td>47.2 %</td>
<td>9.0 % **</td>
<td>26.0 % **</td>
<td>25.9 % **</td>
</tr>
<tr>
<td>Men</td>
<td>52.8</td>
<td>91.0 **</td>
<td>74.0 % **</td>
<td>74.1 % **</td>
</tr>
<tr>
<td>Total</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>100.0 %</td>
<td>100.0 %</td>
</tr>
</tbody>
</table>

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

Source: BBC Research & Consulting from 2008-2012 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 D-5 indicates that there are smaller percentages of Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, and women working in the Ohio construction industry than in all industries considered together. There are smaller percentages of Black Americans, Hispanic Americans, Native Americans, and women working in the Ohio professional services industry than in all industries considered together. There are smaller percentages of Black Americans, Asian Pacific Americans, and women working in the Ohio goods and services industry than in all industries considered together.
Figure D-6.
Percent representation of minorities in selected construction occupations in Ohio, 2008-2012

Notes: ** 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 Ohio construction workers is 6% for Black Americans, 3% for Hispanic Americans, 1% for other race minorities, and 10% for all minorities considered together.

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 2008-2012 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-6 indicates that the Ohio construction occupations with the highest representations of minority workers are plasterers and stucco masons; roofers; and drywall installers, ceiling tile installers, and tapers. The Ohio construction occupations with the lowest representations of minority workers are first line supervisors, secretaries, and glaziers.
Figure D-7. Percent representation of women in selected construction occupations in Ohio, 2008-2012

<table>
<thead>
<tr>
<th>Occupation</th>
<th>Representation</th>
<th>95%**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Secretaries (n=424)</td>
<td>8%</td>
<td></td>
</tr>
<tr>
<td>Painters (n=756)</td>
<td>6%</td>
<td></td>
</tr>
<tr>
<td>Iron and steel workers (n=102)</td>
<td>3%**</td>
<td></td>
</tr>
<tr>
<td>Carpet, floor and tile installers and finishers (n=205)</td>
<td>3%**</td>
<td></td>
</tr>
<tr>
<td>Drivers, sales workers and truck drivers (n=317)</td>
<td>3%**</td>
<td></td>
</tr>
<tr>
<td>Laborers (n=2,555)</td>
<td>3%**</td>
<td></td>
</tr>
<tr>
<td>Electricians (n=874)</td>
<td>3%**</td>
<td></td>
</tr>
<tr>
<td>Pipelayers, plumbers, pipefitters, and steamfitters (n=673)</td>
<td>3%**</td>
<td></td>
</tr>
<tr>
<td>Miscellaneous construction equipment operators (n=715)</td>
<td>1%**</td>
<td></td>
</tr>
<tr>
<td>Cement masons and terrazzo workers (n=139)</td>
<td>1%**</td>
<td></td>
</tr>
<tr>
<td>Drywall installers ceiling tile installers, and tapers (n=226)</td>
<td>1%**</td>
<td></td>
</tr>
<tr>
<td>First-line supervisors (n=1,266)</td>
<td>2%**</td>
<td></td>
</tr>
<tr>
<td>Carpenters (n=1,906)</td>
<td>1%**</td>
<td></td>
</tr>
<tr>
<td>Heparers (n=52)</td>
<td>1%**</td>
<td></td>
</tr>
<tr>
<td>Roofers (n=526)</td>
<td>1%**</td>
<td></td>
</tr>
<tr>
<td>Sheet metal workers (n=121)</td>
<td>1%**</td>
<td></td>
</tr>
<tr>
<td>Brickmasons, blockmasons and stonemasons (n=316)</td>
<td>0.3%**</td>
<td></td>
</tr>
<tr>
<td>Plasterers and stucco masons (n=28)</td>
<td>0%**</td>
<td></td>
</tr>
<tr>
<td>Glaziers (n=35)</td>
<td>0%**</td>
<td></td>
</tr>
</tbody>
</table>

Notes: ** Denotes that the difference in proportions between women workers in the specified occupation and all construction occupations considered together is statistically significant at the 95% confidence level.

The representation of women among all Ohio construction workers is 9%.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2008-2012 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-7 indicates that the Ohio construction occupations with the highest representations of women workers are secretaries; painters; and iron and steel workers. The Ohio construction occupations with the lowest representations of women workers are brickmasons, blockmasons, and stonemasons; plasterers and stucco masons; and glaziers.
Figure D-8.
Percentage of workers who worked as a manager in each study-related industry, Ohio and the United States, 2008-2012

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 2008-2012 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 D-8 indicates that, compared to non-Hispanic white Americans, smaller percentages of Black Americans and Hispanic Americans work as managers in the Ohio construction industry. Compared to men, a smaller percentage of women work as managers in the Ohio professional services industry. Finally, compared to non-Hispanic white Americans, smaller percentages of Black Americans and Hispanic Americans work as managers in the Ohio goods and services industry.
Figure D-9.
Mean annual wages, Ohio and the United States, 2008-2012

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

**, ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level for the United States as a whole and Ohio, respectively.

Source:
BBC Research & Consulting from 2008-2012 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 D-9 indicates that, compared to non-Hispanic white Americans, Black Americans, Hispanic Americans, and Native Americans in Ohio exhibit lower mean annual wages. In addition, women in Ohio exhibit lower mean annual wages than men.
Figure D-10. Predictors of annual wages (regression), Ohio, 2008-2012

Notes:
The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.
For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.
*, ** Denotes statistical significance at the 90% and 95% confidence levels, respectively.
The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, high school diploma for the education variables, manufacturing for industry variables.

Source:
BBC Research & Consulting from 2008-2012 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 D-10 indicates that, compared to being a non-Hispanic white American in Ohio, being Black American, Asian Pacific American, Hispanic American, and Native American is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately $0.87 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man in Ohio, even after accounting for various other personal characteristics.
Figure D-11. Predictors of annual wages (regression), United States, 2008-2012

Notes:
The sample universe is all non-institutionalized, employed individuals aged 25-64 that are not in school, the military, or self-employed.
For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.
* * Denotes statistical significance at the 90% and 95% confidence levels, respectively.
The referent for each set of categorical variables is as follows: non-Hispanic whites for the race variables, high school diploma for the education variables, manufacturing for industry variables.

Source:
BBC Research & Consulting from 2008-2012 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/

<table>
<thead>
<tr>
<th>Variable</th>
<th>Exponentiated Coefficient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
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</tr>
<tr>
<td>Black American</td>
<td>0.875 **</td>
</tr>
<tr>
<td>Asian Pacific American</td>
<td>0.957 **</td>
</tr>
<tr>
<td>Subcontinent Asian American</td>
<td>0.940 **</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>0.913 **</td>
</tr>
<tr>
<td>Native American</td>
<td>0.865 **</td>
</tr>
<tr>
<td>Other minority group</td>
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</tr>
<tr>
<td>Women</td>
<td>0.778 **</td>
</tr>
<tr>
<td>Less than high school education</td>
<td>0.851 **</td>
</tr>
<tr>
<td>Some college</td>
<td>1.204 **</td>
</tr>
<tr>
<td>Four-year degree</td>
<td>1.665 **</td>
</tr>
<tr>
<td>Advanced degree</td>
<td>2.298 **</td>
</tr>
<tr>
<td>Disabled</td>
<td>0.793 **</td>
</tr>
<tr>
<td>Military experience</td>
<td>0.998</td>
</tr>
<tr>
<td>Speaks English well</td>
<td>1.330 **</td>
</tr>
<tr>
<td>Age</td>
<td>1.057 **</td>
</tr>
<tr>
<td>Age-squared</td>
<td>0.999 **</td>
</tr>
<tr>
<td>Married</td>
<td>1.104 **</td>
</tr>
<tr>
<td>Children</td>
<td>1.012 **</td>
</tr>
<tr>
<td>Number of people over 65 in household</td>
<td>0.913 **</td>
</tr>
<tr>
<td>Midwest</td>
<td>0.876 **</td>
</tr>
<tr>
<td>South</td>
<td>0.891 **</td>
</tr>
<tr>
<td>West</td>
<td>0.987 **</td>
</tr>
<tr>
<td>Public sector worker</td>
<td>1.120 **</td>
</tr>
<tr>
<td>Manager</td>
<td>1.315 **</td>
</tr>
<tr>
<td>Part time worker</td>
<td>0.373 **</td>
</tr>
<tr>
<td>Extraction and agriculture</td>
<td>0.899 **</td>
</tr>
<tr>
<td>Construction</td>
<td>0.927 **</td>
</tr>
<tr>
<td>Wholesale trade</td>
<td>0.965 **</td>
</tr>
<tr>
<td>Retail trade</td>
<td>0.754 **</td>
</tr>
<tr>
<td>Transportation, warehouse, &amp; information</td>
<td>1.026 **</td>
</tr>
<tr>
<td>Professional services</td>
<td>1.053 **</td>
</tr>
<tr>
<td>Education</td>
<td>0.664 **</td>
</tr>
<tr>
<td>Health care</td>
<td>1.004 **</td>
</tr>
<tr>
<td>Other services</td>
<td>0.701 **</td>
</tr>
<tr>
<td>Public administration and social services</td>
<td>0.830 **</td>
</tr>
</tbody>
</table>

Figure D-11 indicates that, compared to being a non-Hispanic white American in the United States, being Black American, Asian Pacific American, Subcontinent Asian American, Hispanic American, Native American, or other 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 $0.88 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man, even after accounting for various other personal characteristics.
**Figure D-12.**
Home Ownership Rates, Ohio and the United States, 2008-2012

Note:
The sample universe is all households.
**+, ++ Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level for the United States as a whole and Ohio, respectively.

Source:
BBC Research & Consulting from 2008-2012 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 D-12 indicates that, compared to non-Hispanic white Americans, smaller percentages of Black Americans, Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans, and other race minorities in Ohio own homes.
Figure D-13. Median home values, Ohio and the United States, 2008-2012

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

Source:
BBC Research & Consulting from 2008-2012 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 D-13 indicates that Black American, Hispanic American, and Native American homeowners in Ohio own homes of lower median values than non-Hispanic white American homeowners.
Figure D-14. Denial rates of conventional purchase loans for high-income households, Ohio and the United States, 2007 and 2013

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

Source:
FFIEC HMDA data 2007 and 2013. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool:
http://www.consumerfinance.gov/hmda/explorer

Figure D-14 indicates that in 2013 Black Americans, Asian Americans, and Hispanic Americans in Ohio were denied conventional home purchase loans at a greater rate than non-Hispanic white Americans.
Figure D-15.
Percent of conventional home purchase loans that were subprime, Ohio and the United States, 2007 and 2013

Source:
FFIEC HMDA data 2007 and 2013. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: http://www.consumerfinance.gov/hmda/explore.

Figure D-15 indicates that in 2013 Black Americans and Native Americans in Ohio were awarded conventional home purchase loans that were subprime at a greater rate than non-Hispanic white Americans.
Figure D-16.
Business loan denial rates, United States, 2003

![Graph showing business loan denial rates](image)

Notes:  ** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

Small sample sizes prevent analyses of business loan denial rates for the East North Central Region.


Figure D-16 indicates that in 2003 Black American-owned businesses in the United States were denied business loans at a greater rate than businesses owned by non-Hispanic white men.
Figure D-17.
Businesses that did not apply for loans due to fear of denial, East North Central Region and the United States, 2003

<table>
<thead>
<tr>
<th>Region</th>
<th>Minority/women (n=138)</th>
<th>Non-Hispanic white men (n=512)</th>
</tr>
</thead>
<tbody>
<tr>
<td>East North Central Region</td>
<td>20%</td>
<td>14%</td>
</tr>
<tr>
<td>United States</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black American</td>
<td>47%**</td>
<td></td>
</tr>
<tr>
<td>Asian American</td>
<td>19%</td>
<td></td>
</tr>
<tr>
<td>Hispanic American</td>
<td>20%**</td>
<td></td>
</tr>
<tr>
<td>Non-Hispanic white women (n=666)</td>
<td>22%**</td>
<td></td>
</tr>
<tr>
<td>Non-Hispanic white men (n=3,084)</td>
<td>14%</td>
<td></td>
</tr>
</tbody>
</table>

Notes: ** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The East North Central Region consists of Indiana, Illinois, Michigan, Ohio, and Wisconsin.


Figure D-17 indicates that in 2003 Black American-, Hispanic American-, and non-Hispanic white woman-owned businesses in the United States were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial.
Figure D-18.
Mean values of approved business loans, East North Central Region and the United States, 2003

Notes: **, ++ Denotes statistically significant differences from non-Hispanic white men (for minority groups and women) at the 95% confidence level for the United States as a whole and the East North Central Region, respectively.

The East North Central Region consists of Indiana, Illinois, Michigan, Ohio, and Wisconsin.


Figure D-18 indicates that in 2003 minority- and woman-owned businesses in the East North Central Region who received business loans were approved for loans that were worth less than those for which businesses owned by non-Hispanic white men were approved. The study team observed similar results for the United States as a whole.
Figure D-19.
Self-employment rates in study-related industries, Ohio and the United States, 2000

Notes:
** 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.
Asian Pacific American, Subcontinent Asian American, and other race minority were combined into the single category of "Other minority group" due to small sample sizes.

Source:
BBC Research & Consulting from 2000 U.S. Census 5% sample Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-19 indicates that in 2000 Black Americans working in the Ohio construction industry exhibited lower rates of self-employment (i.e., business ownership) than non-Hispanic white Americans. In addition, women working in the Ohio construction industry exhibited lower rates of self-employment than men. Hispanic Americans and other race minorities working in the Ohio professional services industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Ohio professional services industry exhibited lower rates of self-employment than men. Black Americans and other race minorities working in the Ohio goods and services industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Ohio goods and services industry exhibited lower rates of self-employment than men.
Figure D-20.
Self-employment rates in study-related industries, Ohio and the United States, 2008-2012

Notes:
** 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.
Asian Pacific American, Subcontinent Asian American, and other race minority were combined into the single category of “Other minority group” due to small sample sizes.

Source:
BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/

Figure D-20 indicates that Hispanic Americans working in the Ohio construction industry show lower rates of self-employment (i.e., business ownership) than non-Hispanic white Americans. In addition, women working in the Ohio construction industry show lower rates of self-employment than men. Women working in the Ohio professional services industry exhibited lower rates of self-employment than men. Black Americans, Hispanic Americans, and other race minorities working in the Ohio goods and services industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Ohio goods and services industry exhibited lower rates of self-employment than men.
Figure D-21.
Predictors of business ownership in construction (regression), Ohio, 2008-2012

Notes:
The regression included 15,409 observations.
*, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.
Asian Pacific American, Subcontinent Asian American, and Other race minority were combined into the single category of Other minority group due to limited sample size.
The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:
BBC Research & Consulting from 2008-2012 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa.

Figure D-21 indicates that, compared to being a man in Ohio, being a woman is related to a lower likelihood of owning a construction business, even after accounting for various other personal characteristics.
Figure D-22.
Disparities in business ownership rates for Ohio construction workers, 2008-2012

<table>
<thead>
<tr>
<th>Group</th>
<th>Self-Employment Rate</th>
<th>Disparity Index (100 = Parity)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Actual</td>
<td>Benchmark</td>
</tr>
<tr>
<td>Non-Hispanic white women</td>
<td>16.1%</td>
<td>29.3%</td>
</tr>
</tbody>
</table>

Notes: 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 2008-2012 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-22 indicates that non-Hispanic white women own construction businesses in Ohio at a rate that is 55 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).
Figure D-23.
Predictors of business ownership in professional services (regression), Ohio, 2008-2012

Notes:
The regression included 2,201 observations.
*, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.
Asian Pacific American, Subcontinent Asian American, and Other race minority were combined into the single category of Other minority group due to limited sample size.
The referent for each set of categorical variables is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.
Less than High School and Native American were omitted from the regression due to perfectly predicting business ownership.

Source:
BBC Research & Consulting from 2008-2012 ACS 5%
Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/

Figure D-23 indicates that, compared to being a man in Ohio, being a woman is related to a lower likelihood of owning a professional services business, even after accounting for various other personal characteristics.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-2.4716 **</td>
</tr>
<tr>
<td>Age</td>
<td>0.0491</td>
</tr>
<tr>
<td>Age-squared</td>
<td>-0.0002</td>
</tr>
<tr>
<td>Married</td>
<td>0.0469</td>
</tr>
<tr>
<td>Disabled</td>
<td>-0.1024</td>
</tr>
<tr>
<td>Number of children in household</td>
<td>0.0093</td>
</tr>
<tr>
<td>Number of people over 65 in household</td>
<td>0.1764</td>
</tr>
<tr>
<td>Owns home</td>
<td>-0.2859</td>
</tr>
<tr>
<td>Home value ($1000s)</td>
<td>0.0010 **</td>
</tr>
<tr>
<td>Monthly mortgage payment ($1000s)</td>
<td>-0.0379</td>
</tr>
<tr>
<td>Interest and dividend income ($1000s)</td>
<td>-0.0017</td>
</tr>
<tr>
<td>Income of spouse or partner ($10000s)</td>
<td>0.0021 **</td>
</tr>
<tr>
<td>Speaks English well</td>
<td>-0.4238</td>
</tr>
<tr>
<td>Some college</td>
<td>-0.2233 *</td>
</tr>
<tr>
<td>Four-year degree</td>
<td>-0.0070</td>
</tr>
<tr>
<td>Advanced degree</td>
<td>-0.0563</td>
</tr>
<tr>
<td>Black American</td>
<td>-0.3545</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>0.0061</td>
</tr>
<tr>
<td>Other minority group</td>
<td>-0.3203</td>
</tr>
<tr>
<td>Women</td>
<td>-0.4286 **</td>
</tr>
</tbody>
</table>
Figure D-24. Disparities in business ownership rates for Ohio professional services workers, 2008-2012

<table>
<thead>
<tr>
<th>Group</th>
<th>Self-Employment Rate</th>
<th>Disparity Index (100 = Parity)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Actual</td>
<td>Benchmark</td>
</tr>
<tr>
<td>Non-Hispanic white women</td>
<td>5.3%</td>
<td>12.0%</td>
</tr>
</tbody>
</table>

Notes: 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 2008-2012 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-24 indicates that non-Hispanic white women own professional services businesses in Ohio at a rate that is 44 percent that of similarly-situated non-Hispanic white men.
Figure D-25.
Predictors of business ownership in goods and services (regression), Ohio, 2008-2012

Notes:
The regression included 15,714 observations.
*, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.
Asian Pacific American, Subcontinent Asian American, and Other race minority were combined into the single category of Other minority group due to limited sample size.
The referent for each set of categorical variables variable is as follows: high school diploma for the education variables and non-Hispanic whites for the race variables.

Source:
BBC Research & Consulting from 2008-2012 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/

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-1.9304 **</td>
</tr>
<tr>
<td>Age</td>
<td>0.0276 **</td>
</tr>
<tr>
<td>Age-squared</td>
<td>-0.0001</td>
</tr>
<tr>
<td>Married</td>
<td>0.0594</td>
</tr>
<tr>
<td>Disabled</td>
<td>-0.0314</td>
</tr>
<tr>
<td>Number of children in household</td>
<td>0.0549 **</td>
</tr>
<tr>
<td>Number of people over 65 in household</td>
<td>-0.0065</td>
</tr>
<tr>
<td>Owns home</td>
<td>-0.0239</td>
</tr>
<tr>
<td>Home value ($000s)</td>
<td>0.0007 **</td>
</tr>
<tr>
<td>Monthly mortgage payment ($000s)</td>
<td>-0.0214</td>
</tr>
<tr>
<td>Interest and dividend income ($000s)</td>
<td>0.0027 **</td>
</tr>
<tr>
<td>Income of spouse or partner ($000s)</td>
<td>0.0004</td>
</tr>
<tr>
<td>Speaks English well</td>
<td>-0.2703</td>
</tr>
<tr>
<td>Less than high school education</td>
<td>0.0520</td>
</tr>
<tr>
<td>Some college</td>
<td>-0.0075</td>
</tr>
<tr>
<td>Four-year degree</td>
<td>-0.2137 **</td>
</tr>
<tr>
<td>Advanced degree</td>
<td>-0.3391 **</td>
</tr>
<tr>
<td>Black American</td>
<td>-0.1164 *</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>-0.2905 **</td>
</tr>
<tr>
<td>Native American</td>
<td>0.3544 *</td>
</tr>
<tr>
<td>Other minority group</td>
<td>-0.4926 **</td>
</tr>
<tr>
<td>Women</td>
<td>-0.1179 **</td>
</tr>
</tbody>
</table>

Figure D-25 indicates that, compared to being a non-Hispanic white American in Ohio, being Black American, Hispanic American, or other race minority is related to a lower likelihood of owning a goods and services business, even after accounting for various other personal characteristics. In addition, compared to being a man in Ohio, being a woman is related to a lower likelihood of owning a goods and services business, even after accounting for various other personal characteristics.
Figure D-26.
Disparities in business ownership rates for Ohio goods and services workers, 2008-2012

<table>
<thead>
<tr>
<th>Group</th>
<th>Self-Employment Rate</th>
<th>Disparity Index</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Actual</td>
<td>Benchmark</td>
</tr>
<tr>
<td>Black American</td>
<td>9.8%</td>
<td>12.1%</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>6.9%</td>
<td>12.7%</td>
</tr>
<tr>
<td>Other minority group</td>
<td>3.7%</td>
<td>9.0%</td>
</tr>
<tr>
<td>Non-Hispanic white women</td>
<td>12.3%</td>
<td>14.3%</td>
</tr>
</tbody>
</table>

Notes: 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 2008-2012 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: http://usa.ipums.org/usa/.

Figure D-26 indicates that Black Americans own goods and services businesses in Ohio at a rate that is 81 percent that of similarly situated non-Hispanic white Americans (i.e., non-Hispanic white Americans who share the same personal characteristics). In addition, Hispanic Americans own goods and services businesses in Ohio at a rate that is 55 percent that of similarly situated non-Hispanic white Americans. Similarly, other race minorities own goods and services businesses in Ohio at a rate that is 41 percent that of similarly situated non-Hispanic white Americans. Finally, non-Hispanic white women own goods and services businesses in Ohio at a rate that is 87 percent that of similarly-situated non-Hispanic white men.
Figure D-27. Rates of business closure, expansion, and contraction, Ohio and the United States, 2002-2006

Notes:
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:

Figure D-27 indicates that Black American- and Hispanic American-owned businesses in Ohio show higher closure rates than white American-owned businesses. Woman-owned businesses in Ohio show higher closure rates than businesses owned by men. Black American- and Hispanic American-owned businesses in Ohio show lower expansion rates than white American-owned businesses. Woman-owned businesses in Ohio have lower expansion rates than businesses owned by men.
Figure D-28.
Mean annual business receipts (in thousands), Ohio and the United States, 2007

Note:
Includes employer and non-employer firms. Does not include publicly-traded companies or other firms not classifiable by race/ethnicity and gender. Native Hawaiian and Other Pacific Islander excluded due to insufficient sample sizes in Ohio.

Source:
2007 Survey of Business Owners, part of the U.S. Census Bureau’s 2007 Economic Census.

Figure D-28 indicates that in 2007 Black American-, Asian American-, Hispanic American-, and Native American-owned businesses in Ohio showed lower mean annual business receipts than non-Hispanic white American-owned businesses. In addition, woman-owned businesses in Ohio showed lower mean annual business receipts than businesses owned by men.
Figure D-29. Mean annual business owner earnings, Ohio and the United States, 2008-2012

Notes:
The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2012 dollars.
**, ** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level for the United States as a whole and Ohio, respectively.

Source:
BBC Research & Consulting from 2008-2012 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 D-29 indicates that the owners of Black American- and Hispanic American-owned businesses in Ohio earned less on average than the owners of non-Hispanic white American-owned businesses. In addition, the owners of woman-owned businesses in Ohio earn less on average than the owners of businesses owned by men.
Figure D-30.  
Predictors of business owner earnings (regression), Ohio, 2008-2012

Notes:  
For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.  
The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2012 dollars.  
*, ** 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 2008-2012 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/.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Exponentiated Coefficient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>343.994 **</td>
</tr>
<tr>
<td>Age</td>
<td>1.173 **</td>
</tr>
<tr>
<td>Age-squared</td>
<td>0.998 **</td>
</tr>
<tr>
<td>Married</td>
<td>1.281 **</td>
</tr>
<tr>
<td>Speaks English well</td>
<td>1.105</td>
</tr>
<tr>
<td>Disabled</td>
<td>0.652 **</td>
</tr>
<tr>
<td>Less than high school</td>
<td>0.693 **</td>
</tr>
<tr>
<td>Some college</td>
<td>0.972</td>
</tr>
<tr>
<td>Four-year degree</td>
<td>1.161 **</td>
</tr>
<tr>
<td>Advanced degree</td>
<td>1.703 **</td>
</tr>
<tr>
<td>Black American</td>
<td>0.929</td>
</tr>
<tr>
<td>Asian Pacific American</td>
<td>1.236</td>
</tr>
<tr>
<td>Subcontinent Asian American</td>
<td>0.917</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>1.037</td>
</tr>
<tr>
<td>Native American</td>
<td>0.735</td>
</tr>
<tr>
<td>Other race minority</td>
<td>0.494</td>
</tr>
<tr>
<td>Women</td>
<td>0.524 **</td>
</tr>
</tbody>
</table>

Figure D-30 indicates that, compared to being the owner of a business owned by men in Ohio, being an owner of a woman-owned business is related to lower earnings, even after accounting for various other business and personal characteristics.
**Figure D-31.**
Predators of business owner earnings (regression), United States, 2008-2012

Notes:
For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.
The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2012 dollars.
*, ** 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 2008-2012 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/.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Exponentiated Coefficient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>446.865 **</td>
</tr>
<tr>
<td>Age</td>
<td>1.156 **</td>
</tr>
<tr>
<td>Age-squared</td>
<td>0.999 **</td>
</tr>
<tr>
<td>Married</td>
<td>1.258 **</td>
</tr>
<tr>
<td>Speaks English well</td>
<td>1.166 **</td>
</tr>
<tr>
<td>Disabled</td>
<td>0.593 **</td>
</tr>
<tr>
<td>Less than high school</td>
<td>0.730 **</td>
</tr>
<tr>
<td>Some college</td>
<td>1.062 **</td>
</tr>
<tr>
<td>Four-year degree</td>
<td>1.340 **</td>
</tr>
<tr>
<td>Advanced degree</td>
<td>2.130 **</td>
</tr>
<tr>
<td>Black American</td>
<td>0.851 **</td>
</tr>
<tr>
<td>Asian Pacific American</td>
<td>1.152 **</td>
</tr>
<tr>
<td>Subcontinent Asian American</td>
<td>1.123 **</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>1.061 **</td>
</tr>
<tr>
<td>Native American</td>
<td>0.706 **</td>
</tr>
<tr>
<td>Other race minority</td>
<td>1.091</td>
</tr>
<tr>
<td>Women</td>
<td>0.519 **</td>
</tr>
</tbody>
</table>

Figure D-31 indicates that, compared to being the owner of a non-Hispanic white American-owned business in the United States, being an owner of a Black American- or Native American-owned business is related to lower earnings, even after accounting for various other business and personal characteristics. In addition, compared to being the owner of a business owned by men in the United States, being an owner of a woman-owned business is related to lower earnings, even after accounting for various other business and personal characteristics.
APPENDIX E.
Qualitative Information from Personal Interviews, Public Hearings, and Other Meetings

Appendix E presents qualitative information that the study team collected through in-depth personal interviews, public hearings, written testimony, telephone surveys, and focus groups conducted as part of the disparity study. Appendix E is presented in 10 parts:

- **A. Introduction and Background** describes with whom the study team met to collect the information summarized in Appendix E and how that information was collected. (page 2)

- **B. Background on the Transportation Contracting Industry in Ohio** summarizes information about how businesses become established and how companies change over time. Part B also presents information about the effects of the economic downturn and business owners’ experiences pursuing public and private sector work. (page 4)

- **C. Doing Business as a Prime Contractor or as a Subcontractor** summarizes information about the mix of businesses’ prime contract and subcontract work and how they obtain that work. Part C also presents information on business owners’ experiences utilizing minority- and woman-owned businesses. (page 19)

- **D. Keys to Business Success** summarizes information about certain barriers to doing business and keys to success, including access to financing, bonding, and insurance. (page 26)

- **E. Potential Barriers to Doing Business with Public Agencies** presents information about potential barriers to doing work for public agencies, including the Ohio Department of Transportation (ODOT) and the Ohio Turnpike and Infrastructure Commission (the Commission). (page 35)

- **F. Allegations of Unfair Treatment** presents information about experiences with unfair treatment including bid shopping, treatment during performance of work, and allegations of unfavorable work environment for minorities and women. (page 58)

- **G. Additional Information Regarding any Racial/ethnic- or Gender-based Discrimination** includes additional information concerning potential racial/ethnic- or gender-based discrimination. Topics include stereotypical attitudes about minorities and women and allegations of a “good ol’ boy” network that adversely affects opportunities for minority- and woman-owned businesses. (page 65)
H. Insights Regarding Neutral Measures presents information about business assistance programs, efforts to open contracting processes, and other steps to remove barriers to all businesses or small businesses. (page 69)

I. Insights Regarding Race-/ethnicity- or Gender-based Measures presents information about general comments about the Federal Disadvantaged Enterprise (DBE) Program; the State Encouraging Diversity, Growth, and Equity (EDGE) Program, the State Minority Business Enterprise (MBE) Program; or any other Race/Gender-Conscious Program. (page 88)

J. DBE and Other Certification Processes presents information about the DBE certification process and the EDGE certification process. It also presents information about advantages and disadvantages that subcontractors experience because of their certification as a DBE, MBE, woman-owned enterprise (WBE), or small business enterprise (SBE). (page 92)

A. Introduction and Background

BBC Research & Consulting and Exstare Federal Services Group (the study team) conducted public hearings, in-depth personal interviews, telephone surveys, and focus groups between April and October, 2015. During the interviews, surveys, hearings, and focus groups, participants had opportunities to discuss their experiences working in the local transportation contracting industry; experiences working with ODOT, the Commission, and other public agencies; experiences with potential barriers and/or discrimination based on race/ethnicity/gender; and other matters relevant to doing business in the Ohio marketplace. Throughout the study process, ODOT, the Commission, and the study team encouraged business owners to submit written testimony and comments concerning these matters. In addition, a Steering Committee made up of representatives of Ohio businesses and organizations, including ODOT and the Commission, also helped the study team identify individuals for in-depth personal interviews and for participation in focus groups.

Information from public hearings. As part of the disparity study, ODOT, the Commission, and the study team conducted eight public hearings throughout the state of Ohio. The public hearings were conducted in:

- Toledo (April 6, 2015; comments identified with the prefix “TLP”);
- Dayton (April 8, 2015; comments identified with the prefix “DYP”);
- Columbus (April 14, 2015; comments identified with the prefix “CLP”);
- Highland Hills (April 15, 2015; comments identified with the prefix “HHP”);
- North Canton (April 16, 2015; comments identified with the prefix “NCP”);
- Maumee (May 13, 2015; comments identified with the prefix “MMP”);
- Youngstown (May 14, 2015; comments identified with the prefix “YTP”); and
Public hearing participants represented businesses and organizations throughout the state. The numbering of comments from a particular public hearing (e.g., TLP#1, TLP#2) indicates the order in which participants gave oral testimony at the hearing. For simplicity, Appendix E refers to both public hearing participants and those providing written testimony as “interviewees” in the same way as individuals interviewed at their businesses.

**Written testimony.** ODOT and the study team encouraged business owners who attended a hearing or were not able to attend a hearing to submit written testimony to the study team. Testimony and/or comments were submitted from 17 individuals. Those comments appear throughout Appendix E and are identified by the prefix “WT.”

**In-depth personal interviews.** The study team conducted in-depth personal interviews with 44 Ohio-based businesses between June and October, 2015. Most of the interviews were conducted with the owner, president, chief executive officer, or other officer of the business. Interviewees included individuals representing construction businesses, engineering businesses, suppliers, and other services businesses. Interview participants were obtained primarily from ODOT and the Commission contractor, subcontractor, and vendor data; business owners who attended public hearings and expressed their interest in being interviewed; the Ohio Unified Certification Program (UCP) directory; and from recommendations made by Steering Committee members. A portion of the interview participants were randomly selected.

The interviews included discussions about interviewees’ perceptions and experiences regarding the local transportation contracting industry; ODOT and the Commission contracting policies and practices; any allegations of unfair treatment of minorities and women; and experiences with certification programs (e.g., the DBE Program and the EDGE Program).

Of the businesses interviewed, some work exclusively or primarily as prime contractors or subcontractors, and some work as both. Some businesses were MBEs, some were WBEs, and some were non-Hispanic white male-owned. Some businesses were DBE-certified and/or EDGE-certified. All of the businesses conducted work in Ohio. All interviewees are identified in Appendix E by random interviewee numbers (i.e., #1, #2, #3, etc.).

Because interviewees were often quite specific in their comments, the study team reports interviewee comments generally in many cases to minimize the chance that interviewees or other individuals or businesses mentioned during the interviews could be identified. The study team reports the race/ethnicity and gender of each business owner, and whether each interviewee represents a DBE-certified business, an EDGE-certified business, or a business that did not report having any type of certification.1

**Focus Groups.** As part of the disparity study, the study team also conducted four focus groups with 16 individuals in September 2015. Participants in the focus groups included business organizations, business assistance organizations; DBE- and EDGE-certified firms; minority- and woman-owned businesses; and majority-owned firms. The focus groups conducted were:

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1 Note that “male” or “white” are sometimes not included as identifiers to simplify the written descriptions of business owners.
• Minority- and woman-owned businesses and DBE Focus Group (September 29, 2015; comments identified with the prefix "DBEFG");

• Construction Focus Group (September 29, 2015; comments identified with the prefix "CFG");

• Goods and Services Focus Group (September 30, 2015; comments identified with the prefix "GSFG"); and

• Professional Services Focus Group (September 30, 2015; comments identified with the prefix "PSFG").

Each of the focus groups included discussions about experiences and barriers to doing business in the Ohio marketplace; ODOT and the Commission contracting policies and diversity programs (e.g., DBE Program); and suggestions to enhance DBE and other small business participation in ODOT and the Commission contracting.

The numbering of comments from a particular focus group indicates the order in which interviewees spoke during the focus groups. For simplicity, Appendix E refers to focus group participants as "interviewees" in the same way as individuals interviewed at their businesses.

B. Background on the Transportation Contracting Industry in Ohio

Part B summarizes information related to:

• How businesses become established (page 4);

• Changes in types of work that businesses perform (page 5);

• Fluid employment size of businesses (page 6);

• Flexibility of businesses to perform different types and sizes of contracts in different parts of the state (page 8);

• Local effects of the economic downturn (page 10);

• Current economic conditions (page 14); and

• Business owners’ experiences pursuing public and private sector work (page 15).

How businesses become established. Many interviewees representing construction and construction-related professional services businesses reported that their companies were started (or purchased) by individuals with connections in their respective industries.

Many firm owners worked in the industry before starting their own businesses. Examples from the in-depth interviews include the following:

• The Black American male owner of a DBE- and EDGE-certified construction firm (that also holds HUB Zone, Veteran and SBA 8(a) certifications) said he had been around or
had worked in the construction industry most of his life before establishing his own company. [4]

- The non-Hispanic white male owner of a surveying firm said he “came out of a larger engineering multidisciplinary firm” and “saw the need [for] a stand-alone surveying firm” prior to starting his own company. [13]

- The non-Hispanic white female owner of a DBE- and EDGE-certified electrical engineering company said that she worked in the construction industry before starting her business. [1]

- The business development manager of a DBE-certified Subcontinent Asian American-owned materials testing firm said that the company was started after the owner had worked for other large testing firms. [40]

- The Black American female owner of a DBE- and EDGE-certified architecture and engineering firm said she worked in and had relationships in the industry prior to opening her own businesses. [3]

- The Native American male owner of a professional services firm said he started his business five years ago after working in the industry for many years. [8]

- The Hispanic male co-owner of a DBE- and EDGE-certified survey firm said that he and three co-workers bought a company where they had been employed. [56]

- Other interviewees also indicated that their companies were started (or purchased) by individuals with connections in their respective industries. [For example, #1, #2, #4, #7, #15, #19, #33, #38, #46, #53]

**Multiple interviewees indicated that relationships among family members were instrumental in establishing their businesses.** Examples of such comments include the following:

- The Black American male owner of a DBE-certified general construction management firm started his business in the early 1990s and indicated that his father was in the construction industry. [30]

- The non-Hispanic white female owner of a non-certified sewer maintenance firm said that her company was started by her father who was a civil engineer. Through that work, her father discovered sewer maintenance and started his own sewer maintenance business. [22]

- The Black American male owner of a DBE-, EDGE-, and SBA 8(a)-certified general contracting firm said, “Me and my wife started the company nine years ago with the help of my father-in-law and brother-in-law.” [31]

- The non-Hispanic white male owner of an excavating firm stated that the company was started by his father. The interviewee worked for his father’s company full time. [32]
Changes in types of work that businesses perform. Interviewees discussed whether and why firms over time changed the types of work that they perform.

Many interviewees indicated that their companies had changed or expanded their lines of work to respond to market conditions. For example:

- The business development manager at a DBE-certified Subcontinent Asian materials testing firm said that when the housing market declined in 2008, the company concentrated more on soil and materials testing for mainly concrete and soils for compaction. Although the housing market is starting to return, the firm itself is now specialized and staffed for highway construction needs so it is no longer pursuing housing work. [#40]

- The non-Hispanic white female owner of an EDGE-certified guardrail and lighting firm has added traffic signals and lighting to her company's offerings. [#15]

- The male co-owner of an EDGE-certified engineering firm said, "The company specialized in surveys when it began. Over the years, services have expanded to include engineering, construction management, right of way easement, acquisition, utility relocation, and construction inspection." [#2]

- The non-Hispanic white male owner of an engineering firm recently added new services, including geographic information system (GIS), survey, auto, and micro station computer-aided design (CAD) services. [#10]

- The Black American female owner of a DBE- and EDGE-certified heavy highway construction firm shared that the company originally provided catch basins, curbs, and gutters. Her company now specializes in asphalt paving, milling, trucking, and material sales. [#49]

- The Black American female owner of a DBE- and EDGE-certified architecture and engineering firm said that "Because of the lack of surveying work, we added additional services." [#3]

- The non-Hispanic white male owner of an excavating firm said that the recession caused a shift in the type of work the company performed. Prior to the recession, the company did about 75 percent of its work in home development, mostly in plat development. When the housing market fell off, many of the companies they worked with went out of business. Now 90 percent of their work is commercial contractor work. [#32]
Fluid employment size of businesses. The study team asked business owners about the number of people that they employed and whether their employment size fluctuated.

A number of companies reported that they expand and contract their employment size depending on work opportunities, season, or market conditions. Examples of those comments include the following:

- The Black American female owner of a DBE- and EDGE-certified architecture and engineering firm explained that her company expands and contracts in employment or scale depending on work opportunities, season or market conditions. She said, "The business is seasonal. March to November is when we have to make our money." [#3]

- The non-Hispanic white male project manager of a concrete company that employs 15 people said, "In the winter, we are usually down to about six employees." [#45]

- The Black American male owner of an electrical contracting firm said the firm has four employees. "That changes depending on how much work we have. Sometimes we have up to eight to ten guys working." [#38]

- The Hispanic male owner of a DBE- MBE/EDGE-certified survey firm explained that his company has seen changes in the number of employees and sales. His business has grown from 10 employees to 30 employees. [#56]

- The non-Hispanic white female owner of a janitorial business said that seasonal hiring needs created a problem when she needs to find employees. Strip season causes a demand for more workers, but once the workload is completed, there is a reduction in the employee hourly need and that seasonal hiring needs cause a high level of employee turnover. [#12]

- The Black American female owner of a DBE- and EDGE-certified heavy highway construction company said, "Based on contracts and volume, the company expands or contracts. Traditionally we average from 100 to 110 jobs a year. So April through November we are very busy." [#49]

- The non-Hispanic white female owner of a steel erection company said, "We had 160 people on payroll last week at the height of the [2015] construction season and we will have about 40 to 60 during the winter. The business also expands and contracts depending on Federal and State funding for highway work." [#7]

- The Black American male owner of a DBE-, EDGE-, and SBA 8(a)-certified general contracting firm said, "depending on how much work we have, we go to the union and we have to get people from the union. We have to downsize if we don’t have that much work. If we need more people, we go to the union." [#31]

- The Black American female owner of an EDGE-certified waterproofing and painting company said that she currently employs four people and if she needs more laborers for a bigger project, she will outsource five or six laborers. [#53]
Many other business owners and managers explained that number of employees working for their companies at any one time varied depending on the amount of work the company was performing. [For example, #1, #2, #4, #6, #13, #32, #34, #36, #44, #54]

Many business owners said that they had reduced permanent staff because of poor market conditions. For example:

- The non-Hispanic white female owner of a DBE- and EDGE-certified electrical engineering firm said she had 24 employees in 2011, and 11 employees in 2015. The firm now has one employee. [#1]
- The Black American male owner of a MBE-certified landscaping firm said that at one time the firm had 10-15 employees but now he just employs his son and his granddaughter. [#21]
- The Middle Eastern male co-owner of an EDGE-certified engineering firm said, "We scaled down because of the economy. Ninety percent of the work the firm does is in the private sector for developers. Many of our clients are developers. They were affected by the recession. There were fewer private sector projects, which caused our business to scale down. In 2007, we employed 45 to 48 people." In 2015, the company employs 12 people. "We are down to one surveyor because of the economy and dishonest business practices in our industry."

He added that “All private sector jobs were affected. Our clients asked us to put what we were doing on the shelf. Mortgage failures and bankruptcies, caused a slowdown in the market and we had to lay employees off. Clients who were developers and had to borrow money for projects were doing one tenth or less at a time. They didn't want the risk." [#2]

- The Black American female owner of a DBE- and EDGE-certified firms said, "When I purchased the company in 2004, we had three crews and eight employees, six of whom were surveyors. Prior to the recession, revenues were higher. The recession forced me to lay-off all employees but one or two. Because of the lack of surveying work, we added additional services. On average, the total number of employees has remained at eight but spread over two disciplines—surveying and architectural services." [#3 ]

- The Hispanic male owner of an industrial product manufacturing company said that he only has one employee who works at his company now. He elaborated that “it’s not by choice. It’s kind of sad. And it’s by no lack of trying and enthusiasm, by no lack of ability, by no lack of anything but opportunity.” [#11]

- The non-Hispanic white male owner of a surveying firm said, "At the time of the economic [down]turn about five years ago, we did have to let two people go and have not hired those positions back." [#13]
The non-Hispanic white male owner of an excavating firm said that prior to the recession in 2007, the company had 55 employees but the recession dropped that number to 17 employees. Now the firm has 21 employees. [#32]

**Flexibility of businesses to perform different types and sizes of contracts in different parts of the state.** Interviewees discussed types, locations, and sizes of contracts that their firms perform.

**Some companies said that they prefer to perform projects close to their businesses, but will travel to worksites when necessary.** For example:

- The non-Hispanic white male owner of a franchised landscaping company said that he works in both the public and the private sector. For public contracts, he works primarily in the areas of Dublin, Westerville, and the City of New Albany. More generally, he works north and northeast of Columbus. [#25]

- The non-Hispanic white female manager of a dump truck company said that she will sometimes reconsider the job if “it’s not worth it.” She explained, “If I [have to] drive 50-60 miles, I want [to be] compensated for that. I mean, I’m deadheading 100 miles, and when you get on a project, and you’re only getting maybe $80.00 an hour, sometimes it just doesn’t make sense to drive that far. And say you worked eight hours, but you had to put in 250 bucks worth of fuel or something like that, and you [have to] pay your employees.” [#20]

**Some firm owners indicated that their companies perform both small and large contracts.** For example:

- The Hispanic male owner of a DBE- and EDGE-certified survey firm said the company performs primarily as a sub-consultant on public sector work but that they have performed as a prime on some Commission projects. In addition to private sector work, the company does business with several municipalities, universities and schools, and ODOT. Approximately 70 percent of the firm’s business is in the public sector. This owner said, “The size of a project does not matter to us. We can do the work.” [#56]

- The non-Hispanic white male owner of a fence and guardrail firm said that the firm has changed significantly since it was established 34 years ago. He said that the firm became an LLC and he has hired more people. He said, “We’ve built a building, and got a small office, trucks, equipment, forklift, bobcat, ATV, trucks. We got a lot more insurance than I used to have.” He went on to say that the size of contract has also increased. The biggest contract he has had was last year for $445,000. [#27]

**Some business owners noted that their financial resources affected how large of contracts on which they typically bid:**

- The non-Hispanic white male owner of a franchised landscaping company said that contract size is a risk that he has to weigh before deciding to work on a contract. He explained, “Most of our agreements are anywhere from one to three years. So not any one contract is larger than say 20 percent of our business. But if you’re a really small...
company, your revenue, you know, if any one contract with the state is half of your revenue then there's a huge liability in that if you lose it the following year or there's not additional work in that amount." [#25]

- The Black American female owner of a DBE- and EDGE-certified architecture and engineering firm said, “On the construction side, we are not equipped to be all over the state; you have to have crews in place and projects to keep the crews going. We do not have the equipment or human resources to do that. On the design side, you call and ask to team with an engineering team, and for the most part I have relationships with the same firms that do ODOT, as well as state and local work, but I don't keep up with the programatics like I do with the City of Columbus so I don’t ask those guys about ODOT work. My hands are full with [city] work. In order to do ODOT work, I would have to hire another person to drive that initiative. I just do not have the time or money to do that.” [#3]

- The female owner of a janitorial business said she has a desire to grow and add more contracts, even for stores an hour away. She said right now she has to turn down business because she does not have the capacity to purchase additional vehicles to clean additional sites. As she explained, without extra money, “We’ll just stay small. We’ll stay local, pick up the few out-of-towns that we do, and we’ll just stay right where we’re at.” She said she does not pursue more subcontract opportunities because of her growth challenges. [#12]

- The non-Hispanic white female manager of a dump truck company said that contract size or lengths factor into her decision to take a job. She stated, “If I can't supply the trucks, I have to be careful of what I’m bidding on as far as said company's 30,000 or 40,000 ton of stone. I can't, obviously, bid that project itself versus hiring other people to do it, which I don't do.” [#20]

Other business owners reported that they typically only perform small contracts. For example:

- The Hispanic male owner of a survey firm reported that the company’s market area is Northern Ohio. The firm is a subcontractor and occasionally a prime on public sector projects. [#56]

Some companies reported that they work in several different fields, or that they had changed primary lines of work over time. For example:

- The Middle Eastern male co-owner of an EDGE-certified engineering firm said the company has the ability to perform different types of contracts. “The company specialized in surveys when it began 100 years ago. Over the years, services have expanded to include engineering, construction management, right of way easement, acquisition, utility relocation and construction inspection. The company still provides survey services.” [#2]

Local effects of the economic downturn. Interviewees expressed many comments about the 2007-2009 recession.
Most interviewees indicated that the recession had negatively impacted their businesses and other businesses. For example:

- The Black American male owner of a DBE- and EDGE-certified construction company said, "Work was slow after 2009. The better companies survived. [The recession] thinned the herd out a little." [#4]

- The non-Hispanic white female owner of a DBE-certified electrical engineering firm said the company and the entire industry was impacted by the 2007-2009 recession. She said, "Government budgets lag behind in general. In 2011, stimulus worked peaked." She explained that her company had a tremendous workload during the recession, but as a subcontractor, her company lost money because she was the "last on jobs and ODOT paid slowly." She said she needed more workers, equipment and a bank loan, but banks were not lending to small businesses, especially contractors. She said, "I lost a significant amount of money as a result."

She went on to say that additional difficulties or barriers for small businesses or woman-owned firms in the 2007-2009 recession included lower buying power, paying significantly more for bonding, and less cooperation from vendors. She said, "As a small business, I had to provide cash up front and joint checks." She said she ran across vendors who did not want to do business with her company because she was small. [#1]

- The Black American male owner of a DBE- and EDGE-certified firm said, "The firm was affected by the recession. We were fairly new. We started to grow. In a down economy we were able to maintain. We employed three people, made a foot hold with the state and we started getting positive results." [#54]

- The non-Hispanic white female owner of DBE- and EDGE-certified steel erection company said "[I]t took a long time for the construction industry to bounce back." [#7]

- The non-Hispanic white male manager of a transportation consulting firm said, "The recession caused the company to downsize. In 2007/2008, we had 70 plus employees in five different offices. We first felt the recession in 2009. We closed at least one location." [#9]

- The Black American female owner of a DBE- and EDGE-certified heavy construction company said, "In general lending to minorities and women was more restrictive. The lenders tightened the purse strings. Bonding was also affected because everybody became a risk. Big changes." [#49]

- The Native American male owner of a professional services firm said, "Because of the recession, projects were bid way under budget or way over. Everyone was having a hard time trying to figure out the costs of projects." [#8]

- The non-Hispanic white male owner of a freight services firm said that the recession has been horrible on the company. He said, "We started in 2006; we had three
cornerstone accounts. None [of those companies] are in business now. We lost those accounts. It’s been a difficult climb back up." [#14]

- The Hispanic male co-owner of a DBE- and EDGE-certified survey firm said, “We struggled for the first two years. We stayed lean and we were smart about it. We diversified and did everything that surveying entails. By the time we came out of the recession, many of the companies that were our competitors were gone. The number of competitors went from four to one or two. Some of the competitors were engineering firms with surveying departments. To cut back, they got rid of their survey departments. What’s funny is that some of the engineering firms that competed with us, now hire us to do survey work for them.” He said, “We are a survey only company. We do not really compete with engineering firms even if they have a surveying department. If they get overbooked, we are here to help.” He said that ODOT and the Commission work helped keep the firm above water during the recession. [#56]

- The non-Hispanic female owner of an EDGE-certified guardrail and lighting firm said that the firm was affected before the recession by a traffic accident that took place in one of their work zones. She believes that the accident set them up for the recession. She said, “Because [the accident] actually started us. We had to tighten the purse strings. Let people go that we didn’t need. Take on more work ourselves.”

She said that the recession also affected the type of work the firm did. She explained that, “We had a lot more commercial work, and then when [the recession] hit, that was gone. So that’s when we started bidding and increasing our bids to the municipalities and doing more ODOT work and less on the commercial side.” She also said, “We do less fence work now than we did in the past just because the recession really took the fencing.” [#15]

- The Black American female owner of a DBE- and EDGE-certified firm said, “The recession was a curse and a blessing. The negative part was, of course, that our revenue, in terms of projects to compete, went to zero and the company had to lay-people off. We lost revenue and we struggled to keep the doors open and pursue work.” She said, “We survived on construction as the need for engineering services shrank. Surveying kept the doors open. Large companies were also laying people off—surveyors first. Ironically, this was a blessing because large contractors subcontracted the surveying out. That was our way out of the recession. Our relationships served us well.” [#3]

- The district manager of a majority-owned drilling company was asked if the company was affected by the 2007-2009 recession. He said, “Yes. It probably knocked 40 percent off of our revenue for a couple of years. So it was kind of difficult to operate with that much less income coming in.” [#44]

Some business owners and managers said they have seen much more competition during the economic downturn. They reported that more competitors are going after a smaller number of contracts in specific fields, with substantial downward pressure on prices. Larger firms have been bidding on work that typically went to smaller firms. For example:
- A Black American male owner of a DBE-certified construction company explained that, "The federal government sets aside more for small businesses. Since 2009, they do not set aside as much for minority businesses. Once they reach their quota, it is more economical for them to go total small business. It makes it more difficult for my business because it puts you in competition with larger businesses." [#4]

- The non-Hispanic white male owner of a landscape company said, "We laid employees off for the first time. We saw a trend. Larger companies were offering all services, services that they would not have even considered or would have subcontracted out before the recession. That affected all smaller businesses. There wasn’t as much work." [#47]

- The project manager of a SBE-certified concrete company said, "Because of the lack of work, big companies went after the smaller stuff. They were doing work they would not have looked at before. They weren’t even looking to make money on some of it. They cut their profits down to nothing because they had to cover expenses." [#45]

- The Black American male owner of a certified technology firm said "I’m not sure how much growth can be sustained with government. There are a lot of technology firms. The market is jam packed. So, we are looking to grow by supplying technology staffing to government and expanding into the small business market." [#54]

- The Black American male owner of a trucking company said it is very difficult to do business in the marketplace. The challenges he says are financing, personnel, the competition, the costs of doing business and DOT regulations. "There is a lot of competition. They are a lot bigger, better financed, and have newer equipment," he said. [#46]

**Some business owners said that they scaled back their operations in response to market conditions in order to stay in business.** For example:

- The business development manager of a Subcontinent Asian DBE-certified materials testing firm said that when the housing market declined in 2008, the company concentrated more on soil materials testing for mainly concrete and soils for compaction. Although the housing market is starting to return the firm itself is now specialized and staffed for highway construction needs so it is no longer pursuing housing work. [#40]

- The non-Hispanic white male president of an electrical contracting firm said, "Actually we were pretty good because we had all the school work going on at that time...municipal schools. We weathered [the recession] pretty good. It was after that. After the schools were all done in our area, our market share just shrunk." [#34]

- The non-Hispanic white male owner of an excavating firm said that the recession caused a shift in the type of work the company performed. Prior to the recession, the company did about 75 percent of its work in home development, mostly in plat development. When the housing market fell off, many of the companies they did
business with went out of business. Now 90 percent of their work is commercial contractor work. [#32]

- The Middle Eastern male co-owner of an EDGE-certified engineering firm said, “There were fewer private sector projects [during the recession], which caused our business to scale down. In 2007, we employed 45 to 48 people. In 2015, the company employs 12 people… We are down to one surveyor because of the economy” [#2]

- A Black American male owner of a MBE-certified landscaping firm said that his business started to struggle about 10 years ago because of the economic downturn. He said that the firm did more construction and road work prior to the recession and when the recession hit, the firm started doing more lawn cutting to make ends meet. He went on to say that he does believe his firm is doing better now than most other firms in his industry but he cannot say what the difference has been for his firm. [#21]

According to interviewees, a few businesses may have survived because they were well-capitalized going into the economic downturn. For example:

- The non-Hispanic white female majority owner of a non-certified sewer maintenance firm said that they were not really affected by the recession. She said, “Basically because budgets had already been established with municipalities and they still have an obligation to their clients, the residents, to maintain the sewer systems. If something fails or people get backups in their basement and there's sewage all over the place, people don’t care if there's a recession or not. They want it fixed, now.” [#22]

- The non-Hispanic white male owner of an excavating firm said his firm has made good financial decisions. He said, “We kept a fair amount of cash (through the recession) and didn't over extend ourselves.” [#32]

- The female majority owner of a janitorial services firm said, “[The recession] was a perfect time actually for a brand new company to start to grow because it’s not like you’d jump in deep water without the swimming lesson. We had enough time to grow and then learn to [do] the job and then hire people, and then I could give the new people my knowledge and teach them what to do, what’s the expectation of the company or the customers.” [#19]

A few business owners and managers said that their companies did not see a decline in work due to the economic downturn. Examples of those comments include the following:

- The Black American male owner of a DBE- and MBE/EDGE-certified technology firm said, ”We were fairly new. We started to grow. In a down economy we were able to maintain. We employed three people, made a foot hold with the state and we started getting positive results.” [#54]

- The Native American male owner of a professional services firm said, “Because of the recession, projects were bid way under budget or way over…Our methodology allowed us to deliver budgets that were within plus/minus 10 percent. None of the projects we did budget for were re-bid. Architects for whom we did budgets are still clients and swear by us.” [#8]
- The Black American female owner of a DBE- and EDGE-certified heavy highway construction firm said, "We were not negatively affected. I made a decision that the recession was not going to be our problem; and, it wasn’t. In fact, those were some of our best years." [#49]

**Current economic conditions.** Many business owners and managers said that economic conditions were improving. For example:

- The Native American male owner of a professional services firm said, "Things are looking up in the construction business. I see cranes and buildings going up. If I see one that means there are three in line. That tells me an architect had to develop a design and that there’s work." [#8]

- When asked if there were other factors that impact the company’s ability to do business, the project manager of a non-Hispanic white male owned concrete company said, "the size of the economy. This is the first time in the last 5-6 years the private sector is actually starting to do stuff." [#45]

- The Black American male owner of a DBE- and EDGE-certified construction firm (that also holds HUB Zone, Veteran, and SBA 8(a) certifications) said his opinion was "[t]he industry is rebounding." [#4]

- The non-Hispanic white female owner of a DBE- and EDGE-certified steel erection company said, “They’re good. Today they’re good. I cannot say what they will be next year. The current economic conditions are the best we have seen since the business began.” [#7]

- The non-Hispanic white male owner of a freight services firm said that the current economic conditions of the firm are good. He said, "It’s been our best year since 2007. I’m still very cautious as a business owner." [#14]

- The Black American female owner of a DBE- and EDGE-certified architecture and engineering firm said, “Currently economic conditions on the civil side have improved. During 2014, revenue equaled pre-recession sales. The architectural sales are not as strong.” [#3]

- A non-Hispanic white female owner of a sewer maintenance firm said that the current economic conditions of her firm are "booming." She said that the work is coming back in a big way. [#22]

- The aggregate salesman of a majority-owned stone and ready-mix concrete supplier said that in "the past eight, ten years [we've seen it] where everything crashed and then turned around [and] now we’re seeing a very steady upsweep in the industry." [#28]

- The vice president of a female-owned tunneling firm said, “Right now, there’s been a lot of work out there. This moment it’s been pretty good. We’ve been able to get work.” [#36]
When asked about the current economic conditions for the company’s industry, the manager of a majority-owned transportation consulting firm replied, “I see a recovery. We need reauthorization of the transportation act though.” [#9]

The Hispanic male owner of a DBE- and EDGE-certified survey firm said, “Over the past three to four years, the industry appears to be steady. We recently opened a new office. We have spread out so we have more work. We’re now in Cleveland and Fort Wayne and just opened a Lima office to increase revenue.” [#56]

Based on conditions at the time they were interviewed, other business owners and managers said that market conditions were improving. [For example, #13, #19, #31, #44]

One business owner said he had not yet seen an upswing in market conditions. When asked about current economic conditions in the industry, the Middle Eastern co-owner of an EDGE-certified engineering firm replied, “I don’t believe we have recovered yet.” [#2]

**Business owners’ experiences pursuing public and private sector work.** Interviewees discussed differences between public and private sector work.

**Most interviewees indicated that their firms conduct both public sector and private sector work.** [For example, #1, #3, #5, #6, #7, #9, #10, #13, #22, #25, #26, #27, #28, #31, #32, #36, #44, #46, #49, #54, #56]

**Many interviewees reported that they preferred private sector work over public sector work.** Some of the comments indicated that performing private sector contracts was easier, more profitable, and more straightforward than performing public sector contacts. For example:

- The Native American male owner of a professional services firm said, “The public sector is much more rigid. In the public sector there is a need for transparency. Tax payers have to know what is being spent and rightly so. In the private sector, owners have more latitude [around costs/budgets].” He added that he thinks the cost of doing business in the public sector is higher [for a small company]. Another advantage, he said, “In the private sector no one cares about your race or gender. At the end of the day, they care about meeting budget numbers and getting projects to market. It’s all irrelevant.” [#8]

- The Black American female owner of an EDGE-certified waterproofing and painting company said that she works in both the public and private sector. She started working in the residential market this past year. The shift was “because the commercial [work] was not adding up.” When asked about her experiences in the residential market, she said that there are less specifications and the process goes more smoothly. She stated, “You don’t have to get bonded, and I go in, I give them the estimate, either they take the estimate or they don’t. We come in, they cut half the check for the materials and for the labor, and then they cut the other half of the check when the job is completed. Right there and then when it's completed.” [#53]
The male owner of an excavating firm said, "In private [sector] work, you know your customer and their expectations. Frequently we can do negotiated work; we are not bidding against others." He added that, "I think maybe the advantage is more personal to me to work with customers I know [in the private sector]. The disadvantage that I feel with public work is you’re involved in that relationship only for that period of time. There is a whole learning curve on how to learn to work with those people. We value our working relationships a lot and I don't feel like I get that a lot with public work. The only impediment to public work, you do need to be bonded. That can be difficult because some bonding companies can be [difficult].” [#32]

The female manager of a dump truck company said, "I get more money in [the] private [sector]." [#20]

The vice president of a non-Hispanic white female-owned underground construction company said, "You're dealing with a lot less people with private work, less hoops to jump through." [#36]

The Black American female owner of a DBE- and EDGE-certified architecture and engineering firm said, "Agencies that pay slow hurt small businesses. In the private sector, I have more control over payment because I have the product. In the public sector, you have no control." [#3]

The male owner of a landscape company said, “Our ability to perform different types and size contracts is reflected in the amount of paper work required. There is too much paperwork [in the public sector]. Good contractors are busy. Just tell me what you want and let me bid on it and bid fair.” When asked if the company works in the public or private sector, he responded, "We work in both. Our work was 80 percent public sector years ago but it was only 20 percent of our revenue. Our work now is 90 percent private sector. We have a good niche with geotechnical engineers.”

He went on to say, “You need a large line of credit in the public sector because there may be retainage and payment may be a lot slower than in the private sector. The profit is not that great on public works and the investment of time and money to bid is not worth it. In the private sector, they appreciate our work and they tell us. Engineers we work with pretty much vouch for the quality of our work. They know if we are on the job it will be done right, and we get paid on time.” [#47]

Some interviewees said that current market conditions are such that there are more bidders on government contracts and that competitors sometimes submit low-ball bids on public sector work. Examples of such comments include the following:

The Middle Eastern co-owner of an EDGE-certified engineering firm described current economic conditions for the company's industry as highly competitive and the industry as “corrupt.” In his opinion, owners and developers only want to save money. He described market conditions in which he says competitors ‘rubber stamp’ existing plans. “Surveyors,” he said, “are doing this a lot...copying or rubber stamping plans and/or low balling estimates.” He said this has happened to his firm. [#2]
The female owner of a DBE- and EDGE-certified steel erection company that does business with ODOT and the Commission said, “When we started, [pricing] was a challenge. Our two biggest competitors have a lot of money behind them. They have been in business for a long time, so they could afford to bid low in order to get work and try to get us out of the business or keep us from getting into the business. Margins went negative. That was really, really hard and money was a big issue. So we had to do that too [low ball] just to get work. We lost money the first couple of years. It was almost a strategy. We had to get the work so that people would know that we could perform and we could start building relationships. It took some time. Now, we do not need to take work if we are not going to make money.” [#7]

Other interviewees preferred obtaining public sector contracts because they were more certain that they would be paid. Certainty of payment on public sector projects was a frequent comment among those business owners and managers. Examples of those comments include the following:

- The Black American male owner of a construction company said he prefers the public sector because “[t]he federal government pays its bills. Being a certified minority working for the federal government, you are paid faster. That minimizes the need for financing.” According to this owner, the company is paid within 15 to 30 days in the public sector. He said, “Privately it takes longer to be paid.” [#4]

- When discussing the ease of obtaining work, the district manager of a majority-owned drilling company said, “ODOT work is relatively difficult to get. But you're going back to people who like to know they're going to get paid quickly and there’s going to be very few arguments. The private sector is not like that. I mean, the pay is a lot slower and there's a lot more disagreement. There are some customers in the private sector where payment is now net 60 to the general contractor. So it takes me another 30 days to get mine. So 90 days. ODOT pays monthly and they're paying off a set unit price, so I usually get mine [in] five/ six weeks. That helps.” [#44]

- According to the non-Hispanic white female owner of a DBE-certified electrical engineering firm, one of the major differences between public sector work and private sector work is time and material work. She said that on construction projects “you’re kicked around and paid slowly.” The bulk of the firm's work (85-90%) is performed as a subcontractor in the public sector. She said, “Public sector work is a more level playing field. Private sector work is relationship based and engineers, like me, aren’t always really good at doing that.” [#1]

Some interviewees said that they preferred public sector work because it is more profitable. For example:

- The male project manager of a SBE-certified concrete company was asked if the company prefers working in the public sector. He said, “It depends on the project and the people. On some of the private work, it's who we're working with than who we're working for. When the GC checks out the owner it makes it easier. When we're working for ODOT, it makes it simpler. We know the money is there.” [#45]
Some firms reported that they primarily conduct private sector work and have attempted to obtain public sector contracts, but without success. For example:

- The Black American female owner of a DBE- and EDGE certified architecture and engineering firm said, “The relationships in the public sector or lack thereof make the experience different from the private sector where we have established relationships.” As an example, she recounted an experience with a public agency that facilitated a meeting with a prime. She said, “I felt the prime had limited experience working with minority- and woman-owned businesses. They questioned whether we knew what we were doing. Even though the public agency brought the prime and my firm together the relationship went sour.”

Furthermore, when asked if there are disadvantages or barriers for minority- or woman-owned businesses in particular in pursuing private sector work, she responded, “There are disadvantages for minority- or woman-owned businesses in the private sector. No one is investigating,” she said. “You don't have to hire a minority or woman owned business.” [#3]

Some interviewees with experience in both the private and public sectors identified advantages and disadvantages of private sector and public sector work. Examples of those comments include the following:

- The Black American male owner of a technology firm said he has marketed the firm to major corporations in his immediate geographic area. He expressed disappointment with corporations that express a commitment to use minority businesses. “It was a waste of time,” he said. [#54]

- The manager of a majority-owned transportation consulting firm said he does not see disadvantages or barriers for minority- or woman-owned firms in pursuing private or public sector work. He had worked for a minority owned business once and from that experience believes that minority owned businesses may have been subjected to discrimination and barriers a long time ago but he does not believe that environment still exist. He said he has seen “favoritism” shown toward minority- and woman-owned businesses in the City of Columbus. [#9]

- The co-owner of a non-Hispanic white male-owned electrical contracting firm explained that the number one issue “is getting paid” since going mainly from prime contract work in the public sector to subcontract work in the private sector, He said, “We're chasing money all the time.” [#34]

- The non-Hispanic white male manager of a majority-owned engineering firm was asked if they experience any potential barriers to doing business in the Ohio marketplace. He responded, “Maybe. Recently, unless you have a project with ODOT it’s hard to build a relationship. For a younger engineer it’s harder. Everything is done by email. You don’t have a face to face meeting. And if you don’t have a relationship with the client it’s hard to build relationships with the project manager.” He added that, “We have a business development department so we have those relationships and we represent over 50
communities so we have a feel for what’s coming up. But for small firms starting out, it might be an issue.” [#10]

- When asked if there are any differences between doing business with ODOT and the Commission, the district manager of a drilling company responded, “Yes. It depends on the district you’re in. ODOT has districts that are easier to work with than others. But the overall experience is I’d rather work for ODOT than the Turnpike because it seems I have fewer disagreements working for ODOT. At the Turnpike, the people they’ve hired to run their work for them take harder stances than the ODOT people do. There are three different layers to get through to prove your argument. That takes time. And a lot of times the effort’s not worth what you’re asking for. ODOT is more direct. It’s usually their project engineer that’s on the job, you can talk to him. And then if there’s an issue, you can go to his boss and have a conversation. If he says no, you’re done. If he says let’s talk about it, we’ll talk about it. I never got that far with the Turnpike. I could never get past the construction manager. Just seems easier to do business with ODOT than the Turnpike.” [#44]

C. Doing Business as a Prime Contractor or as a Subcontractor

Business owners and managers discussed:

- Mix of prime contract and subcontract work (page 19);
- Prime contractors’ decisions to subcontract work (page 21);
- Subcontractors’ preferences to do business with certain prime contractors and avoid others (page 24); and
- Subcontractors' methods for obtaining work from prime contractors (page 26);

**Mix of prime contract and subcontract work.** Many firms that the study team interviewed reported that they work as both prime contractors and as subcontractors.

- The study team interviewed many firms that primarily work as subcontractors but on occasion also work as prime contractors. [For example, #1, #2, #7, #22, #56]

- Other firms reported that they usually work as prime contractors but will also serve as subcontractors. [For example, #4, #5, #36, #42]

- Some firms reported that they primarily work as prime contractors or as subcontractors. [For example, #3, #9, #10, #47, #54]

**Some firms reported that they primarily work as subcontractors because doing so fits the types of work that they typically perform.** For example:

- The non-Hispanic white male owner of hauling firm said that he works primarily as a subcontractor. He reported that his firm finds subcontract opportunities from websites and from established business contacts. He said, “There are a couple companies [we] work for pretty regularly.” [#33]
The non-Hispanic white male owner of a surveying firm stated he always bids as a subcontractor on public sector projects, never as a prime contractor. He said, “We are a single disciplinary firm and most of ODOT’s needs are not led by a surveying only entity.” [#13]

The non-Hispanic white male owner of a freight services firm that performs work as a subcontractor in the public and private sectors said, “[Within the Private sector] we are leveraging our ability to price work competitively and make a higher profit. Whereas, in the public sector, it’s steady work but it does have a cap on it. So it’s a good combination between the two. The public sector tends to be longer [contracts] and go on for a longer time. Whereas our private sector work gets done quickly.” [#14]

Some business owners and managers said that they mostly work as subcontractors because they cannot bid on the size and scope of the entire project, or find it difficult to compete with larger firms for those prime contracts. Example of comments included:

When asked about the challenges small businesses have when trying to find prime contracting work, a non-Hispanic white male owner of a franchised landscaping company said that the size of the business is a challenge. He explained that prime contracts “are usually larger contracts. So having the employee[s] and equipment to service them is probably the bigger barrier. I would say that’s probably the largest [concern] is having the manpower to complete the work.” [#25]

A few firm owners said that barriers to bidding as a prime contractor was why their firms primarily performed as subcontractors. For example:

The non-Hispanic white female owner of a DBE-certified electrical engineering firm said that she bids on ODOT work primarily as a subcontractor and that she has not done any business with the Commission. When asked why she has not done any business with the Commission she explained that mobilization is a factor and that the Commission work was basically out of her market area. Additionally, she would have fewer workers to service existing work in her market. [#1]

Some business owners and managers said that they mostly work as prime contractors and prefer to do so. Examples of those comments include the following:

The Black American male owner of a construction company reported that the company bids primarily as a prime contractor and has performed as a prime on 90 percent of the contracts his company has completed. “I’ve had some subcontracts but I’m the prime 90 percent of the time,” which he said he prefers. [#4]

The vice president of a woman-owned underground construction firm said, “I like working as a prime more than a sub just because you have more control over how things go.” [#36]

The non-Hispanic white female co-owner of a non-certified construction company said the company now works mostly as a prime contractor, probably 90 percent of the time. She said, “[The company] mostly works as a prime because then [it] has more control.”
• The non-Hispanic white male general manager of a general contracting company reported, "[The company] works probably 90 percent as a prime and 10 percent as a sub. [It] probably did a lot more subcontracting earlier on in [its history]. As [it] gained experience and capital, [it did more and more work as a prime contractor]." [#33]

A few business owners said that their work is fairly evenly split between prime contracts and subcontracts. Comments about those experiences included the following:

• The male manager of a majority-owned transportation consulting firm said the company is prime 50 percent of the time on traffic studies and operates as a sub on signal design. "We have been the prime on a City of Columbus traffic study and we have been the sub-consultant on ODOT projects," he added. [#9]

Prime contractors’ decisions to subcontract work. The study team asked business owners whether and how they subcontract out work when they are the prime contractor.

Some prime contractors say that they usually perform all of the work or subcontract very little of a project. Examples of such comments included the following:

• The non-Hispanic white female representative of a majority-owned design and engineering firm said, "My experience in general as to how engineering works is that large firms have roadway, traffic, and bridge staff and services. They want to keep those things in-house. They do not do survey, environmental and geotechnical because they do not want the expense. That kind of field work has high overhead so they are more willing to give up a little of that." [#5]

• The non-Hispanic white female owner of a WBE and EDGE-certified guardrail and lighting firm said that majority of the work they do is as a subcontractor. Occasionally they do small projects as a prime contractor and do not use subcontractors. She said, "The [prime contract project] we did get with ODOT was all sign installation. We did it all ourselves. We typically do not bid on projects that have subparts...that need subs on [them]. We have not gotten big enough for that yet." [#15]

• A representative of a majority-owned firm specializing in asset protection said, "We very rarely contract out to anyone. We are a big enough company; we stay away from [subcontracting] if we can. I have never had to subcontract anything out for ODOT work. If we did we would probably use [name of a minority engineering firm], we have a relationship with them. They are in Columbus; they do some of the metallurgical testing, concrete testing, chemical testing, some GPR. Typically, we do not [subcontract]. If we cannot do it, typically, we just stay out of it." [#6]

• The non-Hispanic white male owner of a landscape company explained that he has had little to no requirements to use DBEs. He said, "It doesn't matter to me if a person is black, white, purple, green, male, or female. I care about whether they can do the work." The office manager echoed this theme. She said, "When people show up here looking for work, one of the things I ask is to see their hands. If they have smooth hands and no calluses then I know they do not have any experience." [#47]
Many interviewees from companies that use subcontractors indicated that they use the firms with which they have an existing relationship. Both majority-owned firms and minority- and woman-owned businesses that use subcontractors made such comments.

- The representative of a majority-owned design and engineering firm stated, "We hire sub-consultants that include minority- and woman-owned companies primarily in environmental, survey, geotechnical testing, geotechnical drilling, and Subsurface Utility Engineering (SUE)." When asked to describe how the company finds or identifies sub-consultants, she said, "We draw from previous knowledge, companies we know, firms we've worked with before. Companies contacted us and we grew relationships. The other big thing is identifying sub-consultants is strategic. Environmental is an example. If a sub-consultant is pre-qualified in all of the environmental [NAISC codes], it is going to make our submission much easier. The people who have all of the pre- qualifications and are DBE are few."

She went on to explain that "A lot of times we choose [minority and/or women businesses] we've worked with before. Many times we, and I believe, other firms go with the people we've worked with over and over again. The reason is that you may have to work with a firm nine months to five years. You want to make sure you are working with a firm that is almost an extension of your company. That is the main thing to getting a successful project done." [#5]

- The aggregate salesman of a majority-owned stone and ready-mix concrete supplier said that he has had good experiences working with minority- and woman-owned businesses. He stated, "Everyone that we deal with, everybody is rolling up the same river, and they understand what it takes to get the job done, and if we ask more of them they're usually willing to give more, and they understand that if we don't need as many trucks for that particular day, they have other things going on. There [are] a lot of jobs, a lot of work going on for everybody." [#28]

- The male manager of a majority-owned transportation consulting firm was asked if the firm subcontracts work to minority and/or woman-owned businesses and if so has the experience been positive or negative. He said, "We have and do subcontract with minority and woman-owned businesses that we know and have relationships with or that we meet at industry conferences." When asked what their experience with minority or women sub consultants has been, the interviewee said, "Our experience has been good. We have not had any issues because firms are prequalified." He added that the firm has not had any challenges finding DBE sub consultants. [#9]

- The district manager of a majority-owned drilling company was asked if the company does business with minority- and woman-owned businesses and how the company identifies firms to use as subcontractors on its projects. He responded, "Well, we've got a couple around here that we work with regularly. It doesn't really matter whether it's a project that requires it or not, we like them and get along well with them. And material-wise, we provide concrete and reinforcing steel, and there are several of those folks around. So it's not too hard to meet the goals."
He added that most of the work the company subcontracts out is concrete, reinforcing steel, and trucking. "Trucking" he said "is a big one and truckers are readily available about anywhere you go." [#44]

- The non-Hispanic white male manager of a majority-owned engineering firm explained, "We have relationships with half a dozen firms [certified minority- and woman-owned businesses] that we have worked with; we have a track record with them. A lot of it is based on the sub-consultants' past performance, comments from internal and or external clients, and whether they are on the [Cleveland, for example] list." [#10]

- The Black American male owner of a construction company said, "If the work is not in our NAICS code, like electrical, we would subcontract. As the general contractor, we probably sub out about 40 percent of the work. We work with a minority electrical firm and a woman-owned business for general construction remodeling." He said his experience working with small, minority- and woman-owned firms has been positive. [#4]

- The manager of a majority-owned transportation consulting firm said, "We have and do subcontract with minority and woman-owned businesses that we know and have relationships with or that we meet at industry conferences." [#9]

Some interviewees described similarities and differences between considering DBEs and considering other firms as subcontractors. An example of those comments is:

- The supervisor representing a majority-owned testing and inspections firm said "We have not subcontracted anything on the ODOT project. Some [minority and women subcontractors] find us. To tell you the truth, I have never looked for them. If I am looking [for a subcontractor], I run across them. It does not matter. If their timing is right, if their price is right, I do not turn it down when it's there. I never really had to think about it. I need to find someone who is qualified and I could care less [about race or gender] at that point." [#6]

Some business owners indicated that they based selection of subcontractors on low bid or on qualities that gave a team the best opportunity to win a contract. For example:

- The non-Hispanic white male manager of a majority-owned engineering firm recalled one instance in which a certified sub-consultant delivered CAD drawings that utilized a newer CAD design than the company interviewed has. He said, "That was not expected. It was a pleasant surprise. It made us look at what we were using." [#10]

- When asked how the company selects subcontractors, a representative of a majority-owned firm specializing in testing and inspections described 3 levels each representing different industry credentials. "We look for level 2s," he said. "Contractors should be level 2. We have training and testing criteria. They have to show someone that they have gone through a qualified work procedure and the documentation. Level 3s test them. We have in-house level 3s that test contractors regardless of race or gender. It looks bad on us if you cannot do the job." [#6]
Some owners and managers of minority- and woman-owned businesses, including DBE prime contractors, said they seek out other minority- and women-owned businesses or small businesses as subcontractors on their projects. For example:

- The Black American male owner of a DBE- and EDGE-certified construction company was asked if the company subcontracts work to small and or minority- and woman-owned firms. He said, “If the work is not in our NAISC code, like electrical, we would subcontract. As the general contractor, we probably sub out about 40 percent of the work. We work with a minority electrical firm and a woman-owned business for general construction remodeling.” He said his experience working with small, minority- and woman-owned firms has been positive. [#4]

- The Black American male owner of a DBE-, EDGE-, and SBA 8(a)-certified general contracting firm explained that he decides to subcontract work depending on the project, and that he prefers working with certain subcontractors. He said, “We do sub out work because we just don't do the painting and the entire tile, the drywall. We do have to sub out that type of work.” He added, “I get a chance to talk and mentor other companies too. I really like that. There are a lot of young companies, minority companies that always ask me what my experience is. I like doing that.” [#31]

Subcontractors’ preferences to do business with certain prime contractors and avoid others. Many owners and managers of firms that sometimes work as subcontractors indicated that they preferred to work with certain prime contractors.

An interviewee mentioned speed and reliability of payment as a reason to prefer certain prime contractors and avoid others. A non-Hispanic white female owner of a steel erection company was asked if her company has a preference to work with certain primes. She said, “I think the best way to answer that is I have a preference to not work with certain primes. If they do not pay and if they do not know how to run work, I have a preference not to work with them.” [#7]

Prime contractors said that they had good experiences working with minority- and woman-owned businesses, including DBEs. Examples of such comments include the following:

- The non-Hispanic white female representing a majority owned design and engineering firm was asked to describe the company's experiences, positive or negative, working with small businesses and minority- and woman-owned firms (whether or not they are certified). She said, “It's been good. When you are developing a team, you want each person on the team specializing in what they do. When a small business is a prime and cannot pay their sub that is one of the negatives. It does not happen every day but I have heard of it.” [#5]

- The aggregate salesman of a majority-owned stone and ready-mix concrete supplier said that he has had good experiences working with minority- and woman-owned businesses. He stated, “Everyone that we deal with, everybody is rolling up the same river, and they understand what it takes to get the job done, and if we ask more of them they're usually willing to give more. They understand that if we don't need as many trucks for that particular day, they have other things going on. There [are] a lot of jobs, a lot of work going on for everybody.” [#28]
When asked to describe how the company finds or identifies minority- or woman-owned subcontractors, the representative a majority-owned firm specializing in asset protection responded, “We have not subcontracted anything on the ODOT project. Some minority and women subcontractors find us. To tell you the truth, I have never looked for them. If I am looking for a subcontractor, I run across them. It does not matter. If their timing is right, if their price is right, I do not turn it down when it’s there. I never really had to think about it. I need to find someone who is qualified and I could care less about race or gender at that point.” [#6]

The manager of a majority-owned transportation consulting firm was asked if the firm subcontracts work to minority- and/or woman-owned businesses and if so has the experience been positive or negative. He said, “We have and do subcontract with minority- and woman-owned businesses that we know and have relationships with or that we meet at industry conferences.” When asked what their experience with minority or women sub consultants has been, he said, “Our experience has been good. We have not had any issues because firms are prequalified.” He also said that the firm has not had any challenges finding DBE sub consultants. [#9]

A business owner said she avoided a prime contractor that had treated her company unfairly. A female owner of a DBE-certified electrical engineering firm said that as a subcontractor she sees “a lot of dislike of the government mandate for the small business program.” She shared the following two incidents that she sees as examples of resentment toward the small business program. A general contractor failed to tell the ODOT inspector why she used plastic conduit instead of steel on a project. She said “The prime never told ODOT and I got a scathing review on that project as a result.” On the same project, the prime’s equipment operators would block her company’s access to areas on the project. She said “That was crazy overt. It just happens. You work through it. I never did anything more for [the prime contractor].” [#1]

Subcontractors’ methods for obtaining work from prime contractors. Interviewees who worked as subcontractors had varying methods of marketing to prime contractors.

Some business owners and managers rely on repeat customers and word-of-mouth to obtain work from prime contractors. Examples of those comments include:

- The Hispanic American male owner of a DBE- and EDGE-certified survey firms said, “We live in a very small community. Everyone knows us and we know them. Many of the people have been around for a long time.” He said many of the same companies use his firm as a subcontractor in both the public and private sectors. [#56]

- The Native American male owner of a professional services firm said they do not advertise the firm. He said, “Most of our work is word of mouth. I call on firms with whom we have not done business and sometimes we are included as a partner with a prime on an RFP.” [#8]

- The owner of a landscape company explained that the majority of the company’s work is in the private sector and there is no need to advertise. He said, “Most of our work is word of mouth. Work in the private sector is about relationships. The test for these
guys [customers] is not based on race or gender; it’s based on the quality of your work.” [#47]

- A non-Hispanic white male owner of a franchised landscaping company said that prior relationships and word of mouth are the primary ways to hear about public prime contracting work. He explained “The way that the two or three municipalities that we work with have been, we [needed to have a] relationship to get on a bid list. You [have] to be on the bid list to be invited [to bid].”

When asked how he was invited to be on the bid list, he said that he’ll receive notification by email or mail. He stated, “So we contacted them and said, ‘Hey, is there anything that’s open for bid?’ And they said, ‘Yeah we’ll put you on the bid list for this.’” [#25]

Some business owners said that they are routinely solicited for bids from prime contractors and do not need to pro-actively market to them. An example of those comments is the following:

- The aggregate salesman of a majority-owned stone and ready-mix concrete supplier said that working as a subcontractor helps to solidify relationships. He stated, “As long as you've maintained a cost-effective way for them to do business they're going to come back to you every time, and then there's jobs that aren't publicly known. They're a private project. You're the first one they call because you've taken care of them in the past, and it's nice to have that relationship where they're going to call you first.” [#28]

D. Keys to Business Success

The study team asked firm owners and managers about barriers to doing business and about keys to business success. Topics that interviewers discussed with business owners and managers included:

- Employees (page 27);
- Equipment (page 28);
- Access to materials (page 29);
- Financing (page 30); and
- Other factors (page 33).

Employees. Business owners and managers shared many comments about the importance of employees.

Some interviewees indicated that high-quality workers are a key to business success. Examples of such comments include the following:

- The non-Hispanic white male owner of an excavating firm said, “Employee loyalty through [the recession] was very important. We have a lot of folks here that have been here for 25 years. We have always tried to take care of them and their families and they stuck it out with us believing we would make it through.” [#32]
When asked about keys to business success, the female owner of a steel erection company said, “We have an open door policy here. It's actually in my employee packet. I don't care if it’s your first day on the job or you’ve been here forever or you’re a foreman. No one person is more important than another. Everybody is due respect no matter what their role. I am not more important than anybody else either. We speak that and we try to live it.” [#7]

The non-Hispanic white male owner of a hauling firm said that retaining good drivers is the key to success in his industry. [#33]

Some business owners and managers said that it was difficult to find and hire skilled employees. They attributed that difficulty to several factors:

- The non-Hispanic white male owner of an excavating firm said, "I think the other big challenge on the private side if you’re open shop, meaning if you’re non-union, access to employees has been a little tougher. The union, in theory, would [provide] if you called and asked for a backhaul operator, they should be able to provide you one. That may or may not be the case, but they have maybe a little better access to a few employees. Anymore that’s not a true statement. There’s just a shortage of help everywhere in the area of construction." [#32]

- The non-Hispanic male owner of a freight services firm said that there is a shortage of 70,000 drivers nationwide. He said that there is more work out there than what people can do. He said, "What you have is two different factors: people that are doing it right out there, doing a good job and setting a fair rate. And then you have people that are sitting around refusing to do work unless they get three or four times the scale." [#14]

- The non-Hispanic white male owner of a franchised landscaping company said that staffing is a challenge when starting a business. He explained, “So finding willing, capable, and seasonal employees is difficult. You know it's not only finding [them] but retaining [them] and [that they are] capable of performing the task.” [#25]

A few business owners reported no barriers related to getting qualified personnel. For example, the Black American female owner of an EDGE-certified waterproofing and painting company said that she currently employs four people and if she needs more laborers for a bigger project, she will outsource five or six laborers. [#53]

Many business owners commented on what they saw as a declining quality of workers. For example:

- The Black American male owner of a DBE-, and EDGE-certified construction firm said, "Small businesses have a hard time finding quality employees with the skills they need, especially if they are replacing employees that are 45 years or older." He thinks this is an industry wide problem. He added that it might be an issue for minority firms who are more comfortable with other minorities. Conversely, he said, "I have had employees who didn’t like working for me because of my race." [#4]
The Black American female owner of a DBE- and EDGE-certified architecture and engineering firm said, "You’re only as good as the people you hire. There is a shortage of the type of people with the technical skills our business needs but it is probably industry-wide. The recession wiped out surveyors 52 years old and above and small surveyors went out of business." [#3]

A few company owners and managers said that government screening requirements were a barrier when trying to obtain employees for certain public sector contracts. For example, the Black American male owner of a construction company said, "I have to employ people from the HUB Zone. Two thirds of the work force has to live in the HUB Zone. If an employee moves, I have to let him go. It is very complicated and forces me to discriminate because I cannot employ people who do not live in the HUB Zone." [#4]

Equipment. Some businesses, especially in construction, require a substantial amount of equipment to perform their work. Some own their equipment and some rent equipment.

Other interviewee said his firm owns all their equipment.

A non-Hispanic white male owner of an excavating firm said that the investment costs for his firm were high. He said, "If you lease or rent equipment, then you’re just making a monthly payment on that rental or lease, but we own [our equipment]. And we tend to own it for a long time. That’s just how I choose to do it." [#32]

However, some business owners reported that obtaining expensive equipment is a barrier. They reported that they did not have the cash to purchase the equipment outright and that financing can be a barrier. For example:

The Black American male owner of a MBE-certified landscaping firm said that the biggest disadvantage or challenge he faces as a small or disadvantaged business is not being able to obtain capital to buy the equipment he feels the firm needs. He said, "What we would like to do is set up a line of credit and be able to get trucks and stuff, tractors, and Bobcats. We had a chance that one time this guy was going out of business. He was cutting grass, and he was [going to] set us up real good, but we didn’t have the financing to get the equipment." He said that he believes the key to success in his industry is being able to get the financing to be able to grow. He added, "We don’t have the financing to get the type of equipment that we would like to get to go out and expand." [#21]

When asked to discuss how financing affects his ability to do business in Ohio, a West African male owner of a trucking company, explained that two years ago he wanted to get into the intermodal transport business. He said the lack of financing restricted his company. "The banks didn’t want to loan money. The chassis that cargo is placed on is privately owned. We didn’t own any chassis and we couldn’t touch the customer’s. Without financing, we couldn’t get into that business. Now we own our own chassis but you need loans and a line of credit." He said they did have some financing when he started the business. "We had small loans, from private investors. The interest rates were very high and on one of them we had to make payments daily," he said. [#46]
The public hearing participant said, "If the DBE company can at least get work, they'll at least have money to buy the equipment needed. I wonder does anyone at ODOT or in this room have any idea what [it] costs to use the software that ODOT uses? If you wanted to put four people to work on an ODOT project, we're talking about $5,000 per seat. Okay. So that's just for software alone. And while those costs are reimbursable, you're still talking about that's $20,000. Easy. So those costs are just very hard. And, also, that access to that training and software would be really greatly needed for some of the prime companies that design." [YTP#1]

The Black American male owner of a MBE-certified landscaping firm said that the biggest disadvantage or challenge he faces as a small or disadvantaged business is not being able to obtain capital to buy the equipment he feels the firm needs. [#21]

The Hispanic male co-owner of a survey company was asked if he has experienced any challenges or barriers as a small business. He responded that the cost to gear up for projects could be challenging. He said, “To get started on the pipeline project, for example, we changed banks because the bank we were with couldn't help us get started. We needed more equipment and personnel. There were a lot of costs incurred just in getting started. Our bank said no, so we went to another bank that was smaller and willing to help.” [#56]

Access to materials. As with other potential barriers, interviewees reported a range of experiences with access to materials.

Some business owners and managers said that their ability to obtain credit or having sufficient cash on hand were factors in accessing materials and supplies, especially if they were not receiving timely payment from customers or prime contractors. For example:

- The female owner of an EDGE-certified business said that she believes the recession has affected small business owners in the area of materials pricing. She believes that small businesses cannot purchase in bulk the way that bigger firms can and therefore, it affects their bids on contracts. She said, “We couldn't order [materials] per job anymore as much as we could [in the past], because our prices are just higher. That's what we found, why we don't get too many prime [contracts], because our competition is just bigger. And they just get better pricing than we do. And their costs are just lower on the front end.” [#15]

- The non-Hispanic white female owner of a DBE- and EDGE-certified steel erection company was asked if payment is the same or better in the private sector. She said, “It's always an issue. Our average receivables are probably over 90 days out. We have self-funded since 2013. I'm now trying to get some financing but it's been really difficult. It forces us to pay our suppliers late. They understand the nature of the business but it's not good on a Dun & Bradstreet report.” [#7]

In general, minority and female business owners did not report instances of racial or gender discrimination by suppliers. Anecdotal evidence of disadvantages for minority- and woman-owned business in obtaining materials and supplies in many cases related to the size, credit, and capitalization of those firms.
Financing. As with other issues, interviewees’ perceptions of financing as a barrier depended on their experiences. To some it was a barrier, and to others it was not.

Many firm owners and managers reported that obtaining financing was important in establishing and growing their businesses (including financing for working capital and for equipment), and surviving poor market conditions. For example:

- The Black American male owner of a DBE- and MBE-certified fence installation and supply company said that “a lot of us don't have the finance role, the banks aren’t loaning us any money. We don’t have any money. Ninety percent of the people going into the business, they have an idea and have a dream that one day they can do this or one day they can do that. When you don’t have the finances to do that, you have to accept where you [are] at and finances always play a role in what we do.” [#26]

- The project manager of a SBE-certified concrete company said, “It’s harder to get credit. Small businesses need help with lines of credit. The cost of money is higher and a lot harder to get. SBA’s programs are loans not lines of credit. They are not designed for contractors. There [are] fewer banks’ lending to contractors today. There used to be 30 banks around that did construction loans. There are probably four now.” [#45]

- The EDGE- and DBE-certified Hispanic American male co-owner of a survey company explained that the cost to gear up for projects could be challenging. He said, “To get started on the pipeline project, for example, we changed banks because the bank we were with couldn't help us get started. We needed more equipment and personnel. There were a lot of costs incurred just in getting started. Our bank said no, so we went to another bank that was smaller and willing to help.” [#56]

- When asked about how the firm keeps up on the cost and maintenance of the equipment, the non-Hispanic white female owner of an EDGE-certified guardrail and lighting firm said, “That was the hardest part with the money crunch, with the bank and stuff. The hardest part was being able to get the loans to be able to upgrade and keep the equipment going that we need to do our work. Bucket trucks, cranes, we have specialty equipment that we use to install the guardrail. And you know you can't just have one machine when it goes down.” [#15]

- The Black American male owner of a trucking company said it is very difficult to do business in the marketplace. The challenges he says are financing, personnel, the competition, the costs of doing business, and DOT regulations. He said, “There is a lot of competition. They are a lot bigger, better financed, and have newer equipment.” [#46]

Some firm owners and managers reported that obtaining financing was not a barrier, and some said that it was. Differences in answers were in part attributable to whether firms were construction, engineering, or services companies, and whether the businesses were well-established. For example:

- The Black American male owner of a DBE-, MBE- and EDGE-certified technology firm said, “Race does not impact your credit worthiness, as long as you are straight with creditors and keep them in the loop. We had to do that when we first started.” [#54]
The Black American female owner of a DBE- and EDGE-certified architecture and engineering firm said, "To be successful, small businesses must have access to credit. Banks do not even look at you if your sales are below $500K." [#3]

The Black American male owner of an EDGE-certified information technology (IT) company reported that access to capital is a barrier to executing larger IT contracts. He said, "As the size of the contract grows, [you have to] access lines of credit. It's pretty easy to do $1,500.00 contracts. But when the opportunity presents itself to do $500,000.00, $600,000.00, $700,000.00 contracts, [you are] looking at floating a quarter million dollars with a supplier. Access to working capital is certainly a challenge that we've had to overcome." [#42]

**One interviewee said obtaining financing was difficult when starting the companies, but that financing was no longer a barrier.** The Black American male owner of a DBE- and EDGE-certified technology firm said, "We had the challenge of raising capital. Initially I had to borrow from family and put my house up as collateral on a small loan." [#54]

**Many interviewees said that obtaining financing was a barrier for small companies.** For example:

- The non-Hispanic white male owner of an excavating firm said that capital has been tough for contractors since the recession. He said, "In the period from 2007 to 2011, 17 of my competitors went out of business, and about 13 of them were forced out of business by the banks not providing capital or lines of credit to them anymore. That's probably been one of the biggest challenges." [#32]

- When asked for suggestions about what ODOT and the Commission can do to help small businesses be more successful, a focus group participant said, "Access to capital, that's always critical. If they can create some type of micro loan, there are a lot of businesses that may not need huge, huge dollars to get going, but they may need small dollars, $5,000, $10,000, $20,000 contingent upon the scope of work that they do. The critical component is just how do they grow their business without capital?" [DBEFG#1]

- When the project manager of a SBE-certified concrete company was asked if the company experienced any disadvantages or barriers as a small business pursuing private sector or public sector work he said, "We need to have money available. And it hasn't been the last few years. The owners, investors in the [private sector] can't get loans the way they did before. Banks are now demanding that you show exactly what a project is going to cost. Then it takes 90 days for them to decide if they're going to finance. I don't know why the banks are not lending but money is not as available to finance private sector work." [#45]

- Another focus group participant representing a business assistance organization said, "Access to capital remains a huge, huge challenge and [there] has got to be some more creative financing models, first, not only out of the private sector, but from the public sector as well." [DBEFG#2]
The non-Hispanic white male owner of a franchised landscaping company said that financing is a barrier for small businesses. He explained, “The challenge is getting approved. There’s definitely a challenge in the education of how to apply for financing, where to go for financing. So I think there’s a certain amount of education that you need to go out and do that, really somebody to guide you towards that. And again qualifying is a challenge. Without prior tax returns it’s very difficult to get financing. I mean, we couldn't secure anything until our second year.” He said that financing was a major barrier in starting his business. [#25]

The non-Hispanic white female owner of a janitorial business said that an obstacle for small business owners is their ability to establish credit. She said that her inability to secure business loans makes it difficult to expand her business. She explained, “What is it that I can do...There's nothing. Okay, I pay my bills on time, my contracts are the same. It’s like what do I do to build credit reference? There's nothing there to build a credit reference. So then when I go to a bank and try to get a small business owner's loan, they’re like, ‘Okay, what do you have?’ They do a run check behind it, and they’re like, ‘Well, you don't have any credit references.’ No. And so you're turned down.” [#12]

Some business owners explained the connection between personal assets and the ability to obtain financing. For example:

When asked about any additional difficulties or barriers for small businesses, or minority- or woman-owned firms in particular in the 2007-2009 recession, the Middle Eastern co-owner of an EDGE-certified engineering firm, cited an inability to get financing. He said, “When you’re a small, disadvantaged business it’s tricky. I’m using my life savings to buy company trucks.” [#2]

Other factors. Beyond the factors identified above, many business owners brought up reasons for business success pertaining to overall management and reputation of the firm.

Many business owners specifically mentioned “reputation” and strong relationships with customers and other firms as factors for continued success. Examples included:

The Hispanic male co-owner of a DBE- and EDGE-certified survey firm explained that keys to success include “Diversity, which is the ability to do everything in our industry in surveying. That is how we differ. We are not afraid to take chances and try everything.” He added, “Certification has helped a great deal and we have a great team.” He explained that relationships are extremely important. As an example, he said, “My dad’s best friend used to be an engineer at one of the paving companies in town. We do all their work. We go to church together. A friend of one of my former partners worked there and we do all their work. It is a close-knit community so it is extremely helpful.” [#56]

The Native American male owner of a professional services firm said, ”Relationships are key. Our service is one of trust. Architects have to trust that we understand the project and can deliver.” He added, “It should have nothing to do with your gender or race but be based on the quality of your products and services. If you can provide quality
service, get contracts awarded and people get jobs out of it, what else is there? To me that's being competitive. That's really the nuts and bolts of it.” [#8]

- The non-Hispanic white male owner of a hauling firm reported that a good reputation is important in the hauling industry. He said, “I think we got [a recent] sand and gravel hauling job because of [my firm's] good reputation. My guys show up every day, and [the prime contractor] is happy with them.” [#33]

- The non-Hispanic white female owner of a sewer maintenance firm said that her firm has established good working relationships with other contractors that they work with on ODOT projects. She said, “As a result, I know what they're expecting of me. We're such a niche business, so that it's pretty easy.” She went on to say, “It's not like I'm putting in 500 miles of roadway or anything like that, or bridges or doing any design work. That's just not a part of what we do, but I think the key though is relationships with your contractor and effective communication.” [#22]

- The Black American owner of a construction company said he believes the keys to business success in his industry are "[c]ommunication, quality of work and integrity.” With regard to relationships and employees, he said "Be forthwith and don’t hide anything. Be clear about what you want done, and when you want it done. With employees same thing. I ask employees to repeat what I have asked them to do.” [#4]

- The non-Hispanic white female owner of a steel erection company said, “The first thing is ethics. You do the right thing even if it hurts. The second thing would be continuous education. Formal or informal, it does not matter, just continuous education. The third thing would be to equip your whole team to develop leaders.” [#7]

- A non-Hispanic white male owner of an excavating firm said that the key to his firm’s success working his industry has been strong working relationships. He said, “I think the relationships are built on knowledge, they’re built on trust. I guess fair and equitable dealings over the years. In the private sector that matters, not as much as I’d like it to matter, but way more than it does in public sector.” [#32]

- The female owner of a DBE-certified electrical engineering firm said that keys to success in her business are “technical competence, understanding the contracting procedures, knowing where to get information to bid the contracts, and how to be compliant with those contracts throughout execution.” She added that the other big thing is “schedule, schedule, and schedule.” She stated that to be successful as a subcontractor, “You have to have a track record.” [#1]

- The Black American male owner of a DBE-, EDGE-, and SBA 8(a)-certified general contracting firm said, “Integrity means a lot to me. The teamwork is very important to us. How we treat people is very important to us. Also, I understand that there are companies that have been where I had been when I first started.” [#31]

- Other keys to success according to the owner of a landscape company are hard work and relationships. He said, “We've built a community of people [clients and employees] we know will get the job done right.” [#47]
Related factors — discipline and perseverance — were also mentioned by firm owners as keys to success. Examples of those comments include:

- The Black American male owner of a fence installation and supply company said that a key to business success is “Knowing your customer, knowing your product, knowing yourself, knowing your installer.” He also stated, “You’re only as good as you talk... You can’t be a fly by day, fly by night company. It takes a lot of hard work and determination. It’s not the smartest person in the industry or the wealthiest person in the industry. It’s the person that has determination to persevere. And that’s what makes a difference.” [#26]

- The vice president of a woman-owned underground construction firm said, “Making sure you did the jobs right and don’t pick up work just for the sake of getting work” are keys to success. He said, “You’ve got to make sure you have the proper amount of money in there, that’s key because we’ve been on the wrong end of that a few times and it’s really bad. The main thing is just stick into doing what you know how to do and making sure you did it right. [#36]

- The Black American male owner of a DBE-certified general construction management firm said that he believes that anyone who wants to own a business must work hard, regardless of background. He elaborated, “You make sacrifices every day, and I believe in [diversity] regarding males and females. But I also believe in sacrifice because I know the sacrifices I made to start a business; and it’s tough; and you pay your employees, you don’t pay yourself. So you [need] that mental discipline to say ‘Here’s what we’re going to do.’” He claimed that his success can be attributed to four basic principles: “one, remember the sacrifice; two, is the discipline; three, is the vision; and four, [the] most critical, is the goal.” [#30]

E. Potential Barriers to Doing Business with Public Agencies

The study team asked interviewees about potential barriers to doing work for public agencies, including ODOT and the Commission. Topics included:

- Learning about work and marketing (page 35);
- Bonding requirements and obtaining bonds (page 38);
- Insurance requirements and obtaining insurance (page 40);
- Prevailing wage requirements (page 41);
- Prequalification requirements (page 43);
- Licenses and permits (page 45);
- Other unnecessarily restrictive contract specifications (page 46);
- Bidding processes (page 47);
- Non-price factors public agencies or others use to make contract awards (page 49);
- Timely payment by the customer or prime (page 50);
- Taxes (page 56); and
- Experience with ODOT and the Commission processes (page 56).

Learning about work and marketing. Interviewees discussed opportunities for firm owners and managers to identify public sector work and other contract opportunities, and to market themselves in the in-depth anecdotal interviews.

Many business owners and managers reported that it is easy to market in general and, specifically, to learn about public sector work. Examples of those comments included the following:

- The Hispanic male owner of a DBE- and EDGE-certified survey firm found it “easier” to learn about ODOT work opportunities. He said, “We use the Builders Exchange. ODOT is nice because we know all their work is bid on a certain day. I have one person who does nothing but bid on projects. We like to bid everything. I think ODOT’s process is terrific.” [#56]

- A focus group participant representing an environmental consulting services firm explained that ODOT had a specific area of their website that lists upcoming projects. According to the interviewee, sometimes that website includes the contract opportunities of other local agencies. The interviewee uses the website to identify subcontracting opportunities. The interviewee had not pursued the Commission contracts, but suggested going to their website to see if the Commission had a list of opportunities. [PSFG#1]

- The Black American male owner of a DBE-, MBE- and EDGE-certified information technology was asked if it was easier or harder to find out about the Commission and ODOT opportunities relative to other public sector agencies. He said that it is generally easier in the public sector to learn about opportunities regardless of the agency. He explained, “It is easier in the public sector because they have goals that are broken down into categories. They have to hit their numbers by not throwing the entire spend into one area. In comparison, the private sector is a joke. I stopped attending their events because we got nowhere. The private corporations fall back on traditional services where minorities are found, like janitorial.” [#54]

- The non-Hispanic white female owner of a DBE- and EDGE-certified steel erection company said it is easier to learn about public sector work than it is in the private sector “because all public work is publicly advertised. With the Builder’s Exchange, they advertise all public work. The Commission sends notices of jobs coming up. I think we may have gotten a few things from ODOT.” [#7]

- The non-Hispanic white male owner of an excavating firm said that subcontracting work mostly comes to him from relationships he has with contractors. He said, "We did
Some small business owners said that it was more difficult for smaller firms to market and identify contract opportunities. Examples of comments included the following:

- The focus group participant said, “I haven’t received any information on any [contracting] opportunities [from ODOT or the Commission].” He said, “I don’t know if they publicly [advertise those opportunities or] if they reach out. I’ve been in the company for 10 years and I don’t know... if this is relationship driven and that they keep [contracting opportunities] within their current providers and [if] they keep[those opportunities] close to the vest, or if they are actively looking for companies that currently work with the state. I think it’s a little bit better for us to actively pursue them and for them to actively pursue other qualified companies.” [GSFG#1]

- The Black American female owner of a DBE- and EDGE-certified architecture and engineering firm said, “The real reason I decided to own a surveying company was to do ODOT work and I have not done any. I still aspire to do work with ODOT but there are two points to that -- the design side and the construction side. On the construction side, we are not equipped to be all over the state; you have to have crews in place and projects to keep the crews going. We do not have the equipment or human resources to do that. On the design side, you call and ask to team with an engineering team, and for the most part I have relationships with the same firms that do ODOT, as well as state and local work, but I don’t keep up with the programmatics like I do with... so I don’t ask those guys about ODOT work. My hands are full with work. In order to do ODOT work, I would have to hire another person to drive that initiative. I just do not have the time or money to do that.” [#3]

- A hearing participant explained, “We marketed our business. We talked to ODOT for two years [about an upcoming opportunity]. Sat down with the folks that were going to have the bid. And we kept following up. The bid came out. Well, the last call they said,
well, the bid has been out on the street for like a month maybe. We didn't see it. We didn't get it. I don't know if you're aware but an ODOT bid can go through the State of Ohio or it can be sent out by ODOT. Well, we didn't know that either. That bid went out through the State of Ohio and we were looking at ODOT.

The hearing participant added that the bid would have been in competition with majority companies and that "trying to nail down the bid and chase the bid [was difficult]. We're small. We don't have the resources. I would have had to have somebody allocated sitting at a desk doing nothing but hunting for that particular bid. If I waited on the business and waited on business to come from those avenues, we would be out of business. So the cost associated with even bidding against majority companies and trying to nail it down has been at a disadvantage for us... The only way a minority business is going to get business from the State of Ohio, ODOT, [or] Ohio Turnpike Commission, is if they [have a DBE allocation] and specify dollars.” [CLP#4]

- A focus group participant said, "We're a distributor and from my perspective, as far as growing and dealing with those entities [ODOT and the Commission], [the challenge is that], a lot of these prime contractors and companies have already linked up with previous MBEs or DBEs and it's really challenging to break into it when they have developed a long-term relationship and it's been working for them. That they've already used the same ones time after time versus marketing it out and trying to develop new relationships."

He went on to say, "Even if they did, what we end up doing is MBEs and DBEs are feeding off of each other and minimizing any margins for us to grow just to get the business. That, I see, is one of the challenges... that they already have somebody in place. A lot of times you're just talking just to talk and they're really going to keep with the person that they have, which is if it was me I would be happy.” [GSFG#2]

- When asked if the company has experienced any disadvantages or barriers as a small business pursuing public sector work, the manager of a majority-owned transportation consulting firm said, "Yes. As a small business we compete with large companies and DBEs. Getting work is difficult because our track record and relationships are not as extensive as large companies. I have tried meeting with project managers to get to know them so they in turn know our company. I have asked them for feedback and what I can do to increase our business. The response has been general. Things like keep doing what you're doing."

He explained that, "It is more difficult for majority small firms" to learn about ODOT or the Commission work opportunities relative to other public sector work. The company has had difficulty getting work as a prime with ODOT because they are relatively small and have a limited track record. He added, "If there is an EDGE or DBE requirement, primes have to meet the goals. Our firm is not EDGE or DBE certified so that makes getting work harder." [#9]

- When asked if the firm has attempted to pursue work with either ODOT or the Commission, the Black American male owner of a construction company said he has considered calling on ODOT but because his is a small company "It can be scary...more
travel...more supervisors.” He added that, “The Turnpike Commission is a lot of travel. Even though I go to [state] and [state], when you get into big projects, you are probably going to be a subcontractor so you are at their beck and call and you are traveling... I have more control doing what I do. Mobilization, travel and being a subcontractor is not what I want.” [#4]

**Bonding requirements and obtaining bonds.** Public agencies in Ohio typically require firms working as prime contractors to provide bid, payment, and performance bonds on public construction contracts.

A few business owners reported little or no problem obtaining bonds, or that bonding was not an issue. For example:

- The Black American owner of a DBE-, EDGE-, and SBA 8(a)-certified general contracting firm explained that, “[t]he concrete work that we do are $240 million contracts, $250 million contracts, so we don't even have bonding as a general contractor on the concrete work. You have companies from Japan and Germany that partner up with companies that are already over here, because the bonding is so high. Of course we can’t bond $250,000. That's why we do our concrete work. Then the general contracting work we do, depending on what it is, we can bond that.” [#31]

- The non-Hispanic white male owner of a franchised landscaping company said that bonding or insurance requirements are not an issue for him. He explained “There [are] a lot of providers out there. Now what you pay for it might be different but I don’t think that should be a challenge.” [#25]

However, many business owners, managers and focus group participants indicated that bonding requirements had adversely affected growth and opportunities to bid on public contracts. For example:

- A focus group participant representing a business assistance organization explained, “What we found is that construction companies are having issues of bonding to compete; they’re having issues getting access to capital.” He asked, “[I]s there an opportunity for bonding? There’s something about mobilization money and the mobilization clause as far as financing to get these tools and [bonding].” [DBEFG#1]

- The male vice president of a woman-owned underground construction firm said, “Bonding is always a barrier. We can only bid certain size jobs based on how much bonding capacity we're able to get and that fluctuates with depending on how you're used here.” He went on to say, “If you want bonding, they want to see a good balance sheet. If you’re losing money or your finances are out of whack, you're not going to get any bonding.” When asked whether the size and length of contracts ever been a barrier for the company, he responded, “Yeah. There’s jobs that we would love to do but they're out of our bonding capacity, so we wouldn't be able to bid them.” [#36]

- The Black American male owner of a DBE-, EDGE-, and SBA 8(a)-certified general contracting firm said, “I had some bonding issues when I first started. That was my biggest issue when we first started.” He added, “I have to manage bonding. That’s a big
issue in the industry, period. Sometimes we have to say we can’t do this job because we don’t have enough bonding, or that our bonding is tied up; we want to wait because we can get a much better profit off of this job than this job. It’s a juggling act with bonding.” [#31]

- The non-Hispanic white male owner of a fence and guardrail firm said that he would appreciate bonding assistance. He said, “Bonding is a really complicated thing. I don’t even understand it, but my insurance man does.” He went on to give an example when he had a hard time with bonding. He said, “[The contract] had to be bonded a certain way, and I was a week getting that straightened out, because I didn’t understand it.” [#27]

- The Black American owner of a DBE- and EDGE-certified construction company said that difficulties or barriers he experienced when he started the business included bonding, financing and insurance. He believes those difficulties were because of the economy. He said, “Many companies were failing, so you had to sign your life away to get bonding and insurance. You are new; you have no track-record, so you bond yourself.” [#4]

- A focus group participant representing a non-Hispanic white female owned a construction company said, “I would say one of the biggest challenges for me as a small business; the heavy highway industry requires a lot of things that other industries don’t require, in order to compete. Some of those things are not getting bonding, the insurance requirements, getting credit lines from your bank, and just trying to balance all of that, along with all the requirements that we have to fulfill for being prequalified with ODOT, balancing that with just running your business every day is very challenging.” [CFG#3]

- In reference to the Commission, the male owner of a MBE- and DBE-certified construction firm wrote, “Have you considered waiving the bond requirements for projects below $150K and prompt pay?” [WT#4]

- When asked whether the size or length of contracts was a barrier for his company, the Black American male owner of a general construction firm responded, “Well the only problem with those is that we’re qualified to do them but we can’t financially handle them, that’s why they [public agencies] won’t let us have them. We can’t get the bonding. We can’t get the capital, the operating capital to work the job.” [#38]

- The Black American female owner of an EDGE-certified waterproofing and painting company said that bonding has been a challenge in securing contracts. She explained, “A lot of contracts require the bond, and if your company doesn’t have that credit established, you’re not [going to] be able to get that bond to even bid on a job.” She said that it is difficult for small companies to enter the market because of the financial aspect. She explained, “unless you have excellent credit, you will not get a bond anywhere. So the only other option is to have a large sum of cash on the side. And who can do that paying the overhead? Who can do that? Only a larger company. There’s no room for us. It’s no room for smaller companies to even break in.” [#53]
Insurance requirements and obtaining insurance. The study team asked business owners and managers whether insurance requirements and obtaining insurance presented barriers to business success.

One interviewee identified serious problems for subcontractors in obtaining insurance for public projects. A female manager of a dump truck company said that the insurance requirements for the business prevents them from being able to hire anyone younger than 25. She explained, “Guys that come right out of driving training school, say they’re 20, 21 years old, well, my insurance company will not let me hire them because they have no experience. I feel those are probably the better ones for me to hire versus someone that’s been out there on the road. I can train that kid that just come out of training school to learn how to drive a dump truck.” [#20]

Some interviewees indicated that the cost of obtaining insurance was so high as to affect the contracts that they pursued. For example:

- The vice president of a woman-owned underground construction firm said, “In our line of work, if you don’t have the proper insurance, you won’t even be alive to have the work. Insurance is important, it’s expensive but you can’t do the work without it.” [#36]

- When asked if insurance requirements can be a barrier for small businesses, the non-Hispanic white male owner of a surveying firm said it can be a barrier because it takes capital to secure those insurance requirements. [#13]

- The non-Hispanic white male owner of a small hauling firm, reported that the cost of insurance is prohibitive. He said, “Insurance is high. [The insurance industry] is getting so strict.” [#33]

- When asked about insurance requirements for her business, the owner of a janitorial business said that she has to carry $2 million in insurance. She explained, “They force you...You can’t even do a store if you don’t carry $2 million insurance.”

She went on to say that, “one of my biggest hurdles is the fact that I don’t offer [health] insurance. I was actually with Aflac and I just cancelled with them because I had [too few employees sign up].” She also explained that a barrier to having a small business is the cost of carrying workers’ compensation insurance. She explained that workers’ compensation insurance rates are “not low. And I’ve had numerous claims...A few years back, there were periods where my six-month premium was over $3,000.” [#12]

Prevailing wage requirements. Contractors discussed prevailing wage requirements that government agencies place on certain public contracts.

Some business owners and managers said that prevailing wage requirements present a barrier to working on public contracts. For example:

- The female owner of an EDGE-certified guardrail and lighting firm said, "We've been lucky that we haven't seen issues with [prevailing wage requirements], but we know companies that have...I know [company name] had issues with [prevailing wage
requirements]. So I know that that can be a problem for some of the smaller companies.” [#15]

- The business development manager at a DBE-certified Subcontinent Asian materials testing firm said that an issue they encounter when large contractors are trying to meet an 8 or 10 percent DBE goal is that many of them have prevailing wage signatory agreements. He said, “Many of our DBE companies are not [prevailing wage]. So how do we get to do the important work, or are we just going to do the seeding and cleaning on-site, and some of the trucking?” He expressed indignation that a $400 million bridge project was under way in his predominately African-American community. The project had a requirement for prevailing wage agreements. He said that the project would eliminate access to downtown for two years and that the agency “wants to include us [DBEs]. But if we aren’t in the union, what’s in it for us, really?” [#40]

- The owner of an excavating firm said that his experience working in the public sector has been that 99 percent of the work is under the wage restrictions (prevailing wage). He said, “A lot of guys don’t want to work under union rules. The guys that work on prevailing wage work; sometimes they work for 6 months and then might not have a job.”

  He went on to say, “The only [other]comment I would have to say on prevailing wage is, if you truly want a prevailing wage, you would blend the private-sector rates with the union-sector rates, and that does not happen. When you go to the state website and looked up the prevailing wage rates, it takes you directly to the union scale. Prevailing wage in Ohio means union rate. So that’s really not a prevailing wage. They should just call it union scale.” [#32]

Some interviewees explained other barriers concerning union requirements, and other negative experiences. Examples of those comments include:

- The non-Hispanic white female owner of a DBE-certified electrical engineering firm explained that, “It would be very difficult to work in the highway industry in Ohio without union affiliation. Ohio highway work is very strongly union controlled. The Ohio Contractors Association negotiates those contracts and gives laborers electrical work on highway projects. Without a union affiliation you would get turned down on jobs more often than not.”

  She said, “If I had not been female owned I would have been off every one of those contracts. That was the only incentive for the general contractors to hold onto my contract.” She said she has had a good relationship with the union. She joined the electrical union right away and operating engineers a couple of years later. She joined the Laborers Union in 2014. She said that joining the Laborers Union took “an act of God. The district president shut out electrical workers since electrical are not signatory.” She added that barriers for small businesses “include the fact that unions require fringe bonds which are harder to get than construction bonds because there’s greater liability.” [#1]
A member of the Ohio Contractors Association wrote, “An example of understanding the construction industry environment in Ohio is unionization. Is there an understanding that at least 90 percent of ODOT’s contracted construction work is performed by union firms? That is the make-up of the heavy/highway industry in Ohio. Contained in those union agreements is a requirement that only union subcontractors can be engaged by those union firms. How many of the firms that spoke on June 3rd are unionized companies? Until they become unionized, the prime contractors in Ohio, the vast majority of which are unionized, cannot utilize those firms. In my opinion, this is the single greatest obstacle to DBE firms working in a successful subcontractor relationship with the majority of firms in Ohio.” [WT#12]

The Black American female owner of a heavy highway construction company said, “Sometimes the union is a detriment. The days where people show up and expect to get paid for doing nothing are over. The benefit of the union, at the end of the day, is over. Paying prevailing wage is good. I think everybody should [be] paid a good wage. However, when we go to compete in the private sector we cannot compete because we are union.” [#49]

The Black American male owner of a MBE-certified landscaping firm said that the issues his firm has run into with union or union workers is having the capital to pay the unions “all the fringes.” He believes that is a challenge not only to minority- or woman-owned business but to all businesses. [#21]

**Prequalification requirements.** Public agencies, including ODOT and the Commission, sometimes require construction and/or engineering contractors to prequalify in order to bid or propose on government contracts.

**Some business owners and managers said that prequalification requirements presented a barrier to bidding on work.** [For example, #8, #49, CFG#3] Examples of those comments include the following:

The focus group participant representing a majority-owned construction company said, “A question we ask ODOT quite often and never get an honest answer, is if you have a 2 billion dollar a year program, and your goal overall is to have 10 percent DBE participation, doing that simple math, do you have enough pre-qualified, already certified DBE contractors to fulfill that requirement? My personal opinion is, they don’t. I don’t know the answer to that, but my opinion is they do not, just looking at their list. Therein lies the big problem, that’s why everybody has a challenge meeting the ODOT DBE requirements on everything.” [CFG #6]

The Black American male owner of a construction company said, “Security protocols sometimes chase small businesses away. Because you have to be vetted by the federal government for some small businesses that could be a challenge. It means you cannot work on federal jobs if you have a minor offense.” [#4]

The non-Hispanic white male owner of a franchised landscaping company said that to be added to the bid list, an extensive application is prepared. He explained, “The application for the [city name], that city application is pretty in depth. They asked for all
of your equipment assets, what you have, you know everything that you could imagine as far as making sure that you’re a legal business...insurance, how much you can get bonded for, number of employees, you know past experience obviously has always been [important because if you are] in a situation with no experience, with any of the cities or municipalities or state, that hurts your chances.” [#25]

When asked about issues with prequalification, he explained, “So they prequalify subcontractors for their prime contractors. So in order for one of their primes to use a subcontractor, that sub has to be prequalified by the city.” He finds this challenging for small businesses because of the extensive application process needed to be listed on the bid list. [#25]

■ A public hearing participant said that prequalification is a challenge for small businesses. The participant stated, “There’s no federal regulation that says that ODOT has to have prequalifications. That’s a State of Ohio ODOT requirement. How can you build a bridge if the requirement says you have to already build five bridges before you can bid on a bridge? There’s no federal requirement that says that. That’s ODOT saying that. I’ve been a bridge painter. I painted bridges for three years out on the expressways... I’ve been an asphalt paver. Right now my business is underground utilities, storm sewers, sanitary, water, mass excavation of dirt... But this prequalification thing will not allow many of you to become a prime contractor, as it impeded me for a while, to become a prime.” [CLP#7]

■ When asked if prequalification requirements can be a barrier, the non-Hispanic white female owner of a DBE-certified electrical engineering firm said that ODOT does not require subcontractors to be prequalified under a certain dollar amount. She said, “Your only hurdle is getting your drug free workplace certification. Over a certain amount to get prequalified you have to have a reviewed financial statement, above $5 million you have to have an audited financial statement.” She said, “Thank goodness they changed that rule; my annual accounting fee went down by $20,000. That’s a pretty big hurdle that some suppliers just don’t want to do.” [#1]

■ A focus group participant representing an environmental consulting firm reported that on the prime side, “I’d say a lot of the projects that come out on the ODOT program... have so many pre-qualifications for services, and sometimes those pre-quals aren’t always necessary. I’ll give you one example, just from the environmental side, there is a category called ‘ESA Remedial Design’ which is a very expensive certification for an individual to hold, and yet the technicality of that pre-qual is hardly ever used by ODOT, but they always put that pre-qual in their requirements. We find ourselves, a lot of times, we’re not chosen as a teaming partner because we don’t have that pre-qual. I get a little frustrated because I don’t understand why that pre-qual is in there in the first place.” [PSFG#1]

■ The Black American female owner of a DBE- and EDGE-certified architecture and engineering firm said, “During the recession, we faced the additional challenge of prequalification for ODOT and [city] work. Prequalification is a challenge for small surveying firms. We submitted our package to ODOT two or three times but it was not
approved. The [city] also added prequalification at this time on some road projects. The effect was that this requirement cut off contracts to my business even though we had successfully been doing work for the [city].” She added that, “Prequalification is a discriminatory practice that locks MBEs out of the procurement process.” [#3]

- A focus group participant who owns a DBE-certified construction firm said, “One of the issues facing very small companies that want to work with ODOT, is to get the pre-qualification. To get the pre-qualification, you have to perform a certain amount of work in various work types.” [CFG#4]

**A few interviewees contrasted prequalification requirements in the public sector with typical practices in the private sector.** For example:

- When asked about prequalification requirements, the non-Hispanic white male owner of an excavating firm said, “Sometimes some of the very large general contractors [i]n the private sector have a very involved prequalification situation or forms to fill out.” He went on to say that many times these general contractors will ask for financial statements but are not willing to show him their financial statements. In those instances he will submit his bid without those requested documents. [#32]

**Some interviewees indicated that prequalification was not a barrier to pursuing public sector work.** Examples of those comments include the following:

- The Black American owner of a certified fence installation and supply company said that he did not have any challenges with pre-qualification requirements. [#26]

- When asked whether he thought the pre-qualification process created any barriers, the Black American male owner of a concrete company responded, “It doesn’t. I don’t think it does at all.” [#31]

- The non-Hispanic white male manager of a majority-owned engineering firm that does business with the Commission and ODOT said that they have never had an issue finding qualified sub-consultants. He explained, “The pre-qualification used by ODOT and other public entities provides a list of companies who have the necessary qualifications. ODOT programmatic are advertised quarterly which allows time to identify potential sub-consultants. Generally, we try to look at the projects three months out and see which ones would be a good fit. Based on that, we pick our team, try to get in front of ODOT and do our site visits.”

The interviewee added that “ODOT/ Turnpike Commission have an array of work that most firms can get for non-complex road ways. There are quite a few ways for firms to get work. ODOT is open.” He claimed that startups can succeed in doing business with the interviewed firm. He said “There are so many classifications. Once you get started you can get more.” [#10]

**Licenses and permits.** Certain licenses, permits and certifications are required for both public and private sector projects. The study team discussed whether licenses, permits, and
certifications presented barriers to doing business for firms in the transportation contracting industry.

A few business owners and managers reported that obtaining licenses and permits was not a barrier to doing business. Examples of those comments include the following:

- The non-Hispanic white female owner of a DBE-certified electrical engineering firm said ODOT does not require electrical contractors to have an electrical license. She said her company has an electrical license and can pull permits. She did not see licensing as a disadvantage. [#1]

- A non-Hispanic white male owner of an excavating firm said that licensing and permits are not an issue for his firm. He said, “I have licenses from Cincinnati to Columbus in almost every municipality or county. Sometimes it involves examinations and testing. Sometimes it’s just providing those areas with all your licenses in other areas, and they’ll assume you know what you’re doing if you’re licensed in Cincinnati or Columbus.” [#32]

Other unnecessarily restrictive contract specifications. The study team asked business owners and managers if contract specifications, particularly on public sector contracts, restrict opportunities to obtaining work.

Some owners indicated that some specifications are overly restrictive and present barriers. It appears that some businesses choose not to bid or are precluded from bidding due to what business owners and managers perceive to be overly-restrictive contract requirements. Examples of those comments include the following:

- The Black American female owner of an architecture and engineering firm said, “There are restrictions on a small business’ ability to perform different size contracts. Because of the rating or point system [used to evaluate professional services], big architectural firms can win based on points.” She explained that small firms generally have less experience and sometimes no experience; therefore, small businesses have more difficulty getting work. The evaluation criterion restricts the work they are eligible to perform. [#3]

- The Black American male owner of a certified construction company was asked if he has experienced any contract restrictions that would be barriers for small businesses. He said, “Security protocols sometimes chase small businesses away. Because you have to be vetted by the federal government for some small businesses that could be a challenge. It means you cannot work on federal jobs if you have a minor offense.” [#4]

- The Black American female owner of an EDGE-certified waterproofing and painting company said that contract specifications are a barrier to winning the job. She explained that she “bid on a bridge job that ODOT had, and then found out when I read the specifications that I had to have bridge certification. I followed through and got that bridge certification…[Then I found out that] if I did not own the equipment to do the job, then ODOT wouldn’t give me the job. And that’s another barrier, because who can afford to go and buy a $100,000 truck? Sometimes you do need to rent or lease things,
but their requirements are if it’s not owned by the company, then you will not get the job.”

She went on to say that she finds it easier to work with universities than with ODOT because she faces less hurdles to “break into” the industry. She explained, “Well basically they solicit their jobs on the procurement department. Then you go ahead and go to maybe a pre-bid meeting. It’s a smaller circle. You have more chances of painting that job, being a new company….I helped supply them with microwaves and refrigerators… just as a vendor. And it was just a lot smoother. It wasn’t so many barriers for a small company like me to break in.”

She said that she has attempted to work with the Commission; however, “I got deterred because of the specifications, because I didn’t have this or that, or I couldn’t get bonding.” She added that the Commission had very strict qualifications. She stated, “But I didn’t have all the qualifications. It’s like the qualifications are so far up there that only a medium or a large company can obtain all of what they’re requiring you to have before you can bid… There’s no space for the mom and pop companies that are trying to grow in this state.” [#53]

Bidding processes. Interviewees shared a number of comments about bidding processes.

Many business owners said that bidding procedures presented a barrier to obtaining work. Examples of those comments include the following:

- A public hearing participant said, “I’m an independent appraiser. I am ODOT approved. The only trouble I’ve run into is that a few years ago they did away with personal service contracts, and they went with more like you have to submit like a team player type qualification. You have to list yourself plus who else is going to be on your team in order to qualify for a certain dollar value of contracts for the year. I think it’s up to $75,000 a year. You can work up to that point. The only trouble is a lot of the small independent appraisers only work by themselves. They don’t have teams… I got work last year through other -- let’s say the big boys who know the ins and outs of ODOT and how that works. So I was a subcontract to them and they were a subcontract to ODOT. That work is fine on big projects, but when they don’t have big projects and they don’t need so many appraisers that work stays in house. So it’s that small appraiser that finds it difficult to get direct work from ODOT because of the steps that they make you go through now to do that. You know, it’s very difficult for the independent person to be able to, you know, get the work.” [YTP#4]

- The non-Hispanic white male owner of a fence and guardrail firm said that, “His biggest complaint about the bidding process is not having enough time to ask questions. He suggests allowing “a reasonable amount of time” to review bid documents and to work on the price once they know what you want.” He went on to say that it has been his experience that there can be conflicting specification in the request for bid. [#27]

- The Black American male owner of a DBE- and EDGE-certified construction firm identified the bid process as a possible barrier for minority, small and woman-owned businesses. He described the paper work for the federal government as daunting. “You
have to read all the information, know the legal ramifications and interpret them. That is major”, he said. [#4]

- The managing director of a certified Black American owned management services firm said that, “ODOT should help firms expand their capacity so that they can bid more confidently.” As he explained, “If a smaller DBE firm with a 19 percent margin tries to bid against a medium-sized DBE firm with only a 9 percent margin, the small DBE firm cannot compete against the lower bid. This bidding process translates to a marketplace that is already compromised. As a result, ODOT and the Turnpike have more difficulty actually being able to do business with a small business.” [#41]

- The non-Hispanic white male owner of a landscape company said, "We have submitted bids several times in the past to a nearby city and the county. In one instance we were the second lowest bidder on a sealed bid. They re-bid the project and a woman-owned business came in way under. If everyone else's bid was $700,000, her bid was $200,000. That's a waste of time for us as a small business.”

According to this interviewee, the city rebid another project because minorities and women had not bid. He said, "They [city] allowed a minority business to win with a bid that was 10 percent more than anyone else's; it was a sealed bid and the minority was allowed to submit it late after the closing.” He added that the incident described above happens "too often" and that there are some “paper contractors” out there.

When asked to describe his experience bidding directly or indirectly in the public sector he said, “Bidding is a waste of time. We want feedback when we bid. We think it would be a good idea for ODOT to teach small businesses how to navigate their bid process. ODOT should streamline the process and open it up to the best qualified local contractors.” [#47]

- The business development manager at a certified Subcontinent Asian materials testing firm said that the bid process is “figuratively a blank, or a black hole that we send our bids into. [E]very Thursday, I'll send out 20 faxes and three weeks later we'll get a phone call and find out that we got it.” [#40]

- When asked about his experience with the bidding process, the owner of a franchised landscaping company said that the challenges are: "meeting deadlines, being able to acquire a scope, agree to scope, and be able to bid apples for apples with other companies." He added that it helps to have some experience with the proposal process in order to be successful at winning bids. He said, "We faced that challenge this year with some of that subcontracting work...our rates were much higher than some of the other contractors and we just didn't have that experience and we were protecting ourselves. We weren't able to acquire much of that for that reason.” [#25]

- A public hearing participant said, "I'm MBE and EDGE certified. One of my reasons for coming tonight is -- I'll be perfectly honest. I was growing pretty frustrated trying to deal with the state because in the past it's been very challenging to try to do business for goods and services. I went from the universities to the different agencies. I've met with different officials in the state, but didn't really have a whole lot of success. And one
of my concerns back in 2010, I don’t know what the numbers are looking like now, but the local university, which is sitting in a city that’s almost 50 percent African American, was only spending a little bit less than 3 percent for goods and services with the minority-owned businesses. So I had a problem with that. So not only when you look at universities, you look at the cities, the municipalities, the schools, you know. So those are some of the challenges on the goods and services side that I see that I would like to see something change with ODOT and/or the Turnpike Commission to allow opportunities for goods and services to happen and to occur...So we want to see, myself personally, better numbers and more opportunities to do business.” [YTP#3]

- The Black American female owner of an EDGE-certified waterproofing and painting company said that it would be helpful if [ODOT] contract specifications included a clause for leasing equipment. She stated, “As long as you can get the job done by the specifications and in the timeline allowed it, I don’t think it’s really important where you got the boom or a lift if you don’t own it.” She also recommended that ODOT could improve the bid process by implementing a bonding service. That would “give us a chance,” she said. [#53]

- A public hearing participant said, “I’m from Franklin, Ohio. And I’m a civil engineer surveyor and owned my own business since 1998... I get lots of invitations to bid. They come from parts of the state that I can’t possibly service, and I never get an invitation to bid on a project that’s in my backyard. I’ve offered to bid, and I’m never, ever included. I take that back. I found one engineering company in the Cincinnati area that partnered with me and helped me to grow my business and get some ODOT work, and I’ve appreciated that greatly. But I’ve had that phone call where I call and say, ‘Can I bid this project for you,’ and they’ll say, ‘Well, you know, we don’t think that they are actually going to require anybody to do this work. They’ll give us a waiver so, no, don’t bother.’ It’s frustrating. It’s not fair.” [CNP#2]

Several interviewees reported no problems with the bidding process. Specific comments included:

- The owner of an excavating firm said that the bidding process is more straight forward in the public sector than in the private sector. He said, “Our bid program, and most of the computer bid programs, has the option to just import bid quantities and item numbers directly from the ODOT site, whereas in the private side we often have to generate our own quantities and enter our own specification numbers sometimes in the bids. So it’s actually ODOT, and most city and county specs follow ODOT standards. It’s actually probably more clear and more straightforward than a lot of the private-sector bids.” [#32]

- The male owner of a fence and guardrail firm said of ODOT’s bid process, “It always seems pretty simple and pretty straight up to me. I mean it doesn’t leave me with a bad taste in my mouth at all. It seems like everything is above board, and if we get beat on a price, we get beat. That’s the way it goes. That’s business.” [#27]

- The Hispanic male owner of a DBE- and EDGE-certified firm said, “We do about three projects a year for the Turnpike. We have been the prime on small projects.
Turnpike is easy to work with. In comparison to our total portfolio of business, we do not do a lot of business with the Turnpike but I think it is because the Turnpike is small compared to an ODOT. We do not feel limited in any way. We get a good percentage of their work. We get what we think is fair." [#56]

According to the aggregate salesman of a majority-owned stone and ready-mix concrete supplier, ODOT requests for bids come out early. He stated, “It’s out there really far in advance. That aspect of it I do like because you’re given a month or more, and should something have to change, the addendum process is there [and] we know about it right away.” [#28]

**Non-price factors public agencies or others use to make contract awards.** Public agencies select firms for some construction-related contracts and most professional services contracts based on factors other than price. Many firm owners and managers made observations about those non-price factors.

**Many business owners and managers had complaints about factors that public agencies use to make awards.** For example:

- The Black American male owner of a certified technology firm said some companies only contacted his firm if there was a MBE requirement. He said, “When we first started, I got calls and some business only because we were a minority. I turned some of the business away from companies that were only looking for a minority. That is not the kind of business I want. For example, a local hospital, only buys from us when federal money is involved and they have to buy from a minority.” [#54]

- The aggregate salesman of a majority-owned stone and ready-mix concrete supplier said that changes to ODOT specifications can be very harmful to small businesses because costs have already been set and it can be expensive to change products. He explained, “If you set your cost based on what materials were presented in the original specification, if something has changed or if something needed to be different, it’s very easy to have your numbers completely flip-flop out as far as you’ve presented this job. Your bid was for X number of dollars. You’ve set to get this job, and as soon as the job starts now you’ve got to change with dealing with a product that may be several dollars more than the previous what was originally quoted for the bid, and very quickly you can go into a hole. And there are some materials that are a 25 percent or 30 percent increase to switch from one to another."

He added that ODOT listens to the contractors, and he explained that ODOT has worked to change its concrete specifications. He stated that concrete “used to be class C. That was it. You used one type of concrete for this particular thing, one type for this. Now they've come to the realization there's a hundred ways to bake a pie, and now it's okay, as long as you meet this specific strength we don't care how you make the concrete because cost-wise it was costing astronomical amounts of money. You were throwing money away to meet their specification.” [#28]

**Some business owners said that experience requirements were a barrier to doing business with public agencies.** For example:
A focus group participant representing a general construction contractor said, "We have a bunch of people that are in the ODOT program, but they don’t have the people to be able to do the work. They can’t... They don’t have the experience at bidding, and they don’t have the superintendents that know how to put the work into place." [CFG#1]

**Timely payment by the customer or prime.** Slow payment or non-payment by the customer or prime contractor was often mentioned by interviewees as a barrier to success in both public and private sector work.

**Most interviewees said that slow payment by the customer or a prime contractor is an issue and can be damaging to companies in the transportation contracting industry.** Interviewees reported that payment issues may have a greater effect on small or poorly-capitalized businesses. Examples of such comments include the following:

- The Black American male owner of a DBE-, EDGE-, and SBA 8(a)-certified general contracting firm shared that his company had been a subcontractor on an ODOT project. He said, "We got paid real late. I don’t know if it was because of ODOT or the general contractor. I tend to believe it was the general contractor that paid us late because they’ve got a history of that [late payment]." [#31].

- The non-Hispanic white owner of a franchised landscaping company said that payment in the public sector can be a challenge because it directly affects available cash flow. He said, "Usually turn around could be 30 to 60 days. And again, it varies. Some of our municipalities pay really quickly to whatever terms we pretty much want. Then we have others that it’s just out of their control. It could be as high as 60 days."

  He added that he tries to diversify the type of contracts he works on so that his cash flow is not placed at risk by slow payment terms. He explained, “We try and balance our receivables and our terms so that you know, not everybody’s 60 days. Not everybody’s due upon completion. So we try and balance that... What’s great about working with the public sector is it keeps us diverse... We don’t want any sector to be larger than 25 or 30 percent of our business.” [#25]

- The non-Hispanic white male manager of a majority-owned transportation consulting firm said, "[University] is a notoriously slow payer. Agencies that pay slow make it difficult for small businesses to grow because we can’t plan." [#10]

- The Black American female owner of an EDGE-certified waterproofing and painting company said that she had not had problems collecting full payment, "but I know that they delay their payments." She pointed out that payment delays of 30 or 45 days have a negative effect on small businesses. She explained, “You still have salaries to pay, overhead, equipment, materials – and then that’s another thing: when you bid on a job here, you have to have the money for the material and then wait 30 or 45 days to get reimbursed, and I think that’s wrong, because this is your job.” She recommended that if supplies were divided for subcontractors, payment delays would not put such a disadvantage on a small business.
She explained that payment delays affect how much she can staff her projects. She stated, “You have to pay the overhead of your staff, of your crew, and they might have a requirement of how many people can be on that job. I might have five stable employees, but I’m [going to] have to outsource six, because the specification requires 10 men to be on this job.” She added that payment delays of 90 days can cause a firm to “go under.” She stated, “Can you imagine paying 10 people for 90 days?” [#53]

Other interviewees identified problems with public agencies, not prime contractors, paying on time. Examples of those comments include:

- The owner of a landscape company said, “There are two things that put small businesses at a disadvantage. Public entities that do not pay promptly and paper work.” He added that retainage can also be a barrier. “I see no reason why retainage, for example, has to be held. I’m not ‘that’ guy. That guy who is not going to do the job or do it right.” [#47]

- A public hearing participant representing a management consulting firm said, “Another thing that I found as a small business owner, we only have four employees, is that often times contracts are set so you don’t receive payment maybe for six to 12 months. That is very, very difficult for a very small business to maintain payroll. I know my very first government contact I got -- we got, it was a $75,000 contract which was giant for a very small business, but 50 percent of that payment was not given to us for 18 months after the project. It nearly bankrupted my business, but... we were able to make it through that period”

An issue she said that needs to be looked at is “how the payment structure is and is it helping small businesses continue because to carry a payroll for 6 to 12 months is impossible... You can’t get your cash flow that manages your credit lines until you have a certain amount of time in business. So you cannot, you know, even go to the bank and say will you give me a loan so I can cover payroll while we do this work... that’s a huge barrier to businesses I think.” [CLP#5]

A business owner mentioned excessive retainage and delayed final payments on contracts as concerns. The non-Hispanic white male owner of a landscape company said, “You need a large line of credit in the public sector because there may be retainage and payment may be a lot slower than in the private sector. The profit is not that great on public works and the investment of time and money to bid is not worth it. In the private sector, they appreciate our work and they tell us. Engineers we work with pretty much vouch for the quality of our work. They know if we are on the job it will be done right, and we get paid on time.” [#47]

A few business owners and managers said that payment was sometimes more difficult on private sector contracts than public sector work. Examples of such comments include the following:

- The Black American male owner of a certified IT firm said that a challenge is “being paid on time from the customers... You could be two, three, or four months down the road, having [completed performance] and not had the opportunity to get paid yet.” [#42]
- The non-Hispanic white female manager of a dump truck company said that issues with timely payments are a constant battle. She explained, "Timely to me is 30 days, but when you [have to] wait 90 days sometimes to get a payment, which is ridiculous on some contractors. I mean, I've done the work for you [the contractor], and your job's done, and you can't pay me because you don't pay until you get the money from that contract which I think is baloney. I mean, I have to pay my employees every week whether I got paid or not." When payments aren't timely, she said she has to "struggle around and gather up funds. Well, not gather up funds, but take it out of savings to cover expenses, fuel expenses. I mean, the fuel bill goes in every month, payroll goes out every week, taxes go in every month... You know, I could have $80,000.00 out there, and it's just, 'We'll get it to you when we get it to you. When we get our money, you'll get your money.' And I think that's aggravating. I think contractors should have to pay you once you send them a bill." She added that small businesses run the risk of running out of money and “bellying up” if they do not receive their payments on time.

This same interviewee said that she often has to project her accounting in order to cover issues with timely payments. She explained, "Yeah, at the end of the year you may get this big old lump check, but then you [have to] figure out the whole next six months or something. [It is like] ‘Okay, you [have to] save this money because what you’re [going to] use to keep your business running’ versus ‘Oh, I’m [going to] do a job and I’m [going to] get paid right away, so I can keep this money afloat,’ but instead, you [have to] use money you put in your savings to put in here to keep your business running." [#20]

- The non-Hispanic white male owner of a hauling firm said, "Lately, a company I have been [working] with for thirty years is having trouble [making payments]. I have gotten all my money, [but] sometimes I have to wait two, three, four, or five days [to receive it]." He pointed out that the risk of late payments are a particular worry for small businesses. He explained, "It just takes one person not to pay you to break you. I've got a friend that did that in the vans and he ran for a big company...They didn’t pay him for six months...and it broke him." [#33]

- The male project manager of a non-certified concrete company that performs work as a subcontractor in the public and private sectors said subcontractors have no guarantee that they will get paid. He said the law says the contractor has to pay them but it does not say when. He suggested that the law be changed and apply to both the public and private sector and that there be a requirement that subcontractors be paid when the work is done. He said payment is "usually better in the public sector." [#45]

However, some other interviewees indicated that slow payment was much more of an issue on public sector contracts. Examples of comments concerning timely payment on public sector work include the following:

- The non-Hispanic white female owner of an EDGE-certified guardrail and lighting firm said that her biggest issue is with guardrails that are hit by residents. If a guardrail is damaged in an accident, her firm will get a request from ODOT to go out and replace it but ODOT does not pay them for the work. They are required to seek payment from the
resident’s insurance company which results in not getting payment for months after the work has been completed. She said, “ODOT contacts us and says we need you to fix this, because it’s a hazard. We have to have a guardrail there, because it’s a safety hazard for people not going over the cliff or the side of the road. And so we go fix it. And then we start the paper process. But we have to track down the police report and go after the insurance company and then send certified letters before we can prove that it can’t be paid for by insurance to get our money. We just got a check last week or the week before for a repair we did last May 2014.” [#15]

- The non-Hispanic white male owner of a franchised landscaping company said that payment in the public sector can be a challenge because it directly affects available cash flow. He said, “Usually turn around could be 30 to 60 days. And again, it varies. Some of our municipalities pay really quickly to whatever terms we pretty much want. Then we have others that it’s just out of their control. It could be as high as 60 days.” [#25]

- When asked what ODOT or the Commission could do try address late payment problems, the non-Hispanic white male owner of a hauling firm said that a general set of support services are needed. He said, “There ought to be a place where the little guy should be able to call and say ‘Look, I’m having trouble’ and somebody ought to take care of it.” As he cited, the problem is that “bigger companies…they’ve got lawyers and stuff and the little guy, he [doesn’t have] the money to fight it.” [#33]

Some interviewees specifically mentioned slow payment on ODOT projects to be a problem. They reported payment problems with primes and with ODOT:

- The non-Hispanic white female owner of a DBE- and EDGE-certified steel erection company said, “ODOT is very slow [paying], I haven’t had any trouble with the Turnpike.” [#7]

- The owner of a WBE/DBE/EDGE-certified supplier of heavy highway electrical supplies wrote, “I had two projects with one contractor that was not paying his invoices to me for DBE participation. [Names] both contacted the contractor and made demands that they pay by a certain date. The contractor never compiled and ODOT never had any recourse for the contractor. Worse, the contractor lied many times, saying the check was in the mail. The invoices were more than $171,000 and over 180 days old. I filed an affidavit for claim and it was not accepted... The affidavit was filed too late. There is a time frame to file that is only 120 days from the contract date. Some of the material that I order has a longer lead time than to be able to file within this time frame. I always thought ODOT would protect a DBE firm. This contractor did not comply with his contract. This money stalled my company’s forward movement and hurt my credit with my vendors.” [WT#6]

- The non-Hispanic white female owner of a certified steel erection company was asked what her company’s experience has been getting paid by either the Commission or ODOT. “ODOT is very slow,” she said. “We can have a lot of money out there in labor that we’re waiting on and that can become a burden. The other thing is that force accounts and change orders are terrible. Sometimes it can take a year or longer. I’ve [had] some that have been longer.” [#7]
The non-Hispanic white woman owner of a DBE-certified electrical engineering firm said, "Overall, ODOT's payment is abysmal... ODOT put me out of business." She explained that "the minute you're late with a union fringe payment you get liquidated damages, 30 percent for electrical workers and three percent for operators and laborers plus interest and late fees. It's all about cash flow." She presented averages from the date of invoice to first payment and the longest number of days for payment from the time the first invoice was sent. She said "From the time I sent my invoice for $14,000, I got my first payment 83 days later for $1,800. The last payment was 177 days after I sent the invoice. It took them six months to pay me on that job. I have a job right now I've been waiting for payment for 659 days. No one wants to rock the boat at ODOT."

She went on to say, "In 2013, I learned as a subcontractor I could file for interest payments under state law. I sent this memo to everybody I was working with at ODOT and all the [general contractors] because I was fed up. This was in October and November of 2014. The state office of budget and management dictates the allowed percentages for payments that are not made on time. Three jobs in District 8 were the basis for the interest calculation. I calculated it was over $30,000 just in interest I should have been paid just for [those] projects because ODOT didn't pay me for my work." She was told by ODOT that they could not investigate her payment claims because ODOT did not have a contract with her firm and she would have to go through the general contractor. [#1]

Some interviewees said that they typically do not have difficulty getting paid timely. For example:

- The Hispanic male co-owner of a DBE- and EDGE-certified survey company was asked what his experiences getting paid on ODOT and the Commission work has been and whether relative to other public sector work, it was easier or harder to receive payment. He said it was easier with ODOT. "ODOT has stepped up a few times," he said. "We knew who to go to at ODOT and they know when the prime was paid. Suddenly, the check appeared," he said. [#56]

- The aggregate salesman of a majority-owned stone and ready-mix concrete supplier said that his experience with ODOT payments have been good. He stated, "I mean exactly 30 days they (the contractor) were paid in full. Our contractor paid us in full so I'm assuming they were getting paid from the state or they made sure they had their finances ready to go in order to pay the bill." [#28]

- The non-Hispanic female owner of a certified steel erection company was asked what her company’s experience has been getting paid by either the Commission or ODOT. "ODOT is very slow," she said. "I haven't had any trouble with the Turnpike. Toledo has been pretty good." [#7]

- The Black American male owner of a certified information technology company said his experience is that the state does an outstanding job trying to increase the business it does with minority businesses, as well as trying to get all of its vendors paid on time. "Something may still fall between the cracks and if that happens, a firm should have
Some interviewees said that prime contractors did discriminate against minority-owned and woman-owned firms. For example:

- The certified Black American female owner of an architecture and engineering firm recounted one experience that she considered “blatant, poignant and acute” gender and racial discrimination. “We were looking at work at a hospital...steel erection. Construction is a lot different from design... Steel erection is all white and male. They have had no exposure to a black woman on the job. The construction manager on the project advised the steel erection company to meet with our company so that we could bid as a subcontractor. They talked with us, reviewed the technical requirements and left a $120K contract for us to sign. The next day, the prime told the construction manager by email that we didn’t know what we were doing and couldn’t read construction documents.” [#3]

- The certified Black American female owner of a heavy highway construction company said her company has experienced racial slurs while on a public works project. She recounted an incident that involved a new mill which was being used on an ODOT project. The equipment was vandalized and racial slurs painted on the $600,000 piece of equipment. [#49]

Taxes. The black American male owner of a MBE-certified landscaping firm said that his firm could use assistance with taxes. He said that his firm had some tax problems in the past and would like an expert to help him so that the does not run into problems again. He said, “We could use more help on taxes because I know that we pay money, and owe money for things that we shouldn’t be owing for. We need expertise in that area very, very badly with the tax write-offs and stuff. Different tax write-offs and stuff like that.” [#21]

Experience with ODOT and the Commission processes. In addition to factors common to contracting among public agencies in Ohio, interviewees had many comments specific to ODOT and the Commission processes.

Some business owners and managers described what they perceived as a lack of business opportunities at ODOT and the Commission. Examples of those comments include the following:

- The Black American male owner of a DBE certified general construction management firm, claims that a challenge in working with ODOT is in meeting all of the criteria and getting into a position where you know what to do in order to work with them. He stated, “I think the problem with ODOT that needs to change is they need to have dedicated people that you pick up the phone and you can call Ms. so and so [who] handles contract compliance period. It's not calling 55 people, and you talk to 25 people, and then by the end of the day you're so pissed [because] don't know who [to talk to].” He added that “you talk to 25 different people; you get 25 different answers”
and that sometimes their answers aren’t timely. He recommended having a dedicated staff to deal with specific areas within an organization. [#30]

- The managing director of a certified Black American-owned management services firm said that “ODOT should help firms expand their capacity so that they can bid more confidently. As he explained, if a smaller DBE firm with a 19 percent margin tries to bid against a medium-sized DBE firm with only a 9 percent margin, the small DBE firm cannot compete against the lower bid. This bidding process translates to a marketplace that is already compromised. As a result, ODOT and the Turnpike have more difficulty actually being able to do business with a small business.” [#41]

Some interviewees commented that size of contracts at ODOT presented a barrier to bidding, or that it was difficult for smaller firms to get work with ODOT. For example:

- The non-Hispanic white male owner of an excavating firm reported that the length of a contract could be a barrier. He said, “As far as length of contracts, the only issue... would be the volatility of material costs. I know, for example, ODOT has a schedule – or I don’t know if ‘schedule’ is the right word, but they have a method.” He explained that “if concrete prices increase, it’s based on a certain basis, or if asphalt increases, you get paid for those increases over time. So you got a three-year job with ODOT to do paving, like on an interstate or something, at the time you bid it, asphalt might be a certain price per ton and it escalates by 10 percent by the time you pave in the third year. They have a fair methodology of doing that.” [#32]

- When asked if the size and length of contracts have been a problem, the owner of a small hauling firm reported that ODOT would have to give his firm at least three or four months of work for him to pull his trucks off other projects. He said, “It can’t just be some little piece meal piece of a project...[because] when I leave [an established, contracted] job, I might not be able to get back on what I was doing.” [#33]

Some businesses that often work as subcontractors had positive comments about ODOT’s bid processes and some had negative comments. Examples of those comments include the following:

- The non-Hispanic white female owner of an EDGE-certified guardrail and lighting firm said that she does have some recommendations for ODOT to improve its notification or bid process. She said, “I do think that somewhere that it should be noted if a company [is] prequalified or not when you’re listed on the bidder’s list or whatever. And you should know if they’re even able [to work with ODOT], because sometimes you’ll see companies from all over the country on the bidder’s list. And we don’t know if we should quote them or not. We don’t know why they’re on there.” She also believes that ODOT could improve the bid portion of the website. [#15]

- When asked if ODOT’s bid process is easier or harder than other contract or bid opportunities, the project manager of a small concrete company said its both. “It’s easier because they tell you upfront what’s required. But it is harder because there is more paper work.” [#45]
The non-Hispanic white female owner of a sewer maintenance firm said that her biggest issue with submitting bids to ODOT is the timeframe she is given to do the work. She said, "Not necessarily the costs, because I'm the one that dictates if I can do this, perform this service for x amount of dollars, but the timeframe sometimes is a little short, but that's not necessarily ODOT's fault. That might be my prime not giving me enough notice." [#22]

The managing director of a certified Black American management services firm said that, "The discrepancy between ODOT goals and actual work performed within that DBE requirement is a barrier in the Ohio marketplace." He elaborated that, "there is no teeth in the DBE requirement, so if someone gets a waiver, that money was not actually spent in relation to the corresponding DBE goal. It doesn't matter if it's $3 million for the waiver or $300,000 for the waiver. If the waiver is granted, that means that client is being exempted for driving performance for that project." [#41]

The non-Hispanic white female owner of a DBE-certified electrical engineering firm said that force accounts are complicated to put together and to be in compliance with everything ODOT wants. She said "It took ODOT 6 months to even look at my force account. I still had to pay my guys, I still had to pay those fringes. So on my pet peeve list: force accounts. ODOT requires you to get equipment cost from the Blue Book Equipment Costing book, which is a pay service. It's $3K just to start and then there is an annual fee so you can figure out what ODOT is going to pay you on Force account work. I don't do that much force account work. I could certainly never justify buying the Blue Book so I talked with the office of contracts and they said I could apply for a grant. But I have to buy it to apply for the grant and I don't know if I'm going to get the grant. I will never understand why ODOT doesn't allow you to go into a district office to use their version of the Blue Book to generate your equipment costs so that they comply with ODOT. There has to be a better way." [#1]

The non-Hispanic white male owner of a surveying firm said that he did believe ODOT could improve their bidding process. He said, "When we submit a fee proposal, after being selected, these projects are hourly and we put together a spreadsheet about what we think the hours should be. And then ODOT pushes back on the price and tell[s] us it's too much. And then we get through [with] the job and it costs us more and we lose money. This probably happens two out of five times." He went on to say that although he can lose money on contracts, he still finds it profitable to work with ODOT because "[t]he way they do [pricing] is probably as good as any." [#13]

Some interviewees recommended changes in ODOT processes. For example:

- When asked about recommendation for how to improve the bid process for ODOT, a non-Hispanic white male owner of a franchised landscaping company said that education is critical. For those who have not gone through the process before, they need somebody that they can work with. He explained that it is currently like "'Hey, here's the scope, go.' Instead, it would help if questions were submitting in writing and then answers were made available to everyone who is trying to bid." [#25]
F. Allegations of Unfair Treatment

Interviewees discussed potential areas of unfair treatment, including:

- Bid shopping (page 58);
- Bid manipulation (page 60);
- Treatment by prime contractors and customers during performance of the work (page 61);
- Unfavorable work environment for minorities or women (page 63); and
- Approval of work by prime contractors and customers (page 64).

**Bid shopping.** Business owners and managers often reported being concerned about bid shopping and the opportunity for unfair denial of contracts and subcontracts through that practice.

Several interviewees indicated that bid shopping was prevalent in the local construction industry. Examples of those comments include the following:

- The Black American male owner of a MBE/SBA(8a)/DBE/EDGE-certified general contracting company recounted an experience where his company sent a bid to a general contractor and the general contractor would call and asked for a lower price. He said, “First of all, if I received a phone call I would call everybody in and first of all I would say, ‘Well, this company wants to lower our price. Can we do that or why should we do it?’ Then we would discuss why we should or why we shouldn't do it. We would analyze the whole situation. It might be someone that we do work with a lot, and that means that we might want to lower our price. It might be a company that we don’t know too much at all, and we say, ‘No, we can’t lower our price.’ It depends on what it is, who we’re dealing with. Sometime when these companies would want a price from us and they would shop our price around. We know who those companies are too. We’re very careful who we send numbers to on certain things, especially the concrete work.” [#31]

- The non-Hispanic white female owner of a DBE- and EDGE-certified steel erection company said, “I think there are those people that give out numbers. I don’t know that for sure, but I suspect.” When was asked if her company has any direct experience with this issue. “Yes,” she said. “At least once our price was given to somebody else that the GC preferred. I’ve also had it where somebody said, ‘We did not get your quote,’ and I sent it to them three different ways.” [#7]

- The business development manager at a certified Subcontinent Asian materials testing firm said that there have been instances where people take bids and shop around and that those instances are very obvious because the contractor comes in late. He elaborated, “Somebody [will] call you, just like right before they get their contract from ODOT… And they’ll say something like ‘I don’t know if I got a quote from you, or can you give me a price for this?’ And it’s like, well, wait a minute. You didn’t want it before the
Some interviewees reported that bid shopping occurs on public as well as private sector contracts. Examples of such comments include the following:

- The Black American female owner of an EDGE-certified waterproofing and painting company said that after she submits a quote, it is impossible to find out who is the lowest bidder. She noted that this was indicative of bid shopping, or as she termed it, "fishing." [#53]

- When asked whether the commercial enterprise conglomerates engage in bid shopping, the non-Hispanic white female owner of a non-certified janitorial business, claimed that it does happen. She said, "They'll send that same e-mail not just to me but to all 10 of us. And they'll wait to see what each one of us responds. And if one of us responds and say, 'Yeah, I'll take it at that price,' then they just tell the rest of us, 'Got a vendor, got a vendor. We don't need you, don't need you.' Or even if you contact them, 'Sorry, it's already been given to another contractor.'" [#12]

- The owner of an excavating firm said that he has not experienced bid shopping in the public sector but has experienced it in the private sector. He said that "we do a lot of budgeting and... design help on projects early on when the customer's working up a budget, or when the general contractor's working up a budget. Sometimes we put all that work into it and then they just go out and ask for three or four bids and pass out our information." [#32]

- The Black American male owner of a general construction firm said "A lot of jobs [are] already figured out, who's going to get what before [they] even start bidding it, especially [when company name] is the contract manager." [#38]

One owner of a firm reported how bid shopping affects them. The male co-owner of an electrical contracting company said, "We're just working a lot harder to get work and to be profitable because everybody's bid noticing projects. The general contractors are out shopping their bids." [#34]

Another owner reported an instance of bribery. A non-Hispanic white male owner of a fence and guardrail firm said that he has experienced bribing. He said that he was bidding on a cemetery job and was asked for a gift in return for the contract. He said, "One of the trustees called me and said 'You know I got one guy who wants to go with you, and one guy who wants to go with the other guy.' He said 'If you buy me a gas grill you'll get the fence.' I said let me think about it. So I thought about it, and I said no. I want to pass. We got it anyway. The other two voted for us. He voted against us." [#27]
Bid manipulation. Beyond bid shopping, a number of interviewees discussed bid manipulation.

Many interviewees said that bid manipulation affected their industry, and that it was common. For example:

- The Black American male owner of a construction company said, "Many companies want to do business with M/DBEs. However, I also believe they try to manipulate you too. Big companies have to meet goals. They use minority businesses but they take advantage by telling subcontractors what their numbers have to be. It affects your margins. If you can't meet the number, they go find someone else." [#4]

- When asked if his small business has ever experienced any unfair treatment on public works projects, the non-Hispanic white male owner of a landscape company responded, "Yes. When a public works job is re-bid, there are contractors who will show up at the bid opening and use your numbers." [#47]

- The Black American male owner of an EDGE-certified information technology firm reported that his company has experienced bid manipulation. He said that prime contractors have used bids from his firm to win contracts but then will significantly reduce his firm’s scope when they execute the contract. He said, “The prime company can show a bid response to a government agency that has a subcontractor’s name listed on it for a certain dollar amount or a certain percentage of the overall contract. Then the prime company will get the contract, and they will renege on the agreement with the sub. I’ve had that happen to me.”

This business owner recommends that ODOT and the Commission monitor how contracts are executed so there is no bid manipulation. He said, "[ODOT and the Commission can] monitor [MBE, WBE, or DBE] engagement and make sure that [the contract is] executed the way that it was sold." He also recommends that ODOT and the Commission develop standards of contract integrity and punish firms responsible that take part in such fraudulent activity. [#42]

- The owner of a franchised landscaping company said that in the private sector, he’s experienced bid manipulation. He explained, “Often you have a relationship with somebody. They want you in there and they give you a scope of work to bid and if you have inside information then your bid’s [going to] look a lot different than somebody just going by the scope... I’d say probably 20 percent of what we’ll bid commercial, they may be open for bids but they’re not considering changing or they've got their mind set on who they’re using anyways. Non-competes, I think you run into a lot of the times, we were too young to experience it but I know it happens with people leaving companies and taking information.” He added that he has not experienced bid manipulation in the public sector. [#25]

Treatment by prime contractors and customers during performance of the work.
Many business owners and managers discussed unfair treatment by a prime contractor or customer.
The Black American male owner of a construction company reported that he has observed MBEs treated differently. He recounted an incident that involved his company and the approval of work by independent inspectors. “The inspectors,” he said, “kept coming back. They kept changing their mind. It took three instances before we resolved the issues. We had to document everything and have them sign off each time they changed something.” He added, “The people who do the inspections get paid by the inspection so they kept changing their minds and coming back.” [#4]

The Black American male owner of a DBE-, EDGE-, and SBA 8(a)-certified general contracting firm said, “A lot of times we are in partnerships with people, especially on government jobs. If there's a government job partnership, that means that we are the general contractor, but they might carry the bond. What happens is that we end up mentoring a company that has never done government work. A big company that's never done government work doesn't understand the government's ways, and we end up mentoring them. They think they come into a government agency and say, ‘Hey, this is the way we're used to doing it.’ I say, ‘Well, you're not getting away with doing it that way, but go ahead and try and see what happens.’ That happens all the time.” [#31]

The owner of a DBE- and EDGE-certified steel erection company was asked if her company had ever been identified as a sub on a contract for ODOT or the Commission and then not awarded the work. She said, “It happened one time on a small job for which we were to supply the material and labor. We supplied the material, but they self-performed the labor.” [#7]

When asked about her experiences working with prime contractors, a Black American female owner of an EDGE-certified waterproofing and painting company said that she felt that contractors find ways to eliminate her from the contract after a short amount of time. She stated, “They might give you the job for the first 30 days, or they give you the job for the 30 days and then maybe have a barrier where your staff have to go through extensive background checks and shut everybody down that is in your staff... they said our staff would not pass the background check [yet] it was the [larger firm] on the job that had [an employee from] a penitentiary.” [#53]

Some interviewees indicated that unfair treatment was connected with their race/ethnicity or gender. Examples of those comments included the following:

The Native American male owner of a professional services firm said in his experience there is a lack of knowledge about Native American culture and that lack of knowledge by public sector officials negatively affects Native Americans. He said that he has been denied an opportunity to compete for work because he "looks" white. He added that, “An African American firm told me they would have ‘their’ people do the work. Their people in quotes,” he said. “What they meant was people who looked like them. They thought I was white.”

He went on to say, "I feel public agencies discriminate against Native Americans. I've been to these public meetings where agencies are desperately trying to get minorities included on projects and every one I go to, every time they talk about Native American
percentages [of contracts] it is zero. I tell them, you have one sitting right here and no one has talked to me at all.” [#8]

- A public hearing participant representing a construction company said, “This past January we celebrated 30 years in the heavy highways site development underground utility business. Probably been doing business with ODOT for 29 years out of the 30 years. At one time ODOT was 98 percent of all my business. A lot of things have been mentioned, culture. I’ve experienced racism within ODOT. Been called a monkey. I’ve been told that why should I complain about doing something over if the inspector tells me to because as a DBE, I’m going to get paid for it anyway guaranteed, which, of course, is false. So the culture amongst the employees, the staff is totally bad.” [CLP#7]

- When asked about her personal experience as a woman business owner, the non-Hispanic white female owner of a DBE-certified electrical engineering firm said that a friend of hers at another company said that all the "guys" refer to her company as "Dark Alley." The reference Dark Alley is meant to refer to a part of a woman's anatomy. [#1]

- The non-Hispanic white female owner of a janitorial business recalled an incident where the store manager called the drugstore corporation over his fear of her black workers. She recalled that she received a call stating that ‘So and so at this store does not want those two black men in her store again.’...And it's like, what?...I've known these guys now for eight years. They're both wonderful young Christian men. I hire people through my church, through my husband's church. But yet there's still people out there that are like this that it's the way they're brought up. And I was like, yeah, and this even happened in some of these small towns that I'm talking about where they're fearful."

She recalled another incident in which she was not taken seriously as the owner. She said, "I've walked in a store where there was a – matter of fact, 70-plus-year-old man who is still with [large drugstore], and because I was a female, he looked at my husband and he said, 'So you're the owner?' I'm like, 'No, he's not. I am.' And the gentleman didn't even want to address me." [#12]

- When asked about potential or experienced barriers to doing business in the Ohio marketplace in general and with ODOT and the Commission specifically, the non-Hispanic white female owner of a steel erection company said, "To be perfectly honest with you, I’ve met great people in the field that have been supportive. There has also definitely been what I would consider undue scrutiny by one field person because I am a woman. And to tell you the truth, I think it’s worse being a woman than a minority." When asked to explain, she said, "Personally, it’s just been really hard on me, and I know companies that are not correct, that are minorities, that are, I would say, not legal, and there’s no scrutiny, that I’ve seen or noticed. I cannot believe that if the scrutiny that was placed on me were placed on them, they would still be in business. That is all I’ll say."

When asked to describe the scrutiny she said, "It’s the constant questioning by ODOT... It doesn’t bother me,” she said. "I just wish it was the same across the board. I think
ODOT should scrutinize everything. In fact, I think they should show up in people’s office unannounced to make sure that they are real.” [#7]

When asked how the industry as changed in the last decade, a Hispanic male owner of an industrial product manufacturing company said that there is a tendency for larger corporations to “buy” minority contractors and then control them. He said, “Well I call it buying. But yeah, they use you on contracts until they get their share, and then you get fired. You don’t get fired; they just stop calling you anymore [because] they don’t need you.” [#11]

**Unfavorable work environment for minorities or women.** The study team asked business owners if there was an unfavorable work environment for minorities or women, such as any harassment on jobsites. Some interviewees said that there was. For instance:

When asked if she had encountered any unfavorable work environments for women and minorities, a Black American female owner of an EDGE-certified waterproofing and painting company said that it is prevalent across the whole state. She explained, “You get racial slurs. You get, ‘She’s a woman.’ You get all of that. But I mean, you just [have to] have thick skin. Do the job the best that you can and try to show them that instead of what color you are or what sex you are.”

She said that her crew experiences derogatory language on job sites and that she had to reprimand the other crews. She stated, “That’s not the type of language that my crew people use on our job site, and we would appreciate it if you didn’t use that type of language. But why do I have to tell a grown person that?”

She said that she “can feel it” when a work site is more hostile. She explained, “You can just feel [that it is going to] be a lot of resistance. They’re [going to] do anything they possibly can. Let me tell you. We had a contract. Do you know what another [white, non-minority] contractor told a [black] guy that was working for me? [They told him] ‘This is your last time on this job, because you’re not [going to] keep taking money from our people.’ I was so proud of my worker. He just clammed his mouth shut and let it roll off of him, but that’s what you get...It was really offensive, and we didn’t get any more contracts from [agency].” [#53]

**Some interviewees reported barriers or challenges were a result of their gender or ethnicity.** Comments included:

When asked if she believed the barriers or challenges were a result of her gender, the non-Hispanic white female owner of a DBE- and EDGE-certified steel erection company said, “Undoubtedly. I think many of them were. In fact, it is still interesting, when I go to meetings today, people that know me and know the business will talk to me as though I own the business. However, if my husband is with me and we are at something where people do not know us, the eyes and everything are directed toward him. What is funny is he does not run the business. So then he has to look at me. Not that he does not know what is going on, we work closely together. Nevertheless, it is just very interesting. So sometimes, I get a little chip on my shoulder.” [#7]
The Black American female owner of an EDGE-certified waterproofing and painting company said that gender stereotypes influence the type of opportunities she is presented. She stated, "Because I'm a woman, I have to sell myself a little stronger than maybe the man standing next to me." She explained that she faces additional challenges in her industry that are related to her race and gender. She said, "They [the contractors] don't take you seriously. They don't believe you know what you're talking about or the business. It's such a challenge. I mean it – they don't take you seriously, basically. And I'm a black woman, so that's another X. I have two X's anytime I step to the table, because I'm a black woman." [#53]

**Approval of work by prime contractors and customers.** Interviewees discussed whether approval of work by prime contractors or customers presented a barrier for businesses.

**Some interviewees identify difficulty with approval of work by prime contractors or customers.** For example:

- When asked about being treated unfairly concerning approval of work by prime contractors, a Black American owner of a DBE-, EDGE-, and SBA 8(a)-certified general contracting firm said "I think mostly, no I don't. I think what happens is that the prime contractor will try to find a reason not to pay us, maybe for a change order or something like that. The prime contract will say, 'Well you didn’t do this right, so we subtracted this,’ or, 'This concrete is too high,’ or something... That happens a lot." [#31]

- The non-Hispanic white female owner of a DBE-certified electrical engineering firm said approval of work and not getting paid by ODOT is not new. She said she experienced it at a larger firm where she worked before starting her business. She also experienced it when her company had design issues on an ODOT project. She described ODOT's reluctance to meet with her and she said she was told "to just put the pole per the plan." She said that since she is not the prime contractor she has "no protections through ODOT. The only time I have any protection is when the general contractor decides to take up on my behalf." [#1]

**G. Additional Information Regarding any Racial/ethnic or Gender-based Discrimination**

Interviewees discussed additional potential areas of any racial/ethnic or gender-based discrimination, including:

- Stereotypical attitudes about minorities and women (or MBEs, WBEs, and DBEs) *(page 65)*; and

- “Good ol’ boy” network or other closed networks *(page 65).*

**Stereotypical attitudes about minorities and women (or minority- and woman-owned businesses, including DBEs).** Several interviewees indicated that minorities, women, or minority- and woman-owned businesses are the subject of stereotypical attitudes. For example:
The Black American male owner of a DBE-certified general construction management firm said that discrimination occurs “in appearance” and depending on how you are dressed or how you present yourself, you can be treated very differently. He believes that character is worth building. [#30]

The Native American male owner of a professional services firm was asked if he knew of other Native American firms who felt they were treated unfairly in the public sector. He said he knows Native American business owners who never got work in the public sector and simply gave up and walked away. [#8]

The Black American owner of an EDGE- and DBE-certified construction company said he has encountered stereotypical attitudes about small business. “Because you’re small, they wonder if you really know what you’re doing. It is sometimes also true of how people perceive minorities. I have been on jobs where someone will walk up to one of my employees and assume they are the boss. My employee will tell them to talk to me. They naturally assume. Some people don’t mean anything by it.” [#4]

When asked about barriers to starting or expanding business, a Hispanic male owner of an industrial product manufacturing company said “Don’t be black or brown. There’s no blacks in my trade. None. Zero… I’ve been in my trade 40 years almost, and I’ve really never seen any black tradesmen.” [#11]

“Good ol’ boy” network or other closed networks. Many interviewees had comments concerning the existence of a “good ol’ boy” network that affects business opportunities.

Those who reported the existence of a good ol’ boy network included minority, female, and white male interviewees. For example:

The non-Hispanic white male owner of a franchised landscaping company said that he has not experienced a good old boy network yet, but has “no doubt that it happens…I mean I saw some of that when I used to work for the state.” When asked about that experience, he said that favoritism and tenure are a key indication. [#25]

The Black American female owner of a DBE- and EDGE-certified architecture and engineering firm was asked if she has experienced any “good ol’ boy” networks or other closed networks. In response, she said, “Public sector, public servants with limited experience entrenched in the way they do business or limited experience working with people of color or women is a closed network.” [#3]

When asked about general challenges for small businesses starting or growing a business, a focus group participant representing a goods supplier said, “We’re a distributor and from my perspective, starting and growing, I guess there’s a lot of things I want to talk about as far as growing and dealing with those entities [ODOT and the Commission] but [a challenge] is, a lot of these prime contractors and companies have already linked up with previous MBEs or DBEs and it’s really challenging to break into it when they have developed a long-term relationship and it’s been working for them. That they’ve already used the same ones time after time versus marketing it out and trying to develop new relationships. Even if they did, what we end up doing is MBEs
and DBEs are feeding off of each other and minimizing any margins for us to grow just to get the business... A lot of times you’re just talking just to talk and they’re really going to keep with the person that they have...” [GSFG#2]

- When asked about “good ol’ boy” networks, the non-Hispanic white male owner of an excavating firm said, “Oh, I’m sure there are. I don’t think that’s any different – well, it might be a little more prevalent in trades than it might be in other situations, but that’s just a human nature thing. People sometimes try to do whatever they can get by with, until they get caught.” [#32]

- The manager of a majority-owned transportation consulting firm was asked questions related to work as a prime contractor. When asked if there were any challenges for a small business to work as a prime contractor, he said, “Yes. As a small business we see large companies hire former ODOT employees. They can afford to bring people on board and invest in salaries even if they do not see a return on investment for a year or two. Former ODOT employees have relationships with and know ODOT people and are therefore more likely to get ODOT work.” [#9]

- The Black American male owner of a DBE-, EDGE-, and SBA 8(a)-certified general contracting firm said he had never pursued any contracts with the Commission. When asked why, he responded, “I’m going to tell you why. In this area, there are one or two contractors that do all the work.” He said, “That kind of turns me off a little, to be honest with you.” [#31]

- The aggregate salesman of a majority-owned stone and ready-mix concrete supplier said that the industry is “a close-knit niche... It’s a thing where everybody knows everybody else.” [#28]

- The Black American female owner of an EDGE-certified waterproofing and painting company said that it’s been challenging to win contracts in Ohio because she has a hard time breaking through contractor relationships that are already established. She said that the Ohio marketplace operates as a closed network. She explained, “A lot of companies here are clipped up. They’re already clipped up with who they want to work with... Instead of hiring me right here in [city] as a minority company, they would rather keep the relationship that they have with a company in [city].” She added that that prime contracting companies “are more partial to hire a male that has been established here longer, or someone who can easily get a bond, or has had different contracts that may have had relations with [large construction firm].” She said that small, non-established companies are often crowded out of the network of larger companies. [#53]

- When asked to share his experiences about ODOT or the Commission, the non-Hispanic white male owner of a landscape company expressed concern that there are only three or four major general contractors who receive all of the ODOT work and those general contractors do not use subcontractors on projects. He said, “I have never seen an ODOT bid for mulching. We do mulching. There are maybe two companies that get all of that work.”
He shared another example of a few contractors getting the bulk of the work. "On Route 32," he said "none of the local businesses or small companies are getting any of that work. One big general contractor has all of the work and I have not seen any subcontractors on the project." [#47].

- When asked about a good ol' boy network, the Hispanic male owner of an industrial product manufacturing company said, "It's the only thing that exists." He expanded by stating, "I think it's statewide. [Multi-million dollar highway construction company has a] huge contract... They've got every single project pretty much in the state of Ohio. Geez, they've started over there by my mom's house in a little...field. Okay? You know with one or two cranes and stuff, and now they're – Oh geez, they're just – they're huge. How does that happen, you know what I mean?" [#11]

**Some minority and female interviewees indicated that the good ol' boy network adversely affects their businesses.** For example:

- A focus group participant representing an environmental consulting firm said, "I find that we are at a disadvantage because we don't have anybody on our staff that used to work at ODOT. I think that there is given preferential treatment if you've worked at ODOT in the past." She continued, "[Preferential treatment] is a detriment to being selected to be awarded a project. It's scored. The scoring is somewhat subjective, and I think not having had an experience working there or knowing people is a disadvantage." [PSFG#1]

- A focus group participant representing a maintenance services firm said, "I've only been in the Ohio market with an existing company but what I've seen based on growing an existing business is developing your relationships across the state. Between Cleveland and Cincinnati and Columbus, they all have their unique differences but what I would say would be their relationships, breaking through those relationships and getting the opportunities with the state work, I don't think the State of Ohio does a very good job sometimes of getting these bids out to all the appropriate players. It comes kind of down to... the relationship."

He added, "I know personally we are one of a few companies in the state that has state term pricing that the state can buy from in our industry." He explained that there was a recent bid opportunity that his firm was not aware of, and said, "You would think with being one of only [a few] companies in our industry that has that certification [term pricing]... we would be automatic[ally] in for a bid opportunity or even just an opportunity in general." [GSFG#1]

**Some minority and female business owners and managers said that there was a good ol' boy network, but they have, over time, been able to enter the group or form their own groups.** For example:

- When asked if she experienced any stereotypical attitudes about minorities or women (or minority- and woman-owned businesses) or any "good ol' boy" networks or other closed networks, the non-Hispanic white female owner of a steel erection company said, "Oh, yes... Not so much with ODOT, but with the [city name]. I would say if you're
not in that circle, whether you are a woman or a minority, I don't know if males have that problem or not, it's a barrier. You can break through it. But you have to be proactive.” [#7]

- The Black American female owner of a heavy highway construction company was asked if she experienced any closed networks and if so how she overcame them. She said, “The 'good ol' boy' network is still alive. I have been told my place was in the kitchen.” She added, however, that “It was easier for me because of my father. Everyone liked my father. There was a pathway of openness and acceptance.” [#49]

- The non-Hispanic white female owner of a DBE-certified electrical engineering firm said that she believes that “the prevalence of [the “Good Ol’ Boy Network” or other closed networks] has gone way down and changed because the cross section of our world, more working women and successful minorities, the presence of the diverse workforce at all levels has helped normalize it. It's still out there. Just saying it's not as bad.” When asked if the small business programs help to change the prevalence of the “Good Ol’ Boy Network” she said she thought so because “contractors are forced to work and forced to see the capabilities of minorities and women and they're either satisfied or not. If I’m doing my job, they’re going to be satisfied and more accepting of others.” [#1]

H. Insights Regarding Neutral Measures

The study team asked business owners and managers about their views of potential race- and gender-neutral measures that might help all small businesses, or all businesses, obtain work in the transportation contracting industry. Interviewees discussed various types of potential measures and, in many cases, made recommendations for specific programs and program topics. The following pages of this Appendix reviews comments pertaining to:

- Technical assistance and support services (page 69);
- On-the-job training programs (page 70);
- Mentor-protégé relationships (page 72);
- Joint venture relationships (page 74);
- Financing assistance (page 74);
- Bonding assistance (page 75);
- Assistance in obtaining business insurance (page 75);
- Assistance in using emerging technology (page 75);
- Information on public agency contracting procedures and bidding opportunities (page 75);
- Pre-bid conferences where subcontractors can meet prime contractors (page 76);
- Other agency outreach such as vendor fairs and events (page 76);
- Streamlining or simplification of bidding procedures (page 79);
- Breaking up large contracts into smaller pieces (page 79);
- Price or evaluation preferences for small businesses (page 82);
- Small business set-asides (page 82);
- Mandatory subcontracting minimums (page 84);
- Small business subcontracting goals (page 85); and
- Other measures (page 86).

**Technical assistance and support services.** The study team discussed different types of technical assistance and other business support programs. Some business owners thought that technical assistance and support services would be helpful.

**Some interviewees recommended specific technical assistance topics.** For example:

- The Black American female owner of a waterproofing and painting company said that estimating classes would be helpful for learning how to read the blueprints. [#53]

- The Black American male owner of a construction company said it would be beneficial to small contractors if the SBA helped with licensing. He said, “They need to get into more detail and tell people to get licensed; everything has to have a license. The last thing you want to do as a small business is get a contract and not be licensed. It happened to us.” [#4]

- When asked about recommendations for small business programs, a non-Hispanic white owner of a franchised landscaping company said that he has used small businesses as a resource, but feels that more education about bid lists, bid submission, and general support services would be helpful. He explained, “I know a lot of times bid packets are 100 pages long. They're difficult to navigate so some type of resource or database, a website, a person that can help [them] through that process.” [#25]

**Some business owners and managers reported being aware of technical assistance and support services programs and having used them.** Examples of such comments include the following:

- A focus group participant representing an environmental consulting firm had participated in ODOT's Supportive Services Program and found it to be useful. The interviewee said, "We were able to get a very expensive GIS program so we can better provide our mapping and figures. I can't say enough about that opportunity." [PSFG#1]

- The Black American male owner of a DBE-certified general construction management firm, recommended that ODOT or the Turnpike should be oriented to helping
businesses only after “you have the educational standpoint to run your business, whatever that is” and that your business should be incorporated. After that point, ODOT could give guidance on what to do next, such as: “You need help, go over here.” [#30]

Some business owners and managers said that generalized technical assistance would help firms, but others said that it could actually be harmful. For example:

- When asked if programs that support/assist small business are needed, the representative of a majority-owned design and engineering firm said, “I definitely say yes. The issue is, however, that you cannot open something and allow people to assume they are going to get a whole bunch of business from that. That is the inherent issue. I have been to many [events] where you think by going you are networking. Well no, you are not networking. Networking would be where you go to get business. I do not think people understand that. The success of any business starts with begging for one job and doing a really good job. Where you spend more time [than anticipated] and probably did not make any money but now you have a project sheet to show and an evaluation. One guy says they do a really good job, I’m going to hire them again. You cannot teach that. You need to do a good job and you probably need to work two jobs until you do that one job.” [#5]

On-the-job training programs. Business owners and managers interviewed were supportive of on-the-job training programs, but described the need for more advanced training. For example:

- The non-Hispanic white female owner of a steel erection company said, “I think it would be great if they had workshops on things that really are practical. That would help. Most of the events are about how to become certified.” When asked what kinds of workshops would be helpful, she specified “workshops on blueprint reading, estimating, how to be competitive, and how to put out a professional bid... So if we want to raise people up and really equip them to be successful, we have got to teach them how to be professional.” [#7]

- The Black American male owner of a MBE-certified landscaping firm said that assistance learning new techniques in his field would be helpful to him. He said, “Well I was telling you about putting in these pipes, and different areas on underground work. Like as a general contractor I’d like to get more knowledge into areas like that.” [#21]

- A public hearing participant said, “I don’t really have any real complaints, but I have some things to say about some challenges. First of all, on the design side, if you want to work with ODOT, it’s going to be just a lot of expense for a small business. Some of that expense incurs software and training to stay current to work with the prime companies. There should be something – a little more assistance from ODOT to aid in those standards and procedures, you know, to work with some of the prime companies. Something along the lines of maybe a certification that you’ve gone through this type of training with ODOT and you’re ready to work [with] the primes. They will have confidence having to work with you. Access to organizations like the ACEC or some engineering society. Those companies don’t have any idea of where they exist. And so, basically, they don’t know that the resources [are] available. Supplemental training for
some of the prime companies where they would have the ability to get advanced training whether it be subsurface engineering, whether it's just design training to stay current to work with the primes.” [YTP#1]

- The non-Hispanic white male owner of a landscape company was asked if he had any recommendations on the public works contracting processes. In response, he recommended that the bid process be streamlined or simplified and that the information regarding contracting procedures and bidding opportunities be sent directly to small businesses. He also recommended that ODOT and other public agencies sponsor an on-the-job training program. He indicated that there is a need for skilled workers and that an on-the-job training program that partners with local trade schools or colleges would benefit small businesses and the industry. [#47]

- The Hispanic male owner of an industrial product manufacturing company, recommended that ODOT, or other public agencies could help with vocational programs in order to boost the supply of skilled laborers. He stated, "Introduce their programs in middle school versus high school or college... Whether you want to be in construction, administration, skill trades, painting, whatever... The internships [need] to be started earlier, before the kids get lazy.”

  He went on to say that training programs need to get more people ready for work. He stated that schools have a lot of money but “the student comes out not knowing what to do. Work-ready technical programs with criteria specified by the trades and not some national standard or state standard, but specified by the trades [are needed].” [#11]

- When asked about job training program recommendations, a non-Hispanic white male owner of a franchised landscaping company said that his firm does a lot to properly train the staff to perform the tasks needed. However, he stated that safety and compliance would be a good area to expand state agency training programs. [#25]

**Mentor-protégé relationships.** Some interviewees commented on mentor-protégé programs.

**Some business owners had favorable comments about mentor protégé programs.** For example:

- The Black American male owner of a DBE-certified construction company said the company participated in a mentor-protégé relationship when the firm was initially SBA 8(a) certified. “We were mentored by [company]. It was very helpful. Three quarters of the things I have told you, I learned from the mentor protégé program. One of the things I learned was to make sure you do not do something that will send you to jail.” He said he would recommend that others participate in mentor protégé relationships but only with the right mentor. “Not everyone can be a mentor,” he said. [#4]

- The Black American male owner of a MBE-certified landscaping firm said that he had a mentor/protégé relationship previously and it was very helpful to his business. He said, “Well he was just knowledgeable; you just learnt so much from him in all areas. The hydro seeding; the tree planting; the grading; he would show us the equipment [and]
we would take a tractor and go in there and work [really hard]. And we might work on an eighth of a ground two days with the equipment we had, and then he had equipment that he could go in there and do that same job in a day." [#21]

- When asked about mentor protégé relationships, a non-Hispanic white male owner of a franchised landscaping company said that it would be beneficial. He stated, “I mean in the instance of somebody being awarded a contract or I guess that might ease the concern for somebody hiring a small or disadvantaged business if they knew that they had a mentorship program and on the job trainings, you know provided by the state. I mean that would definitely help. If I were going to the state having no experience with basic landscape services but they wanted us to do the work as a subcontractor, I would think the prime contractor would be more comfortable knowing that they’re [going to] oversee that, help with it.” [#25]

**Other business owners and managers had criticisms of mentor-protégé programs.** For example:

- A business owner wrote, “I applied and have been waiting for a position in the [ODOT] Mentor-Protégé Program. At this time, I have concluded that this program is no longer something to anticipate being accepted into. I would like to take this opportunity to state that the complete disregard of a response was and continues to be a blemish on this program.” [WT#8]

- The Black American female business owner said, “ODOT developed a plan to mentor my firm. The purpose of the plan was to prepare for pre-qualification. A prime would mentor my firm. It went sour. Perhaps, because we were a minority or too small and it may have come down to money with the prime having to give part of their work away." She further explained that in order to participate in the mentor program, she had to purchase special software. “I went in the hole,” she said. “The software program cost between $8 and $9 thousand dollars. ODOT’s software vendor allowed payments but I am still paying for it and I have never used it. When the mentor relationship went sour, it meant the revenue went away.” [#3]

- The Black American owner of a certified fence installation and supply company said that larger prime companies claim that they mentor small companies “but then again sometimes that [doesn’t] work out.” [#26]

- The Black American male owners of a construction management and general construction company said, “This is one of the games they play when... minority participation [is] required... That’s supposed to be... a mentoring program. They also have requirements [for mentors] that say you’re supposed to mention these because we have a mentor/protégé program and we want you to be the mentor to these companies and make sure they know how to bid, do the work. That’s not being fulfilled. Actually... it’s more like a bait switch. They draw you in, you get all this information then they tell you what the program is but then once you agree, everything changes. Once you get a project and get a contract it changes because they want their guy, they want you to do [things their] way... We've been doing this stuff so long and we tell them we don't need
mentors. We don’t even need it because we’ve done, [and] we were doing millions of dollars’ worth of work in [the] mid ’80s.” [#38]

- A public hearing participant said, “ODOT has a mentor-protégé program. That program -- I’m in that program, but it’s not really -- I don’t really need them, if that program is not that much of use to me. I have a large company that I’m working with but all they do is they just meet with me. Ask me, ‘Well, how you doing now?’ I don’t really need that. I need them to guide me through the work, maybe some training.” [YTP#1]

- The non-Hispanic white female owner of a construction company said, “I participated in [the ODOT] mentor/protégé program for DBEs [for] two years, and... heard from ODOT one time in two years. We don’t even know what we we’re supposed to be doing in that program. We felt like they’re just supposed to have this program, and then they never even followed up on it.” [CFG#3]

- Another female owner of another construction company agreed. She said, ”I know in the mentor/protégé program..., we got absolutely no guidance, no help, not even a format to follow from ODOT. We met religiously, and filled in the forms, and never a comment.” [CFG #4]

**Joint venture relationships.** Interviewees also discussed joint venture relationships.

**Some of the business owners interviewed had favorable comments about joint venture programs.** For instance:

- The Black American male owner of a MBE-certified landscaping firm said that he has never participated in a joint venture but he would be open to it. He said, ”Oh yeah I haven’t had any experience with it but I wouldn’t mind trying it. If I ran into a job big enough I wouldn’t mind trying something like that.” He went on to say that a partnership like that would help him learn and grow. [#21]

**Other interviewees expressed reservations about joint venture programs.** For example:

- The owner of a franchised landscaping company said that there could be benefits and challenges. He explained, ”There are definitely companies in our industry that I would partner with but there’s a lot that I wouldn’t so I would hate to be thrown with a partnership that doesn’t work. I don’t see how that could work out. Partnerships as a whole are difficult. And our standards and expectations are very different from other companies.” [#25]

- The Black American male owner of a DBE-certified general construction management firm said that ODOT’s ability to improve [joint venture partnerships] will only work if the other side can also uphold its responsibilities. He stated, ”It’s got to be a marriage. You do this; we’ll do this. So what I think [is a structure needs to be] put in place on both sides of the table [about] the terms of a partnership [and] that ODOT staff and the joint venture parties are held accountable.” [#30]
Financing assistance. Many business owners and managers had comments about assistance obtaining business financing.

Some business owners and managers indicated that financing assistance would be helpful. Comments in favor of financing assistance programs included the following:

- The business development manager at a certified Subcontinent Asian materials testing firm said that it would help them to have more "low-cost loans for business or for equipment acquisition. We need to spend probably $100,000 to buy drilling equipment...you know, four percent interest or something." [#40]

- The non-Hispanic white owner of a franchised landscaping company said that financial assistance could help remove obstacles to growing a business. He stated that the SBA program was extremely helpful: "One of our first loans was a line of credit was with, through SBA and we couldn't get that financing through a private bank so we went the SBA route and had no problem." [#25]

- Financing assistance specifically makeings lines of credit available was a priority for the project manager of a certified concrete company. He said, "Not loans, but credit. A line of credit is harder to get and cost more now." [#45]

Bonding assistance. The study team asked business owners and managers about bonding assistance.

A business owner indicated that bonding assistance would be helpful. She stated, "If your credit is not there, you don't get the bond. If you don't get the bond, there's no way you can win the job, unless you have $20,000 or $30,000 sitting somewhere just for the bond – just to pay for the bond, and then you still have to pay for your overhead. So I think that they should take one or the other. Either help with the overhead the first 60 days, or implement maybe an easier route for people with challenged credit to obtain these bonds." [#53]

Conversely, another business owner did not think bonding assistance was helpful. He said that there are plenty of those programs, but they are ineffective. He stated that "real companies are not built from the process." [#11]

Some business owners and managers recommended assistance in obtaining business insurance. For example, the female manager of a woman-owned, DBE-certified construction company said that assistance in obtaining business insurance would be helpful. "Yes, if [the assistance] could get [our company's] premium down. Holy cow! [The insurance companies] are the ones making all the money now." [#19]

Assistance in using emerging technology. Interviewees discussed assistance in the emerging technology.

Some business owners said that assistance using emerging technology would be helpful. For example:

- The aggregate salesman of a majority-owned stone and ready-mix concrete supplier said that it would help a small business to know where to look for projects and how to
navigate the sites. He explained, "If you don't know where to look, you'll never find anything on there. If they had specific job listings, [because] they are there...but to print it out and have a hundred pages of stuff come out to sort through. I mean to whereas if they brought all that out and just had an easy access to it, and you can pick and choose what you wanted to see, basically right now when you open it you have to see the entire state of every possible job that's listed there. Just a little more user friendly as far as what projects that ODOT are going to put out, that would be wonderful because you can waste a lot of time looking for stuff." [#28]

- The non-Hispanic white male owner of a fence and guardrail firm said he thinks getting assistance with emerging technology would be wonderful. [#27]

**Information on public agency contracting procedures and bidding opportunities.**

Most interviewees indicated that more information on public agency contracting procedures and bidding opportunities would be helpful.

**Many business owners and managers reported that they were already receiving information on bidding opportunities or knew how to search for them.** For example:

- The non-Hispanic male owner of an excavating company said that information on public agency contracting procedures and bidding opportunities is pretty easy to find if you look for it. [#32]

- The non-Hispanic white male owner of a fence and guardrail firm said that he was not aware that you could find bid opportunities on ODOT's website. He said he used to get the Dodge report and wished that ODOT had something similar to that. [#27]

**Pre-bid conferences where subs can meet primes.** Some business owners and managers supported holding pre-bid conferences. For example,

- The non-Hispanic white male owner of a fence and guardrail firm said that he has participated in these conferences and finds them very useful. He said what he finds useful is, "I can find out what they really want, get a timeline on things, know who that you're working with, who you're working for, know who to report to." [#27]

- The non-Hispanic white female owner of a sewer maintenance firm said, "It's a great opportunity to get a first-hand look at who your client is and what they expect you to do, [because] it's not all written down on paper... Those things are, to me, just priceless, because it gives me as, an individual, the opportunity to ask any question I want, but it also lets me hear what other people are asking as well and that's, I don't know, it's very helpful in my understanding the complete project." [#22]

**One interviewee did not think that pre-bid meetings were useful.** She said that pre-bid meetings commonly illustrate the severity of Ohio's closed networks. She stated, "When you get in a room of contractors that bid on jobs, constantly -- Bob might be doing a pre-bid meeting and Jim walks in. He knows Jim. He has a rapport with Jim, and that's intimidating, because Jim is more likely to get that job than me, because he has a rapport with Jim. I'm a new company." [#53]
Other agency outreach, such as vendor fairs and events. Some business owners and managers reported that outreach such as vendor fairs and events were useful. Others no longer regularly attend those events.

Examples of positive comments about agency outreach events include the following:

- The Hispanic male owner of a DBE- and EDGE-certified survey firm said, "I attended outreach efforts early on in 2008-9 because I had the time to do it. I went to local chamber and city of Toledo events. Since then, I have not had time. I did find them useful. For example, [company name] put on a class every Saturday for six or 10 weeks. That was extremely helpful. It took you through every aspect of business from startup to contracting." [#56]

- When asked about agency outreach, a non-Hispanic white female owner of a DBE-certified electrical engineering firm said, "I see them [ODOT] every place. I think ODOT does a nice job of outreach." [#1]

- The non-Hispanic male owner of a non-certified excavating firm said that he has attended other agency outreach fairs and events. He said, "I think you get what you want out of it. There's plenty there to take advantage of." [#32]

- The non-Hispanic white female owner of a steel erection company said she attends many of the outreach events that ODOT, the Commission and other municipalities' host. She said. "When I started the business they were very, very helpful and they remain helpful especially as a way to meet contractors that I do not know." [#7]

Many interviewees expressed the need for a variety of improvements in outreach to businesses. Examples of such comments include the following:

- The non-Hispanic white male project manager of a certified concrete company said “They [public entities] need to do a better job of making firms aware of outreach events. We don't get emails telling us about any outreach events." [#45]

- A focus group participant representing an environmental consulting firm said, "I would love it if [ODOT] would just have a meeting to discuss openly what's coming up, where anybody could come instead, so it wouldn't be so labor intensive for everyone to try to set up individual meetings, so that we, as a firm, understand what's coming up, too. Smaller firms, most of us don't have a whole marketing staff that can commit their whole day to going around to the different ODOT districts and making those face-to-face connections." [PSFG#1]

- The Black American male managing director of a certified management services firm said that "outreach opportunities are being hampered" by a lack of information. He recommended that ODOT more effectively communicate all criteria. [#41]

- The Black American male owner of a DBE-certified general construction management firm stated that ODOT certifies companies, following specific criteria, but that ODOT does not offer outreach for small businesses. He elaborated, "It needs to be driven in the
sense of ‘What are you doing? What headway are you making?’” He said, “I would strongly encourage them to revisit their outreach program.”

He also said that the Commission would also need to improve outreach. He elaborated, “If you want a great organization, you have to have outreach; you [need] marketing... How are you going out to those women, those small business, those minorities?... What is your processes for success? You’ve got a certification standpoint -- why? Because you’re mandated to achieve; so how are you achieving that?” [#30]

- A focus group participant representing a business assistance organization said, “I think that we don’t have to make huge 180 changes; I think it’s information sharing, it’s the advocacy again, having [minority business assistance centers], if it’s possible, to be in those discussions [and] having a deliberate role, because we have those in metrics to meet as well, so this becomes a great symbiotic relationship. I think that sharing... information with our clients as far as... federal dollars not being [set] aside specifically for race, I think that at least if they hear it, if they hear it from us, although they may not be satisfied with that, at least they now know. With that information that we now know and the ODOT not being this dark abyss... we can disseminate this information, we can communicate, we can see more of ODOT’s presence maybe coming to our cities, doing workshops with us. All of these things are steps in the right direction, in my opinion.” [DBEFG #1]

- The Black American male owner of a certified IT firm recommends that ODOT and the Commission improve engagement by conducting outreach events in the community. [#42]

- The Hispanic male owner of an industrial product manufacturing company said that the racial bias of his industry could be helped with more outreach to minority communities. He explained, “There needs to be outreach to the minority communities so that skill trades is an option to people rather than... handouts or free government money... Real outreach with internships and where there’s face to face stuff, and you actually touch a tool, and we can actually do something instead of talking about what’s possible. They need to nurture minority businesses to become majority players, and then those businesses could reach out to their own community. Not a cover up using a woman, or a cover up using a black man as a straw man. It has to be real.” [#11]

- The district manager of a drilling company said his company has never attended outreach events sponsored by ODOT or the Commission. He said he is not aware of either agency notifying his company of the events. [#44]

- A public hearing participant representing a management consulting firm said, “I have never even seen an ODOT bid go out on the state procurement web site that was in my classification. So they don’t. Okay. So there’s one reason that if people were looking to do work with ODOT and they’re primarily looking at the Ohio State Procurement site to know about opportunities, they’re not there.” [CLP#5]

- The non-Hispanic white male owner of a landscape company said, “If ODOT wants small businesses to compete and work on their contracts they need to communicate
efficiently and quickly. They should provide information directly to small businesses so we can bid on upcoming work. It almost feels like the decisions are already made. We hear about it in the news after the fact. ODOT is not getting the best product. Lots of guys are not bidding because the good companies do not want to waste their time. I think public works promote inefficiency and wasted tax dollars.” [#47]

- The non-Hispanic white male owner of a hauling firm said that he has not participated in any ODOT or Commission outreach events. He said that it’s because “I didn’t figure they would even mess with a company like [mine].” He indicated that a website that lists opportunities and allows you to contact a person directly would help him learn more about how to work with ODOT in the capacity that fits his business. He said, “I mean if I knew of a website of where to go to look for these jobs, I’d be going there.”

He added that he would like ODOT to reach out to him directly. He said, “Call me, put me on a list, let me know that there [are closely-located] jobs.” Ideally, he would like to be able to enter his information through the web and then be contacted for jobs when his abilities matched someone’s need. He said, “I could go in and put what equipment I have and what I could do for them and then they, as they’re searching for contractors, [could find me and contact me].” [#33]

A number of business owners and managers indicated that outreach events were not useful. For example:

- The Native American male owner of a professional services firm was asked if he has ever attended any of the outreach sessions hosted by ODOT, the Commission or other public agencies. He said, “When I go to these outreach events and economic inclusion meetings contracts awarded to Native Americans are always zero. Native Americans are left out [of the DBE, MBE and WBE programs]. There is a preference for African Americans and Hispanics.” He recounted an outreach event that he remembered from eight or nine years ago held by the state architect, and said, “The attendees, [minority and women business owners] were asked by the chief architect if any one there had ever been awarded a contract by a prime, paid for the work and did not perform the work. Every hand in the room went up. They were paid to go away. Handed a check for doing nothing.” [#8]

- The Black American male owner of a certified information technology firms said he has participated in trade fairs and expos but has not seen much success from them. He said, “We attended the expos to get our name out. I think the city and the state are trying to do an outstanding job but there is not enough follow through. The Turnpike Commission and ODOT recently had an open house but I did not attend because I think they are more focused on construction and not on technology.” [#54]

Streamlining/simplification of bidding procedures. Most business owners said that streamlining or simplifying bidding procedures would be helpful.

Some interviewees indicated that they thought that bidding procedures were already streamlined, or that further streamlining was not needed. For example:
The non-Hispanic white male owner of an excavating firm said, “Well, I’m sure that there’s ways to improve it, but honestly, the electronic methodology now, where they can reach almost anybody with the push of a button, it’s just out there. You just need to go down the list or look it up.” [#32]

**Breaking up large contracts into smaller pieces.** The size of contracts and unbundling of contracts were topics of interest to many interviewees.

**Many business owners and managers and focus group interviewees indicated that breaking up large contracts into smaller components would be helpful.** Examples of those comments include the following:

- The Black American male owner of a MBE-certified landscaping firm said that breaking up large contracts into smaller contract piece would be helpful to his firm. He said, “Oh man yeah, that would help. But then that’s why you [are] supposed to have your business together so you can go in and get the big contract, you see? And that’s what we [are] trying to shoot for now, is putting ourself in the position to go that route.” He went on to say, “by being smaller, if it was broke up, I wouldn’t have to get a big bond.” [#21]

- The project manager of a SBE-certified concrete company stressed that the size and type of contracts through ODOT are a significant barrier for small businesses and that breaking up large contracts into smaller pieces is critical for small businesses. He said, “I can’t go after 95 percent of what they [public entities] put out there.” [#45]

- The non-Hispanic white male owner of this concrete company agreed that the size of contracts is a barrier for small businesses. He said, “That’s why you don’t see the little guys on ODOT projects. The contracts are just too big. We don’t want to put all our eggs in one basket. We don’t want to take a job that’s going to take up the whole company’s time and every employee to do one project. We have to allocate it. I can’t be in a position where I’m waiting for one customer to pay.” [#45]

- A focus group participant said, "I think that the subcontractors will continue to have a hard time being primes just with the way that currently bid packages are made, or projects are even packaged in the first place... [Small contractors] don't necessarily have the working capital... or access to larger lines of credit for large, large bid packages, so then they're coming in as subs, but there's the same problem... when they're working as general contractors... Still you need to be larger or have access to a larger pool of money and/or workforce and/or equipment to be able to be competitive."

This interviewee added that “The small contractors have a larger hill to climb. Now I know here in [city name], there’s a project just, for instance, [company name] is the general contractor on that... Because it’s a biodiversity goal, they’re meeting with small subs one-on-one to figure out what their capacity is and they’re breaking out the bid packages in more creative ways so that we can get more participation on a project. Stuff like that kind of has to happen.” [DBEFG#2]

- The Black American male owner of a certified IT firm said his firm is at a disadvantage when IT services are bundled into one contract. He would prefer a contract for each
specialized IT service. He said, "There are times when services are bundled into a larger contract that could be broken out. Toledo Public Schools does a really good job of breaking contracts down into multiple components and taking bid responses from companies that focus specifically on a particular component. Those specialized companies may not have the capability or the desire to respond to a larger contract. So the organization, if they're sensitive to that, can meet their needs [and] engage more companies." [#42]

- A focus group participant said, "If there was a way that ODOT could identify work that is geared toward a smaller entity, such as myself, that would help as opposed to grouped together and given to a prime contractor that is not an MBE. Actually require that that contractor seek MBE services. I think it would help me if the State of Ohio would seek to do that directly rather than indirect." [GSFG#2]

- When asked if he had any suggestions for improving the state and city's programs, the Middle Eastern co-owner of an engineering firm replied, "The state should consider making the contracts smaller or breaking up contracts so that small companies can get some of the work." [#2]

- The non-Hispanic white male owner of a fence and guardrail firm said that he thinks that breaking up large contracts into smaller pieces would be great. He said, "Like for instance this bypass fence. If I could bid a mile of it I'd bid it, but I don't want 26 miles of it. I wouldn't mind having it, because we could work on it for a year and have it done, but they want it done in 3 months, and I don't have the man power to do it, but I could do 1,000 foot of it, or even 1 mile of it." [#27]

- A public hearing participant said, "On a broader scale, the size of projects that ODOT awards or puts out are normally too large for most of us to bid as a prime. I think there is an anti-trust issue as somebody mentioned earlier in certain industries. I was an asphalt paver for ten years. I think one of the mistakes that we make is always wanting to be a sub, first of all. I preached to ODOT for years that they should put out more prime contracts in smaller amounts and we should attempt to be primes in those, which is eventually where I had success. My thing was I wanted to be a big fish in a small pond versus the other way around. But waivers are a big, big -- and always have been a big, big problem." [CLP#7]

- The non-Hispanic white female manager of a dump truck company said that it would help if larger contracts were broken into small pieces so that she could bid directly on those. The contract sizes currently prohibit her from bidding on ODOT and the Commission projects. [#20]

- When asked if unbundling contracts would be useful to him, the non-Hispanic white male owner of a small hauling firm said that if he had information about the hauling part of the contract, it would help him know to bid on it. [#33]

- The non-Hispanic white female owner of a DBE- and EDGE-certified steel erection company said, "Prequalification can be hard for people. Maybe they can handle a larger job, but in bite-size pieces. I think this should be reviewed. They have allowed people to
break up the C92s, (basically the work) so maybe it's a $2 million project, but they write the C92 for $500,000. I think that is helpful to a small company. Perhaps they may not be able to prequalify for $5 or $10 million, but they may be able to handle $3 to $5 million if they are not doing it all at once.” [#7]

- The non-Hispanic white owner of a franchised landscaping company said that unbundling contracts would be more costly for the state and would require more coordination, but would be very helpful to disadvantaged or small businesses. He stated, “Rather than one, you know $100,000 agreement, now there are two $50,000 agreements where a company, like us as a startup, [could] service that. That $100,000 agreement, no way we would've [won] that. No way we would've been able to do it.”

He went on to say that a problem with breaking contracts into smaller pieces is that he would have to evaluate the margins more carefully to determine that it’s not “scraps” that a prime would not want to do. He believes that having subcontracting minimums would prevent this problem. [#25]

- The Hispanic male owner of an industrial product manufacturing company said that “it would be very helpful if agencies unbundled their contracts into smaller pieces.” [#11]

A few business owners saw both positive and negative aspects of unbundling contracts. For example:

- The non-Hispanic white male owner of an excavating firm said, “I'm a little ambivalent on that. On the one hand, ... there's probably potential for savings, and you get to bid your own section, and maybe you can get the bid, whereas if you're bidding with a different contractor, you may not. But the process is just not always smooth. It’s kind of imperfect.” [#32]

Price or evaluation preferences for small businesses. Interviewees also discussed bid preferences for small businesses.

Some interviewees identified advantages and disadvantages with preferences for small businesses. For example:

- The Black American male owner of a DBE-, EDGE-, and SBA 8(a)-certified general contracting firm explained that, “We’re doing a job in [city], and 35 percent of their residents have to be on this job.... This is their [city’s] first sewer project.” He explained that it was a challenge to meet the city's requirement, as 50 percent of the employees have to live in the city and 35 percent have to work for his company. He said, “It’s the numbers that we have to try to get. That affects our price too. We’re a specialty company and we have to price it. We're not going to be as efficient with [price] because we have hire [outside of the company’s local area].” [#31]

Small business set-asides. The study team discussed the concept of small business set-asides with business owners and managers. That type of program would limit bidding for certain contracts to firms qualifying as small businesses.
Most business owners and managers supported small business set-asides. Examples of those comments include the following:

- The Black American male owner of a MBE-certified landscaping firm said that small business set-asides would be useful to his firm as long as the bonding requirement was not too high. [#21]

- A majority-owned engineering firm was asked if the company had any suggestions for ODOT, the Commission, or other public agencies to improve its small business or MBE/WBE/DBE/EDGE programs. The non-Hispanic white male manager said a way to help small businesses learn and gain experience would be to set-aside projects that allow them to partner or shadow larger firms interning as they learn the business. [#10]

- The representative of a majority-owned design and engineering firm said, “We have been the sub-consultant to a minority on a federal small business set-aside. [Set asides are] of significant benefit. The government understands the small business is still learning. They need support, especially if the contract[s] are in multiple states. Small businesses can win and they do.” [#5]

Some business owners and managers generally supported small business set-asides but expressed some reservations about the concept. For example:

- The non-Hispanic white female manager of a dump truck company said that small business set asides only helps if they use a larger threshold to define small business. She explained, “Less than ten trucks? Less than two trucks? Less than $1 million a year? Less than $500,000? I mean, what they decide is small business does not compare to what we think is a small business. I mean, you can say, ‘Yeah, you gross $1 million a year, but does that make you a big business?’ No, I don’t think so… Our first five years we grossed $1 million a year. Now, we haven’t been. But I don’t know if we’re still considered a small business or if they put us at the top of their lines or whatever you [want to] call them.” [#20]

- The Black American male owner of a DBE-, EDGE-, and SBA 8(a) certified construction company explained that he has to compete with other 8(a) firms that are bigger companies and non-union firms. He said, “We bid a lot of work and we get it solely on past performance. Most of the work the company gets are not set-asides, although we are happy to take set-asides. A friend of mine gave me some good advice. He said if the system is there; do not be ashamed to use it. However, if you are going to run a business, run a business. Do not come into this thinking, I am a minority. I am going to take advantage of set-asides.”

He added that, “It’s the small business set-asides that scare me. You are competing against the larger companies. It is harder to compete against them. Some are much larger and some are non-union. They can bid the union work. Their overhead is smaller.” [#4]
The Black American male owner of a DBE-certified general construction management firm said that the preservation of equal opportunity is needed across all arenas. He claims, "There's always a role that not only public, and individuals, and gubernatorial folks can play. They may choose different, but you can always reach out and create opportunity. Whether it's student loans so you can go to get your education; whether it's opportunity for funding for my business; whether it's opportunity for outreach... It shouldn't be color based; it should be opportunity based. It shouldn't be gender based whether you're a male or a female. We should all have an opportunity, right?"

This interviewee recommended that public agencies reach out and demand more opportunities for more people, regardless of label. He said that the governor has done a lot to create opportunities, but these need to be expanded by other politicians. He elaborated, "So my broad line of minority is not just African American; it's across the board. The word 'minority' to me means otherwise you would not have exposure or opportunity. So it could be your family is billionaires, but your dad has cut you out of the will; you have no opportunity. You're poor and disadvantaged, so you don't have the opportunity. It's not just opportunity though; it's exposure." [#30]

Other business owners did not support small business set-asides. For example:

- The Black American female owner of a waterproofing and painting company said that she does not see a benefit to the set aside program because the contractors can easily manipulate their ability to meet state requirements and avoid hiring disadvantaged firms. [#53]

- When asked about small business set-asides, the female owner of a sewer maintenance firm said that she thinks it's "really asinine." She said, "Because the job should be given out based on the merits of your work and your price and other factors, not on the fact that you're a male or female or the fact that you're white or black or whatever you are, it's really what you say you're gonna provide and you do it." [#22]

Mandatory subcontracting minimums. Some business owners and managers supported requiring a minimum level of subcontracting on projects. Some interviewees did not.

Examples of comments in support of a mandatory subcontracting minimum program include the following:

- The aggregate salesman of a majority-owned stone and ready-mix concrete supplier said that he supports the idea of percentage goals. He stated, "With having the percentages there to give them a chance to go after some of this work, I mean it's only fair. I believe that everybody needs a chance to succeed. If having those requirements in there helps keep everything in check, I'm all for it. It's one of those things that it should happen on its own, but unfortunately it doesn't." [#28]

- Regarding small business sub-contracting goals, the non-Hispanic white female owner of a sewer maintenance firm said, "I understand the need for it, especially with startup companies. They've got to start somewhere. Somebody's got to give them a break to get
in there... Helping new businesses get off the ground and get started, regardless of their ethnicity and gender background because it’s kind of tough to break in." [#22]

Some owners of firms had reservations concerning a mandatory subcontracting minimum program. For example:

- The Black American male owner of a MBE-certified landscape firm said that he appreciates the subcontracting goals and minimums for small business but he believes many companies do not put in the effort to find qualified subcontractors. He said that many companies will just go with the lowest price subcontractor. [#21]

- The project manager of a certified concrete company was asked his opinion of mandatory subcontracting, small business subcontracting goals and small business set-asides. In response he said, “Cleveland has done a couple but they’re the only ones who have contacted us. The county does it but it’s still a whole project, not a part of a contract like concrete. The county gives GCs credit for using us. I don’t know how much it helps them but that only helps if there are contract requirements. There are no incentives for them to use me otherwise. The SBE requirements help.” [#45]

Some interviewees did not like the idea of mandatory subcontracting minimums or did not think it would be effective. For example:

- Regarding subcontracting minimums, the non-Hispanic white male owner of a fence and guardrail firm was not sure he was in favor of that. He said, “I’m not sure about that. I don’t like laws making anything mandatory about free enterprise, but I can see where it’d be a good thing.” He went on to explain when it might be a good thing and how he is still conflicted on the subject. He said, “Helping some small businesses, but again I can see why they wouldn’t want to do that, because then if it’s mandatory that you use a small business partner [and] you can’t find a competent one, then what do you do? There are some incompetent small business people out there.” [#27]

- The female manager of a dump truck company said that they generally are not useful to her. She explained, “Because we don’t ever get the projects. I mean, it’s useful probably to somebody else, but not to me.” [#20]

- The non-Hispanic white male owner of an excavating firm said, “There’s a cost either way. And it kinda reminds me of the government breaking up monopolies back in the early years of the Industrial Revolution. I don’t know. I guess if it’s public money and you decide that that’s better for the public good, then that’s okay. But if I were the guy that had spent my life building a company with 10,000 employees and I could do it all, to be told I could only bid on part of it wouldn’t sit so well [with] me either, so I don’t know where I land on that one.”

He added that one of the issues he has with work in the public sector is the subcontracting minimums. He said, “If I’m not in a position of needing a subcontractor to perform my work, then what do I do about that? The only thing I can do is maybe hire a minority contractor to haul gravel to my job or something like that. Just depends on the scope of work. If I’m doing something where I’ve got paving and curb in my
contract, then there's plenty of contractors to find, but if I'm just moving dirt around, putting in sewer pipe, there's not much I can do in that kind of a situation, other than hire a trucking company." [#32]

**Small business subcontracting goals.** Interviewees discussed the concept of setting contract goals for small business participation.

A business owner recommended against a small business subcontracting goals programs A non-Hispanic white male owner of an excavating firm said, "Public policy legislates fairness in how you spend money – I guess I understand it, but it runs counter to the idea of having a free country with equal opportunities supposed to be out there. I mean, you just got to get in and do it. I don’t know that creating our official situations is the best way to go." [#32]

**Other measures.** Some business owners identified other neutral measures for consideration. For example:

- When asked about business assistance programs that would be helpful for small businesses, the Black American male owner of a DBE-certified general construction management firm said that ODOT and the Commission do have them, but "you don’t know how to get to them... ODOT will pay for a certain of your accounting; ODOT as the state will – they’ll pay for certain processes. But you don't know it...unless somebody tells you." [#30]
  
- The non-Hispanic white female owner of a steel erection company said she is aware of ODOT assistance that reimburses DBEs for financial audits. She said, "I have applied for reimbursement. They are out of the funds right now. However, the department is trying [to] get additional funds. Audits are about $25,000." She said. "If you do over $5 million worth of work, which does not take long in this industry, you have to have a full-blown audit. Every year we have to provide audited financial statements." She recommended that ODOT change the rules to every three years and allow companies to submit financial statements or reviewed financials annually. [#7]

**I. Insights Regarding Race-/ethnicity- or Gender-based Measures**

Interviewees, participants in public hearings, and other individuals made a number of comments about race- and gender-based measures that public agencies use, including DBE contract goals. Comments regarded:

- Support for race-/ethnicity- or gender-based measures *(page 86)*;
- Negativity towards race-/ethnicity- or gender-based measures *(page 86)*;
- Criticism for aspects of the Implementation of the Federal DBE Program *(page 87)*; and
- MBE/WBE/DBE fronts or fraud *(page 89)*.

**Support for race-/ethnicity- or gender-based measures.** There were many comments in favor of the Federal DBE Program, including DBE contract goals.
Negativity towards race-/ethnicity- or gender-based measures. Some interviewees said that they did not support programs that gave advantages to minority- and woman-owned businesses.

Some interviewees said that race- and gender-based programs should be discontinued or substantially changed. For example:

- The non-Hispanic white female representing a majority-owned design and engineering firm was asked if she had any suggestions for ODOT, the Commission, or other public agencies to improve small business or MBE/WBE/DBE/EDGE programs. She recommended uniform certification. She explained that, "If the federal government certifies you, and you have a local office for the SBE program, you should be certified. The resources could be changed so that someone who is [sitting at a desk] reviewing paperwork could be out introducing firms [to decision makers]." She also recommended that some of the differences between programs be reconciled. "[It is] a lot of wasted resources," she said. [#5]

- The district manager of a majority-owned drilling company said "I think there needs to be a time limit on how long they [minorities and women] can use the crutch. I think if they're a good, viable business, that'll be enough to get them going." [#44]

- A manager of a majority-owned transportation consulting firm said, “I am from England and England does not have the same history with race as the United States. So, some of this is lost on me. I do not see the need in today’s market. I think there should be a limitation on the definition of disadvantaged—the programs weren’t set up for people who are not disadvantaged. After a certain number of years or they grow to a certain size, they should not be in the program any longer. It should be a small business program where everyone benefits.” [#9]

Criticism for aspects of the Implementation of the Federal DBE Program. There were several comments criticizing how public agencies implement particular aspects of the Federal DBE Program.

Some interviewees were critical about key aspects of the implementation of the Federal DBE Program. For example:

- A focus group participant said, "I'd be interested to see what other people think, but I think the DBE program has gone downhill a lot this past year and maybe past two years. We don't even know who to call in the DBE program, to ask questions. There have been so many turnovers; I don't think there's even really been a solid leader in the program. It's been very frustrating, trying to get anything done." She added, "I've been very disappointed in the DBE program. It took me almost a year to get certified... It's been very frustrating for me. I'd be interested to see if other people have the same experience. I've submitted my annual certification every single year, and I never hear a word back to even say that they got it. It's frustrating." [CFG#4]

- When asked about his impression of the DBE program, a Hispanic male owner of an industrial product manufacturing company said that it is "nonexistent." He elaborated,
"It's a myth in that there's always another obstacle, another hurdle to have to come over, to jump over. Yeah we've spoke... we've been to meetings, and it's just, nothing ever manifests, it's just words."

He said that a “real contract” would not be controlled by the majority, but “actually goes to the corporate minority owner, that he owns and he controls.” He explained that a problem with the DBE program now is that majority corporations “like to have control over the minority contractors.”

He went on to say that the DBE goals are not enough. He elaborated, “It's got to be mandated. It can never be a goal. That's where the program is wrong. That's where the whole breakdown in this process is.” He explained that there is “all this administration money, and all this false hope, and all these process take place, and nothing every changes. The big get bigger, the rich get richer, and the fat get fatter. That's what happens. I think the whole process is broken... I'll tell you the truth, at first, I was really excited about it. When I first got in and I was young and I went into all these meetings and I saw all these opportunities and what could be possible [for] the future of what could be. [Because] I know I'm a hard worker, and I've got good credit, and... then when I started to see the reality of things, it just makes you sick. I mean, to be honest with you, it made me sick because I'm an able-bodied person, and to be not allowed to play is really – is quite sad.” [#11]

Some individuals expressed the opinion that there should be preferences for small businesses. Specific comments include:

- The Black American male owner of a technology firm said, “There should be an in-state preference. There was a 5 percent preference for certified companies but I do not think it is there anymore. I would also like to see the city of Columbus do something to directly benefit technology companies. That would have a ripple effect from city to county to state.” [#54]

Many interviewees expressed opinions about communication, outreach, and advocacy. Examples of such comments included the following:

- The Black American male owner of a technology firm said, “We talk with ODOT all the time, they are a valued partner. The Turnpike and ODOT are on the right track. The Turnpike could do even better. I think there should be more communication between firms and the Turnpike.” [#54]

- The business development manager of a certified Subcontinent Asian materials testing firm said, "The problem is that information is not given freely during bids. If they know how many pours, the quantity, and the schedule, then we can make a very accurate quote just for them, with their information. And for anybody else, we've [guessed]. I think – originally I thought that they wanted to be very protective of their information, but for concrete in particular, I don't know. I just think they don't want to fool with it. They figure it'll be five percent of the contract, and they'll deal with it, see if they get it.” [#40]
When asked if she had any additional comments or something she felt was especially beneficial working with ODOT or any other public agency, the non-Hispanic white female owner of a DBE-certified electrical engineering firm responded, "Individuals who take the time to teach you or connect you with someone. The DBE coordinator when I started the company took the time to introduce me to a bonding agent and it really helped. Those kinds of introductions and referrals are really helpful." [#1]

When asked about recommended changes to the DBE program, a Hispanic male owner of an industrial product manufacturing company said that he would recommend “bonafide internships with majority corporate partners rather than talk about it. They have to do it. You’d have to be walked in almost holding hands. It’d be a handholding kind of thing.” He believes that this would give people “a chance at a real contract.” [#11]

Several interviewees expressed opinions about the need for transparency. For example:

- A focus group participant said, “there’s no transparency as far as ODOT reporting its goals, its minority spend goals.” [DBEFG#2]

- A public hearing participant said, “The biggest disparity that I’ve seen occurring occurs within ODOT in the way they handle waivers and the way they set the goals and the way they allow contracts and goals to be fulfilled and not fulfilled with their good faith effort requests. And not only with their good faith effort requests but at the end of the job, when the goal hasn’t been fulfilled, then it just a null and void thing. So what I would really be interested in is to see how [much] is allocated annually to the DBE spend and how much money actually goes to the DBE spend. And within that DBE spend and the difference how much of that is in actual up front waivers and how much of that is at the end of the job. Because until ODOT tightens up their practices and the things that they are allowing contractors to do, which puts the DBE’s out of business -- not out of business but not able to participate on the contracts, not able to participate on certain jobs. Until they fix their processes, the huge disparity lies within ODOT. We see it all the time.” [CLP#6]

- The Black American male owner of a construction management and general construction firm said, “It needs to be transparent. None of these programs are transparent. They all are hidden and there’s always somebody who you have to go to. These projects, programs should be transparent so that anybody that wants to see should be able to go inside and see exactly what’s going on. They should be able to see who’s doing [what project], who’s project it is, who the minority is going to be, how much it is, and how long. Everything should be open and above all.” [#38]

- A public hearing participant said, “I think ODOT itself needs to be more transparent. We understand that... they haven’t been doing so well lately... We want to see the reports that they see, and we don’t want to have to send a public records request to get them. We would like to have a DBE utilization report that comes out semi-annually posted on ODOT's website so we can go back and calculate who got the contracts, and we can help monitor because it doesn’t -- it seems like they need a little help monitoring. So we
would like to see that posted on the website. We would like to have more transparency." [CNP#2]

- When asked about recommendations to improve ODOT or the Commission’s bidding process, a Hispanic male owner of an industrial product manufacturing company said the bids should be known. He stated, “Make all the bids known so that the minority and smaller companies know where they have to be, where their costs are. Publish them, I guess, if they’re not already.” [#11]

**MBE/WBE/DBE fronts or fraud.** Many interviewees with a diverse range of experiences and opinions commented on the existence of fronts or fraud.

**Several interviewees reported knowledge of examples of fronts or fraud.** Some gave first-person accounts of instances they witnessed, whereas others spoke of less-specific instances or those of which they had no first-hand knowledge. For example:

- The Hispanic male owner of an industrial product manufacturing company said that there are a lot of “strawman” business dealings when you are a minority company. He explained, “I’ve seen it at the meetings and the organizations where these corporations buy a black person or they know a wife of this guy or this guy and – ‘Oh, we can start this little entity if we use your face and name’ and... of course they never last, because only things that are real last.” [#11]

- The non-Hispanic white male owner of an excavating firm said, “I know that happens. I think it’s wrong. But it’s just the way it works, I guess.” He went on to say that he does not have any personal experience with any companies that “front.” [#32]

- The non-Hispanic white female owner of a DBE- and EDGE-certified steel erection company was asked if she was aware of opportunities for public sector work [state or local] where she wanted to participate but was not welcome because she is a woman-owned business. She said, “This happened to me in [city]. It was a pretty large project. And the thing is it’s going to be okay, because in the disparity study, it’s not only women, but also minorities. This particular project went to a minority company who I know is a front. The contractor interpreted the goals as minority only. In fact, it could have been minority or woman-owned. It also happened on a Port Authority bid. My bid wasn’t considered because of that.” [#7]

- The Black American male owner of a DBE-, EDGE- and SBA 8(a) certified general contracting firm said, “When I first started [the company], and I know it’s still going on, everybody wanted to use [company name] as a pass-through company. ’Hey I just want to use your name, and then I’ll give you a couple hundred dollars here.’ Being new and not knowing the past of minority companies in Cleveland, what’s going on, I think that affected [that company].” [#31]

- The non-Hispanic white male owner of a landscape company reported, “The FBI just sent over 20 agents into a company right down the road. Apparently, the owner set up a minority front and they caught them. The guy, a white male, owns a number of companies and he set up one more with a black guy who everybody knows doesn’t
know enough to run a company. That’s why we thought we were being interviewed. Everybody knows about this guy.” [#47].

One interviewee explained the impact of alleged DBE fronts on her company. The non-Hispanic white female owner of a DBE- and EDGE-certified steel erection company said her experience when starting the business included rumors and allegations that she was a front. She said, “Our competition was ruthless. There were many rumors. For example, they said that different people owned us, people I did not even know. It was just ridiculous. They said that my husband’s old employer owned us. None of it was true, but there were all these rumors going around, and of course, over time, some of them have subsided. All of them have, really, I have not heard anything recently. But that was very hard.” She added that other rumors included, “That we would not be able to perform on jobs. We got many questions from contractors about whether we would be able to man jobs. It took a long time to build a good reputation.”

She added that she thinks the rumors about her company being a front triggered several ODOT visits. She said, “In fact, ODOT’s been out here three times since I’ve been in business, and my guess is because they suspect [fraud].” [#7]

J. DBE and other Certification Processes

Business owners and managers discussed the process for DBE certification and other certifications, including comments related to:

- Difficulty of becoming certified (page 90); and

- Advantages and disadvantages of DBE certification (page 96);

Difficulty of becoming certified. Many interviewees commented on how difficult it was to become certified.

Numerous interviewees reported difficulties with the DBE certification process. Several interviewees reported concerns about DBE certification implementation and oversight. Other interviewees indicated that obtaining certification in the proper North American Industry Classification System (NAICS) codes was a challenge. Examples of such comments included the following:²

- A public hearing participant said, “This certification process is something that definitely needs to be looked at, and it is not as filtered and as clean as the guy that was here suggested. If I have a certification from one certifying body, I can bring that to the table and get through. If I’ve been operating illegally for a number of years and have been producing and finishing projects, I’m deemed legitimate whether I am or not. So the certification process has to be looked at. If we’re going to go forward and have a belief that the DB[E] program is going to be implemented, as it should be. The people like

²The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy.
myself and others who investigate these things and document how things are going or how things have been done have to [be] listened to in order for us to get it right. I don’t want something that I don’t work for, but I also don’t want those who don’t work for something to get something they shouldn’t have.” [CNP #1]

- When asked to share some general challenges for small businesses, a focus group participant explained that not having the correct NAICS codes affected DBE certification and the ability to pursue contracting opportunities. He explained that when the bid is out, some businesses are saying that they weren’t aware that a particular NAICS code is necessary, and that there are issues when they try to get the code added to their DBE certification. The interviewee also mentioned that DBE certification backlogs are an issue. [DBEFG#1]

- The non-Hispanic white female owner of a DBE-certified steel erection company said, “The department [ODOT] needs to provide clarification on NAICS codes. You get conflicting reports of how they determine where you fall revenue-wise. It is almost cryptic. It is very important, because without knowing that, you could go over the standards and lose all your DBE work and your certification as a DBE. That could be 80 percent of your revenue. It could destroy a business.” [#7]

- A focus group participant representing a steel erectors company said, “I just spent $55,000 trying to keep my certification with ODOT, and I’m still in the appeal process, which will probably cost me a lot more. I’ve been a DBE now for 15 years, and all of a sudden... a couple of ODOT certifying... people, decided to change my NAICS code, and [to] also call general contractors letting them know that my participation was not going to count, just on a whim, without any real authority to do so.” She said, “I could bid the jobs, but I could not participate as a DBE any longer, so basically that knocks you out of the market. Going through this appeal process for the last 3 months, I have gotten my participation reinstated through a hearing judge. In the meantime, until ODOT and the federal government, the Federal Highway [Administration], get on the same page, the NAICS code situation is kind of unknown. They’ve been going by this NAICS code system forever, but they still don’t understand it.”

According to this interviewee, the people who testified during the appeal process had no knowledge of construction whatsoever. She said when they were asked what specialty trade contractor should be certified as a trade contractor on bridges they said, “Maybe the people painting the lines on the highway, because any construction done after post bridges, or post the building is done, they should only be the trade’s contractors that should be certified under bridge and highway? It was amazing.” She went on to say that “no one’s clear on rules and it's all subjective... If they [certifying people] want to take a business and put them out of the DBE [program], or let them in the DBE [program, it is all subjective].” [CFG#5]

- Another focus group participant representing a business assistance organization said, “The codes are an issue [e]specially with the way databases are searched, the way codes are assigned. I know, for instance, at the state level that they’re certifying to a more general code level than the procurement officers are trained for, and so some people...
are getting lost or missed because they don’t have the super specific codes when they have the general codes that still apply to the same contract.” She went on to say, “Certification is just a generally burdensome process, because you’re going to have to stop what you’re doing, unless you have somebody in your office that can compile all the documentation... Seems that you [must] have all your paperwork in order in the first place [so] that you’re just really keeping great records, which is not always the case, especially on a construction site.” [DBEFG#2]

- A focus group participant representing a business assistance organization said, “There’s no oversight as far as the DBE certification [such as for] white women, [who are] setting up these pass-throughs where there’s not sufficient oversight as far as who is actually in charge [or] after they’re in business to do a follow-up to make sure that they are still indeed the owners of these construction companies.” [DBEFG#1]

- The Native American male owner of a professional services firm said that the certification process is unfair to Native Americans because of the requirements to document heritage and social disadvantage in writing. He clarified, “Native American culture was oral so there is not a lot of history in writing. In our culture, you were told and then you had the obligation to pass it down to the next generation by word.” He further stated that, “The cost and time of preparing and applying for certification is not worth the effort. I can’t get a return on the investment. Certification is not worth spending $400 to $500. When I went for certification, no one wanted to talk candidly. I was told that as a Native American, I would have to provide documentation at length to confirm my claim [of heritage]. And, I said, ‘Would I have to do the same thing if I walk in and I’m black? Would I have to tell you which boat my ancestors came over from Africa?’” He said the reply was “’No. You’re black.’ I said there’s something wrong with that. You came over here. My people were already here. But now I have to prove to you I was here? I understand discrimination. I don’t subscribe to it. But if I show you a picture of my grandfather in his head dress on the reservation, that ought to qualify.” When asked what the response was to that statement, he said he was told he still had to provide documentation and that he explained that because Native American culture was oral, he had very little written documentation. He went on to say, “At the same time, I understand there are people who would take advantage or abuse certification. I am not one of them.” [#8]

- A focus group participant representing a highway and heavy bridge construction contractor said, “I’ve been very disappointed in the DBE program. It took me almost a year to get certified, in 2013. It’s been very frustrating for me. I’d be interested to see if other people have the same experience. I’ve submitted my annual certification every single year, and I never hear a word back to even say that they got it. It’s frustrating.” [CFG#3]

- The Black American male owner of a DBE- and EDGE-certified construction company reported that, “Certification was the largest challenge. You have to provide so much information. Are you a minority? Are you a veteran? You have to write an essay about how you are disadvantaged. Things I would like to throw out the window and move on.
I do not like hashing about how I was discriminated against. I am not saying it is discouraging but you have to prepare yourself.” [#4]

- A public hearing participant said, “The certification process is flawed. We need to fix it. We need to either be able to graduate people out of the category, if ... you find that most of the contracts and dollars spent in the category are going to two or three companies, then somewhere we have to come to an understanding these people are not disadvantaged; they’re mostly advantaged. And we need to be able to graduate them out some kind of way so that people who actually need the program can benefit from it, right... So if we can’t build the numbers in a particular category then we need to delve deeper into why that happens. I mean, why it happens or why it doesn't happen. And I think if you start with the certification process, you can go -- if you can’t get certified in one place, you can go somewhere else in the city and get certified, right, whether you're a legitimate business or not. That certification has weight. You take that to the next program, right. They automatically say, 'Okay. They were good over here. We'll get them in'. All of a sudden you have an illegitimate that now is legitimate. It's difficult to root them out over the time, especially if they get to operate in the SIC code that they're contracting in, right. Now they become a legitimate person or a legitimate company. That illegitimate company, those illegitimate companies are killing all the legitimate companies.” [CLP#3]

- The non-Hispanic white female owner of an EDGE-certified guardrail and lighting firm said, “Just the fact that typically it is a small company that’s trying to get certified and the time constraints on getting all that information together and going through the process annually.” She went on to say that each certification program has different submission due dates and occasionally, those submission dates change. She said, “It's not consistent. Two years ago it was due in October. And then I didn't hear back until December. So the next year it was due in December. And then I didn't hear back until February. So the next year it was due in February. So it's a really awkward – it's not consistent.” She said she thinks that the WBE certification process would be easier for her firm if the submission date was every other year instead of annually. She said, “I wish we could do this every two years. You know I wish that it could be just last a little bit longer. I think EDGE goes longer. It would be nice if everything went just a little bit longer. And I understand why they do it, because there are changes that happen even to us.” She went on to say, “You forget you have to let them know about all your changes.” [#15]

- An anonymous owner of a MBE/DBE/EDGE/SBE-certified firm wrote, “Since becoming involved in the DBE program and various Disadvantaged Business Certification programs within a wide range of government entities to include the Ohio Department of Transportation, it is my opinion [that] there seems to be an enormous lack of oversight by both the Government agencies providing the certification and the executive management of private Contractors that receive tax dollars on public works projects.” [WT#8]

- The Black American female owner of an EDGE-certified waterproofing and painting company said that ODOT has a long process for DBE certifications. She explained, "It has
taken me almost a year and a half to get my DBE certification... I understand that they're short-staffed, but that is a direct effect on me, because I have a job coming up October 15th that requires DBE certification, and I haven't even received the certification in my hand yet, and I had my on-site July 27th.” [#53]

When asked about specific recommendations for ODOT to improve the DBE process, she said that if you are certified by another agency, there should be a “fast track” for similar certifications. She explained that the MBE certification works as a fast track, "So if I was DBE certified first, then I could've gotten fast tracked for my MBE/EDGE [certification].” [#53]

- The representative of a general contracting firm said, “A year and a half ago, we got a large job with Cleveland, with ODOT in Cleveland that had a substantial DBE requirement on it. One of the things that we committed to do as part of the job was bring new DBEs to ODOT, because... there are not enough qualified DBEs to do everything we need to do. We were looking for upwards of 40 million dollars’ worth of DBE on this job, and wanted to bring some new DBEs to the party.” He added, “[T]o get somebody pre-qualified and to get somebody certified, the process is broken. We had contractors that were done performing their work, and still had not received certification or pre-qualification from ODOT to get into the DBE program. When you're trying to get people in... an easy detractor is to have all those challenges, barriers, all your key words, to get into the program.” [CFG#6]

- The Black American male owner of a DBE-certified general construction management firm said that ODOT has “one of the toughest” certification processes, which he viewed as a good example of certification processes. He recommended, however, that ODOT work on how to implement its DBE program, particularly accountability. He said, “Show me evidence that you know what you’re doing, that you know how to do it, and what demonstration have you conducted to show me that you've taken initiative?” He added, “Whether you’re a small business, or whether you’re a government agency; the same rules apply. And if you can't answer [those] question[s], then it's problematic.”

According to this business owner, the Commission did not have a certification program. He explained that, “it's mostly just a tracking mechanism. So they've been mandated... to set up the more formal EDGE Program... The Turnpike really needs help on their certification process.” [#30]

- When asked about her impressions of the federal DBE program, a female manager of a dump truck company said that “it’s very complicated as far as all the information that they want from a person to apply for the DBE... The form that I had to fill out and the application that I had to fill out, you know, did it to the best of my knowledge, and then they [said] 'You're disqualified because of these reasons.' Just aggravating.”

When asked if her denied application to the DBE program presents a disadvantage in securing work, this interviewee said, "If I would've had my DBE, not saying that one truck is [going to] get a [lot of] work,... I still would've been able to probably get phone calls from the contractors say[ing], 'Hey, I [want to] use your truck as a DBE because I
have to make this 5 percent, and I’ll give you this work.’ But instead, of course, they had to [use someone] else.”

She added that being able to get a DBE or EDGE certification would help her “get more work on my one truck alone, and not have to work through somebody else... To me now, I'm disadvantaged [because] I'm only one little truck, and if I don't get to work through her [the truck] or work through my husband, one truck, you know, you can only do so much.”

She said that she runs her own business. She explained, “They wanted me to get a whole new office and get a whole new business address and not work with his [her husband's] company at all because they said I couldn't focus on my own business if I was running his, so they denied me the DBE [certification] which I thought was a bunch of baloney.” She has also been denied EDGE certification. She explained, “The whole process, having to do it, and them knowing that I live here with my husband and we have the same residence, and I work with his company, and I'm not focused on mine only. I can do two businesses. How many people out there just run one little bitty truck? So they threw that in our face, and I was really aggravated by that, and it's like, 'Yeah, I can run his company and my company also.' I don't really consider mine as a company, but it's a company, I guess.” [#20]

When asked if she sees any differences in DBE, EDGE or other certification programs, a non-Hispanic white female representing a majority-owned design and engineering firm said, “There are some critically different criterions,” she said. “You get MBEs through EDGE. DBE and FBE criteria is different. The goal of the programs is the same. However, when I was preparing certification applications for a small business, I would submit thousands of papers for certification and then you had to re-submit the package again in two years [re-certification]. Not to say it is not important, I think the rules are important, however, it could be re-assessed.” [#5]

Advantages and disadvantages of DBE/MBE/WBE certification. Interviews and public hearings included broad discussion of whether and how DBE/MBE/WBE certification helped subcontractors obtain work from prime contractors.

Some owners of DBE-certified firms interviewed indicated that certification helped their business get an initial opportunity to work with a prime contractor. For example:

- The Black American male owner of a DBE-certified general construction management firm supported the need for a certification process. He stated that some certification processes “are just a rubber stamp” and applauded good certification processes that helped businesses get an opportunity through a disciplined process. He also felt that proper certification did not allow unqualified businesses to compete with more qualified ones. [#30]

- When asked if certification is an element of success, the non-Hispanic white female owner of DBE-certified steel erection company said, “Yes. It actually is. I want to be careful how I put this. I do not think a person should get a job because they are a woman or because they are a minority. They should get the job because they have
earned it. But they should not be denied the opportunity because they are a woman or a minority. This program [DBE] provides opportunity for which I am very thankful. I think once you get the right to bid then you have to perform.”

She added, “If it were not for the DBE program, I don’t know that I would have ever become a viable company. I needed that push. I needed contractors to almost have to use me, in a sense. Without DBE certification, I don’t think I would be in business, and without it, I don’t think I would stay in business. I would have to restructure my company and maybe I could do that over time. But the initial shock, if it were suddenly taken away, would be really tough because it’s such a large amount of our work.” [#7]

Some interviews indicated that there are limited advantages, or even disadvantages, to being certified. For example:

- The project manager of a certified concrete company said the company has gotten some business as a result of SBE certification. “Certification helps if it’s a requirement for a project. If there’s no set-aside, it doesn’t help. Otherwise it’s just another hoop to jump through. I don’t need practice filling out paperwork.” [#45]

- A female manager of a dump truck company said that not having a certification is a disadvantage for the firm. She stated, “A lot of the ODOT projects, and even some others, like all your school funding projects..., [the general contractors] all want this percentage of DBEs, like 5 percent or 7 percent. Up in [the] Toledo area, it’s 10-15 percent, and when you have [DBE certification], you’re [going to] get that work over me.” [#20]

- The non-Hispanic white male owner of an excavating firm said that he has considered a WBE certification for his firm. He said, “During the recession, my wife and I were looking at WBE as an opportunity for her. She actually owns more of the stock than I do, and she’s integral to the operations. But we didn’t find it necessarily to be an advantage for our kind of work, so we didn’t pursue it.”

In regards to the advantages of becoming certified, he added that, “I think it’s probably great for somebody that has the ability to perform work and gain those certifications. But ultimately it’s a bit artificial, because it really only applies mostly to public work. It’s not that meaningful to most private projects unless it’s, like, a philanthropy thing where the person providing the money wants to make sure that everybody has a percentage of the work. Most private-sector work's not that way.” [#32]

- Another public hearing participant reported that her company has “been in business since 1990 through no help from our DBE certification. But here’s the interesting thing. We were not DBE certified and we are able to obtain a couple of contracts. We were bidding against majority companies and it went really well. We got the contracts, but guess what? We were told we had to get a DBE certification, if we wanted to maintain those contracts. So we were really upset. It’s like, duh, we have to go through this. And one of the contracts, she held it until I applied for the DBE certification. I’m not going to give a name, but it was through a transportation company. So we went and applied for DBE certification. We got the DBE certification and since we received that DBE
certification, we have not gotten any business except for the business where a prime contractor was told they had to have a percent of DBE participate. And those are always what, 10 percent? So what do you get? A $10,000 job maybe, $15,000? And that's the only -- and we've had a couple of those...We didn't really care about DBE.” [CLP#4]

- The non-Hispanic white female owner of a sewer maintenance firm said, “I have never filled out all that paperwork for the WBE or [DBE certification] and it doesn't really matter. People call me because of the business and the reputation, not because I'm a woman-owned business.” [#22]

- When asked about the disadvantages of being certified, a Hispanic male owner of an industrial product manufacturing company said “Now you're marked. You've authenticated yourself as somebody that's less than a majority. That's the whole thing I don't believe in. Now you're authentic. You have a license to be less, hence the term minority.” [#11]
APPENDIX F.

Detailed Disparity Results
Figure F-1.

| Time period     | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 |
| 2010-2014       | X | X | X |   |   | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X |
| 2010-2011       |   |   |   |   |   |   |   |   | X |   |   |   |   |   |   |   |   |   |   |   |   |
| 2012-2014       |   |   |   |   |   | X |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Type            |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| All contracting | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X |
| Construction    | X |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Professional services | X | X |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Contract role   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Prime/Sub       | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X |
| Prime           |   | X |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Sub             |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Contract size   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| All             | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X |
| Small prime contracts* | X |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Large prime contracts** | X |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Geography       |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Ohio            | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X |
| Northwest       |   | X |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Northeast       |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Southwest       |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Central and Southeast |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Funding         |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Federally- and State-funded | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X |
| Federally-funded | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X |
| State-funded    |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Goals           |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| All             | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X |
| No goals        |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| DBE goals       | X |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| EDGE goals      | X |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Components of DBE goal |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| Analysis of potential DBEs | X | X | X |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |

* $2M and under for construction and $500K and under for professional services
** Greater than $2M for construction and greater than $500K for professional services
Figure F-2.
Funding source: Federally- and State-funded
Goals: All contracts
Time period: January 1, 2010 - December 31, 2014
Contract area: Construction and professional services
Contract role: Prime Contracts and Subcontracts
Region: Ohio

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
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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 DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.
### Table: Funding Goals

**Funding source:** Federally- and State-funded
**Goals:** All contracts
**Time period:** January 1, 2010 - December 31, 2014
**Contract area:** Construction
**Contract role:** Prime Contracts and Subcontracts
**Region:** Ohio

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
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<td>6.8</td>
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<tr>
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<tr>
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<tr>
<td>(14) Black American-owned DBE</td>
<td>569</td>
<td>$99,346</td>
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</tr>
<tr>
<td>(15) Asian-Pacific American-owned DBE</td>
<td>66</td>
<td>$6,162</td>
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<tr>
<td>(16) Subcontinent Asian American-owned DBE</td>
<td>62</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(17) Hispanic American-owned DBE</td>
<td>53</td>
<td>$6,529</td>
<td>$7,995</td>
<td>0.1</td>
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<td></td>
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</tr>
<tr>
<td>(18) Native American-owned DBE</td>
<td>52</td>
<td>$18,474</td>
<td>$23,201</td>
<td>0.3</td>
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</tr>
<tr>
<td>(19) Unknown minority-owned DBE</td>
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<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(20) White male-owned DBE</td>
<td>2</td>
<td>$300</td>
<td>$300</td>
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<td></td>
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</tr>
<tr>
<td>(21) Unknown DBE</td>
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<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**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 DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

**Source:** BBC Research & Consulting Disparity Analysis.
### Figure F-4.

**Funding source:** Federally- and State-funded  
**Goals:** All contracts  
**Time period:** January 1, 2010 - December 31, 2014  
**Contract area:** Professional services  
**Contract role:** Prime Contracts and Subcontracts  
**Region:** Ohio

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
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<td>(2) Minority- and woman-owned</td>
<td>775</td>
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<td>$157,311</td>
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<td>81.0</td>
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<td>392</td>
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<td>$67,283</td>
<td>10.1</td>
<td>5.4</td>
<td>4.7</td>
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<td>(4) Minority-owned</td>
<td>383</td>
<td>$76,610</td>
<td>$90,027</td>
<td>13.5</td>
<td>23.7</td>
<td>-10.2</td>
<td>56.9</td>
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<tr>
<td>(5) Black American-owned</td>
<td>49</td>
<td>$13,718</td>
<td>$14,213</td>
<td>2.1</td>
<td>11.9</td>
<td>-9.8</td>
<td>17.9</td>
</tr>
<tr>
<td>(6) Asian Pacific American-owned</td>
<td>109</td>
<td>$12,419</td>
<td>$14,890</td>
<td>2.2</td>
<td>1.0</td>
<td>1.2</td>
<td>200+</td>
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<td>(7) Subcontinent Asian American-owned</td>
<td>205</td>
<td>$46,855</td>
<td>$55,379</td>
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<td>2.3</td>
<td>6.0</td>
<td>200+</td>
</tr>
<tr>
<td>(8) Hispanic American-owned</td>
<td>5</td>
<td>$137</td>
<td>$138</td>
<td>0.0</td>
<td>7.7</td>
<td>-7.7</td>
<td>0.3</td>
</tr>
<tr>
<td>(9) Native American-owned</td>
<td>11</td>
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<td>$5,407</td>
<td>0.8</td>
<td>0.8</td>
<td>0.0</td>
<td>105.7</td>
</tr>
<tr>
<td>(10) Unknown minority-owned</td>
<td>4</td>
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<tr>
<td>(11) DBE-certified</td>
<td>397</td>
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<td>$65,557</td>
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<tr>
<td>(12) Woman-owned DBE</td>
<td>185</td>
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<td>$24,557</td>
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<tr>
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<tr>
<td>(15) Asian-Pacific American-owned DBE</td>
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<tr>
<td>(16) Subcontinent Asian American-owned DBE</td>
<td>81</td>
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<td>$14,608</td>
<td>2.2</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(17) Hispanic American-owned DBE</td>
<td>3</td>
<td>$115</td>
<td>$115</td>
<td>0.0</td>
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<td></td>
</tr>
<tr>
<td>(18) Native American-owned DBE</td>
<td>1</td>
<td>$500</td>
<td>$500</td>
<td>0.1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(19) Unknown minority-owned DBE</td>
<td>0</td>
<td></td>
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<td></td>
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<tr>
<td>(20) White male-owned DBE</td>
<td>17</td>
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<td>$4,474</td>
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<td></td>
</tr>
<tr>
<td>(21) Unknown DBE</td>
<td>0</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Note:** Numbers are rounded to the nearest thousand dollars or tenths of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.  
*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.
Figure F-5.
Funding source: Federally- and State-funded
Goals: All contracts
Time period: January 1, 2010 - December 31, 2011
Contract area: Construction and professional services
Contract role: Prime Contracts and Subcontracts
Region: Ohio

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
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<td>$3,113,170</td>
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<tr>
<td>(2) Minority- and woman-owned</td>
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<td>$331,220</td>
<td>$430,569</td>
<td>13.8</td>
<td>17.4</td>
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<td>79.4</td>
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<tr>
<td>(3) Woman-owned</td>
<td>1,147</td>
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<td>$284,068</td>
<td>9.1</td>
<td>7.4</td>
<td>1.7</td>
<td>123.7</td>
</tr>
<tr>
<td>(4) Minority-owned</td>
<td>530</td>
<td>$109,419</td>
<td>$146,500</td>
<td>4.7</td>
<td>10.0</td>
<td>-5.3</td>
<td>46.8</td>
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<tr>
<td>(5) Black American-owned</td>
<td>219</td>
<td>$43,384</td>
<td>$60,482</td>
<td>1.9</td>
<td>7.2</td>
<td>-5.3</td>
<td>26.9</td>
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<tr>
<td>(6) Asian Pacific American-owned</td>
<td>70</td>
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<td>0.7</td>
<td>-0.3</td>
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<tr>
<td>(7) Subcontinent Asian American-owned</td>
<td>114</td>
<td>$28,729</td>
<td>$39,033</td>
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<td>0.3</td>
<td>0.9</td>
<td>200+</td>
</tr>
<tr>
<td>(8) Hispanic American-owned</td>
<td>36</td>
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<td>1.2</td>
<td>-0.9</td>
<td>20.6</td>
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<tr>
<td>(9) Native American-owned</td>
<td>63</td>
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<td>$28,184</td>
<td>0.9</td>
<td>0.7</td>
<td>0.2</td>
<td>132.8</td>
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<tr>
<td>(10) Unknown minority-owned</td>
<td>28</td>
<td>$1,822</td>
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<tr>
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<td>934</td>
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<td>$243,312</td>
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<tr>
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<tr>
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<tr>
<td>(14) Black American-owned DBE</td>
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<td>$47,722</td>
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<td></td>
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<tr>
<td>(15) Asian-Pacific American-owned DBE</td>
<td>48</td>
<td>$5,877</td>
<td>$6,742</td>
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<tr>
<td>(16) Subcontinent Asian American-owned DBE</td>
<td>72</td>
<td>$16,080</td>
<td>$20,391</td>
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<tr>
<td>(17) Hispanic American-owned DBE</td>
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<td>$6,916</td>
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<tr>
<td>(18) Native American-owned DBE</td>
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</tr>
<tr>
<td>(19) Unknown minority-owned DBE</td>
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<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(20) White male-owned DBE</td>
<td>8</td>
<td>$1,304</td>
<td>$1,304</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(21) Unknown DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: Numbers are rounded to the nearest thousand dollars or tenths of one percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.
*Unknown minority-owned businesses and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.
Figure F-6.
Funding source: Federally- and State-funded
Goals: All contracts
Time period: January 1, 2012 - December 31, 2014
Contract area: Construction and professional services
Contract role: Prime Contracts and Subcontracts
Region: Ohio

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
<td>17,077</td>
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<td>(2) Minority- and woman-owned</td>
<td>5,813</td>
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<td>18.3</td>
<td>-3.9</td>
<td>78.5</td>
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<td>8.7</td>
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<td>115.0</td>
</tr>
<tr>
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<td>9.6</td>
<td>-5.2</td>
<td>45.3</td>
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<td>735</td>
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<td>7.0</td>
<td>-4.7</td>
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<tr>
<td>(6) Asian Pacific American-owned</td>
<td>157</td>
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<td>-0.6</td>
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<tr>
<td>(7) Subcontinent Asian American-owned</td>
<td>203</td>
<td>$42,088</td>
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<td>0.7</td>
<td>200+</td>
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<tr>
<td>(8) Hispanic American-owned</td>
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<td>-0.6</td>
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<td>(9) Native American-owned</td>
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<td>0.7</td>
<td>-0.1</td>
<td>89.5</td>
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<td></td>
</tr>
<tr>
<td>(11) DBE-certified</td>
<td>2,877</td>
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<td>6.6</td>
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<tr>
<td>(12) Woman-owned DBE</td>
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<tr>
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<td>2.1</td>
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<td></td>
<td></td>
</tr>
<tr>
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<td>1.3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(15) Asian-Pacific American-owned DBE</td>
<td>96</td>
<td>$10,389</td>
<td>$12,416</td>
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<td></td>
<td></td>
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<tr>
<td>(16) Subcontinent Asian American-owned DBE</td>
<td>71</td>
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<td>$30,680</td>
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<td></td>
</tr>
<tr>
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<tr>
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<td>$834</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(19) Unknown minority-owned DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(20) White male-owned DBE</td>
<td>11</td>
<td>$3,470</td>
<td>$3,470</td>
<td>0.1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(21) Unknown DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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 and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.
### Figure F-7.
Funding source: Federally- and State-funded
Goals: All contracts
Time period: January 1, 2010 - December 31, 2014
Contract area: Construction and professional services
Contract role: Prime Contracts
Region: Ohio

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>All businesses</td>
<td>3,527</td>
<td>$5,520,997</td>
<td>$6,454,756</td>
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<tr>
<td>Minority- and woman-owned</td>
<td>527</td>
<td>$304,171</td>
<td>$372,331</td>
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<td>14.4</td>
<td>-8.7</td>
<td>39.9</td>
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<tr>
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<td>369</td>
<td>$238,873</td>
<td>$283,422</td>
<td>4.4</td>
<td>5.7</td>
<td>-1.3</td>
<td>77.4</td>
</tr>
<tr>
<td>Minority-owned</td>
<td>158</td>
<td>$65,298</td>
<td>$88,909</td>
<td>1.4</td>
<td>8.8</td>
<td>-7.4</td>
<td>15.7</td>
</tr>
<tr>
<td>Black American-owned</td>
<td>23</td>
<td>$18,199</td>
<td>$18,755</td>
<td>0.3</td>
<td>6.8</td>
<td>-6.5</td>
<td>4.3</td>
</tr>
<tr>
<td>Asian Pacific American-owned</td>
<td>35</td>
<td>$8,328</td>
<td>$10,250</td>
<td>0.2</td>
<td>0.6</td>
<td>-0.5</td>
<td>25.8</td>
</tr>
<tr>
<td>Subcontinent Asian American-owned</td>
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<td>$32,529</td>
<td>$48,571</td>
<td>0.8</td>
<td>0.2</td>
<td>0.6</td>
<td>200+</td>
</tr>
<tr>
<td>Hispanic American-owned</td>
<td>2</td>
<td>$503</td>
<td>$4,659</td>
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<td>0.8</td>
<td>-0.8</td>
<td>8.7</td>
</tr>
<tr>
<td>Native American-owned</td>
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<td>$6,674</td>
<td>0.1</td>
<td>0.4</td>
<td>-0.3</td>
<td>28.3</td>
</tr>
<tr>
<td>Unknown minority-owned</td>
<td>14</td>
<td>$2,306</td>
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<td></td>
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</tr>
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<td>DBE-certified</td>
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<td>$111,925</td>
<td>1.7</td>
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<td>Woman-owned DBE</td>
<td>120</td>
<td>$60,214</td>
<td>$71,861</td>
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<td>Minority-owned DBE</td>
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</tr>
<tr>
<td>Asian-Pacific American-owned DBE</td>
<td>27</td>
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<td>$6,080</td>
<td>0.1</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Subcontinent Asian American-owned DBE</td>
<td>25</td>
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<td>$20,372</td>
<td>0.3</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Hispanic American-owned DBE</td>
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<td>$0</td>
<td>$0</td>
<td>0.0</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Native American-owned DBE</td>
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<td>$1,242</td>
<td>$1,242</td>
<td>0.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unknown minority-owned DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>White male-owned DBE</td>
<td>6</td>
<td>$3,140</td>
<td>$3,140</td>
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<td></td>
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</tr>
<tr>
<td>Unknown DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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 and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.
**Figure F-8.**
Funding source: Federally- and State-funded
Goals: All contracts
Time period: January 1, 2010 - December 31, 2014
Contract area: Construction and professional services
Contract role: Subcontracts
Region: Ohio

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
<td>18,272</td>
<td>$2,238,837</td>
<td>$2,592,034</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(2) Minority- and woman-owned</td>
<td>6,963</td>
<td>$775,920</td>
<td>$911,160</td>
<td>35.2</td>
<td>26.9</td>
<td>8.3</td>
<td>130.8</td>
</tr>
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<td>5,104</td>
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<td>$596,081</td>
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<td>14.7</td>
<td>8.3</td>
<td>156.4</td>
</tr>
<tr>
<td>(4) Minority-owned</td>
<td>1,859</td>
<td>$265,825</td>
<td>$315,079</td>
<td>12.2</td>
<td>12.2</td>
<td>0.0</td>
<td>100.0</td>
</tr>
<tr>
<td>(5) Black American-owned</td>
<td>931</td>
<td>$153,539</td>
<td>$178,076</td>
<td>6.9</td>
<td>7.7</td>
<td>-0.9</td>
<td>89.0</td>
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<tr>
<td>(6) Asian Pacific American-owned</td>
<td>192</td>
<td>$15,513</td>
<td>$19,043</td>
<td>0.7</td>
<td>1.2</td>
<td>-0.5</td>
<td>60.7</td>
</tr>
<tr>
<td>(7) Subcontinent Asian American-owned</td>
<td>247</td>
<td>$38,288</td>
<td>$48,854</td>
<td>1.9</td>
<td>0.6</td>
<td>1.2</td>
<td>200+</td>
</tr>
<tr>
<td>(8) Hispanic American-owned</td>
<td>168</td>
<td>$10,720</td>
<td>$13,125</td>
<td>0.5</td>
<td>1.2</td>
<td>-0.7</td>
<td>42.6</td>
</tr>
<tr>
<td>(9) Native American-owned</td>
<td>264</td>
<td>$45,262</td>
<td>$55,981</td>
<td>2.2</td>
<td>1.4</td>
<td>0.8</td>
<td>154.3</td>
</tr>
<tr>
<td>(10) Unknown minority-owned</td>
<td>57</td>
<td>$2,502</td>
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</tr>
<tr>
<td>(11) DBE-certified</td>
<td>3,613</td>
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<td>$521,999</td>
<td>20.1</td>
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<td></td>
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<tr>
<td>(12) Woman-owned DBE</td>
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<td>12.7</td>
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<tr>
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<td>7.4</td>
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<td>4.5</td>
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<tr>
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<td></td>
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<td>$30,699</td>
<td>1.2</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(17) Hispanic American-owned DBE</td>
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<td>$6,645</td>
<td>$8,110</td>
<td>0.3</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(18) Native American-owned DBE</td>
<td>49</td>
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<td>$22,458</td>
<td>0.9</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(19) Unknown minority-owned DBE</td>
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<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(20) White male-owned DBE</td>
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<td>$1,634</td>
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<tr>
<td>(21) Unknown DBE</td>
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<td>$0</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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 and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.
Figure F-9.
Funding source: Federally- and State-funded
Goals: All contracts
Time period: January 1, 2010 - December 31, 2014
Contract area: Construction and professional services
Contract role: Prime Contracts
Region: Ohio

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
<td>2,677</td>
<td>$1,240,231</td>
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<td></td>
</tr>
<tr>
<td>(2) Minority- and woman-owned</td>
<td>450</td>
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<td>$184,977</td>
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<td>22.9</td>
<td>-10.7</td>
<td>53.0</td>
</tr>
<tr>
<td>(3) Woman-owned</td>
<td>322</td>
<td>$123,608</td>
<td>$132,897</td>
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<td>11.2</td>
<td>-2.5</td>
<td>77.9</td>
</tr>
<tr>
<td>(4) Minority-owned</td>
<td>128</td>
<td>$28,468</td>
<td>$52,079</td>
<td>3.4</td>
<td>11.7</td>
<td>-8.3</td>
<td>29.2</td>
</tr>
<tr>
<td>(5) Black American-owned</td>
<td>18</td>
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<td>$2,941</td>
<td>0.2</td>
<td>6.5</td>
<td>-6.3</td>
<td>3.0</td>
</tr>
<tr>
<td>(6) Asian Pacific American-owned</td>
<td>34</td>
<td>$7,508</td>
<td>$9,589</td>
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<td>2.6</td>
<td>-2.0</td>
<td>24.2</td>
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<tr>
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<td>46</td>
<td>$11,977</td>
<td>$27,999</td>
<td>1.8</td>
<td>0.2</td>
<td>1.6</td>
<td>200+</td>
</tr>
<tr>
<td>(8) Hispanic American-owned</td>
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<td>$503</td>
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<td>0.9</td>
<td>-0.6</td>
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</tr>
<tr>
<td>(9) Native American-owned</td>
<td>14</td>
<td>$3,433</td>
<td>$6,802</td>
<td>0.4</td>
<td>1.5</td>
<td>-1.0</td>
<td>29.9</td>
</tr>
<tr>
<td>(10) Unknown minority-owned</td>
<td>14</td>
<td>$2,306</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(11) DBE-certified</td>
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<tr>
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<td>$5,260</td>
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<tr>
<td>(16) Subcontinent Asian American-owned DBE</td>
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<td></td>
</tr>
<tr>
<td>(17) Hispanic American-owned DBE</td>
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<td>$0</td>
<td>$0</td>
<td>0.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(18) Native American-owned DBE</td>
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<td>$1,242</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(19) Unknown minority-owned DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
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<td>2</td>
<td>$290</td>
<td>$290</td>
<td>0.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(21) Unknown DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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 DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.
## Figure F-10.

**Large prime contracts**

**Funding source:** Federally- and State-funded  
**Goals:** All contracts  
**Time period:** January 1, 2010 - December 31, 2014  
**Contract area:** Construction and professional services  
**Contract role:** Prime Contracts  
**Region:** Ohio

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
<td>850</td>
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<td>$4,927,309</td>
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</tr>
<tr>
<td>(2) Minority- and woman-owned</td>
<td>77</td>
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<td>$187,355</td>
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<td>11.8</td>
<td>-8.0</td>
<td>32.1</td>
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<td>47</td>
<td>$115,266</td>
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<td>3.1</td>
<td>4.0</td>
<td>-0.9</td>
<td>77.0</td>
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<tr>
<td>(4) Minority-owned</td>
<td>30</td>
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<td>$36,830</td>
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<td>7.9</td>
<td>-7.1</td>
<td>9.5</td>
</tr>
<tr>
<td>(5) Black American-owned</td>
<td>5</td>
<td>$15,458</td>
<td>$15,458</td>
<td>0.3</td>
<td>6.9</td>
<td>-6.6</td>
<td>4.5</td>
</tr>
<tr>
<td>(6) Asian Pacific American-owned</td>
<td>1</td>
<td>$820</td>
<td>$820</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>200+</td>
</tr>
<tr>
<td>(7) Subcontinent Asian American-owned</td>
<td>24</td>
<td>$20,552</td>
<td>$20,552</td>
<td>0.4</td>
<td>0.1</td>
<td>0.3</td>
<td>200+</td>
</tr>
<tr>
<td>(8) Hispanic American-owned</td>
<td>0</td>
<td>$0</td>
<td>$0</td>
<td>0.0</td>
<td>0.8</td>
<td>-0.8</td>
<td>0.0</td>
</tr>
<tr>
<td>(9) Native American-owned</td>
<td>0</td>
<td>$0</td>
<td>$0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>(10) Unknown minority-owned</td>
<td>0</td>
<td>$0</td>
<td>$0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>(11) DBE-certified</td>
<td>29</td>
<td>$39,256</td>
<td>$50,903</td>
<td>1.0</td>
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<td></td>
<td></td>
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<tr>
<td>(12) Woman-owned DBE</td>
<td>12</td>
<td>$22,333</td>
<td>$33,980</td>
<td>0.7</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(13) Minority-owned DBE</td>
<td>13</td>
<td>$14,073</td>
<td>$14,073</td>
<td>0.3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(14) Black American-owned DBE</td>
<td>4</td>
<td>$7,372</td>
<td>$7,372</td>
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<td></td>
</tr>
<tr>
<td>(15) Asian-Pacific American-owned DBE</td>
<td>1</td>
<td>$820</td>
<td>$820</td>
<td>0.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(16) Subcontinent Asian American-owned DBE</td>
<td>8</td>
<td>$5,881</td>
<td>$5,881</td>
<td>0.1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(17) Hispanic American-owned DBE</td>
<td>0</td>
<td>$0</td>
<td>$0</td>
<td>0.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(18) Native American-owned DBE</td>
<td>0</td>
<td>$0</td>
<td>$0</td>
<td>0.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(19) Unknown minority-owned DBE</td>
<td>0</td>
<td>$0</td>
<td>$0</td>
<td>0.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(20) White male-owned DBE</td>
<td>4</td>
<td>$2,850</td>
<td>$2,850</td>
<td>0.1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(21) Unknown DBE</td>
<td>0</td>
<td>$0</td>
<td>$0</td>
<td>0.0</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**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 DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

**Source:** BBC Research & Consulting Disparity Analysis.
Figure F-11.
Funding source: Federally- and State-funded
Goals: All contracts
Time period: January 1, 2010 - December 31, 2014
Contract area: Construction and professional services
Contract role: Prime Contracts and Subcontracts
Region: Northwest

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
<td>2,722</td>
<td>$1,285,964</td>
<td>$1,460,729</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(2) Minority- and woman-owned</td>
<td>884</td>
<td>$118,938</td>
<td>$148,664</td>
<td>10.2</td>
<td>15.7</td>
<td>-5.5</td>
<td>64.9</td>
</tr>
<tr>
<td>(3) Woman-owned</td>
<td>533</td>
<td>$65,878</td>
<td>$79,360</td>
<td>5.4</td>
<td>8.2</td>
<td>-2.7</td>
<td>66.6</td>
</tr>
<tr>
<td>(4) Minority-owned</td>
<td>351</td>
<td>$53,061</td>
<td>$69,304</td>
<td>4.7</td>
<td>7.5</td>
<td>-2.8</td>
<td>63.1</td>
</tr>
<tr>
<td>(5) Black American-owned</td>
<td>169</td>
<td>$33,341</td>
<td>$36,555</td>
<td>2.5</td>
<td>6.0</td>
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</tr>
<tr>
<td>(6) Asian Pacific American-owned</td>
<td>18</td>
<td>$1,428</td>
<td>$2,879</td>
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<td>0.6</td>
<td>-0.4</td>
<td>31.0</td>
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<tr>
<td>(7) Subcontinent Asian American-owned</td>
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<td>$2,527</td>
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<td>0.2</td>
<td>0.0</td>
<td>111.2</td>
</tr>
<tr>
<td>(8) Hispanic American-owned</td>
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<td>0.2</td>
<td>0.3</td>
<td>200+</td>
</tr>
<tr>
<td>(9) Native American-owned</td>
<td>46</td>
<td>$13,520</td>
<td>$20,008</td>
<td>1.4</td>
<td>0.5</td>
<td>0.9</td>
<td>200+</td>
</tr>
<tr>
<td>(10) Unknown minority-owned</td>
<td>6</td>
<td>$398</td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>(11) DBE-certified</td>
<td>424</td>
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<td>$72,546</td>
<td>5.0</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(12) Woman-owned DBE</td>
<td>246</td>
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<td>$34,406</td>
<td>2.4</td>
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<td></td>
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<tr>
<td>(13) Minority-owned DBE</td>
<td>178</td>
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<td>$38,140</td>
<td>2.6</td>
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<td></td>
<td></td>
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<tr>
<td>(14) Black American-owned DBE</td>
<td>125</td>
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<td>$30,962</td>
<td>2.1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(15) Asian-Pacific American-owned DBE</td>
<td>12</td>
<td>$938</td>
<td>$938</td>
<td>0.1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(16) Subcontinent Asian American-owned DBE</td>
<td>7</td>
<td>$1,098</td>
<td>$1,098</td>
<td>0.1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(17) Hispanic American-owned DBE</td>
<td>28</td>
<td>$227</td>
<td>$227</td>
<td>0.0</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(18) Native American-owned DBE</td>
<td>6</td>
<td>$1,609</td>
<td>$4,915</td>
<td>0.3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(19) Unknown minority-owned DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(20) White male-owned DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(21) Unknown DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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 and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.
Figure F-12.
Funding source: Federally- and State-funded
Goals: All contracts
Time period: January 1, 2010 - December 31, 2014
Contract area: Construction and professional services
Contract role: Prime Contracts and Subcontracts
Region: Northeast

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
<td>7,893</td>
<td>$2,768,525</td>
<td>$3,313,330</td>
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<td></td>
</tr>
<tr>
<td>(2) Minority- and woman-owned</td>
<td>2,815</td>
<td>$476,455</td>
<td>$564,407</td>
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<td>17.3</td>
<td>-0.3</td>
<td>98.2</td>
</tr>
<tr>
<td>(3) Woman-owned</td>
<td>2,114</td>
<td>$330,359</td>
<td>$398,433</td>
<td>12.0</td>
<td>7.9</td>
<td>4.2</td>
<td>152.9</td>
</tr>
<tr>
<td>(4) Minority-owned</td>
<td>701</td>
<td>$146,095</td>
<td>$165,974</td>
<td>5.0</td>
<td>9.5</td>
<td>-4.5</td>
<td>52.8</td>
</tr>
<tr>
<td>(5) Black American-owned</td>
<td>384</td>
<td>$87,568</td>
<td>$97,804</td>
<td>3.0</td>
<td>7.3</td>
<td>-4.3</td>
<td>40.6</td>
</tr>
<tr>
<td>(6) Asian Pacific American-owned</td>
<td>84</td>
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<td>$11,639</td>
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<td>0.6</td>
<td>-0.2</td>
<td>59.3</td>
</tr>
<tr>
<td>(7) Subcontinent Asian American-owned</td>
<td>62</td>
<td>$15,650</td>
<td>$18,131</td>
<td>0.5</td>
<td>0.2</td>
<td>0.3</td>
<td>200+</td>
</tr>
<tr>
<td>(8) Hispanic American-owned</td>
<td>55</td>
<td>$7,770</td>
<td>$8,341</td>
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<td>0.6</td>
<td>-0.3</td>
<td>43.7</td>
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<tr>
<td>(9) Native American-owned</td>
<td>109</td>
<td>$22,822</td>
<td>$30,059</td>
<td>0.9</td>
<td>0.8</td>
<td>0.1</td>
<td>110.3</td>
</tr>
<tr>
<td>(10) Unknown minority-owned</td>
<td>7</td>
<td>$1,794</td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>(11) DBE-certified</td>
<td>1,335</td>
<td>$211,704</td>
<td>$237,877</td>
<td>7.2</td>
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<tr>
<td>(12) Woman-owned DBE</td>
<td>981</td>
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<td></td>
</tr>
<tr>
<td>(13) Minority-owned DBE</td>
<td>350</td>
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<td>$87,734</td>
<td>2.6</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(14) Black American-owned DBE</td>
<td>227</td>
<td>$48,767</td>
<td>$53,146</td>
<td>1.6</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(15) Asian-Pacific American-owned DBE</td>
<td>43</td>
<td>$5,137</td>
<td>$6,003</td>
<td>0.2</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(16) Subcontinent Asian American-owned DBE</td>
<td>24</td>
<td>$5,559</td>
<td>$5,606</td>
<td>0.2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(17) Hispanic American-owned DBE</td>
<td>21</td>
<td>$5,727</td>
<td>$6,207</td>
<td>0.2</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(18) Native American-owned DBE</td>
<td>35</td>
<td>$15,351</td>
<td>$16,773</td>
<td>0.5</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(19) Unknown minority-owned DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(20) White male-owned DBE</td>
<td>4</td>
<td>$424</td>
<td>$424</td>
<td>0.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(21) Unknown DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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 DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.
## Figure F-13.

Funding source: Federally- and State-funded  
Goals: All contracts  
Time period: January 1, 2010 - December 31, 2014  
Contract area: Construction and professional services  
Contract role: Prime Contracts and Subcontracts  
Region: Southwest

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
<td>5,354</td>
<td>$1,812,541</td>
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</tr>
<tr>
<td>(2) Minority- and woman-owned</td>
<td>1,810</td>
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<td>$283,390</td>
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<td>16.9</td>
<td>-4.1</td>
<td>76.0</td>
</tr>
<tr>
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<td>1,427</td>
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<td>8.4</td>
<td>1.1</td>
<td>112.9</td>
</tr>
<tr>
<td>(4) Minority-owned</td>
<td>383</td>
<td>$43,130</td>
<td>$73,898</td>
<td>3.4</td>
<td>8.5</td>
<td>-5.2</td>
<td>39.4</td>
</tr>
<tr>
<td>(5) Black American-owned</td>
<td>123</td>
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<td>$17,330</td>
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<td>6.4</td>
<td>-5.6</td>
<td>12.3</td>
</tr>
<tr>
<td>(6) Asian Pacific American-owned</td>
<td>49</td>
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<td>0.7</td>
<td>-0.5</td>
<td>34.0</td>
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<tr>
<td>(7) Subcontinent Asian American-owned</td>
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<td>0.2</td>
<td>1.9</td>
<td>200+</td>
</tr>
<tr>
<td>(8) Hispanic American-owned</td>
<td>9</td>
<td>$324</td>
<td>$328</td>
<td>0.0</td>
<td>0.7</td>
<td>-0.6</td>
<td>2.2</td>
</tr>
<tr>
<td>(9) Native American-owned</td>
<td>72</td>
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<td>$5,469</td>
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<td>0.5</td>
<td>-0.3</td>
<td>48.7</td>
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<tr>
<td>(10) Unknown minority-owned</td>
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<td>$696</td>
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<td></td>
<td></td>
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<tr>
<td>(11) DBE-certified</td>
<td>960</td>
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<td>7.7</td>
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<td></td>
<td></td>
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<td>(12) Woman-owned DBE</td>
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<td>$114,081</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(13) Minority-owned DBE</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(14) Black American-owned DBE</td>
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<td>$14,132</td>
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<td></td>
<td></td>
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<tr>
<td>(15) Asian-Pacific American-owned DBE</td>
<td>36</td>
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<td>$4,722</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(16) Subcontinent Asian American-owned DBE</td>
<td>63</td>
<td>$18,250</td>
<td>$35,403</td>
<td>1.6</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(17) Hispanic American-owned DBE</td>
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<td>$66</td>
<td>$66</td>
<td>0.0</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(18) Native American-owned DBE</td>
<td>4</td>
<td>$428</td>
<td>$428</td>
<td>0.0</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(19) Unknown minority-owned DBE</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(20) White male-owned DBE</td>
<td>0</td>
<td>$0</td>
<td>$0</td>
<td>0.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(21) Unknown DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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 and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.  

Source: BBC Research & Consulting Disparity Analysis.
Figure F-14.
Funding source: Federally- and State-funded
Goals: All contracts
Time period: January 1, 2010 - December 31, 2014
Contract area: Construction and professional services
Contract role: Prime Contracts and Subcontracts
Region: Central and Southeast

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
<td>5,830</td>
<td>$1,892,804</td>
<td>$2,072,377</td>
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<td></td>
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<td></td>
</tr>
<tr>
<td>(2) Minority- and woman-owned</td>
<td>1,981</td>
<td>$273,640</td>
<td>$287,030</td>
<td>13.9</td>
<td>21.8</td>
<td>-8.0</td>
<td>63.5</td>
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<tr>
<td>(3) Woman-owned</td>
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<td>8.8</td>
<td>0.5</td>
<td>105.7</td>
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<td>(4) Minority-owned</td>
<td>582</td>
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<td>-8.5</td>
<td>35.1</td>
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<tr>
<td>(5) Black American-owned</td>
<td>278</td>
<td>$41,469</td>
<td>$45,528</td>
<td>2.2</td>
<td>8.2</td>
<td>-6.0</td>
<td>26.7</td>
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<td>(6) Asian Pacific American-owned</td>
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<td>-0.8</td>
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<tr>
<td>(7) Subcontinent Asian American-owned</td>
<td>138</td>
<td>$28,997</td>
<td>$31,093</td>
<td>1.5</td>
<td>0.6</td>
<td>0.9</td>
<td>200+</td>
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<tr>
<td>(8) Hispanic American-owned</td>
<td>10</td>
<td>$692</td>
<td>$1,715</td>
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<td>2.3</td>
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<tr>
<td>(9) Native American-owned</td>
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<td>$6,948</td>
<td>$7,104</td>
<td>0.3</td>
<td>0.7</td>
<td>-0.3</td>
<td>51.2</td>
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<tr>
<td>(10) Unknown minority-owned</td>
<td>29</td>
<td>$1,919</td>
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<tr>
<td>(11) DBE-certified</td>
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<td>$154,667</td>
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<td>$103,490</td>
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<tr>
<td>(13) Minority-owned DBE</td>
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<td>$46,827</td>
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<tr>
<td>(14) Black American-owned DBE</td>
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<td>$27,173</td>
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<tr>
<td>(15) Asian-Pacific American-owned DBE</td>
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<td>$7,449</td>
<td>$7,494</td>
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<td>(16) Subcontinent Asian American-owned DBE</td>
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<td>$8,964</td>
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<tr>
<td>(17) Hispanic American-owned DBE</td>
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<td>$625</td>
<td>$1,610</td>
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<tr>
<td>(18) Native American-owned DBE</td>
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<td>$1,586</td>
<td>$1,586</td>
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<tr>
<td>(19) Unknown minority-owned DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
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<td></td>
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<tr>
<td>(20) White male-owned DBE</td>
<td>15</td>
<td>$4,350</td>
<td>$4,350</td>
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<tr>
<td>(21) Unknown DBE</td>
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<td>$0</td>
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</tr>
</tbody>
</table>

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 and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.
Figure F-15.
Funding source: Federally-funded
Goals: All contracts
Time period: January 1, 2010 - December 31, 2014
Contract area: Construction and professional services
Contract role: Prime Contracts and Subcontracts
Region: Ohio

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
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<td>$8,179,908</td>
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<tr>
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<td>6,327</td>
<td>$929,627</td>
<td>$1,133,027</td>
<td>13.9</td>
<td>17.7</td>
<td>-3.8</td>
<td>78.3</td>
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<tr>
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<td>8.2</td>
<td>1.5</td>
<td>117.9</td>
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<tr>
<td>(4) Minority-owned</td>
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<td>$340,190</td>
<td>4.2</td>
<td>9.5</td>
<td>-5.3</td>
<td>43.9</td>
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<tr>
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<td>816</td>
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<td>$169,588</td>
<td>2.1</td>
<td>7.0</td>
<td>-4.9</td>
<td>29.7</td>
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<tr>
<td>(6) Asian Pacific-American-owned</td>
<td>159</td>
<td>$16,192</td>
<td>$21,376</td>
<td>0.3</td>
<td>0.7</td>
<td>-0.5</td>
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<tr>
<td>(7) Subcontinent Asian American-owned</td>
<td>210</td>
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<td>$77,619</td>
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<td>0.2</td>
<td>0.7</td>
<td>200+</td>
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<tr>
<td>(8) Hispanic American-owned</td>
<td>146</td>
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<td>0.9</td>
<td>-0.7</td>
<td>23.0</td>
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<tr>
<td>(9) Native American-owned</td>
<td>216</td>
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<td>$55,336</td>
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<td>0.7</td>
<td>0.0</td>
<td>102.3</td>
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<tr>
<td>(10) Unknown minority-owned</td>
<td>49</td>
<td>$2,359</td>
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<td>(11) DBE-certified</td>
<td>3,269</td>
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<td>$576,202</td>
<td>7.0</td>
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<tr>
<td>(12) Woman-owned DBE</td>
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<td>$115,678</td>
<td>1.4</td>
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<tr>
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<td>$10,276</td>
<td>$13,169</td>
<td>0.2</td>
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<tr>
<td>(16) Subcontinent Asian American-owned DBE</td>
<td>101</td>
<td>$27,374</td>
<td>$44,635</td>
<td>0.5</td>
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<tr>
<td>(17) Hispanic American-owned DBE</td>
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<td>$8,076</td>
<td>0.1</td>
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<tr>
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<td>37</td>
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<tr>
<td>(19) Unknown minority-owned DBE</td>
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<td>$0</td>
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<tr>
<td>(20) White male-owned DBE</td>
<td>5</td>
<td>$487</td>
<td>$487</td>
<td>0.0</td>
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<tr>
<td>(21) Unknown DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

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 and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.
Figure F-16.
Funding source: State-funded
Goals: All contracts
Time period: January 1, 2010 - December 31, 2014
Contract area: Construction and professional services
Contract role: Prime Contracts and Subcontracts
Region: Ohio

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
<td>3,549</td>
<td>$866,882</td>
<td>$866,882</td>
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<tr>
<td>(2) Minority- and woman-owned</td>
<td>1,163</td>
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<td>$150,464</td>
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<td>20.9</td>
<td>3.6</td>
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<td>(3) Woman-owned</td>
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<td>8.6</td>
<td>1.4</td>
<td>116.0</td>
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<td>$63,798</td>
<td>7.4</td>
<td>12.3</td>
<td>-4.9</td>
<td>59.8</td>
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<tr>
<td>(5) Black American-owned</td>
<td>138</td>
<td>$26,497</td>
<td>$27,555</td>
<td>3.2</td>
<td>7.8</td>
<td>-4.6</td>
<td>40.8</td>
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<td>(6) Asian Pacific American-owned</td>
<td>68</td>
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<td>$7,955</td>
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<td>1.4</td>
<td>-0.5</td>
<td>66.0</td>
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<tr>
<td>(7) Subcontinent Asian American-owned</td>
<td>107</td>
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<td>$19,467</td>
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<td>0.8</td>
<td>1.4</td>
<td>200+</td>
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<tr>
<td>(8) Hispanic American-owned</td>
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<td>-1.4</td>
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<td>(9) Native American-owned</td>
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<td>0.7</td>
<td>0.2</td>
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<tr>
<td>(10) Unknown minority-owned</td>
<td>22</td>
<td>$2,449</td>
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<tr>
<td>(11) DBE-certified</td>
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<td>2.9</td>
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<td>(14) Black American-owned DBE</td>
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<td>$9,735</td>
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<td>1.1</td>
</tr>
<tr>
<td>(15) Asian-Pacific American-owned DBE</td>
<td>46</td>
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<td>$5,989</td>
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<tr>
<td>(16) Subcontinent Asian American-owned DBE</td>
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<td>$6,436</td>
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<td>0.7</td>
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<td>(17) Hispanic American-owned DBE</td>
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<td>$35</td>
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<td>(18) Native American-owned DBE</td>
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<tr>
<td>(19) Unknown minority-owned DBE</td>
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</tr>
<tr>
<td>(20) White male-owned DBE</td>
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<td>$4,288</td>
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<td>0.5</td>
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<tr>
<td>(21) Unknown DBE</td>
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<td></td>
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<td></td>
</tr>
</tbody>
</table>

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 and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.
### Figure F-17.
**Funding source:** Federally- and State-funded  
**Goals:** No goals  
**Time period:** January 1, 2010 - December 31, 2014  
**Contract area:** Construction and professional services  
**Contract role:** Prime Contracts and Subcontracts  
**Region:** Ohio

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
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<tr>
<td>All businesses</td>
<td>4,803</td>
<td>$888,608</td>
<td>$1,544,234</td>
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<td>-5.2</td>
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<td>$75,467</td>
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<td>12.1</td>
<td>-7.2</td>
<td>40.5</td>
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<td>$26,440</td>
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<td>-6.6</td>
<td>20.6</td>
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<tr>
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<td>$16,140</td>
<td>$27,814</td>
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<td>0.6</td>
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<td>Black American-owned DBE</td>
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<td>$16,762</td>
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<tr>
<td>Subcontinent Asian American-owned DBE</td>
<td>41</td>
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<td>Hispanic American-owned DBE</td>
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<td>$2,464</td>
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<tr>
<td>Unknown minority-owned DBE</td>
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<td></td>
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<td></td>
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<tr>
<td>White male-owned DBE</td>
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<td>$1,534</td>
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<tr>
<td>Unknown DBE</td>
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<td></td>
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</tr>
</tbody>
</table>

**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 DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

**Source:** BBC Research & Consulting Disparity Analysis.
### Figure F-18.
#### Funding source: Federally- and State-funded Goals: DBE goals
#### Time period: January 1, 2010 - December 31, 2014
#### Contract area: Construction and professional services
#### Contract role: Prime Contracts and Subcontracts
#### Region: Ohio

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
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<td>5,528</td>
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<td>$939,840</td>
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<td>17.4</td>
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<td>78.7</td>
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<tr>
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<td>$577,225</td>
<td>$658,628</td>
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<td>8.3</td>
<td>1.3</td>
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<td>9.1</td>
<td>-5.0</td>
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<tr>
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<td>761</td>
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<td>$146,307</td>
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<td>6.8</td>
<td>-4.6</td>
<td>31.5</td>
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<tr>
<td>(6) Asian Pacific-American-owned</td>
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<td>0.7</td>
<td>-0.5</td>
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</tr>
<tr>
<td>(7) Subcontinent Asian American-owned</td>
<td>158</td>
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<td>$58,867</td>
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<td>200+</td>
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<tr>
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<td>0.7</td>
<td>0.1</td>
<td>108.7</td>
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<tr>
<td>(19) Unknown minority-owned DBE</td>
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<td>$0</td>
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<tr>
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<td>$200</td>
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<tr>
<td>(21) Unknown DBE</td>
<td>0</td>
<td>$0</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**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 DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

**Source:** BBC Research & Consulting Disparity Analysis.
<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
<td>2,197</td>
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<td>$645,093</td>
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<td>(2) Minority- and woman-owned</td>
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<td>19.0</td>
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<td>$64,478</td>
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<tr>
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<tr>
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<td>0.7</td>
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<tr>
<td>(12) Woman-owned DBE</td>
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<tr>
<td>(15) Asian-Pacific American-owned DBE</td>
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<tr>
<td>(16) Subcontinent Asian American-owned DBE</td>
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<td>$2,322</td>
<td>$2,322</td>
<td>0.4</td>
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<tr>
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<tr>
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<td>$2,531</td>
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</tr>
<tr>
<td>(19) Unknown minority-owned DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(20) White male-owned DBE</td>
<td>10</td>
<td>$3,040</td>
<td>$3,040</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(21) Unknown DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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 and unknown DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-19.
Funding source: Federally- and State-funded
Goals: EDGE goals
Time period: January 1, 2010 - December 31, 2014
Contract area: Construction and professional services
Contract role: Prime Contracts and Subcontracts
Region: Ohio
### Figure F-20.

**Analysis of potential DBEs**

**Funding source:** Federally-funded

**Goals:** All contracts

**Time period:** January 1, 2010 - December 31, 2014

**Contract area:** Construction and professional services

**Contract role:** Prime Contracts and Subcontracts

**Region:** Ohio

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
<td>18,250</td>
<td>$6,892,952</td>
<td>$8,179,908</td>
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<tr>
<td>(2) Minority- and woman-owned</td>
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<td>15.6</td>
<td>-1.8</td>
<td>88.7</td>
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<tr>
<td>(3) Woman-owned</td>
<td>4,731</td>
<td>$662,302</td>
<td>$792,837</td>
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<td>7.1</td>
<td>2.6</td>
<td>137.3</td>
</tr>
<tr>
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<td>1,596</td>
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<td>$340,190</td>
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<td>8.6</td>
<td>-4.4</td>
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<tr>
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<tr>
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<td>-0.5</td>
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<tr>
<td>(7) Subcontinent Asian American-owned</td>
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<td>200+</td>
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<td>(18) Native American-owned DBE</td>
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<tr>
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<td>$0</td>
<td></td>
<td></td>
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<td></td>
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<tr>
<td>(20) White male-owned DBE</td>
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<td>$487</td>
<td>$487</td>
<td>0.0</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>(21) Unknown DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**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 DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

**Source:** BBC Research & Consulting Disparity Analysis.
### Analysis of potential DBEs

**Funding source:** Federally-funded  
**Goals:** All contracts  
**Time period:** January 1, 2010 - December 31, 2014  
**Contract area:** Construction  
**Contract role:** Prime Contracts and Subcontracts  
**Region:** Ohio

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
<td>17,215</td>
<td>$6,547,597</td>
<td>$7,741,394</td>
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<td></td>
</tr>
<tr>
<td>(2) Minority- and woman-owned</td>
<td>5,979</td>
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<td>$1,039,023</td>
<td>13.4</td>
<td>15.2</td>
<td>-1.8</td>
<td>88.1</td>
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<tr>
<td>(3) Woman-owned</td>
<td>4,570</td>
<td>$629,255</td>
<td>$757,377</td>
<td>9.8</td>
<td>7.2</td>
<td>2.6</td>
<td>136.3</td>
</tr>
<tr>
<td>(4) Minority-owned</td>
<td>1,409</td>
<td>$222,199</td>
<td>$281,646</td>
<td>3.6</td>
<td>8.1</td>
<td>-4.4</td>
<td>45.1</td>
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<tr>
<td>(5) Black American-owned</td>
<td>800</td>
<td>$136,355</td>
<td>$159,890</td>
<td>2.1</td>
<td>6.4</td>
<td>-4.3</td>
<td>32.3</td>
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<tr>
<td>(6) Asian Pacific American-owned</td>
<td>101</td>
<td>$10,390</td>
<td>$13,208</td>
<td>0.2</td>
<td>0.7</td>
<td>-0.5</td>
<td>24.0</td>
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<tr>
<td>(7) Subcontinent Asian American-owned</td>
<td>106</td>
<td>$23,818</td>
<td>$41,182</td>
<td>0.5</td>
<td>0.1</td>
<td>0.4</td>
<td>200+</td>
</tr>
<tr>
<td>(8) Hispanic American-owned</td>
<td>143</td>
<td>$9,705</td>
<td>$16,111</td>
<td>0.2</td>
<td>0.4</td>
<td>-0.2</td>
<td>51.3</td>
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<tr>
<td>(9) Native American-owned</td>
<td>212</td>
<td>$40,775</td>
<td>$51,256</td>
<td>0.7</td>
<td>0.5</td>
<td>0.2</td>
<td>145.9</td>
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<tr>
<td>(10) Unknown minority-owned</td>
<td>47</td>
<td>$1,156</td>
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<td></td>
</tr>
<tr>
<td>(11) DBE-certified</td>
<td>3,084</td>
<td>$453,943</td>
<td>$540,606</td>
<td>7.0</td>
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<tr>
<td>(12) Woman-owned DBE</td>
<td>2,370</td>
<td>$312,803</td>
<td>$358,361</td>
<td>4.6</td>
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</tr>
<tr>
<td>(13) Minority-owned DBE</td>
<td>712</td>
<td>$140,840</td>
<td>$181,945</td>
<td>2.4</td>
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</tr>
<tr>
<td>(14) Black American-owned DBE</td>
<td>508</td>
<td>$93,193</td>
<td>$108,203</td>
<td>1.4</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(15) Asian-Pacific American-owned DBE</td>
<td>58</td>
<td>$5,818</td>
<td>$8,567</td>
<td>0.1</td>
<td></td>
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<td></td>
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<tr>
<td>(16) Subcontinent Asian American-owned DBE</td>
<td>61</td>
<td>$19,305</td>
<td>$36,457</td>
<td>0.5</td>
<td></td>
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<tr>
<td>(17) Hispanic American-owned DBE</td>
<td>48</td>
<td>$6,494</td>
<td>$7,960</td>
<td>0.1</td>
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<tr>
<td>(18) Native American-owned DBE</td>
<td>37</td>
<td>$16,030</td>
<td>$20,756</td>
<td>0.3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(19) Unknown minority-owned DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(20) White male-owned DBE</td>
<td>2</td>
<td>$300</td>
<td>$300</td>
<td>0.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(21) Unknown DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**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 DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.
Table F-22. Analysis of potential DBEs

<table>
<thead>
<tr>
<th>Business Group</th>
<th>(a) Number of contract elements</th>
<th>(b) Total dollars (thousands)</th>
<th>(c) Estimated total dollars (thousands)*</th>
<th>(d) Utilization percentage</th>
<th>(e) Availability percentage</th>
<th>(f) Utilization - Availability</th>
<th>(g) Disparity index</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All businesses</td>
<td>1,035</td>
<td>$345,355</td>
<td>$438,514</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(2) Minority- and woman-owned</td>
<td>348</td>
<td>$78,173</td>
<td>$94,004</td>
<td>21.4</td>
<td>22.1</td>
<td>-0.7</td>
<td>96.9</td>
</tr>
<tr>
<td>(3) Woman-owned</td>
<td>161</td>
<td>$33,047</td>
<td>$35,461</td>
<td>8.1</td>
<td>5.0</td>
<td>3.1</td>
<td>161.1</td>
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<tr>
<td>(4) Minority-owned</td>
<td>187</td>
<td>$45,126</td>
<td>$58,544</td>
<td>13.4</td>
<td>17.1</td>
<td>-3.7</td>
<td>78.1</td>
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<tr>
<td>(5) Black American-owned</td>
<td>16</td>
<td>$8,886</td>
<td>$9,382</td>
<td>2.1</td>
<td>6.1</td>
<td>-3.9</td>
<td>35.3</td>
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<tr>
<td>(6) Asian Pacific American-owned</td>
<td>58</td>
<td>$5,802</td>
<td>$8,241</td>
<td>1.9</td>
<td>0.9</td>
<td>1.0</td>
<td>200+</td>
</tr>
<tr>
<td>(7) Subcontinent Asian American-owned</td>
<td>104</td>
<td>$28,280</td>
<td>$36,812</td>
<td>8.4</td>
<td>0.4</td>
<td>8.0</td>
<td>200+</td>
</tr>
<tr>
<td>(8) Hispanic American-owned</td>
<td>3</td>
<td>$115</td>
<td>$118</td>
<td>0.0</td>
<td>8.9</td>
<td>-8.9</td>
<td>0.3</td>
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<tr>
<td>(9) Native American-owned</td>
<td>4</td>
<td>$840</td>
<td>$3,991</td>
<td>0.9</td>
<td>0.8</td>
<td>0.1</td>
<td>119.3</td>
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<tr>
<td>(10) Unknown minority-owned</td>
<td>2</td>
<td>$1,203</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(11) DBE-certified</td>
<td>185</td>
<td>$34,154</td>
<td>$35,596</td>
<td>8.1</td>
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<tr>
<td>(12) Woman-owned DBE</td>
<td>89</td>
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<td>$15,040</td>
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<tr>
<td>(13) Minority-owned DBE</td>
<td>93</td>
<td>$19,825</td>
<td>$20,369</td>
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<tr>
<td>(14) Black American-owned DBE</td>
<td>10</td>
<td>$7,181</td>
<td>$7,474</td>
<td>1.7</td>
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<tr>
<td>(15) Asian-Pacific American-owned DBE</td>
<td>40</td>
<td>$4,459</td>
<td>$4,602</td>
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<tr>
<td>(16) Subcontinent Asian American-owned DBE</td>
<td>40</td>
<td>$8,069</td>
<td>$8,178</td>
<td>1.9</td>
<td></td>
<td></td>
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<tr>
<td>(17) Hispanic American-owned DBE</td>
<td>3</td>
<td>$115</td>
<td>$115</td>
<td>0.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(18) Native American-owned DBE</td>
<td>0</td>
<td>$0</td>
<td>$0</td>
<td>0.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(19) Unknown minority-owned DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(20) White male-owned DBE</td>
<td>3</td>
<td>$187</td>
<td>$187</td>
<td>0.0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(21) Unknown DBE</td>
<td>0</td>
<td>$0</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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 DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 5) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 5 and the sum would be shown in column c, row 5. Additionally, column c was adjusted for the sampling weights for the contract elements that local agencies awarded.

Source: BBC Research & Consulting Disparity Analysis.