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## **ARIZONA DEPARTMENT OF TRANSPORTATION 2020 DISPARITY STUDY Draft Report**



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**Draft Report  
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KEEN INDEPENDENT RESEARCH LLC

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## **EXECUTIVE SUMMARY.**

### **2020 ADOT Disparity Study**

### **Keen Independent Research LLC**

The Arizona Department of Transportation operates the Federal Disadvantaged Business Enterprise (DBE) Program to assist disadvantaged business enterprises on contracts that use U.S. Department of Transportation (USDOT) funds. Every three years, ADOT must set an overall annual goal for participation of DBEs in those contracts. The Federal DBE Program applies to USDOT-funded contracts awarded by ADOT and by local agencies that receive USDOT funds through ADOT.

The 2020 Disparity Study provides information about minority- and women-owned firms and DBEs to help ADOT set overall DBE goals and operate the Federal DBE Program. ADOT engaged Keen Independent Research (Keen Independent) to complete this research. Keen Independent conducted studies for ADOT in 2014, 2015 and 2017 using the same methodology as the 2020 study.

David Keen, Principal of Keen Independent, has led similar disparity studies for many state DOTs across the country, including most of the state DOTs in the western part of the United States. These research projects are called “disparity studies” because they determine if there is a disparity between the utilization and availability of minority- and women-owned firms in an agency’s contracts.

### **Summary of Results**

ADOT must set a separate overall DBE goal for each of three types of USDOT funds it receives. Each goal is expressed as the percentage of contract dollars that will go to firms certified as DBEs. In addition to setting overall goals, ADOT must project whether it can meet each goal entirely through race- and gender-neutral means (such as training, outreach and small business programs). If not, ADOT must determine how much of each overall goal must be achieved through race- and gender-based programs such as DBE contract goals.

Keen Independent helped determine previous overall DBE goals based in part on the relative number of minority- and women-owned firms in Arizona available for ADOT transportation work. The 2019 update of that survey found that the share of firms that are minority- or women-owned increased by 5 percentage points since 2015. As a result, proposed overall DBE goals have increased.

- **FHWA-funded contracts.** Based on results of the 2017 Availability Study, ADOT set an overall DBE goal for federal fiscal years (FFYs) 2018 through 2020 of 9.55 percent for contracts using Federal Highway Administration (FHWA) funds. ADOT projected that it would meet that goal through a combination of race-neutral means such as small business assistance and through race-conscious measures such as DBE contract goals. Based on information in the 2020 Disparity Study, ADOT might set a new overall DBE goal of 12.89 percent for FHWA-funded contracts beginning fall 2020.

Study results indicate that ADOT would need to use DBE contract goals as well as small business programs and other neutral means to meet this overall goal.



- **FAA-funded contracts.** ADOT receives funds from the Federal Aviation Administration (FAA) for projects at Grand Canyon National Park Airport (a state-owned airport) and other contracts. Its current 8.05 percent overall DBE goal for these contracts extends through September 30, 2021. ADOT does not apply DBE contract goals to these contracts.

Study results suggest that an overall DBE goal of 10.69 percent would be supportable for the three years beginning October 1, 2021, with ADOT continuing to attempt to meet all of it through small business programs and other race-neutral means.

- **FTA-funded contracts.** ADOT receives funding through the Federal Transit Administration (FTA) to support rural transit operations throughout the study. Most large transit agencies in Arizona directly receive FTA funding and are responsible for their own operation of the Federal DBE Program.

For the three years ending September 30, 2021, ADOT has a 11.00 percent overall DBE goal for FTA-funded contracts. ADOT does not apply DBE contract goals to these contracts.

This study provides information to help ADOT set a new DBE goal for those contracts for the three years beginning October 1, 2021. Results suggest that an overall DBE goal of 14.64 percent would be supportable, with ADOT continuing to meet the goal through small business programs and other neutral means.

Figure ES-1 summarizes these results. As a point of comparison, actual DBE participation for FHWA-, FAA- and FTA-funded contracts from October 2013 through September 2018 was about 10 percent, 8 percent and 23 percent, respectively.

Figure ES-1.

Information for ADOT consideration concerning potential overall DBE goals and projections of race-neutral for FHWA-, FTA- and FAA- funded contracts

Component of overall DBE goals	FHWA	FAA	FTA
Overall goal	12.89 %	10.69 %	14.64 %
Neutral projection	- 4.72	- 10.69	- 14.64
Race-conscious projection	8.17 %	0.00 %	0.00 %

## Disparity Study Research

The Disparity Study began in February 2019.

- Throughout the study, Keen Independent consulted with an Internal Stakeholder Group that included staff across ADOT departments and different groups of external stakeholders that included businesses and trade associations. ADOT and Keen Independent also met with FHWA officials and local public agency representatives.
- Keen Independent examined ADOT and local public agency transportation-related contracts awarded from October 2013 through September 2018. The study team collected data on ADOT's transportation contracts and compiled information on local public agency (LPA) contracts that used USDOT money administered by ADOT. Keen Independent analyzed more than 12,000 ADOT prime contracts and subcontracts and more than 2,000 contracts for local agencies that together totaled nearly \$4.2 billion.

The study team isolated the effects of the South Mountain Freeway mega-project when examining utilization and availability, including when establishing the goal for future FHWA-funded contracts. For example, Keen Independent assumed that FHWA-funded contracts for FFY 2021 through FFY 2023 would not include a mega-project and instead reflect typical highway improvement and maintenance work.

- Keen Independent included ADOT's state-funded transportation contracts in the study due to their dollar volume and similarity to FHWA-funded highway contracts, and because there are no DBE contract goals on these contracts. One of the disparity analyses in the study combined these state-funded contracts with FHWA-funded contracts for which no DBE contract goals applied.
- Since 95 percent of ADOT contract dollars go to firms with Arizona offices, Keen Independent collected and analyzed data about the Arizona transportation contracting industry. The study team also collected qualitative information from input collected from more than 330 individuals representing businesses, trade associations and other groups throughout the state.
- Most of ADOT's transportation contract dollars are related to highway construction and engineering, but the study also includes vertical construction, planning studies, transit services and other types of transportation-related work. Keen Independent classified ADOT work into 32 different subindustries and collected availability information for each subindustry.
- The study team completed telephone surveys with 4,859 businesses across the state to determine the availability of firms indicating qualifications and interest in ADOT and local agency transportation-related work. After considering answers to several screening questions, the final availability database included 996 companies. These companies identified the race, ethnicity and gender of the business owner and their annual revenue.

- To determine utilization results, Keen Independent identified the race, ethnicity and gender ownership of companies receiving ADOT prime contracts and subcontracts through sources including telephone interviews with those firms. Results examined minority-owned firms (by race and ethnicity), white women-owned firms and majority-owned firms (firms that are not minority- or women-owned). ADOT reviewed the ownership data for these firms.
- The study team performed disparity analyses by comparing the utilization of minority- and women-owned firms to the availability benchmarks developed in the study.
- Keen Independent assisted ADOT in considering overall DBE goals for FHWA-, FAA- and FTA-funded contracts and projecting the portion of those goals that could be met through race- and gender-neutral means.
- ADOT is distributing the draft 2020 Disparity Study for public comment. Keen Independent will review those comments before preparing the final report.

**Regulations governing overall DBE goals.** Keen Independent and ADOT followed federal regulations in Title 49 Code of Federal Regulations (CFR) Part 26 and USDOT guidance when determining how to (a) set overall DBE goals for USDOT-funded contracts, (b) project how much of a goal will be met through race-neutral means, and (c) project the portion of the goal (if any) to be met through programs such as DBE contract goals.

The 2005 Ninth Circuit Court of Appeals decision in *Western States Paving Co. v. Washington State DOT* is also important for this study. The Court upheld the constitutionality of the Federal DBE Program, but it found that the Washington State DOT failed to show its implementation of the Federal DBE Program to be narrowly tailored (see Chapter 2 and Appendix B of the full report). The Disparity Study provides information for ADOT to ensure that its operation of the Federal DBE Program meets these legal requirements.

**Availability of minority- and women-owned firms and other businesses for ADOT transportation contracts.** Figure ES-2 on the following page describes race, ethnicity and gender ownership of the 996 firms in the availability database for this study. Minority-owned firms (MBEs) comprise about 23 percent of businesses in Arizona available for ADOT transportation contracts. White women-owned firms (WBEs) account for about 17 percent of the companies available for ADOT work. Comparable information from the 2015 Disparity Study shows that the share of both MBEs and WBEs increased between the 2015 and 2020 studies.

The study team then identified the specific characteristics of each of the 14,399 prime contracts and subcontracts from October 2013 through September 2018 that were included in the study and then counted the number of minority-, women- and majority-owned businesses available for each of those prime contracts and subcontracts. Type of work, size and location were considered. Importantly, the results took into account the “bid capacity” that each firm indicated in the availability survey.<sup>1</sup>

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<sup>1</sup> Firms were asked to identify the size of the largest contract the firm had won or bid on in recent years. As an example, if a firm had only bid on contracts or subcontracts up to \$1 million, it was not counted as available for a \$5 million ADOT contract.

Figure ES-2.

Race, ethnicity and gender ownership of businesses included in the availability database, 2015 and 2020

Note:

Numbers rounded to nearest tenth of 1 percent.

Percentages may not add to totals due to rounding.

Only a portion of MBE/WBEs are DBEs.

Source:

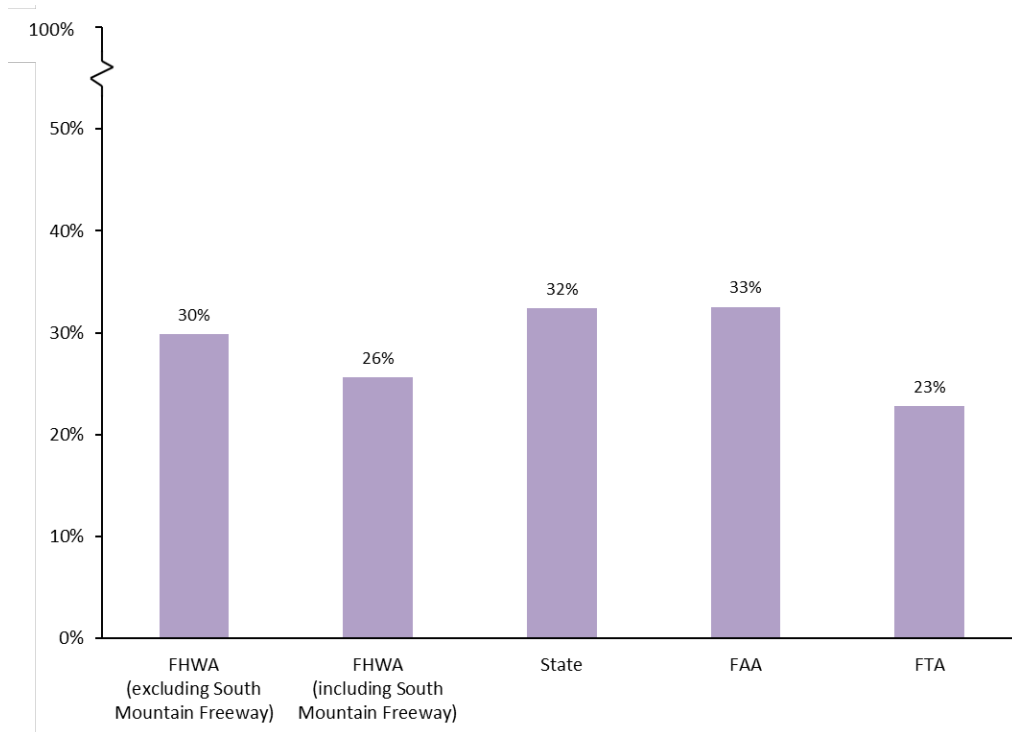
Keen Independent availability analysis.

Race/ethnicity and gender	2015	2020
	Percent of firms	Percent of firms
African American-owned	1.8 %	4.0 %
Asian-Pacific American-owned	1.3	1.2
Subcontinent Asian American-owned	1.3	1.1
Hispanic American-owned	13.2	14.4
Native American-owned	2.6	2.3
<b>Total MBE</b>	<b>20.2 %</b>	<b>23.0 %</b>
WBE (white women-owned)	14.8	16.8
<b>Total MBE/WBE</b>	<b>35.0 %</b>	<b>39.8 %</b>
Total majority-owned firms	65.0	60.2
<b>Total firms</b>	<b>100.0 %</b>	<b>100.0 %</b>

Once availability for each contract and subcontract was determined, Keen Independent dollar-weighted results based on the size of the contract or subcontract. MBE/WBEs accounted for about 40 percent of available firms, but availability benchmarks on a dollar-weighted basis were 23 percent to 32 percent of contract dollars after performing the analysis described above (see Figure ES-3).

Figure ES-3.

Overall dollar-weighted MBE/WBE availability estimates for ADOT FHWA-, state-, FAA- and FTA-funded contracts, October 2013–September 2018



Source: Keen Independent availability analysis.

The proposed overall DBE goals for FHWA-, FAA- and FTA-funded contracts are lower than the benchmarks shown above. One reason is that not all MBE/WBEs are current or potential DBEs. For example, some are too large to be certified as a DBE and therefore are not counted as a potential DBE in the availability analyses that form the basis of the goal.

**Utilization of minority- and women-owned firms and DBEs.** Figure ES-4 presents the share of total contract dollars going to MBE/WBEs for contracts examined in the study. The darker portion of each bar presents the utilization of MBE/WBEs that were DBE-certified.

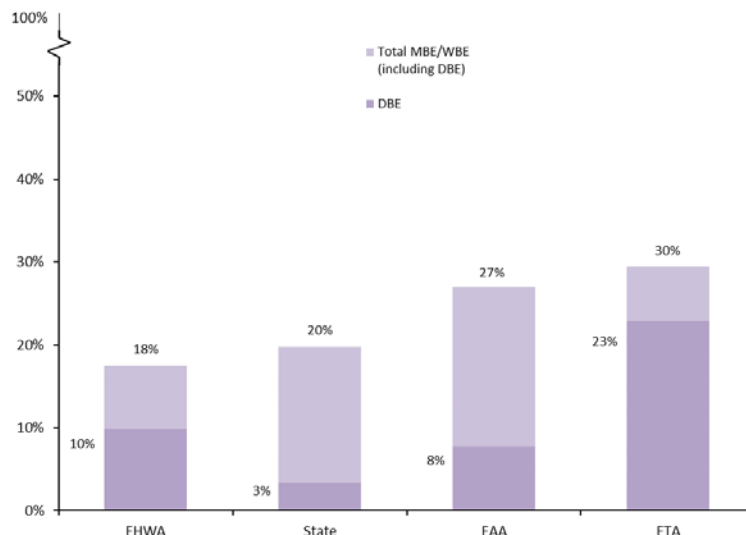
Focusing on results for the \$3.7 billion in FHWA-funded contracts from October 2013 through September 2018, minority- and women-owned firms obtained 18 percent of these contract dollars. About 10 percent of FHWA-funded contract dollars went to firms certified as DBEs<sup>2</sup> and the difference, 8 percent, went to non-certified minority- and women-owned firms.

Compared with FHWA-funded contracts, utilization of DBEs was lower on state-funded contracts (3% of contract dollars), but overall participation of minority- and women-owned firms was higher (20%). MBE/WBE participation on these contracts was primarily from firms not certified as DBEs.

MBE/WBE participation was higher for FAA-funded (27%) and FTA-funded contracts (30%).

**Figure ES-4.**  
MBE/WBE and DBE share of prime contract/subcontract dollars for FHWA-, state-, FAA- and FTA-funded transportation contracts, October 2013–September 2018

**Note:**  
Dark portion of bar is certified DBE utilization.  
Number of contracts/subcontracts analyzed is 14,399



**Source:**  
Keen Independent from data on ADOT and LPA contracts October 2013–September 2018.

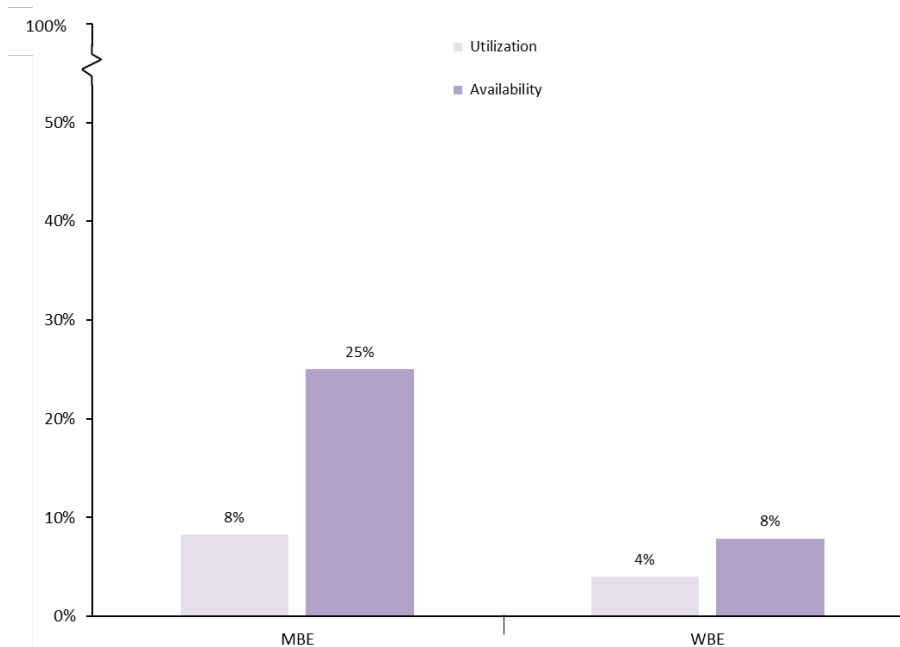
<sup>2</sup> Most firms certified as DBEs are minority- or women-owned firms. White male-owned firms can also meet the federal certification requirements and be certified as DBEs if they demonstrate they are both socially and economically disadvantaged, as described in 49 CFR Part 26.67(d).

**Key results from the disparity analysis.** In one of the disparity analyses in the study, Keen Independent compared the utilization and availability of minority- and women-owned firms for FHWA- and state-funded transportation contracts that did not have DBE contract goals. Results for those contracts best indicated results for FHWA-funded contracts if ADOT did not operate a DBE contract goals program for any of its contracts.

About 8 percent of ADOT contract dollars went to minority-owned firms, substantially less than the 25 percent that might be expected based on the availability analysis. As presented in Chapter 6 of the full report, further analysis by racial and ethnic group identified substantial disparities for African American-, Asian Pacific American-, Hispanic American-, Subcontinent Asian American- and Native American-owned firms.

As shown in Figure ES-5, white women-owned firms received 4 percent of FHWA- and state-funded contract dollars where DBE goals were not applied, substantially less than the 8 percent that might be expected from the availability analysis.<sup>3</sup>

**Figure ES-5.**  
**MBE and WBE utilization and availability without DBE contract goals for FHWA- and state-funded contracts, October 2013–September 2018**



**Note:** Number of contracts/subcontracts analyzed is 10,761 with DBE contract goals and 3,170 without contract goals. Includes South Mountain Freeway contracts.

Coffman Specialties is counted as a majority-owned firm.

**Source:** Keen Independent from data on FHWA- and state-funded prime contracts and subcontracts, October 2013–September 2018.

<sup>3</sup> As discussed in Chapter 6, there was one firm that identifies itself as a WBE that is counted as majority-owned in the study based on the specific reasons used in a previous ADOT denial of certification.

**Quantitative and qualitative information about the local marketplace.** Federal courts have found that Congress “spent decades compiling evidence of race discrimination in government highway contracting, barriers to the formation of minority-owned construction businesses, and barriers to entry.”<sup>4</sup> Congress found that discrimination has impeded the formation and expansion of qualified MBE/WBEs. Barriers that Congress found on a national level also appear in Arizona. Quantitative and qualitative information about the Arizona transportation contracting marketplace suggests that there is not a level playing for minority-owned firms or for women-owned firms.

**Entry and advancement.** Keen Independent identified barriers for people of color and women entering and advancing in the Arizona construction and engineering industries, which negatively affected the number of MBE/WBE construction and engineering companies in business today.

**Business ownership rates for minorities and women in the transportation contracting industry.** The study team identified disparities in business ownership rates for minorities and women that depress the relative number of MBE/WBEs available for ADOT construction and engineering work.

**Access to capital.** Potential barriers associated with access to capital may affect business outcomes for MBE/WBEs. There is evidence that minority- and women-owned firms do not have the same access to capital as majority-owned firms.

**Success of businesses in the transportation contracting industry.** Minority- and women-owned construction and engineering firms in Arizona had lower revenue than majority-owned firms. This may indicate discrimination and it also demonstrates that any disadvantages for small businesses disproportionately affect MBEs and WBEs.

Some minority and female business owners reported that they were disadvantaged by their size and lack of relationships within the industry. Some interviewees also reported negative stereotypes and other forms of discrimination against minority- and women-owned firms.

## **Race-Neutral Measures**

Race-neutral measures include any initiatives that increase the availability and competitiveness of small businesses. ADOT has had considerable business assistance programs in place for many years. ADOT has further enhanced assistance to DBEs and other small businesses, including:

- Additional outreach to certify DBEs;
- Small Business Resource Center;
- DBE Business Development Program;
- One-on-One Business Counseling;
- Lunch and Learn Sessions;
- Business Coach on Demand online training; and
- “Just One More” campaign to encourage use of DBEs beyond a contract goal.

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<sup>4</sup> *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d, 970 (8th Cir. 2003) (citing *Adarand Constructors, Inc.*, 228 F.3d at 1167 – 76); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 992 (9th Cir. 2005).

There are only a few general areas of race- and gender-neutral initiatives employed by other state DOTs that ADOT has not implemented (see Chapter 8). Some of the most notable are:

1. Small business contract goals programs;
2. Small prime contracts programs;
3. Changes to state prequalification systems for contractors;
4. Unbundling of contracts;
5. Working capital loan programs; and
6. Bonding programs.

ADOT might need state legislative action to authorize use of some of these measures.

### **Development of the Overall DBE Goals and Neutral Projections**

As described earlier in this Executive Summary, Keen Independent compiled availability data through surveys with businesses in Arizona. Only businesses reporting their qualifications and interest in ADOT and local agency transportation-related prime contracts and subcontracts were included in the final analyses. Some of firms were current or potential DBEs.

**Base figure analysis using results of dollar-weighted availability.** Keen Independent determined that ADOT and local agency prime contracts and subcontracts from October 2013 through September 2018 (not including South Mountain Freeway) best reflect the variety of USDOT-funded contracts expected in future years. As previously described, to calculate availability of DBEs for a prime contract or subcontract, Keen Independent calculated:

- (a) Number of current/potential DBEs available for that type, size and location of work;
- (b) Total number of firms available for that work; and
- (c) Percentage DBE availability for that prime contract or subcontract, calculated by dividing (a) by (b).

Keen Independent then dollar-weighted the percentage DBE availability results for each prime contract and subcontract to develop overall DBE availability figures for FHWA-, FAA- and FTA- contracts.

**Step2 adjustments.** Federal regulations require ADOT to consider “step 2 adjustments” when determining overall DBE goals. These adjustments raise or lower the overall goal from what it would be only considering current availability of DBEs (and potential DBEs) for an agency’s contracts (which is called the “base figure” in the federal regulations).



For FHWA-, FAA- and FTA-funded contracts, Keen Independent calculated potential upward and downward adjustments.

- **FHWA.** The base figure (i.e., “unadjusted” availability) for FHWA-funded contracts is 16.15 percent based on study results. The proposed 12.89 percent overall DBE goal for FHWA-funded contracts reflects a 3.26 percentage point downward step 2 adjustment to account for “current capacity of DBEs to perform work” as measured by the volume of work on ADOT’s FHWA-funded contracts that DBEs have performed in recent years ( $16.15\% - 3.26\% = 12.89\%$ ). Chapter 9 of the report explains these analyses.
- **FAA.** The base figure analysis for FAA-funded contracts indicated DBE availability of 19.72 percent for these contracts. The proposed overall DBE goal reflects a 9 percentage point downward step 2 adjustment. (Chapter 10 provides these results.)
- **FTA.** The proposed overall DBE goal for FTA-funded contracts was determined from the base figure analysis for these contracts (14.64%). Keen Independent calculated potential step 2 adjustments, each of which would have increased the overall DBE goal for FTA-funded contracts. (See Chapter 11.)

**Projections of the share of the overall goal to be met through neutral means.** MBE/WBE utilization and DBE participation for past FAA- and FTA-funded contracts suggest that ADOT could meet the proposed goals solely through neutral means, especially if some of the minority- and women-owned firms receiving these contracts could be certified as DBEs.

For FHWA-funded contracts, it appears that ADOT could achieve some but not all of the 12.89 percent overall DBE goal solely through small business programs and other neutral measures. For example, 5.9 percent of ADOT’s FHWA-funded contract dollars went to minority- and women-owned firms that were not DBE-certified but appear that they could be certified. If ADOT encouraged more of these firms to be certified, it could count this additional neutral participation toward its overall DBE goal.

Even with more neutral participation of DBEs on FHWA-funded contracts, ADOT may need to continue selective use of DBE contract goals for FFY 2020 through FFY 2022.

## Public Comment Process for the 2020 Disparity Study Draft Report

ADOT published this draft Disparity Study report for public comment before Keen Independent finalizes the report. Public comments concerning information in this report as well as ADOT's proposed overall DBE goals can be made through June 12, 2020.

ADOT will hold two webinars concerning the Disparity Study and ADOT's proposed DBE goals:

- Tuesday, May 12, 2020 from 1:00 to 2:30 pm; and
- Monday, May 18, 2020 from 4:00 to 5:30 pm.

Information about the webinars can be found at [www.azdot.gov/DBEDisparityStudy](http://www.azdot.gov/DBEDisparityStudy). The public will be able to give feedback and provide written comments:

- (a) During the webinars;
- (b) Online at the above address;
- (c) By calling the study telephone hotline at 602-730-0466;
- (d) Via email at [adotdisparitystudy2019@keenindependent.com](mailto:adotdisparitystudy2019@keenindependent.com); and
- (e) Through regular mail to Keen Independent Research LLC, 701 N. 1st St., 2nd Floor, Phoenix, AZ 85004.

Keen Independent will incorporate information from the webinars and written comments into the final report. ADOT will also review this information when finalizing its proposed overall DBE goals calculation for submission to USDOT. This process follows the approach for the 2014 Availability Study, 2015 Disparity Study and the 2017 Availability Study that Keen Independent prepared for ADOT.

## CHAPTER 1.

### Introduction

The federal government requires state and local governments to operate the Federal Disadvantaged Business Enterprise (DBE) Program if they receive U.S. Department of Transportation (USDOT) funds for transportation projects. The Arizona Department of Transportation (ADOT) has been operating some version of the Federal DBE Program since the 1980s.

ADOT must set a separate overall goal for participation of DBEs in USDOT-funded contracts for each of three types of USDOT funds it receives: (a) Federal Highway Administration (FHWA) funds, (b) Federal Transit Administration (FTA) monies and (c) Federal Aviation Administration (FAA) funds. Each overall goal is expressed as the percentage of contract dollars that will go to firms certified as DBEs. Each overall goal is for three years, and every year ADOT must set a new overall annual goal for one of these different operating administrations within USDOT. The new three-year goal for FHWA-funded contracts must be in place starting October 1, 2020. ADOT will start new three-year DBE goals for FAA- and FTA-funded contracts in fall 2021.

The USDOT recommends that agencies such as ADOT conduct disparity studies to develop the information needed to effectively implement the Program. ADOT retained Keen Independent Research LLC (Keen Independent) to conduct the 2020 Disparity Study. Keen Independent previously conducted ADOT's 2017 Availability Study, 2015 Disparity Study and 2014 DBE Availability Study. Keen Independent's methodology for the 2020 Disparity Study is the same as Keen Independent's previous studies for ADOT.

This draft report presents preliminary research results that ADOT can use to make certain decisions about the operation of the Federal DBE Program for its FHWA-funded contracts beginning fall 2020. Based in part on Keen Independent's 2017 Availability Study, ADOT submitted a preliminary overall DBE goal of 9.55 percent for FHWA-funded contracts for FFY 2018 through FFY 2020, which was approved by FHWA.

The 2020 Disparity Study report provides information that ADOT can use to establish a new overall goal for FHWA-funded contracts and review its operation of the Federal DBE Program. ADOT can also use information from the 2020 Study to set its future overall DBE goals for FAA- and FTA-funded contracts. The website [www.azdot.gov/DBEDisparityStudy](http://www.azdot.gov/DBEDisparityStudy) provides ADOT's proposed overall goals, information about webinars and how to submit written comments, and other information about the disparity study.

The balance of Chapter 1:

- A. Introduces the study team;
- B. Provides background on the Federal DBE Program;
- C. Outlines the analyses and describes where results appear in the report; and
- D. Provides information about webinars and the public comment process.

## A. Study Team

David Keen, Principal of Keen Independent, directed this disparity study. He has conducted similar studies for more than 100 public agencies throughout the country, including many state transportation departments. Keith Wiener from Holland & Knight provided the legal framework for this study. Mr. Wiener has extensive experience with disparity studies as well and has worked with Mr. Keen in this field since the early 1990s. Mr. Keen and Mr. Wiener have helped public agencies successfully defend DBE and minority business enterprise programs in court.

The Keen Independent study team also included Así Marketing Group, Partners in Brainstorms, Gordley Group and Customer Research International. Each of these firms is a minority- and/or women-owned business. Except for Partners in Brainstorms, each of the study team members also participated in Keen Independent's 2015 Disparity Study for ADOT.

Figure 1-1.  
2020 ADOT Disparity Study team

Firm	Location	Team leader	Responsibilities
Keen Independent Research LLC, prime consultant	Phoenix, AZ Denver, CO	David Keen Principal	All study phases
Holland & Knight LLP	Atlanta, GA	Keith Wiener Partner	Legal framework
Así Marketing Group	Phoenix, AZ	Letty Alvarez Principal	In-depth interviews, outreach
Partners in Brainstorms	Phoenix, AZ	Debra Pryor President	In-depth interviews, program analysis
Gordley Group	Tucson, AZ	Jan Gordley President	In-depth interviews, public outreach
Customer Research International	San Marcos, TX	Sanjay Vrudhula President	Availability telephone interviews

## B. Federal DBE Program

ADOT operates the Federal DBE Program as a condition of receiving USDOT funds. It has been operating some version of a Federal DBE Program since the 1980s. After enactment of the Transportation Equity Act for the 21st Century (TEA-21) in 1998, USDOT established a new Federal DBE Program to be operated by state and local agencies receiving USDOT funds. USDOT revised the Federal DBE Program in 2011 and again in 2014.

Federal regulations in 49 CFR Part 26 direct how state and local governments must operate the Federal DBE Program.<sup>1</sup> If necessary, under the federal regulations, the Program allows state and local agencies to use DBE contract goals, which ADOT currently sets on certain FHWA-funded contracts. When awarding those contracts, ADOT considers whether or not a bidder or proposer meets the DBE goal set for the contract or shows good faith efforts to do so.

The Federal DBE Program also applies to cities, towns, counties, transportation authorities, tribal governments and other jurisdictions that receive USDOT funds as a subrecipient of ADOT.

**Key Program elements.** Components of the Federal DBE Program include the following elements.

**Setting an overall goal for DBE participation.** ADOT must develop separate overall three-year goals for DBE participation in its FHWA-, FAA- and FTA-funded contracts. The Federal DBE Program sets forth the steps an agency must follow in establishing its goals, including development of a “base figure” and consideration of possible “step 2” adjustments to a goal.<sup>2</sup>

ADOT’s overall goals for DBE participation are aspirational. Failure to meet an annual DBE goal does not automatically cause any USDOT penalties unless an agency fails to administer the DBE Program in good faith. However, if ADOT does not meet its overall DBE goal, federal regulations require it to analyze the reasons for any shortfall and develop a corrective action plan to meet the goal in the next fiscal year.<sup>3</sup>

For the three-year period ending September 30, 2020, ADOT has a goal of 9.55 percent DBE participation for FHWA-funded contracts. ADOT’s current overall goals are 11.00 percent for FTA-funded contracts and 8.05 percent for FAA-funded contracts.

**Establishing the portion of the overall DBE goal to be met through neutral means.** Regulations governing operation of the Federal DBE Program allow for state and local governments to operate the program without the use or with limited use of race- or gender-based measures such as DBE contract goals. According to program regulations 49 CFR Section 26.51, a state or local agency must meet the maximum feasible portion of its overall goal for DBE participation through “race-neutral means.” Race-neutral program measures include removing barriers to participation of firms in general or promoting use of small or emerging businesses. Setting goals for small business participation on contracts is another potential neutral measure (see 49 CFR Section 26.51(b) for more examples of race-neutral program measures).

If an agency can meet its goal solely through race-neutral means, it must not use race-conscious program elements. For example, a state DOT operating a 100 percent race- and gender-neutral program would not apply DBE contract goals.

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<sup>1</sup> 49 CFR Part 26 [https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26\\_main\\_02.tpl](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl)

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

<sup>3</sup> 49 CFR Section 26.47.

When an agency sets an overall DBE goal, the Federal DBE Program also requires that it project the portion of that goal it will meet through neutral measures and the portion, if any, to be met through race-conscious measures such as DBE contract goals. USDOT has outlined a number of factors for an agency to consider when making that determination.<sup>4</sup>

Many state DOTs project that they will meet their overall DBE goal through a combination of race-neutral and race-conscious measures. Some DOTs have operated the Federal DBE Program solely through neutral measures and without the use of DBE contract goals (state DOTs in Florida, Maine, Montana, New Hampshire, New Mexico, Vermont and Wyoming are examples). These agencies projected that 100 percent of their overall DBE goal for FHWA-funded contracts will be met through neutral means.

The draft 2020 Disparity Study provides ADOT information to consider when making these projections for its future overall DBE goals for FHWA-, FAA- and FTA-funded contracts. For its current overall DBE goals for FAA- and FTA-funded contracts, ADOT projected that it would meet them goals entirely through neutral means. Therefore, it does not apply DBE contract goals to those contracts. ADOT is using a combination of neutral and race- and gender-conscious means to meet its current overall DBE goal for FHWA-funded contracts. It sets DBE contract goals on many (but not all) of its FHWA-funded contracts.

**Determining whether all racial, ethnic and gender groups will be eligible for race- or gender-conscious elements of the Federal DBE Program.** Under the Federal DBE Program, the following racial, ethnic and gender groups can be presumed to be socially disadvantaged:

- Black Americans (or “African Americans” in this study);
- Asian-Pacific Americans;
- Subcontinent Asian Americans;
- Hispanic Americans;
- Native Americans; and
- Women of any race or ethnicity.

To be economically disadvantaged, a company must be below an overall revenue limit and an industry-specific limit, and its firm owner(s) must be below net worth limits.<sup>5</sup> White male-owned firms and other ethnicities not listed above can also meet the federal certification requirements and be certified as DBEs if they demonstrate that they are both socially and economically disadvantaged, as described in 49 CFR Part 26.67(d). (This has occurred in Arizona.)

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<sup>4</sup> See Chapter 7 of this report for an in-depth discussion of these factors.

<sup>5</sup> 49 CFR 26 Subpart D provides certification requirements. There is a gross receipts limit (currently not more than \$22,410,000 annual three-year average revenue, and lower limits for certain lines of business) and a personal net worth limit (currently \$1.32 million excluding equity in the business and primary personal residence) that firms and firm owners must fall below to be able to be certified as a DBE. <http://www.ecfr.gov/cgi-bin/text-idx?SID=5423bdfc26e2255aef5fb43e3f450a13&node=49:1.0.1.1.20.4&rgn=div6>

Under 49 CFR Section 26.67(b), a certifying agency may consider other factors to determine if an individual is able to accumulate substantial wealth, in which certification is denied (annual gross income of the owner and whether the fair market value of the owner’s assets exceed \$6 million are two such factors that may be considered).

ADOT's current operation of the Program, similar to most states, includes DBEs owned by each of the above minority groups and women as eligible for race- and gender-conscious measures such as DBE contract goals applied to FHWA-funded contracts. However, USDOT provides a waiver provision if an agency determines that it does not need to include certain racial, ethnic or gender groups in the race- or gender-conscious portions of the Federal DBE Program.

**Promoting DBE participation as prime contractors.** The Federal DBE Program calls for agencies to remove any barriers to DBE participation as prime contractors and consultants, but does not require agencies to operate programs that give preference to DBE primes. Quotas are prohibited.

The Federal DBE Program requires agencies such as ADOT to develop programs to assist all small businesses.<sup>6</sup> For example, small business preference programs, including reserving contracts on which only small businesses can bid, are allowable under the Federal DBE Program.

**Promoting DBE participation as subcontractors.** In accordance with federal regulations and subject to USDOT approval, an agency can decide that it will use DBE contract goals as part of its operation of the Federal DBE Program. ADOT currently uses DBE contract goals for certain FHWA-funded contracts and does not for FAA- or FTA-funded contracts.

**Past court challenges to the Federal DBE Program and to state and local agency implementation of the Program.** Although agencies are required to operate the Federal DBE Program in order to receive USDOT funds, different groups have challenged program operation in court.

- A number of courts have held the Federal DBE Program to be constitutional, as discussed in Chapter 2 and Appendix B of this report.
- State transportation departments in California, Illinois, Minnesota, Montana and Nebraska successfully defended their operation of the Federal DBE Program, as have several cities and other local government agencies. The Washington State Department of Transportation was not able to successfully defend its operation of the Federal DBE Program. (See Chapter 2 and Appendix B.)

In *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation*, the Ninth Circuit Court of Appeals examined the methodology and results of the disparity study David Keen directed for the California Department of Transportation (Caltrans). (Mr. Keen also provided expert testimony in this case.) As discussed in more detail in Appendix B, the Ninth Circuit favorably reviewed the methodology and the quantitative and qualitative information provided in the disparity study and determined that the information justified Caltrans' operation of the Federal DBE Program. Keen Independent is applying a methodology in ADOT's 2020 Disparity Study that is very similar to what the court favorably reviewed in the Caltrans case.

As discussed in Chapter 2 of this Disparity Study, ADOT also succeeded when facing a legal challenge to its implementation of the Federal DBE Program.

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<sup>6</sup> 49 CFR Section 26.39.

## C. Analyses Performed in the 2020 Disparity Study and Location of Results

Figure 1-2 below outlines the chapters in the 2020 Disparity Study. The following pages briefly describe where to find specific information in the report.

Figure 1-2.

2020 Disparity Study report chapters

Chapter	Description of 2020 Disparity Study report chapters
ES. Executive Summary	Brief summary of study results
1. Introduction	Study purpose, study team and overview of analyses
2. Legal Framework	Summary of Federal DBE Program regulations and relevant court decisions
3. ADOT Transportation Contracts	How the study team collected ADOT contract data and defined the geographic area and transportation contracting industry
4. Marketplace Conditions	Summary of quantitative and qualitative information about the Arizona transportation contracting marketplace
5. Availability Analysis	Methodology and results regarding availability of minority- and women-owned firms and other businesses for ADOT contracts and subcontracts
6. Utilization and Disparity Analysis	Comparison of utilization and availability of minority- and women-owned firms (disparity analysis)
7. Exploration of MBE/WBE and DBE Utilization	Further examination of disparity results to determine if any disparities can be explained by neutral factors
8. Summary of Evidence and Program Recommendations	Summary of study results and conclusions as well as recommendations regarding program operation
9. Overall Annual DBE Goal and Projections for FHWA-funded Contracts	Information to review when setting a three-year overall DBE goal, including consideration of a “step 2 adjustment,” as well as determining the portion of the overall DBE goal to be met through neutral means
10. Overall Annual DBE Goal and Projections for FAA-funded Contracts	Information for DBE Program for FAA-funded contracts
11. Overall Annual DBE Goal and Projections for FTA-funded	Information for DBE Program for FTA-funded contracts



**Legal framework.** Chapter 2 summarizes the legal framework for the study. Appendix B presents detailed analyses of relevant cases.

**Collection of prime contract and subcontract information for past USDOT- and state-funded contracts.** The study team collected information about past FHWA-, FTA-, FAA- and state-funded contracts awarded by ADOT or by local public agencies from October 2013 through September 2018. Chapter 3 outlines the data collection process and describes these contract data. Appendix C provides additional documentation.

**Analysis of local marketplace conditions.** The study team examined quantitative and qualitative information relevant to the Arizona transportation contracting industry. Chapter 4 synthesizes quantitative information about local marketplace conditions. In accordance with USDOT guidance, Keen Independent analyzed:

- Any evidence of barriers for minorities and women to enter and advance in their careers in the construction and engineering industries in Arizona (detailed results in Appendix E);
- Any differences in rates of business ownership in Arizona (discussed in detail in Appendix F);
- Access to business credit, insurance and bonding (detailed results in Appendix G);
- Any differences in measures of business success and access to prime contract and subcontract opportunities (examined in detail in Appendix H); and
- Certain other issues potentially affecting minorities and women in the local marketplace.

Chapter 4 also summarizes analysis of qualitative information, including results of in-depth interviews, public comments and other input from more than 330 businesses, trade association representatives and others as part of the public comment process for the 2020 Disparity Study. Appendix J of this report provides detailed analysis of this qualitative information.

This combined quantitative and qualitative information about the marketplace is relevant to ADOT's development of an overall DBE goal and its projection of how much of the goal will be met through neutral means.

**Availability analysis, including calculation of base figure for overall DBE goals.**

Keen Independent's availability analysis generates benchmarks to use when assessing ADOT's utilization of minority- and women-owned firms. The availability results also provide information for ADOT to consider when setting its three-year goal for DBE participation on FHWA-, FAA- and FTA-funded contracts.

Discussion of results is organized as follows:

- The methods used to collect and analyze availability of minority-, women- and majority-owned firms;
- Availability benchmarks used in the disparity analysis; and
- Information relevant to ADOT's "base figure" for its overall DBE goals for FHWA-, FAA- and FTA-funded contracts.

**MBE/WBE utilization and disparity analysis.** Chapter 6 presents Keen Independent's analysis of the utilization of minority- and women-owned businesses in ADOT's FHWA-, state-, FAA- and FTA-funded contracts during the study period. The disparity analysis in Chapter 6 compares utilization to availability to determine whether there is underutilization of minority- or women-owned firms in ADOT transportation contracts.

Chapter 7 further explores this information, including results for different types of ADOT contracts. It also contains analysis of DBE participation on FHWA- and state-funded contracts, and explores whether there is any evidence of overconcentration of DBEs.

**Summary of evidence and recommendations.** Chapter 8 summarizes the information gleaned from the utilization and disparity analysis and includes recommendations for ADOT consideration as it continues to operate the Federal DBE Program on USDOT-funded contracts.

**Information for overall DBE goal and DBE Program operation for FHWA-funded, FAA- and FTA-funded contracts.** The final three chapters of the report present analyses of overall DBE goals, projections of neutral attainment and other program issues regarding FHWA-funded contracts (Chapter 9), FAA-funded contracts (Chapter 10) and FTA-funded contracts (Chapter 11).

## **D. Public Comment Process for the 2020 Disparity Study Draft Report**

ADOT published this draft Disparity Study report for public comment before Keen Independent finalizes the report. Public comments concerning information in this report as well as ADOT's proposed overall DBE goals can be made through June 12, 2020. ADOT will hold two webinars concerning the Disparity Study and its proposed DBE goals:

- Tuesday, May 12, 2020 from 1:00 to 2:30 pm; and
- Monday, May 18, 2020 from 4:00 to 5:30 pm.

Information about the webinars can be found at [www.azdot.gov/DBEDisparityStudy](http://www.azdot.gov/DBEDisparityStudy). The public will be able to give feedback and provide written comments (a) during the webinars; (b) online at the above address; (c) by calling the study telephone hotline at 602-730-0466; (d) via email at [adotdisparitystudy2019@keenindependent.com](mailto:adotdisparitystudy2019@keenindependent.com); and (e) through regular mail to Keen Independent Research LLC, 701 N. 1st St., 2nd Floor, Phoenix, AZ 85004.

Keen Independent will incorporate comments into the final report. ADOT will also review this information when finalizing its proposed overall DBE goals calculation for submission to USDOT. This process follows the approach for the 2014 Availability Study, 2015 Disparity Study and the 2017 Availability Study that Keen Independent prepared for ADOT.

## CHAPTER 2.

### Legal Framework

The legal framework for ADOT Disparity Study is based on regulations for the Federal DBE Program and other sources including the Official USDOT Guidance, court decisions related to the Federal DBE Program and court decisions concerning challenges to minority- and women-owned business enterprise programs. Applicable federal regulations are located at Title 49 Code of Federal Regulations (CFR) Part 26.

- The 1989 U.S. Supreme Court decision in *City of Richmond v. J.A. Croson Company* established the strict scrutiny standard of review for race-conscious programs adopted by state and local governments<sup>1</sup> and its 2005 decision in *Adarand Constructors, Inc. v. Peña* established the same standard of review for federal race-conscious programs.<sup>2</sup>
- The Federal DBE Program has been held to be constitutional “on its face” in subsequent legal challenges, but a court may still find that an agency implementing the program fails to meet this legal standard in its implementation of the Program. Some legal challenges have been brought against state DOTs, including ADOT.<sup>3</sup>
- In 2005, Western States Paving Company successfully challenged Washington State Department of Transportation’s implementation of the Federal DBE Program. The United States Ninth Circuit Court of Appeals decision in the *Western States Paving*<sup>4</sup> case affected each agency implementing the Federal DBE Program in states within the Ninth Circuit, including Arizona.
- Many state and local agencies within the Ninth Circuit adjusted their implementation of the Federal DBE Program to comply with the *Western States Paving* case and the Official USDOT Guidance issued in response to the decision. ADOT discontinued use of DBE contract goals for its FHWA-funded contracts at that time.
- After completing disparity studies, ADOT and many other state DOTs reinstated use of DBE contract goals.
- When the California Department of Transportation (Caltrans) returned to using DBE contract goals, it was challenged in court. In 2013, the Ninth Circuit Court of Appeals held in *AGC, San Diego Chapter v. California DOT*<sup>5</sup> that Caltrans’ implementation of the Federal DBE Program was valid and complied with its decision in *Western States Paving*.

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<sup>1</sup> *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

<sup>2</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>3</sup> *Braunstein v. Arizona DOT*, 683 F.3d 1177 (9th Cir. 2012).

<sup>4</sup> *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

<sup>5</sup> *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. 2013).

David Keen of Keen Independent directed the disparity study for Caltrans and served as an expert witness in this case. The methodology Mr. Keen used in the Caltrans disparity study was approved by USDOT, U.S. Department of Justice, and ultimately the Ninth Circuit Court of Appeals. The same methodology was used in the 2020 ADOT Disparity Study.

To further understand the legal framework and context for the study, it is useful to review:

- A. The Federal DBE Program;
- B. Similar state and local MBE/WBE programs in the United States; and
- C. Legal standards that race- and gender-conscious programs must satisfy.

### **A. The Federal DBE Program**

The Federal DBE Program includes requirements for state and local governments implementing the program. Three important requirements are:

- **Setting overall goals for DBE participation.** (49 CFR Section 26.45)
- **Meeting the maximum feasible portion of the overall DBE goal through race- and gender-neutral means.** (49 CFR Section 26.51)
  - Race- and gender-neutral measures include promoting the participation of small or emerging businesses.<sup>6</sup>
  - If an agency can meet its overall DBE goal solely through race- and gender-neutral means, it must not use race- and gender-conscious measures when implementing the Federal DBE Program.
- **Appropriate use of race- and gender-conscious measures, such as contract-specific DBE goals.** (49 CFR Section 26.51)
  - Because these measures are based on the race or gender of business owners, use of these measures must satisfy stringent court imposed legal and regulatory standards in order to be legally valid.<sup>7</sup>
  - Measures such as DBE quotas are prohibited; DBE set-asides may only be used in limited and extreme circumstances (49 CFR Section 26.43).
  - Some state DOTs following court decisions and USDOT Official Guidance have restricted eligibility to participate in DBE contract goals programs to certain racial, ethnic and gender groups based on the evidence of discrimination for those groups in the state's transportation contracting industry.

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<sup>6</sup> Note that all use of the term “race- and gender-neutral” refers to “race-, ethnic- and gender-neutral” in this report.

<sup>7</sup> Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply the “intermediate scrutiny” standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail.

Based on these requirements, all state DOTs set an overall goal for DBE participation and use certain race-neutral measures to encourage DBE participation. Many state DOTs use race- and gender-conscious measures such as DBE contract goals to help meet their overall DBE goal.

Some state DOTs limit participation in race- and gender-conscious programs such as DBE contract goals to those DBE groups for which there is sufficient evidence of discrimination in the state transportation contracting industry (sometimes called “underutilized DBE” or “UDBE” contract goals programs). Implementation of such contract goals programs requires approval of a waiver from USDOT.<sup>8</sup>

## **B. State and Local MBE/WBE Programs in the United States**

In addition to USDOT-funded contracts, ADOT awards transportation contracts that are solely funded through state sources. The Federal DBE Program does not apply to those contracts.

Some state DOTs and other agencies operate minority- and women-owned business enterprise (MBE/WBE) programs for their non-federally funded contracts (the cities of Phoenix and Tucson operated such programs in the past). As examples, the North Carolina Department of Transportation and the Indiana Department of Transportation operate MBE/WBE programs that are similar to the Federal DBE Program.

However, in 2010 the State of Arizona approved Proposition 107, which was an Amendment to the State Constitution known as the “Arizona Civil Rights Amendment.” The Arizona Civil Rights Amendment is codified as Article II, Section 36 of the Arizona State Constitution. Section 36 prohibits any preferential treatment by the State or local governments based on race, sex, color, ethnicity or national origin.

Section 36 does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to Arizona. Therefore, ADOT still implements the Federal DBE Program since compliance with and implementation of the Program is required to obtain certain USDOT funds.

Although ADOT has no race- or gender-conscious program for its state-funded contracts, court decisions regarding MBE/WBE programs in other states are still instructive for this disparity study. Appendix B examines insights from these cases.

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<sup>8</sup> 49 CFR Section 26.15.

### C. Legal Standards that Race- and Gender-Conscious Programs Must Satisfy

In *City of Richmond v. J.A. Croson Company*, the U.S. Supreme Court established that government contracting programs with race-conscious measures must satisfy the “strict scrutiny” standard of constitutional review.<sup>9</sup> As described in detail in Appendix B, the strict scrutiny standard is very difficult for a government entity to meet.

Under the strict scrutiny standard, a governmental entity must have a strong basis in evidence that:

- There is a *compelling governmental interest* in remedying specific past identified discrimination or its present effects; and
- Any program adopted is *narrowly tailored* to remedy the identified discrimination. There are a number of factors a court considers when determining whether a program is narrowly tailored (see Appendix B).

A government agency must satisfy both components of the strict scrutiny standard. A race-conscious program that fails to meet either one is unconstitutional.

Following *Western States Paving*, the USDOT recommended that state DOTs and other agencies use disparity studies to examine whether or not there is evidence of discrimination and how remedies might be narrowly tailored when implementing the Federal DBE Program.<sup>10</sup>

The USDOT suggests consideration of both statistical and anecdotal evidence. The USDOT instructs that recipients should ascertain evidence for discrimination and its effects separately for each group presumed to be disadvantaged in 49 CFR Part 26. The USDOT’s Guidance provides that recipients should consider evidence of discrimination and its effects.<sup>11</sup>

The USDOT’s Guidance is recognized by the federal regulations as “valid, and express the official positions and views of the Department of Transportation”<sup>12</sup> for states in the Ninth Circuit.

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<sup>9</sup> Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply the “intermediate scrutiny” standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail (starting on page 33 of Appendix B).

<sup>10</sup> Questions and Answers Concerning Response to *Western States Paving Company v. Washington State Department of Transportation* (January 2006) [hereinafter USDOT Guidance], available at 71 Fed. Reg. 14,775; see 49 CFR Section 26.9; see, also, 49 CFR Section 26.45.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, 49 CFR Section 26.9; See, 49 CFR Section 23.13.

## **CHAPTER 3.**

### **ADOT Transportation Contracts**

Many components of the 2020 Disparity Study require ADOT contract and subcontract data as building blocks for the analysis. When designing the availability research, for example, it is important to understand the geographic area from which ADOT draws contractors and consultants and the types of work involved in ADOT transportation contracts. The utilization and disparity analyses in the 2020 Disparity Study are based on information from ADOT prime contracts and subcontracts.

Before conducting other analyses, Keen Independent collected information for ADOT and local agency transportation contracts for the October 2013 through September 2018 study period. Chapter 3 describes the study team's process for compiling and merging these data. Chapter 3 consists of four parts:

- A. Overview of ADOT transportation contracts;
- B. Collection and analysis of contract data;
- C. Types of work involved in ADOT contracts; and
- D. Location of businesses performing ADOT work.

Appendix C provides additional detail concerning collection and analysis of contract data.

#### **A. Overview of ADOT Transportation Contracts**

ADOT uses FHWA, FAA, FTA and state funds to build and maintain transportation projects. The Disparity Study included contracts awarded by cities, counties, other local agencies and tribal entities using money passed through ADOT.

- FHWA- and state-funded construction projects include building new highway segments and interchanges, widening and resurfacing roads, and improving bridges.
- Engineering-related work includes design and management of projects, planning and environmental studies, surveying and other transportation-related consulting services (includes FHWA-, state-, FAA- and FTA-funded contracts).
- ADOT has design-build contracts that combine engineering and construction project activities (both FHWA- and state-funded contracts).
- ADOT's FTA-funded contracts also include vehicle purchases and transit services.

A single ADOT project can involve many types of businesses, as described below.

**Prime contracts, subcontracts, trucking and materials supply.** A typical construction project includes a prime contractor and several subcontractors. Trucking companies and materials suppliers are often involved in construction projects as well. Some subcontractors on ADOT construction projects further contract out work to what is known as a “second-tier” or “lower-tier” subcontractor. Keen Independent examined ADOT contract information for each level of participants.

Many ADOT projects have an engineering phase prior to construction that requires work performed by engineering companies and related firms. The engineering prime consultant retains the specialized subconsultants needed to complete these contracts. ADOT sometimes contracts with engineering companies through on-call agreements. When specific work is needed, ADOT issues task orders to those firms. Keen Independent included engineering task orders in this analysis.

For both construction and engineering contracts, Keen Independent separated the contract dollars going to subcontractors (and truckers and suppliers) from the dollars retained by the prime contractor. Keen Independent calculated the total dollars going to the prime contractor by subtracting subcontractor, trucker and supplier dollars from the total contract value. This step was important for both the availability analyses and the utilization analyses performed in the 2020 Disparity Study.

**ADOT contracts and Local Public Agency Program contracts.** The 2020 Disparity Study includes ADOT contracts and those for local agencies that use ADOT-administered funds. Through ADOT’s Local Public Agency (LPA) Program, USDOT funds for transportation projects go to cities, counties, regional transportation commissions, other local agencies and tribal entities.

**Transportation-related contracts.** The study focused on transportation construction and engineering contracts and does not include acquisition of real property. The study team excluded any contracts to not-for-profit entities or government agencies.

**Regions.** Based on ADOT and industry input, Keen Independent divided the Arizona contracting market into the three regions shown in Figure 3-1. “Location” refers to physical location of the project, not the ADOT office managing the work or the address of the contractor. Keen Independent coded statewide assignments and work not in a single physical location as “statewide.”

Figure 3-1.  
Study regions



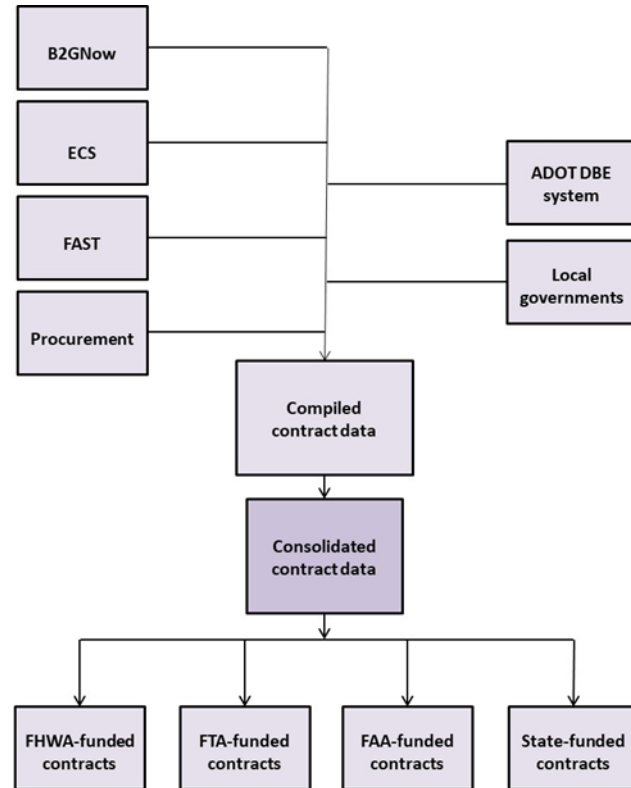


## B. Collection and Analysis of Contract Data

As shown in Figure 3-2, Keen Independent collected data on ADOT's contracts from multiple sources. Data for most ADOT construction and engineering contracts came from ADOT's B2GNow system. The Engineering Consultant Section (ECS) provided information about ADOT engineering contracts. Prime contract and subcontractor information was obtained also from ADOT's FAST system and Procurement department. Contracts for local agencies awarded with funds administered through the Local Public Agency (LPA) Section were obtained from ADOT's B2GNow system.

Keen Independent merged contracts from different sources into one database, which was reviewed to exclude duplicate records, and then sorted by funding source (FHWA-, FAA-, FTA-, and state-funded contracts).

Figure 3-2.  
Collection of contract data



**Study period.** Keen Independent examined contracts awarded from October 1, 2013 through September 30, 2018.

- **Study period end date.** Because Keen Independent began compiling contract data in early 2019, it was appropriate to choose the close of the previous federal fiscal year (September 2018) as the study period end date.
- **Study period start date.** Keen Independent research began with contract awarded in October 1, 2013 to capture the last five federal fiscal years of contract data.

**Data sources for ADOT contracts.** Keen Independent obtained data on prime contracts, subcontracts, trucking services and materials suppliers from ADOT records. To the extent possible, the dollar amounts used correspond to the total dollars paid or expected to be paid to the firm for services on that contract or subcontract.<sup>1</sup>

ADOT contract records provided information about award date, location (county), a general description of the work, whether or not the contract was FTA-, FAA- or FHWA-funded, and whether the DBE contract goals applied. Keen Independent used consistent methods to collect information on FHWA, FAA-, FTA- and state-funded contracts.

When there was any amount of USDOT funding expected for a contract, ADOT typically treated that contract as USDOT-funded. “State-funded” contracts are those with no USDOT funding.

Some overlapping of contract data existed between department records. Keen Independent examined and removed any duplicate contracts.

**Data sources for local agency contracts.** ADOT uses B2GNow to manage and track information about local agency projects funded through the LPA Program. ADOT provided access to Keen Independent to B2GNow to obtain construction and engineering contracts using LPA Program funds.

**Limitations concerning contract data.** As discussed in Appendix C, ADOT has not maintained comprehensive data concerning every subcontractor, trucker and supplier involved in ADOT or LPA contracts during the October 2013 through September 2018 study period. This limitation concerning data for past contracts would not appear to have a meaningful effect on overall study results.

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<sup>1</sup> For example, Keen Independent examined the *total* value of the awarded contract and related subcontracts for an August 2017 contract, not what was paid on that contract before the September 2018 study period end date. For certain completed contracts and task orders, payment amounts were used to determine contract value.

### C. Types of Work Involved in ADOT Contracts

Keen Independent included 14,399 transportation-related contracts and task orders totaling nearly \$4.2 billion over the October 2013 through September 2018 study period. These contracts included those directly awarded by ADOT and those that used USDOT funds that flowed through ADOT to local agencies. Figure 3-3 presents the number and dollar value of contracts in FHWA-, FAA-, FTA-, and state-funded contracts.

Figure 3-3.  
Number and dollars of ADOT and LPA transportation contracts,  
October 2013–September 2018

Total	
<b>Number of contracts</b>	
FHWA-funded	12,407
FAA-funded	147
FTA-funded	321
State-funded	1,524
<b>Total</b>	<b>14,399</b>
<b>Dollars (by millions)</b>	
FHWA-funded	\$ 3,675
FAA-funded	26
FTA-funded	31
State-funded	461
<b>Total</b>	<b>\$ 4,193</b>

Note: Numbers may not add due to rounding.  
FHWA contracts include South Mountain Freeway projects.

Source: Keen Independent from ADOT and local agency contract data.

The study team coded types of work involved in each prime contract and subcontract based upon data in ADOT contract records and, as a supplement, information about the primary line of business of the firm performing the work. Keen Independent developed the work types based in part on the work type descriptions used by ADOT as well as Dun & Bradstreet's 8-digit classification codes.

**Contract dollars by type of work for FHWA- and state-funded contracts.** Just considering FHWA- and state-funded contracts, Figure 3-4 on the following page presents information about dollars for 35 different types of prime contract and subcontract work. Dollars for prime contracts are based on the contract dollars retained (i.e., not subcontracted out) by the prime contractor or prime consultant.

Figure 3-4.

Dollars of ADOT and LPA FHWA- and state-funded prime contracts and subcontracts by type of work, October 2013–September 2018

Type of work	FHWA-funded		State-funded		Combined	
	Dollars (\$1,000s)	Percent	Dollars (\$1,000s)	Percent	Dollars (\$1,000s)	Percent
General road construction and widening	\$ 976,070	26.6 %	\$ 87,189	18.9 %	\$ 1,063,259	25.7 %
Architecture and engineering	878,608	23.9	40,747	8.8	919,355	22.2
Asphalt paving	330,524	9.0	57,275	12.4	387,799	9.4
Electrical work including lighting and signals	192,987	5.3	22,145	4.8	215,132	5.2
Bridge work	175,901	4.8	446	0.1	176,347	4.3
Steel work	135,440	3.7	7,092	1.5	142,531	3.4
Trucking and hauling	109,962	3.0	4,634	1.0	114,596	2.8
Landscaping and related work	104,616	2.8	32,135	7.0	136,750	3.3
Temporary traffic control	78,616	2.1	8,691	1.9	87,308	2.1
Concrete flatwork (sidewalk, curb and gutter)	76,021	2.1	1,238	0.3	77,259	1.9
Guardrail, signs or fencing	64,509	1.8	6,423	1.4	70,931	1.7
Portland cement concrete paving	58,285	1.6	1,803	0.4	60,088	1.5
Drilling and foundations	53,942	1.5	2,839	0.6	56,781	1.4
Soils and materials testing	45,153	1.2	1,113	0.2	46,266	1.1
Milling	39,677	1.1	15,739	3.4	55,416	1.3
Environmental consulting	38,255	1.0	7,860	1.7	46,115	1.1
Striping or pavement marking	32,220	0.9	16,032	3.5	48,252	1.2
Transportation planning	21,346	0.6	2,222	0.5	23,568	0.6
Underground utilities	20,804	0.6	425	0.1	21,229	0.5
Construction management	20,066	0.5	2,288	0.5	22,354	0.5
Excavation, grading and drainage	16,728	0.5	6,900	1.5	23,628	0.6
Surveying and mapping	15,518	0.4	1,432	0.3	16,951	0.4
Construction remediation and cleanup	14,880	0.4	8,527	1.8	23,406	0.6
Structural concrete work	14,295	0.4	36	0.0	14,331	0.3
Wrecking and demolition	14,015	0.4	256	0.1	14,271	0.3
Asphalt, concrete or other paving materials	8,725	0.2	8,418	1.8	17,143	0.4
Concrete cutting	7,107	0.2	1,117	0.2	8,225	0.2
Painting for road or bridge projects	6,484	0.2	666	0.1	7,150	0.2
Concrete pumping	5,363	0.1	330	0.1	5,693	0.1
Aggregate materials supply	2,652	0.1	27	0.0	2,679	0.1
Transit services	1,362	0.0	3,239	0.7	4,601	0.1
Petroleum and fuel	183	0.0	920	0.2	1,103	0.0
Other construction-related	71,972	2.0	16,467	3.6	88,439	2.1
Other professional services	32,364	0.9	17,266	3.7	49,630	1.2
Other goods	10,441	0.3	77,146	16.7	87,587	2.1
<b>Total</b>	<b>\$ 3,675,089</b>	<b>100.0 %</b>	<b>\$ 461,084</b>	<b>100.0 %</b>	<b>\$ 4,136,173</b>	<b>100.0 %</b>

Note: Numbers may not add due to rounding.

FHWA contracts include South Mountain Freeway projects.

Source: Keen Independent from ADOT and local agency contract data.

When prime contracts and subcontracts pertain to multiple types of work, Keen Independent coded the entire work element based on what appeared to be the predominant type of work in the contract or subcontract. For example, if a subcontract included fencing and landscaping, and it appeared that the work was predominantly fencing, the entire subcontract was coded as fencing.<sup>2</sup>

Similarly, an individual prime contract or subcontract was sometimes for a broad range of road construction activities. When a more specialized activity could not be identified as the primary area of work, these contracts were classified as road construction and widening.

As shown in Figure 3-4, the top three general types of work account for almost 60 percent of ADOT FHWA- and state-funded transportation contract dollars.

- Prime contracts and subcontracts for general road construction and widening accounted for about \$1.1 billion of the FHWA- and state-funded contract dollars examined, including prime contracts and subcontracts. This work area accounted for 26 percent of the contract dollars examined.
- Design engineering accounted for \$919 million or 22 percent of FHWA- and state-funded prime contracts and subcontracts. (Note that when contracts for design engineering included subcontracts for other types of work such as surveying or testing, these subcontracts were subtracted from the total for design engineering.)
- Asphalt paving accounted for \$388 million of FHWA- and state-funded prime contracts and subcontracts, or about 9 percent of the total.

Types of work that did not fit into the categories listed in Figure 3-4 were included in “other construction,” “other professional services” or “other goods and services” as appropriate. Together, these three “other” categories comprised 5 percent of FHWA- and state-funded contract dollars, as shown in Figure 3-4.

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<sup>2</sup> Data concerning subcontract awards or payments were for the entire subcontract, not individual work elements.

**Contract dollars by type of work for FAA-funded contracts.** FAA-funded contracts were primarily awarded for road construction, electrical work, architectural and engineering services, and asphalt paving and materials. This accounted for about 70 percent of all FAA-funded dollars. Figure 3-5 presents dollars by type of construction, goods or services for FAA-funded contracts.

Figure 3-5.

Dollars of ADOT FAA-funded prime contracts and subcontracts  
by type of work, October 2013–September 2018

Type of work	FAA-funded	
	Dollars (\$1,000s)	Percent
General road construction and widening	\$ 5,931	22.7 %
Electrical work including lighting and signals	4,438	17.0
Architecture and engineering	3,533	13.5
Asphalt paving	1,874	7.2
Asphalt, concrete or other paving materials	1,746	6.7
Transportation planning	1,280	4.9
Underground utilities	1,213	4.7
Portland cement concrete paving	989	3.8
Trucking and hauling	985	3.8
Environmental consulting	639	2.4
Striping or pavement marking	396	1.5
Milling	339	1.3
Surveying and mapping	298	1.1
Construction management	230	0.9
Concrete cutting	225	0.9
Landscaping and related work	213	0.8
Construction remediation and cleanup	91	0.3
Soils and materials testing	58	0.2
Drilling and foundations	48	0.2
Guardrail, signs or fencing	44	0.2
Excavation, grading and drainage	26	0.1
Temporary traffic control	20	0.1
Painting for road or bridge projects	5	0.0
Other construction	86	0.3
Other professional services	895	3.4
Other goods and services	477	1.8
<b>Total</b>	<b>\$ 26,079</b>	<b>100.0 %</b>

Note: Numbers may not add due to rounding.

Source: Keen Independent from ADOT and local agency contract data.

**Contract dollars by type of work for FTA-funded contracts.** Figure 3-6 presents information about dollars of prime contracts and subcontracts for ADOT's FTA-funded contracts. As shown, much of the work is related to transit services and fuel (75%).

Figure 3-6.

Dollars of ADOT and LPA FTA-funded prime contracts and subcontracts by type of work, October 2013–September 2018

Type of work	FTA-funded	
	Dollars (\$1,000s)	Percent
Transit services	\$ 18,689	61.1 %
Petroleum and fuel	4,203	13.7
Transportation planning	1,151	3.8
Architecture and engineering	790	2.6
Trucking and hauling	649	2.1
Asphalt paving	289	0.9
Structural concrete work	284	0.9
Concrete flatwork (sidewalk, curb and gutter)	140	0.5
Construction management	60	0.2
Electrical work including lighting and signals	29	0.1
Portland cement concrete paving	0	0.0
Environmental consulting	0	0.0
Other construction-related	788	2.6
Other professional services	1,228	4.0
Other goods	2,281	7.5
<b>Total</b>	<b>\$ 30,581</b>	<b>100.0 %</b>

Note: Numbers may not add due to rounding.

Source: Keen Independent from ADOT and local agency contract data.

## D. Location of Businesses Performing ADOT Work

In this study, analyses of local marketplace conditions and the availability of firms to perform contracts and subcontracts focus on the “relevant geographic market area” for ADOT contracting. Keen Independent determined the relevant geographic market area through the following steps:

- For each prime contractor and subcontractor, determined whether the company had an establishment in Arizona based upon ADOT vendor records and additional research.
- Added the dollars for firms with Arizona locations and compared with the total.

Based upon analysis of combined ADOT and local agency contract dollars from October 2013 through September 2018, firms with locations in Arizona obtained:

- 95 percent of FHWA-funded contract dollars;
- 81 percent of state-funded contract dollars;
- 86 percent of FAA-funded contract dollars; and
- 83 percent of FTA-funded contract dollars.

Figure 3-7.

Dollars of ADOT and LPA prime contracts and subcontracts by location of firm, October 2013–September 2018

	Arizona	Out of state	Total
<b>Dollars (millions)</b>			
FHWA-funded	\$ 3,506	\$ 169	\$ 3,675
FAA-funded	22	4	26
FTA-funded	25	5	31
State-funded	373	88	461
<b>Total</b>	<b>\$ 3,926</b>	<b>\$ 267</b>	<b>\$ 4,193</b>
<b>Percent of total dollars</b>			
FHWA-funded	95 %	5 %	100 %
FAA-funded	86	14	100
FTA-funded	83	17	100
State-funded	81	19	100
<b>Total</b>	<b>94 %</b>	<b>6 %</b>	<b>100 %</b>

Note: Numbers may not add due to rounding.

FHWA contracts include South Mountain Freeway projects.

Source: Keen Independent from ADOT and local agency contract data.

Based on this information, Keen Independent selected Arizona as the relevant geographic market area for the study for FHWA-, FAA- and FTA-funded contracts as well as state-funded contracts. Therefore, Keen Independent’s availability analysis examined firms with locations in Arizona. The analyses of marketplace conditions in Chapter 4 and Appendices E through J also focus on Arizona.



## CHAPTER 4.

### Marketplace Conditions

Federal courts have found that Congress “spent decades compiling evidence of race discrimination in government highway contracting, barriers to the formation of minority-owned construction businesses, and barriers to entry.”<sup>1</sup> Congress found that discrimination has impeded the formation and expansion of qualified minority- and women-owned businesses (MBE/WBEs).

As part of the Disparity Study, Keen Independent conducted quantitative and qualitative analyses of conditions in the Arizona marketplace to examine whether barriers that Congress found on a national level also appear in Arizona. The study team analyzed whether barriers exist in the Arizona construction and engineering industries for people of color, women and businesses owned by them, and whether such barriers might affect opportunities on ADOT and local agency transportation contracts. Chapter 4 and supporting appendices update similar analyses in the 2015 ADOT Disparity Study.

Understanding current marketplace conditions is important as ADOT determines its overall goal for DBE participation in USDOT-funded contracts and estimates the portion of its overall goals to be met through neutral means.

Keen Independent organized Chapter 4 to provide some of the historical context in which market conditions affecting people of color and women have evolved, as well as examine current conditions in the Arizona marketplace, particularly in the construction and engineering industries:

- A. Composition of the Arizona workforce and business owners;
- B. Entry and advancement;
- C. Business ownership;
- D. Access to capital, bonding and insurance; and
- E. Success of businesses.

Chapter 4 also summarizes input collected from more than 330 individuals representing businesses, trade associations and other groups throughout the state.

- The Keen Independent study team conducted in-depth personal interviews with businesses, trade associations and business assistance providers.
- The availability survey included open-ended questions about marketplace conditions.
- The study team developed a website, an email address and dedicated telephone hotline for the study that asked any interested individuals to provide comments.

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<sup>1</sup> *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d, 970 (8th Cir. 2003) (citing *Adarand Constructors, Inc.*, 228 F.3d at 1167–76); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 992 (9th Cir. 2005).

Appendices E through H present detailed quantitative information concerning conditions in the Arizona marketplace. Appendix I discusses data sources. Appendix J provides a summary of the qualitative information collected in the study.

## **A. Composition of the Arizona Workforce and Business Owners**

Keen Independent examined marketplace conditions for people of color and women working and owning businesses in the construction and engineering industries in Arizona.

**Groups examined in this study.** The Federal DBE Program provides benefits to economically and socially disadvantaged businesses. In addition to women, business owners from certain racial and ethnic minority groups are presumed to be socially and economically disadvantaged, which are grouped as “minority-owned businesses” for purposes of this study.

- **People of color.** Programs that assist businesses owned by people of color often focus on four minority groups — African Americans, Asian Americans, Hispanic Americans and Native Americans.

In this study, “MBEs” refers to all minority-owned business enterprises combined (regardless of certification status). Some information sources provide enough data to report results by individual minority group.

- **Women.** Chapter 4 examines marketplace conditions for women and women-owned businesses. “WBEs” refers to white women-owned business enterprises (whether or not they are certified as such).

Analysis of availability survey results compares three groups of businesses: (a) those owned by people of color (including men and women); (b) those owned by white females; and (c) majority-owned firms. Keen Independent chose this approach in order to isolate any gender differences in outcomes.

**Representation of people of color and women within the Arizona workforce.** Analysis of American Community Survey (ACS) data allows Keen Independent to compare the representation of people of color and women among study industry business owners with a benchmark based on overall composition of the Arizona workforce. (See Appendices E and F for more information.)

**Racial and ethnic minorities.** The study team examined the representation of people of color among workers and business owners in Arizona based on 2013–2017 ACS data from the U.S. Bureau of the Census.

The first column of Figure 4-1 presents demographic characteristics of the statewide labor force. As shown, 43 percent of Arizona workers were racial or ethnic minorities:

- Hispanic Americans were 30 percent of workers in Arizona;
- African Americans were about 5 percent of the workforce; and
- Asian Americans and Native Americans were both about 4 percent of the workforce.

The ACS data also include information about whether an individual is a business owner. Figure 4-1 shows that people of color were 39 percent of business owners in the Arizona construction and engineering industries. Except for Hispanic Americans, each minority group made up a smaller share of construction and engineering business owners than what might be expected based on their representation in the overall workforce or on their share of business owners in all other industries.

**Women.** Figure 4-1 also reports the representation of women among all workers and construction and engineering business owners in Arizona from 2013 through 2017. Women accounted for 46 percent of the Arizona labor force and 43 percent of business owners in all other industries, but only about 8 percent of business owners in the construction and engineering.

Figure 4-1.

Demographic distribution of the statewide workforce and construction and engineering industry business owners in Arizona, 2013–2017

Arizona	Workforce in all industries	Business owners in study industries	Business owners in all other industries
<b>Race/ethnicity</b>			
African American	4.9 %	1.2 % **	2.6 % **
Asian American	4.1	0.7 **	3.8
Hispanic American	30.1	35.9 **	23.7 **
Native American or other minority	3.9	1.3 **	2.0
Non-Hispanic white	57.0	60.9 **	67.9 **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>			
Female	46.3 %	7.8 % **	43.4 % **
Male	53.7	92.2 **	56.6 **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>

Note: \*\* Denotes that the difference in proportions between business owners in the specified industries and the workforce in all industries for the given race/ethnicity/gender group is statistically significant at the 95% confidence level. Only the civilian workforce is included in workforce calculations.

Source: Keen Independent Research from 2013–2017 ACS Public Use Microdata sample. The 2013–2017 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

## B. Entry and Advancement

Studies throughout the United States have indicated that race and gender discrimination has affected the employment and advancement of certain groups in the construction and engineering industries. The study team therefore examined the representation of people of color and women among workers in construction and engineering industries in Arizona.

In the construction industry, Keen Independent also analyzed the advancement of people of color and women into supervisory and managerial roles. Appendix E presents detailed results.

As summarized below, quantitative analyses of the Arizona marketplace — based primarily on data from the 2013–2017 ACS — showed that, in general, certain minority groups and women appear to be underrepresented among workers in the Arizona study industries. In addition, people of color and women appeared to face barriers regarding advancement to supervisory or managerial positions. Because individuals who form construction and engineering businesses tend to work in those industries before starting their own businesses, any barriers related to entry or advancement within the industry may prevent some people of color and women from starting businesses in those industries.

**Quantitative information concerning entry into construction and engineering industries in Arizona.** Keen Independent’s analyses suggest that certain minority groups and women are encountering barriers to entry in the study industries in Arizona:

- People of color were 50 percent of construction workers in Arizona, slightly higher than their overall representation in the workforce (42%). However, most of this representation came from Hispanic Americans, who made up 43 percent of the construction workforce in Arizona, while only 1 percent were Asian Americans, 2 percent were African Americans and 4 percent were Native Americans or other minorities.
- Of Arizona construction workers, only 10 percent were women, which is considerably less than representation of women in the workforce (49%).
- In the Arizona engineering industry, fewer people of color (other than Hispanic Americans) and fewer women worked in the industry than what might be expected based on data regarding workers 25 and older with a four-year college degree.

**Quantitative information about entry and advancement.** Keen Independent found that people of color working in the construction industry disproportionately work in entry-level or low-skill positions. For example, 11 percent of non-Hispanic white construction workers reported being managers, but only 5 percent of African Americans, 7 percent of Asian American, 2 percent of Hispanic Americans and about 4 percent of Native Americans reported being managers.

**Qualitative information about entry and advancement.** Keen Independent collected qualitative information about entry and advancement in the Arizona construction and engineering industries through in-depth interviews, availability surveys and other processes described in Appendix J.

Many business owners reported that they worked in the construction or engineering industry before starting their businesses. Interviewees indicated that construction and engineering companies are typically started (or sometimes purchased) by individuals with connections to the construction or engineering industries. Therefore, business ownership could be affected by any employment barriers in the construction or engineering industry that might exist.

**Effects of entry and advancement on the Arizona transportation contracting industry.** If there are barriers for people of color and women entering and advancing within the Arizona construction and engineering industries, there could be substantial effects on the number of minority- and women-owned in businesses within those industries.

- Typically, employment and advancement are preconditions to business ownership in the construction and engineering industries. Because certain minority groups and women appear to be underrepresented in the Arizona construction and engineering industries — both in general and as supervisors and managers — it follows that such underrepresentation may reduce the number of minorities and women starting businesses, depressing overall MBE/WBE availability in the local transportation contracting industry.
- There is evidence that underrepresentation of certain minority groups and women in the Arizona construction and engineering industries — particularly in supervisory and managerial roles — may perpetuate any beliefs or stereotypical attitudes that MBE/WBEs may not be as qualified as majority-owned businesses. As an example, one male interviewee said that his firm’s industry has been traditionally viewed as a “man’s work.” A white female business owner said, “When you think of construction, you don’t think of women ....” She added that some contractors don’t want to talk to her because she is a woman. Any such beliefs may also be making it more difficult for MBE/WBEs to win work in Arizona, including work with ADOT and local agencies.

### **C. Business Ownership**

National research and studies in other states have found that race, ethnicity and gender also affect opportunities for business ownership, even after accounting for race- and gender-neutral factors. Figure 4-2 summarizes how courts have used information from such studies — particularly from regression analyses — when considering the validity of an agency’s implementation of the Federal DBE Program.

**Quantitative information about business ownership.** The study team used U.S. Bureau of the Census data from 2013–2017 to examine whether there are differences in business ownership rates between minorities and nonminorities and between women and men in the Arizona construction and engineering industries.

- In the construction industry, African Americans, Native Americans and women working in the industry were less likely to be business owners.
- People of color working in the Arizona engineering industry (except for Hispanic Americans) were also less likely to be business owners than nonminorities and women working in the industry were less likely to own businesses than men.

Keen Independent used regression analyses to examine whether those racial and gender differences in business ownership rates persisted after accounting for other personal characteristics.

- Keen Independent's regression models showed that African Americans, Asian Americans, Native Americans and women working in the Arizona construction industry were less likely to own businesses than similarly situated non-Hispanic whites and men, even after accounting for various personal characteristics including education, age and the ability to speak English (statistically significant effects.)
- People of color (other than Hispanic Americans) and women working in the Arizona engineering industry were less likely to own businesses after accounting for certain personal characteristics. These results were statistically significant.

Appendix F presents detailed results from the quantitative analyses of business ownership rates.

#### **Qualitative information about business**

**ownership.** Keen Independent collected qualitative information about business ownership in the Arizona construction and engineering industries through in-depth interviews, availability surveys and other avenues. Minority, women and white male owners of small businesses reported many of the same challenges in starting and growing their businesses. There is some evidence of additional barriers to starting a successful business for people of color and for women, as discussed in Appendix J. Some of those barriers are a result of unequal access to capital, which is discussed in the following pages of Chapter 4.

**Effects of disparities in business ownership rates for minorities and women on the transportation contracting industry.** The disparities in business ownership rates for certain minority groups and women in the construction and engineering industries mean that there are fewer minority- and women-owned firms in the statewide transportation contracting marketplace than there would be if there were a level playing field for minorities and women in the Arizona marketplace. Results suggest that the relative MBE/WBE availability for ADOT construction and engineering work may have been depressed.

**Figure 4-2.**

#### **Use of regression analyses of business ownership in defense of the Federal DBE Program**

State and federal courts have considered differences in business ownership rates between minorities and non-Hispanic whites and between women and men when reviewing the implementation of the Federal DBE Program. For example, disparity studies in California, Illinois and Minnesota used regression analyses to examine the impact of race, ethnicity and gender on business ownership in the construction and engineering industries. Results from those analyses helped determine whether differences in business ownership exist between minorities and women and non-Hispanic white males after statistically controlling for race- and gender-neutral characteristics. Those analyses, which were based on Census data, were included in materials submitted to the courts in subsequent litigation concerning the implementation of the Federal DBE Program.

## D. Access to Capital, Bonding and Insurance

Access to capital is one of the key factors that researchers have examined when studying business formation and success. If race- or gender-based discrimination exists in capital markets, people of color and women may have difficulty acquiring the capital necessary to start or expand a business.

Keen Independent examined whether minority and female business owners (and potential business owners) have access to capital — both for their homes and for their businesses — that is comparable to that of nonminorities and men. In addition, the study team examined whether minority- and women-owned firms face any barriers in obtaining bonding and insurance. Appendix G provides details about the study team’s quantitative analyses and Appendix J reports qualitative information on this topic.

As discussed in Appendix G, there is evidence that people of color and women face certain disadvantages in accessing capital that is necessary to start, operate and expand businesses. Capital is required to start companies, so barriers to accessing capital can affect the number of people of color and women who are able to start businesses. Based on national data, people of color and women start businesses with less capital. Multiple studies have demonstrated that lower start-up capital adversely affects prospects for those businesses.

**Quantitative information about homeownership and mortgage lending.** Wealth created through homeownership can be an important source of funds to start or expand a business. Barriers to homeownership or building home equity can affect business opportunities by limiting the availability of funds for new or expanding businesses.

Keen Independent analyzed 2013–2017 American Community Survey (ACS) data to determine if there were any differences in homeownership in Arizona by racial and ethnic groups. The study team also examined the potential impact of race and ethnicity on mortgage lending outcomes in Arizona based on Home Mortgage Disclosure Act (HMDA) data for 2007, 2013 and 2017. (See Appendix G for more detail.)

- **Homeownership rates.** All minority groups — African Americans, Asian Americans, Hispanic Americans and Native Americans — owned homes at a lower rate than non-Hispanic whites in Arizona. This difference was statistically significant for each minority group.
- **Home values.** African Americans, Hispanic Americans and Native Americans had lower median home values than non-Hispanic whites. However, Asian Americans owned homes of greater value than non-Hispanic whites.

- **Mortgage lending.** People of color may be denied opportunities to own homes, to purchase more expensive homes or to access equity in their homes if they are discriminated against when applying for home mortgages.

In 2007, 2013 and 2017, high-income African Americans, Hispanic Americans, Native Americans, Asian Americans and Native Hawaiians or other Pacific Islanders applying for home mortgages in Arizona were more likely than high-income non-Hispanic whites to have their applications denied. For example, in 2017, 13 percent of African American high-income applicants and 20 percent of Native American high-income applicants were denied loans, compared with only 7 percent of non-Hispanic white high-income applicants in Arizona.

Mortgage lending discrimination can also occur through higher fees and interest rates. Subprime lending is one example of discrimination through fees associated with various loan types. Because of higher interest rates and additional costs, subprime loans affected homeowners' ability to grow home equity and increased their risk of foreclosure. There is national evidence that predatory lenders disproportionately targeted people of color with subprime loans, even when applicants could qualify for prime loans. Analysis of available data for Arizona indicates that African American, Hispanic American, Native American and Native Hawaiian or other Pacific Islander borrowers were more likely to receive subprime home purchase loans than non-Hispanic whites in 2007, 2013 and 2017.

There is substantial quantitative evidence of disparities in homeownership, home values and home mortgage lending for people of color in Arizona. Any past discrimination against minorities that affected the ability to purchase homes could have long-term impacts on the home equity available to start and expand businesses, and the ability of minority business owners to access business credit.

**Quantitative information about business credit.** Business credit is also an important source of funds for small businesses. Any race- or gender-based barriers in the application or approval processes of business loans could affect the formation and success of MBE/WBEs.

To examine the role of race/ethnicity and gender in capital markets, the study team analyzed data from the Federal Reserve Board's Survey of Small Business Finances (SSBF) — the most comprehensive national source of credit characteristics of small businesses (those with fewer than 500 employees). The survey contains information on loan denial and interest rates as well as anecdotal information from businesses. The Mountain region is the level of geographic detail of SSBF data most specific to Arizona and 2003 is the most recent information available from the SSBF. (These data were also examined in the 2015 Disparity Study.)



**Business loan approval rates.** Keen Independent examined business loan approval rates in the Mountain region in 2003. Results included the following:

- More minority- and women-owned small businesses were denied loans than non-Hispanic male-owned small businesses.
- There are statistically significant disparities in loan approval rates for African American-owned small businesses when compared with similarly situated nonminority-owned firms.

**Applying for loans.** Fear of loan denial can be a barrier to business credit in the same way that actual loan denial presents a barrier. The SSBF includes a question that gauges whether a business owner did not apply for a loan due to fear of loan denial.

- Among small business owners who reported needing business loans, minority and female business owners in the Mountain region were nearly twice as likely as non-Hispanic white men to report that they did not apply due to fear of denial.
- Compared with similarly situated nonminorities and men, the study team identified statistically significant disparities in the rate at which African Americans and women reported not applying for loans due to fear of denial.

**Loan values and interest rates.** Based on Keen Independent's examination of 2003 SSBF data for the average business loan values and interest rates paid by small businesses that received loans:

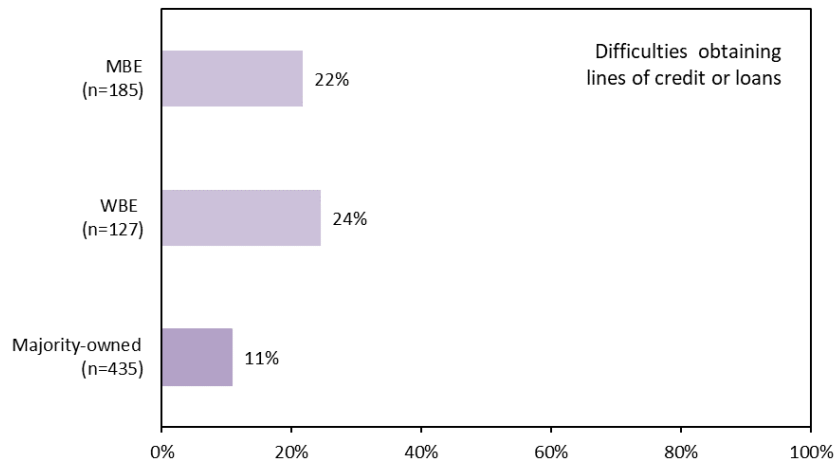
- The mean value of approved loans for minority- and female-owned businesses in the Mountain region was less than one-half that for non-Hispanic white male-owned firms.
- There is evidence that minority- and women-owned small businesses in the Mountain region paid higher interest rates on their business loans than nonminority male-owned small businesses.

**Experiences of MBEs, WBEs and majority-owned businesses in the Arizona transportation construction and engineering industries.** As part of availability surveys that the study team conducted in 2019, Keen Independent asked several questions related to potential barriers or difficulties in the local marketplace. The interviewer introduced these questions with the following: "Finally, we're interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences within the past six years as you answer these questions."

The first question was, "Has your company experienced any difficulties in obtaining lines of credit or loans?" As depicted in Figure 4-3, minority-owned and nonminority women-owned firms were about twice as likely as majority-owned firms to report that they had such difficulties. About 22 percent of MBEs and 24 percent of WBEs reported difficulties obtaining lines of credit or loans, compared with 11 percent of majority-owned firms. These results appear to be consistent with the other data summarized in Chapter 4 concerning greater difficulties gaining access to financing for minority- and women-owned firms.

Figure 4-3.  
Percent responding  
“yes” to, “Has your  
company experienced  
any difficulties in  
obtaining lines of  
credit or loans?” for  
MBEs, WBEs and  
majority-owned firms

Source:  
Keen Independent Research  
2019 availability survey.



**Quantitative information about bonding and insurance.** Keen Independent also examined whether businesses face difficulties obtaining bonding and insurance as part of the availability surveys.

Keen Independent asked firms completing availability surveys the following two questions:

- Has your company obtained or tried to obtain a bond for a project?
- [If so] Has your company had any difficulties obtaining bonds needed for a project?

Among construction firms that had obtained or tried to obtain a bond for a project, 11 percent of MBEs indicated difficulties obtaining bonds needed for a project compared with 4 percent of majority-owned firms.

Differences between groups were not as large when examining the proportion of firms reporting difficulties obtaining insurance.

**Qualitative information about access to capital, bonding and insurance.** Keen Independent collected qualitative information about access to capital, bonding and insurance for businesses in the Arizona transportation contracting industry through in-depth interviews, availability surveys and other means.

**Business financing.** Many firm owners 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.

- Small business owners indicated that access to financing was a barrier in general and more specifically when starting and first growing. Many used personal resources, such as financing from colleagues and family, to finance their businesses.
- Interviewees reported that they could obtain and perform more work but that barriers to accessing financing kept them from accepting that work.

- Some interviewees, including MBEs, WBEs and majority-owned firms, reported that receiving timely payment on contracts and subcontracts could often be difficult which led to an increased need for business capital and financing.
- Some interviewees reported that it was more difficult for women and minorities to obtain financing. Others reported that financing was a problem for all small businesses whether or not they are minority- or women-owned.
- Also, if business size and personal equity are affected by race or gender discrimination, then discrimination could also impact the ability to obtain business financing. This can have a self-reinforcing effect, as many interviewees noted the importance of business capital and credit to pursue larger construction and engineering contracts.

**Bonding.** For ADOT and local agency construction contracts, surety bonds are typically required to bid on projects. Sometimes prime contractors require subcontractors on a project to have bonds.

In order to obtain a bond, businesses must provide company history and evidence of financial strength to a bonding company. The bonding company uses this information to determine whether to issue a bond of a particular size. Consequently, any effects on access to capital may impact the ability to obtain a bond.

According to business owners and other individuals interviewed:

- Many MBEs, WBEs and other small construction companies cannot obtain the necessary bonding to bid on ADOT and other public contracts.
- Interviewees explained the link between business capital and bonding as well as between personal finances and bonding. For example, one minority business owner reported that she has difficulty getting bonding because the business must have some type of collateral or history to prove its ability to pay and “hold their own.” A Hispanic American owner of a DBE construction firm reported, “I feel that those challenges are more directed to minority- and women-owned contractors. They don’t look at us as true contractors.”

The in-depth interviews indicate that any difficulties building capital affect the ability to obtain a surety bond.

**Access to insurance.** Construction and professional services firms bidding or proposing on ADOT and local government contracts must meet those agencies’ insurance requirements. Provisions often apply to subcontractors and subconsultants.

The study team asked business owners and managers whether insurance requirements and obtaining insurance presented barriers to doing business. In general, interviewees reported that obtaining insurance is relatively easy. The barrier presented by insurance requirements is due to the cost, especially at high levels of coverage. For example, a Hispanic American female business owner reported, “Our biggest expense is insurance. We could buy two vehicles for what we pay for insurance.”

If a small business owner decides that the premiums for a certain level of insurance are cost-prohibitive, it may preclude the firm from bidding on certain contracts. Some business owners indicated that they had difficulty meeting ADOT's insurance requirements. Some interviewees pointed out that they might only have a small subcontract but still need to maintain expensive, high dollar insurance policies. One interviewee reported that he had been awarded an ADOT Job Order Contract, purchased expensive insurance to be able to perform the contract for ADOT, and then did not get any work.

### **Effects of access to capital, bonding and insurance on the transportation contracting industry.**

Potential barriers associated with access to capital, bonding and insurance may affect business outcomes for MBE/WBEs.

- Well-capitalized businesses are, in general, more successful than other businesses, and national research indicates that minority- and women-owned firms start with less capital. Compared with majority-owned firms, MBE/WBEs in the Arizona transportation contracting industry are disproportionately small. Obtaining business financing, bonding and insurance is more of a barrier to small businesses than large businesses. The effect of such barriers is to make it less likely that a small firm can expand or successfully pursue public sector work.
- Bonding and insurance are required to bid on ADOT and other public sector prime contracts. To obtain bonding, a company must have financial strength. Any barriers to accessing capital can affect a company's ability to obtain a bond of a certain size. There is evidence that minority- and women-owned firms do not have the same access to capital as majority-owned firms.
- A company must also have considerable working capital to complete an ADOT contract or subcontract, especially if there are delays in payment on that contract (which some businesses experience). There is some quantitative evidence that minorities do not have the same personal access to capital as nonminorities, which affects personal financial resources. Personal net worth and financial history can affect access to business loans, bonding and prequalification for public sector work in Arizona.

## **E. Success of Businesses**

Keen Independent completed quantitative and qualitative analyses that assessed whether the success of MBE/WBEs differs from that of majority-owned businesses in the Arizona transportation contracting industry. Appendix H provides details about these quantitative analyses of business success. Keen Independent also collected and analyzed information from interviews with business owners and managers and others knowledgeable about the local contracting industry.

**Quantitative analysis of business receipts and earnings.** Keen Independent examined business earnings data for Arizona construction and engineering industries using 2013–2017 ACS data and results from the 2019 availability survey with Arizona businesses (pertaining to 2016-2018).

Results indicated that minority- and women-owned firms had lower revenue than majority-owned firms. In the 2019 availability survey, a larger proportion of MBEs (61%) and WBEs (59%) than majority-owned firms (50%) reported annual revenue of less than \$0.5 million. Conversely, relatively more majority-owned firms (14%) reported annual revenue greater than \$7.6 million than MBEs (5%) or WBEs (9%).

ACS data include personal characteristics of business owners allowing the study team to apply regression analysis that statistically controls for these characteristics to determine whether race and gender disparities persist. These analyses showed that in the Arizona construction industry, minority business owners, other than Hispanic Americans, earned less than similarly situated nonminorities. In the engineering industry, minority and white female business owners had lower earnings than non-Hispanic white male owners after controlling for personal characteristics.

**Quantitative analysis of telephone survey results concerning potential barriers.** Keen Independent’s availability surveys with Arizona businesses included questions about whether firms had experienced barriers or difficulties associated with starting or expanding a business and working with different types of customers. Questions included whether (a) the size of projects had presented a barrier to bidding; (b) the firm had experienced difficulties learning about bid opportunities with ADOT, local governments or private companies; and (c) the firm had experienced difficulties learning about subcontracting opportunities in Arizona. Results include the following:

**Results for minority-owned construction companies.** Answers to questions concerning marketplace barriers in the availability survey indicated large differences in the proportion of minority- and majority-owned construction firms reporting that they experienced difficulties in the Arizona marketplace regarding:

- Large project sizes; and
- Learning about bid opportunities in the private sector and subcontracting opportunities with prime contractors.

**Results for white women-owned construction companies.** There were large differences in the share of white women-owned and majority-owned construction firms that identified difficulties concerning:

- Learning about bid opportunities with ADOT and with cities, counties and other local agencies in Arizona;
- Learning about bid opportunities in private sector, and subcontracting opportunities with prime contractors; and
- Obtaining approval from inspectors or prime contractors.

**Results for minority-owned engineering companies.** Among engineering firms responding to the availability survey, minority-owned firms were far more likely than majority-owned companies to report difficulties related to:

- Being prequalified for work;
- Large project sizes; and
- Learning about bid opportunities with ADOT, with local governments, in the private sector and with prime contractors.

**Results for white women-owned engineering companies.** White women-owned engineering companies were far more likely than majority-owned firms to report difficulties related to:

- Insurance requirements on projects;
- Large project sizes; and
- Learning about bid opportunities with local governments, in the private sector and with prime contractors.

**Results related to prompt payment.** Across minority-, women- and majority-owned construction and engineering firms responding to the availability survey, relatively few businesses reported difficulties being paid when working directly with ADOT, but many indicated difficulties being paid by other customers and when working as a subcontractor.

**Qualitative information about success of businesses in the Arizona marketplace.**

Keen Independent also collected qualitative information about success of businesses in the Arizona transportation contracting industry through in-depth personal interviews, availability surveys and other avenues. Some of the comments were noted earlier in Chapter 4.

**Current economic conditions in the Arizona marketplace.** Interviewees explained that firms in the transportation contracting industry must adapt to the changing economic marketplace conditions. Many firms commented on the “hit or miss” nature of the Arizona economy. They do well when the economy is up and poorly when growth slows.

- Some firms reported that current conditions make it hard for smaller companies to compete with larger companies. One white female owner of a WBE construction firm reported, “... for small companies, our mark-up can’t even be 10 percent and we’re still being told, even at that, we can’t compete with these large companies.”
- Some commented that the current shortage of skilled workers, technicians and potential subcontractors makes operating an Arizona business a challenge. One Hispanic American owner of a goods and services firm commented, “unless you offer a very nice benefit package deal, it’s pretty hard to get qualified experienced technicians.”
- Some interviewees reported that small businesses may be at a disadvantage because the acquisition of equipment and supplies is affected by the financial health of the company and its ability to obtain financing.

**Importance of business relationships.** Existing relationships are an important factor in finding opportunities to bid on work according to many primes and subcontractors. Many interviews said that prime contractors take price into consideration when selecting a subcontractor, but the previous relationships they have play a large role in the selection process. Confidence that a subcontractor will perform well on a job is important to a prime contractor.

- Many interviews said that primes have preferred subcontractors and that it was hard to break in with those primes.
- A male representative of a majority-owned construction firm reported, “We just stick with local people here that we know.” A Hispanic American male owner of a professional services firm reported that “prime contractors have go-to minority-owned subcontractors or consultants that they choose to work with.”

Many minority, female and white male interviewees reported the presence of a “good ol’ boy” network in Arizona that affects the construction and engineering industries.

- A large share of interviewees, including minority, female and white male business owners, reported that the “good ol’ boy” network was pervasive in this industry in Arizona and some reported that the “good ol’ boy” network added barriers for women- and minority-owned firms in the transportation contracting industry.
- Some people of color, women and white men interviewed in the study reported a closed network of companies that typically do work with ADOT. One white owner of a construction firm reported that it is worse in Arizona than in neighboring states.

**Disadvantages for small businesses.** Many interviewees indicated that small businesses are at a disadvantage when competing in the transportation contracting industry.

- For many of the reasons discussed above, many small businesses including MBE/WBEs said that it was difficult to establish relationships with prime contractors and customers.
- Access to financing can be affected by business size according to some interviewees.

In addition, owners and managers of small businesses reported that public agency contracting processes and requirements often put small businesses at a disadvantage when competing for public sector work. There was qualitative evidence that:

- Small construction businesses seeking prime contracting and subcontracting work face barriers due to public sector bonding requirements.
- Excessive paperwork that often comes with public sector work is an extra burden to small businesses.
- Large size and scope of public sector contracts and subcontracts present a barrier to bidding.

- Public sector insurance requirements are a barrier to construction and engineering businesses seeking public sector prime contracts and subcontracts.
- Interviewees indicated that public agencies favor bidders and proposers they already know, limiting opportunities for other businesses.
- Some firms indicated that it is challenging to learn about opportunities with local agencies because each agency will use a different method of notification for projects.
- Some interviewees reported that the change in “on-call” methods from ADOT has negatively impacted their ability to obtain ADOT contracts.
- Slow payment by public agencies or by prime contractors can be especially damaging to small businesses and can present a barrier to performing that work. (Some interviewees reported that they do not have enough capital to wait to be paid when working on large contracts.) One interviewee said, “Government doesn’t care!”

MBE/WBEs in the Arizona transportation contracting industry are more likely than majority-owned businesses to be low-revenue businesses. Therefore, any barriers for small businesses may have a disproportionate effect on MBEs and WBEs. Some minority and female business owners indicated that the size of their businesses and lack of relationships in the industry create significant barriers.

**Stereotyping, double standards and other race and gender discrimination.** In the in-depth interviews, availability surveys and other information the study team analyzed as part of the study, some interviewees indicated difficulties for minorities and women other than those associated with being a small business.

There was evidence that some prime contractors or customers held negative stereotypes concerning minority- and women-owned firms. For example:

- One white female owner of a construction firm reported that contractors don’t want to talk to her because she is a woman. She added that that she has asked her employees to be on the phone with her so a contractor would hear a man’s voice before speaking to her.
- A Hispanic American owner of a goods and services firm reported that the firm had recently dropped his last name [a Hispanic surname] from the company in order to appeal to a larger market.
- One Hispanic American business reported that others make assumptions about the quality of his work based on his ethnicity “all the time.”



- One white male business owner described the racial discrimination that his minority business partner experiences. The partner minimizes his exposure to customers as a result. The white interviewee concluded “a lot of minorities ... have dealt with so much racism. I’m privileged.”
- The white owner of a professional services firm reported that there are biases against women-owned businesses in engineering because “it’s a male-dominated culture.” He added, “... women-owned businesses are not given the same credibility.”

Appendix J provides views from a large number of business owners and managers, trade association representatives and others who are knowledgeable about the Arizona transportation contracting industry.

**Effects of success of businesses on the transportation contracting industry.** Minority- and women-owned construction and engineering businesses in Arizona tend to have lower revenue than majority-owned businesses. Therefore, any disadvantages for small businesses disproportionately affect MBEs and WBEs. Additionally, relatively more minority- and women-owned firms reported difficulties learnings about contracts, both public and private, which influences their growth opportunities.

Success in the transportation contracting industry depends on relationships with prime contractors and customers. Some minority and female business owners reported that they were disadvantaged by their size and lack of relationships within the industry. Some of the minority and female interviewees also reported negative stereotypes and other forms of discrimination against minority- and women-owned businesses in Arizona.

## Summary

As discussed in this chapter and supporting appendices, there is quantitative and qualitative information suggesting that there is not a level playing field for minority- and women-owned businesses in the Arizona transportation contracting industry.

Such information should be considered when interpreting the results of the disparity analysis and considering ADOT’s future operation of the Federal DBE Program for USDOT-funded contracts.

## CHAPTER 5.

### Availability Analysis

Keen Independent analyzed the availability of minority- and women-owned business enterprises (MBE/WBEs) that are ready, willing and able to perform ADOT and local agency prime contracts and subcontracts. The study team also examined availability of current and potential DBEs for ADOT's FHWA-, FAA- and FTA-funded contracts. Chapter 5 describes the study team's availability analysis in eight parts:

- A. Purpose of the availability analysis;
- B. Definitions of MBEs, WBEs, certified DBEs, potential DBEs and majority-owned businesses;
- C. Information collected about potentially available businesses;
- D. Businesses included in the availability database;
- E. Businesses in the availability database counted as DBEs or potential DBEs;
- F. MBE/WBE availability calculations on a contract-by-contract basis;
- G. Availability results; and
- H. Base figure for ADOT's overall DBE goal for FHWA-, FAA- and FTA-funded contracts.

Appendix D provides supporting information about availability survey methodology and results.

#### **A. Purpose of the Availability Analysis**

Keen Independent examined the availability of minority- and women-owned firms for transportation contracts to develop the base figures for ADOT's overall DBE goals for FHWA-, FAA- and FTA-funded contracts. The study team also uses the availability figures as benchmarks in the disparity analysis, as discussed below.

**1. Benchmark in the disparity analysis.** Disparity analysis compares utilization of MBE/WBEs, by group, against benchmarks developed through the availability analysis. Specifically, the disparity analysis compares:

- The percentage of ADOT contract dollars going to minority- and women-owned firms (MBE/WBE "utilization"); and
- The percentage of dollars that might be expected to go to those businesses based on their availability for specific types, sizes and locations of ADOT contracts (MBE/WBE "availability").

The utilization, availability and disparity analyses are conducted for firms owned by each racial, ethnic and gender group included in the Federal DBE Program to determine whether disparities exist and, if so, the groups affected. Chapter 6 presents these utilization, availability and disparity results.

**2. Base figure for ADOT’s overall DBE goals.** The 2020 Disparity Study examines information for ADOT to consider as it sets its next overall three-year goals for DBE participation for its FHWA-, FAA- and FTA-funded contracts. ADOT must follow regulations in 49 CFR Section 26.45(c) to determine these overall DBE goals. It must start by calculating a “base figure” for each overall DBE goal, as explained in detail in Part H of this chapter.

- Keen Independent’s process for calculating the base figure for an overall DBE goal is the same as for determining MBE/WBE availability in a disparity analysis.
- However, the base figure calculation only includes current DBEs and those MBE/WBEs that appear that they would be eligible for DBE certification (“potential DBEs”). Therefore, businesses that have been denied certification, have been decertified, have graduated from the DBE Program, appear to have current average annual revenue that exceeds certification limits, or otherwise appear that they could not be certified as DBEs should not be counted in the base figure.
- This process follows guidance in the Final Rule effective November 3, 2014 and USDOT’s “Tips for Goal-Setting” that explains that minority- and women-owned firms that are not currently certified as DBEs, but could be DBE-certified, should be counted as DBEs in the base figure calculation.

Separate base figures were calculated for FHWA- and FTA-funded contracts and for FAA-funded contracts at each airport

The balance of Chapter 5 explains each step to determine the MBE/WBE availability benchmarks and the base figures for ADOT’s overall DBE goals, beginning with definitions of terms.

## **B. Definitions of MBEs, WBEs, Certified DBEs, Potential DBEs and Majority-Owned Businesses**

The following definitions of terms based on ownership and certification status are useful background to the availability analysis.

**MBE/WBEs.** The availability benchmark and the base figure analyses use the same definitions of minority- and women-owned firms (MBE/WBEs) as do other components of the Disparity Study.

**Race, ethnic and gender groups.** As specified in 49 Code of Federal Regulations (CFR) Part 26, the study team separately examined utilization, availability and disparity results for businesses owned by:

- African Americans;
- Asian-Pacific Americans;
- Subcontinent Asian Americans
- Hispanic Americans;
- Native Americans; and
- Non-Hispanic white women.

Firms owned by minority women are grouped with businesses owned by minority men, so “WBEs” refers to white women-owned companies. Note that “majority-owned businesses” refers to businesses that are not minority- or women-owned.

**Certified DBEs.** Certified DBEs are businesses that are certified as such through ADOT, the City of Phoenix or the City of Tucson (the three certifying agencies in Arizona), which means that they are businesses that:

- Are owned and controlled by one or more individuals who are presumed to be both socially and economically disadvantaged according to 49 CFR Part 26;<sup>1</sup> and
- Have met the gross revenue and personal net worth requirements described in 49 CFR Part 26.

**Potential DBEs.** For the purposes of this study, potential DBEs are minority- and women-owned firms that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Section 26.65 (regardless of actual certification). Potential DBEs do not include businesses that have been denied certification or have graduated or been decertified from the DBE Program.

The study team examined the availability of potential DBEs as part of helping ADOT calculate the base figures for its overall DBE goals for USDOT-funded contracts. Figure 5-1 provides further explanation of Keen Independent’s definition of potential DBEs.

Keen Independent obtained information from ADOT to identify firms that, in recent years, had graduated from the DBE Program or had been denied DBE certification (and had not been recertified). The study team also used information from the USDOT Decertified DBEs, Denials and DBE Appeal Decisions online database.

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<sup>1</sup> The Federal DBE Program specifies that African Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, women of any race or ethnicity, and any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration are presumed to be disadvantaged.

**Figure 5-1.**  
**Definition of potential DBEs**

Keen Independent did not include the following types of MBE/WBEs in its definition of potential DBEs:

- MBE/WBEs that had graduated from the DBE Program and not been recertified, or were de-certified;
- MBE/WBEs that are not currently DBE-certified that had applied for certification and had been denied;
- MBE/WBEs not currently DBE-certified that appear to have exceeded the three-year average annual revenue limits for DBE certification;
- Firms without an active account with the Arizona Corporation Commission;
- Firms indicating in follow-up interviews performed by ADOT that they were over the revenue or personal net worth limits or otherwise would not meet certification requirements;
- Firms indicating in ADOT interviews that they were not interested in DBE certification;
- MBE/WBEs not responding to ADOT’s request for follow-up.

At the time of this study, the overall revenue limit for DBE certification was a \$23,980,000 three-year average of annual gross receipts. Lower revenue limits applied for subindustries according to the U.S. Small Business Administration small business standards. Some MBE/WBEs exceeded either the \$23,980,000 or the subindustry revenue limits based on information that they provided in the availability interviews.

Business owners must also meet USDOT personal net worth limits for their businesses to qualify for DBE certification. Personal net worth was only a factor in the base figure calculations when a firm had graduated or been denied certification based on personal net worth that exceeded certification limits or indicated in follow-up interviews that they exceeded the personal net worth limits.

Additionally, ADOT attempted to follow up with each firm the study team initially flagged as a potential DBE. Keen Independent used results of these contacts to further screen the list of potential DBEs. Firms were counted as potential DBEs if they indicated interest in certification to ADOT (and had an active account with the Arizona Corporation Commission).

**Majority-owned businesses.** Majority-owned businesses are businesses that are not owned by minorities or women (i.e., businesses owned by non-Hispanic white males).

- In the utilization and availability analyses, the study team coded each business as minority-, women- or majority-owned.
- Majority-owned businesses included any non-Hispanic white male-owned businesses that were certified as DBEs.<sup>2</sup>

### C. Information Collected about Potentially Available Businesses

Keen Independent’s availability analysis focused on firms with Arizona locations that work in subindustries related to ADOT transportation-related construction and engineering contracts.

Based on review of ADOT and LPA prime contracts and subcontracts during the study period, the study team identified specific subindustries for inclusion in the availability analysis. Keen Independent contacted businesses within those subindustries by telephone to collect information about their availability for specific types, sizes and locations of ADOT and local agency prime contracts and subcontracts.

Keen Independent’s method of examining availability is sometimes referred to as a “custom census” and has been accepted in federal court. Figure 5-2 summarizes characteristics of Keen Independent’s custom census approach to examining availability.

**Overview of availability surveys.** The study team conducted telephone interviews with business owners and managers to identify businesses that are potentially available for ADOT and local agency transportation prime contracts and subcontracts.<sup>3</sup> Figure 5-3 on the following page summarizes the process for identifying businesses, contacting them and completing the surveys.

#### Figure 5-2. Summary of the strengths of Keen Independent’s “custom census” approach

Federal courts have reviewed and upheld “custom census” approaches to examining availability. Compared with some other previous court-reviewed custom census approaches, Keen Independent added several layers of screening to determine which businesses are potentially available for work in the transportation contracting industry in Arizona.

For example, the Keen Independent analysis included discussions with businesses about interest in ADOT and local government work, contract role and geographic locations of their work — items not included in some of the previous court-reviewed custom census approaches. Keen Independent also analyzed the sizes of contracts and subcontracts that businesses have bid on or performed in the past (referred to as “bid capacity” in this analysis).

<sup>2</sup> Keen Independent did not identify any DBE-certified white male-owned firms in Arizona in the availability interviews.

<sup>3</sup> The study team offered business representatives the option of completing interviews via fax or email if they preferred not to complete interviews via telephone.

Keen Independent began by compiling lists of business establishments that:

- a. Previously identified themselves to ADOT as interested in learning about future work (by listing themselves on AZ UTRACS, bidding or proposing on contracts, or becoming prequalified with eCMS); or
- b. Dun & Bradstreet/Hoovers identified in certain transportation contracting-related subindustries in Arizona.<sup>4</sup>

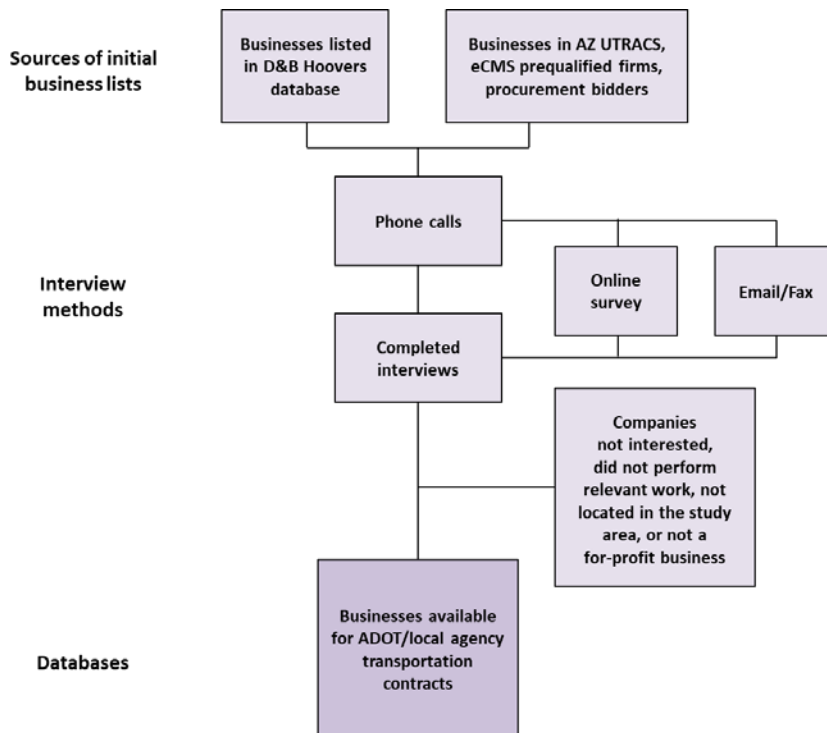
**Telephone interviews.** Figure 5-3 outlines the process Keen Independent used to complete interviews with businesses possibly available for ADOT and local agency transportation-related work.

- The study team contacted firms by telephone to ask them to participate in the interviews (identifying ADOT as the organization requesting the information). Surveys began in July and were completed in early September 2019.
- Some firms completed interviews when first contacted. For firms not immediately responding, the study team executed intensive follow-up over many weeks.
- When a business was unable to conduct the interview in English, the study team called back with a bilingual interviewer (English/Spanish) to collect basic information about the company. Keen Independent then followed up with these firms with a bilingual interviewer (English/Spanish) to offer the option of filling out a written version of the full survey (in English).
- Businesses could also learn about the availability interviews or complete the interviews via other methods such as fax, email, or through the disparity study website that was maintained throughout the project.

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<sup>4</sup> D&B's Hoovers database is accepted as the most comprehensive and complete source of business listings in the nation. Keen Independent collected information about all business establishments listed under 8-digit work specialization codes (as developed by D&B) that were most related to the transportation contracts that ADOT awarded during the study period.

Figure 5-3.  
Availability interview process



**Information collected in availability interviews.** Survey questions covered many topics about each organization, 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;
- Types of transportation contract work performed, from asphalt paving to surveying (Figure D-1 in Appendix D provides a list of work categories included in the interviews);
- Qualifications and interest in performing transportation-related work for ADOT and local agencies in Arizona;
- Qualifications and interest in performing transportation-related work as a prime contractor or subcontractor (note that “prime consultant” and “subconsultant” were the terms used in the interviews of professional services companies);
- Past work in Arizona as a prime contractor or as a subcontractor, trucker or supplier;
- Ability to work in specific geographic regions (Southern Arizona, Central Arizona and/or Northern Arizona);
- Largest prime contract or subcontract bid on or performed in Arizona in the previous six years (“bid capacity”);
- Year of establishment; and
- Race/ethnicity and gender of ownership.

Appendix D provides an availability interview instrument.

**Screening of firms for the availability database.** The study team asked business owners and managers about the types of work that their companies performed, their past bidding history, and their qualifications and interest in working on contracts for ADOT and local government agencies, among other topics. Keen Independent considered businesses to be potentially available for ADOT transportation prime contracts or subcontracts if they reported:

- a. Being a private business (as opposed to a public agency or not-for-profit organization);
- b. Performing work relevant to transportation contracting; and
- c. Being qualified and interested in work for ADOT and/or local governments.<sup>5</sup>

#### D. Businesses Included in the Availability Database

Data from the availability interviews allowed Keen Independent to develop a representative depiction of businesses that are qualified and interested in the highest dollar volume areas of ADOT and local agency transportation-related work, but it should not be considered an exhaustive list of every business that could potentially participate in those contracts. Appendix D explains why the database should not be considered an exhaustive list of potentially available businesses.

After completing interviews with 1,485 Arizona businesses, the study team reviewed responses to develop a database of businesses that are potentially available for ADOT transportation contracting work. The survey identified 996 businesses reporting that they were available for ADOT and local agency work. Of those businesses, 229 (23.0%) were minority-owned and 167 (16.8%) were white women-owned. MBE/WBEs totaled about 40 percent of all firms in the availability database. Figure 5-4 presents the number of businesses that study team included in the availability database.

Figure 5-4.  
Number of businesses included in  
the availability database

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

Source:  
Keen Independent availability analysis.

Race/ethnicity and gender	Number of firms	Percent of firms
African American-owned	40	4.0 %
Asian-Pacific American-owned	12	1.2
Subcontinent Asian American-owned	11	1.1
Hispanic American-owned	143	14.4
Native American-owned	23	2.3
<b>Total MBE</b>	<b>229</b>	<b>23.0 %</b>
WBE (white women-owned)	167	16.8
<b>Total MBE/WBE</b>	<b>396</b>	<b>39.8 %</b>
Majority-owned firms	600	60.2
<b>Total</b>	<b>996</b>	<b>100.0 %</b>

Because results are based on a simple count of firms with no analysis of availability for specific ADOT contracts, they only reflect the first step in the availability analysis.

<sup>5</sup> Separate survey questions were asked about prime contract work and subcontract work.



## E. Businesses in the Availability Database Counted as DBEs or Potential DBEs

Keen Independent counted two groups of firms as DBEs or potential DBEs in the base figure analysis: current DBEs and “potential DBEs” that are not currently DBE-certified.

**Current DBEs.** When performing the base figure analysis for the overall DBE goal, the study team identified firms in the availability database as “current DBEs” if they were certified as DBEs in Arizona as of December 2019. Keen Independent obtained certification information from ADOT.

**Potential DBEs that are not currently certified.** Keen Independent counted MBE/WBEs as potential DBEs in the availability calculations for USDOT-funded contracts if they:

- Had not graduated from the DBE Program in recent years, were decertified from the Program or applied for DBE certification in ADOT and were denied;<sup>6</sup>
- Had not reported in the availability survey average annual revenue over three years exceeding the revenue limits for DBE certification for their subindustry;
- Had an active account with the Arizona Corporation Commission; and
- Indicated in follow-up communications with ADOT staff that they were interested in becoming certified as a DBE.

There were some minority- and women-owned firms identified in the availability survey that were not counted as current or potential DBEs, as shown in Figure 5-5. In total, about 23 percent of firms in the availability database were current or potential DBEs. (About 14 percent of total firms were current DBEs and 9 percent were potential DBEs.)

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<sup>6</sup> Based on ADOT data and USDOT Decertified DBEs, Denials and DBE Appeal Decisions online database.

Figure 5-5.

Number of current or potential DBEs businesses and non-DBEs in the availability database

Note:

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

Source:

Keen Independent availability analysis.

Race/ethnicity and gender	Number of firms	Percent of firms
<b>Current or potential DBEs</b>		
African American-owned	19	1.9 %
Asian-Pacific American-owned	6	0.6
Subcontinent Asian American-owned	6	0.6
Hispanic American-owned	86	8.6
Native American-owned	13	1.3
WBE (white women-owned)	95	9.5
Majority-owned firms	0	0.0
<b>Total current or potential DBEs</b>	<b>225</b>	<b>22.6 %</b>
<b>Non-DBEs</b>		
African American-owned	21	2.1 %
Asian-Pacific American-owned	6	0.6
Subcontinent Asian American-owned	5	0.5
Hispanic American-owned	57	5.7
Native American-owned	10	1.0
WBE (white women-owned)	72	7.2
Majority-owned firms	600	60.2
<b>Total non-DBEs</b>	<b>771</b>	<b>77.4 %</b>
<b>Total available firms</b>	<b>996</b>	<b>100.0 %</b>

## F. Availability Calculations on a Contract-by-Contract Basis

Keen Independent analyzed information from the availability database to develop dollar-weighted availability estimates for use as a benchmark in the disparity analysis and in helping ADOT set its overall DBE goals for FHWA-, FAA- and FTA-funded contracts.

- Dollar-weighted availability estimates represent the percentage of ADOT transportation contracting dollars that MBE/WBEs might be expected to receive based on their availability for specific types and sizes of ADOT transportation-related construction and engineering prime contracts and subcontracts.
- Keen Independent’s approach to calculating availability was a bottom up, contract-by-contract process of “matching” available firms to specific prime contracts and subcontracts.

**Steps to calculating availability.** Only a portion of the businesses in the availability database were considered potentially available for any given ADOT construction or engineering prime contract or subcontract (referred to collectively as “contract elements”).

- The study team examined the characteristics of each specific contract element, including type, location, size and date of the prime contract or subcontract; and
- Identified available firms that perform work of that type, in that location, of that size, in that role (prime or sub), in business when the contract was awarded.

**Steps to the availability calculations.** The study team identified the specific characteristics of each of the 14,399 ADOT and local agency prime contracts and subcontracts included in the utilization analysis 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 work in that particular role, for that specific type of work, for that particular type of agency (ADOT or local agencies) or had actually performed work in that role based on contract data for the study period;
  - Indicated in the interview that they had performed work in the particular role (prime or sub) in Arizona within the past six years (or had done so based on contract data for the study period);
  - Are able to do work in that geographic location (or had done so based on contract data for the study period, or are located in that region);
  - Had bid on or performed work of that size in Arizona in the past six years (or had done so based on contract data for the study period); and
  - Were in business in the year that the contract or task order was awarded.
2. For the specific contract element, the study team then counted the number of MBEs (by race/ethnicity), WBEs and majority-owned businesses among all businesses in the availability database that met the criteria specified in step 1 above.
3. The study team translated the numeric availability of businesses for the contract element into percentage availability (as described in Figure 5-6).

**Figure 5-6.**  
**Example of an availability calculation**

One of the subcontracts examined was for landscaping (\$72,296) on a 2015 Federal Highway Administration-funded contract for ADOT in Northern Arizona. To determine the number of MBE/WBEs and majority-owned firms available for that subcontract, the study team identified businesses in the availability database that:

- a. Were in business in 2015;
- b. Indicated that they performed landscaping on transportation-related projects;
- c. Reported working or bidding on subcontracts in Arizona in the past six years;
- d. Reported bidding on work of similar or greater size in the past six years;
- e. Reported ability to perform work in Northern Arizona; and
- f. Reported qualifications and interest in working as a subcontractor on state and local government transportation projects.

There were 46 businesses in the availability database that met those criteria. Of those businesses, 22 were MBEs or WBEs. Therefore, MBE/WBE availability for the subcontract was 48 percent (i.e.,  $22/46 = 48\%$ ).

The weight applied to this contract was  $\$72,296 \div \$3.7 \text{ billion} = 0.002\%$  (equal to its share of total FHWA-funded contract dollars). Keen Independent repeated this process for each prime contract and subcontract.

The study team repeated those steps for each contract element examined in 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. These calculations produced a dollar-weighted estimate of overall availability of MBE/WBEs and estimates of availability for each MBE/WBE group. Figure 5-6 provides an example of how the study team calculated availability for a specific subcontract in the study period.

**Special considerations for supply contracts.** When calculating availability for a particular type of materials supplies, Keen Independent counted as available all firms supplying those materials that reported qualifications and interest in that work for ADOT (or for local agencies when it was a local agency contract) and indicated that they could provide supplies in the pertinent region of the state. Bid capacity was not considered in these calculations.

**Improvements on a simple “head count” of businesses.** Keen Independent used a dollar-weighted approach to calculating MBE/WBE availability for ADOT and local agency work rather than using a simple “head count” of MBE/WBEs (i.e., simply calculating the percentage of all Arizona transportation contracting businesses that are minority- or women-owned). Using a dollar-weighted approach typically results in lower availability estimates for MBEs and WBEs than a headcount approach due in large part to Keen Independent’s consideration of types and sizes of work performed measuring availability and because of dollar-weighting availability results for each contract element (a large prime contract has a greater weight in calculating overall availability than a small subcontract). The types and sizes of contracts for which MBE/WBEs are available in Arizona tend to be smaller than those of other businesses. Therefore, MBE/WBEs are less likely to be identified as available for the largest prime contracts and subcontracts.

There are several important ways in which Keen Independent’s dollar-weighted approach to measuring availability is more precise than completing a simple head count approach.

**Keen Independent’s approach accounts for type of work.** USDOT suggests calculating availability based on businesses’ abilities to perform specific types of work. USDOT gives the following example in Part II F of “Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program”:

*For instance, if 90 percent of your contract dollars will be spent on heavy construction and 10 percent on trucking, you should weight your calculation of the relative availability of firms by the same percentages.<sup>7</sup>*

The study team took type of work into account by examining 32 different subindustries related to transportation construction, engineering and related purchases as part of estimating availability for ADOT and local agency work.

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<sup>7</sup> USDOT. Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program as updated June 25, 2013 <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

**Keen Independent’s approach accounts for qualifications and interest in transportation-related 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 ADOT and local agency transportation work, in addition to the consideration of several other factors related to prime contracts and subcontracts (e.g., contract types, sizes and locations):

- Only businesses that reported being qualified for and interested in working as prime contractors were counted as available for prime contracts (or included because contract data for ADOT or local agencies indicated that they had prime contracts in the past six years).
- Only businesses that reported being qualified for and interested in working as subcontractors were counted as available for subcontracts.
- 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.

**Keen Independent’s approach accounts for the size of prime contracts and subcontracts.** 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 six years (referred to here as “bid capacity”) when determining whether to count that business as available for a particular contract element. When counting available businesses for a particular prime contract or subcontract, the study team considered whether businesses had previously bid on or received at least one contract of an equivalent or greater dollar value in Arizona in the previous six years, based on the most inclusive information from survey results and analysis of past ADOT and local agency prime contracts and subcontracts.

Keen Independent’s approach is consistent with many recent, key court decisions that have found relative capacity measures to be important to measuring availability, as discussed in Appendix B.

**Keen Independent’s approach accounts for the geographic location of the work.** The study team determined the location where work was performed for ADOT and local agency contracts (Southern, Central or Northern Arizona).

**Keen Independent’s approach generates dollar-weighted results.** Keen Independent 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 more to overall availability estimates than those of relatively small contract elements. This 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.

## G. Availability Results

Keen Independent used the custom census approach described above to estimate the availability of MBE/WBEs and majority-owned businesses for FHWA-, state-, FAA- and FTA-funded prime contracts and subcontracts that ADOT and local agencies awarded during the study period. For FHWA-funded contracts, Keen Independent examined availability with and without the South Mountain Freeway project. Figure 5-7 presents overall dollar-weighted availability estimates by MBE/WBE group for those contracts.

**FHWA-funded contracts.** As shown in Figure 5-7, Keen Independent’s availability analysis for ADOT and local agency FHWA-funded contracts (not including South Mountain Freeway) indicates that MBE/WBEs might be expected to receive about 30 percent of these contract dollars, somewhat less than the “headcount” availability in Figure 5-4. Dollar-weighted availability was highest for Hispanic American-owned (7.07%) and Native American-owned companies (10.09%).

Keen Independent did not include South Mountain Freeway prime contracts and subcontracts in the analysis of ADOT’s future overall DBE goal for FHWA-funded contracts, but did include this project in the disparity analysis for FHWA-funded contracts.<sup>8</sup> Including the South Mountain Freeway, dollar-weighted availability for MBE/WBEs was 25.63 percent, as shown in the second column of Figure 5-7.

**State-funded contracts.** The mix of work, size of contracts, subcontract opportunities and geographic distribution of projects differed between ADOT’s FHWA- and state-funded highway projects. This results in MBE/WBE availability for state-funded contracts — 32.43 percent — that was higher than for ADOT’s FHWA-funded contracts.

Figure 5-7.

Overall dollar-weighted availability estimates for ADOT FHWA-, state-, FAA- and FTA-funded contracts, October 2013–September 2018

Race/ethnicity and gender	FHWA		State	FAA	FTA
	Excludes South Mountain Freeway contracts	Includes South Mountain Freeway contracts			
African American-owned	1.63 %	2.15 %	3.17 %	3.36 %	1.78 %
Asian-Pacific American-owned	4.17	3.83	4.84	4.88	0.53
Subcontinent Asian American-owned	0.59	0.55	0.66	1.42	0.76
Hispanic American-owned	7.07	5.75	7.77	7.86	6.75
Native American-owned	10.09	8.02	7.08	5.47	1.02
Total MBE	23.54 %	20.30 %	23.53 %	22.99 %	10.84 %
WBE (white women-owned)	6.30	5.33	8.90	9.56	11.99
<b>Total MBE/WBE</b>	<b>29.84 %</b>	<b>25.63 %</b>	<b>32.43 %</b>	<b>32.55 %</b>	<b>22.82 %</b>
Total majority-owned	70.16	74.38	67.57	67.45	77.18
<b>Total</b>	<b>100.00 %</b>	<b>100.00 %</b>	<b>100.00 %</b>	<b>100.00 %</b>	<b>100.00 %</b>

Note: Numbers may not add to totals due to rounding.

Source: Keen Independent availability analysis.

<sup>8</sup> This was a mega-project (design-build) that is not indicative of future work. Due to its large size and unique characteristics, ADOT set a separate DBE project goal for South Mountain Freeway.

**FAA-funded contracts.** MBE/WBE availability for FAA-funded contracts was 32.55 percent based on Keen Independent’s dollar-weighted availability analysis. Dollar-weighted availability was highest for Hispanic American-owned businesses (7.86%), white women-owned firms (9.56%) and Native American-owned companies (5.47%).

**FTA-funded contracts.** FTA-funded contracts primarily pertain to transit services and goods purchases such as fuel. Dollar-weighted MBE/WBE availability for FTA-funded contracts was lower than for highway contracts: 22.82 percent.

## **H. Base Figure for ADOT’s Overall DBE Goal for FHWA-, FAA- and FTA-Funded Contracts**

Establishing a base figure is the first step in calculating an overall goal for DBE participation in ADOT’s FHWA-, FAA- and FTA-funded contracts. Keen Independent calculated the base figure for each set of contracts using the same availability database and approach described above.

Keen Independent’s approach to calculating ADOT’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 28, 2011 that outline revisions to the Federal DBE Program; and
- USDOT’s “Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program.”

**Base figure for FHWA-funded contracts.** Keen Independent’s availability analysis indicates that the availability of MBE/WBEs for ADOT’s FHWA-funded transportation contracts is 29.84 percent based on current availability information and analysis of FHWA-funded ADOT and local agency contracts awarded from October 2013 through October 2018 (not including South Mountain Freeway contracts).<sup>9</sup> Based on review of ADOT’s Statewide Transportation Improvement Plan, these past contracts appear to reflect the mix of future FHWA-funded contracts for the three federal fiscal years beginning October 1, 2020. Future FHWA-funded projects will include new road segments, highway widening, interchange projects, pavement preservation and other improvements and maintenance, as did past contracts. Although there will be large ADOT projects involving federal funds in the coming three years, none will be the scale of the South Mountain Freeway project, which is why Keen Independent excluded it from the data used to establish the overall DBE goal.

**Calculations to convert MBE/WBE availability to availability of current and potential DBEs.**

Figure 5-8 provides the calculations to derive current/potential DBE availability when starting from MBE/WBE availability figures.

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<sup>9</sup> Total does not include 498 South Mountain Freeway prime contracts and subcontracts.

For FHWA-funded contracts, there were three groups of MBE/WBEs that Keen Independent did not count as potential DBEs when calculating the base figure:

- MBE/WBEs that in recent years graduated from the DBE Program or had applied for DBE certification in Arizona and had been denied (based on information supplied by ADOT and USDOT Decertified DBEs, Denials and DBE Appeal Decisions online database);
- MBE/WBEs that in the availability interviews reported having annual revenue over the most recent three years that exceeded the three-year average annual revenue limits for DBE certification for their subindustry; and
- MBE/WBEs that upon follow-up by ADOT indicated that they were not interested or would not qualify for DBE certification, were not successfully reached by ADOT, were found to not have an active account in the Arizona Corporation Commission, or were not successfully reached in ADOT's follow-up research.

Together, removing these three categories of MBE/WBEs reduced the base figure for FHWA-funded contracts by 13.69 percentage points. (Many of these firms were excluded for multiple reasons, so the deduction shows them combined.)

After subtracting 13.69 percentage points for the above refinements, dollar-weighted availability for current and potential DBEs was 16.15 percent. (Keen Independent did not identify any white male-owned firm DBE-certified firms in the availability analysis.) Figure 5-8 shows these calculations to determine the base figure for FHWA-funded contracts.

**Figure 5-8.**

**Overall dollar-weighted availability estimates for current and potential DBEs for FHWA-funded contracts, October 2013–September 2018**

Calculation of base figure	FHWA
Total MBE/WBE	29.84 %
Less firms that graduated from the DBE Program or were denied DBE certification in recent years or exceed revenue thresholds or indicated that they were not interested in DBE certification or did not have an active account with the Arizona Corporation Commission	13.69
Subtotal	16.15 %
Plus white male-owned DBEs	--
Current and potential DBEs	16.15 %

Note: Does not include South Mountain Freeway projects.

Source: Keen Independent availability analysis.



**Base figure for FAA-funded contracts.** Dollar-weighted MBE/WBE availability for ADOT's FAA-funded transportation contracts is 32.55 percent based on current availability information and analysis of ADOT's FAA-funded contracts awarded from October 2013 through September 2018. Figure 5-9 provides the calculations to derive current/potential DBE availability: 19.72 percent.

Figure 5-9.

Overall dollar-weighted availability estimates for current and potential DBEs for FAA-funded contracts, October 2013–September 2018

Calculation of base figure	FAA
Total MBE/WBE	32.55 %
Less firms that graduated from the DBE Program or were denied DBE certification in recent years or exceed revenue thresholds or indicated that they were not interested in DBE certification or did not have an active account with the Arizona Corporation Commission	12.83
Subtotal	19.72 %
Plus white male-owned DBEs	--
Current and potential DBEs	19.72 %

Source: Keen Independent availability analysis.

As with FHWA-funded contracts, Keen Independent did not include as potential DBEs that MBE/WBEs that had graduated or been denied certification, appeared to exceed annual revenue limits, or indicated in follow-up ADOT interviews that they were not interested or did not qualify for certification (or could not be reached). Removing these three categories of MBE/WBEs reduced the base figure for FAA-funded contracts by 12.83 percentage points. (Keen Independent did not identify any white male-owned firm DBE-certified firms in the availability analysis.)

**Base figure for FTA-funded contracts.** Keen Independent's availability analysis indicates that the availability of MBE/WBEs for ADOT's FTA-funded transportation contracts is 22.82 percent based on current availability information and analysis of contracts awarded FFY 2014 through FFY 2018.

**Calculations to convert MBE/WBE availability to availability of current and potential DBEs.**

Figure 5-10 provides the calculations to derive current/potential DBE availability when starting from MBE/WBE availability figures. As with FHWA-funded contracts, Keen Independent did not include as potential DBEs that MBE/WBEs that had graduated or been denied certification, appeared to exceed annual revenue limits, or indicated in follow-up ADOT interviews that they were not interested or did not qualify for certification (or could not be reached).

Together, removing these three categories of MBE/WBEs reduced the base figure for FTA-funded contracts by 8.18 percentage points. Keen Independent did not identify any white male-owned firm DBE-certified firms in the availability analysis. Therefore, after subtracting 8.18 percentage points for the above refinements, dollar-weighted availability for current and potential DBEs was 14.64 percent. Figure 5-10 shows these calculations to determine the base figure for FTA-funded contracts.

Figure 5-10.

Overall dollar-weighted availability estimates for current and potential DBEs for FTA-funded contracts, October 2013–September 2018

Calculation of base figure	FTA
Total MBE/WBE	22.82 %
Less firms that graduated from the DBE Program or were denied DBE certification in recent years or exceed revenue thresholds or indicated that they were not interested in DBE certification or did not have an active account with the Arizona Corporation Commission	8.18
Subtotal	14.64 %
Plus white male-owned DBEs	--
Current and potential DBEs	14.64 %

Source: Keen Independent availability analysis.

**Base figures based on currently certified DBEs.** Keen Independent also determined the base figures for ADOT FHWA-, FAA- and FTA-funded contracts using only currently certified DBEs.

Keen Independent's analysis indicates that the availability of current DBEs is 13.76 percent for ADOT's FHWA-funded transportation contracts (not including South Mountain Freeway contracts), 12.25 percent for ADOT's FTA-funded contracts and 15.86 percent for ADOT's FAA-funded contracts based on current availability information and analysis of FHWA-, FAA- and FTA-funded contracts awarded from October 2013 through September 2018. Figure 5-11 provides these figures.

Figure 5-11.

Overall dollar-weighted availability estimates for current DBEs for ADOT FHWA-, FAA- and FTA-funded contracts, October 2013–September 2018

	FHWA	FAA	FTA
Current DBEs	11.58 %	15.86 %	12.25 %

Note: FHWA results do not include South Mountain Freeway projects.

Source: Keen Independent availability analysis.

**Additional steps before ADOT determines its overall DBE goals for FHWA-, FAA- and FTA-funded contracts.** ADOT must consider whether to make a “step 2” adjustment to these base figures as part of determining its overall DBE goals for FHWA-, FAA- and FTA-funded contracts. Step 2 adjustments can be upward or downward, but there is no requirement for ADOT to make a step 2 adjustment as long as it can explain the factors considered and why no adjustment was warranted.

Chapters 9, 10 and 11 discuss factors that ADOT might consider in deciding whether to make step 2 adjustments to the base figures for FHWA-, FAA- and FTA-funded contracts.

## CHAPTER 6.

### Utilization and Disparity Analysis

Keen Independent’s utilization analysis reports the percentage of ADOT transportation contract dollars going to minority- and women-owned firms. The disparity analysis compares that utilization with the participation of minority- and women-owned firms that might be expected based on the availability analysis. (Chapter 5 and Appendix D explain the availability analysis.)

Chapter 6 presents results of the utilization and disparity analysis in the following sections:

- A. Overview of the utilization analysis;
- B. MBE/WBE and DBE utilization on ADOT contracts;
- C. Utilization by racial, ethnic and gender group for FHWA-, state-, FAA- and FTA-funded contracts;
- D. Disparity analysis for ADOT contracts; and
- E. Statistical significance of disparity analysis results.

#### A. Overview of the Utilization Analysis

Keen Independent examined the participation of minority- and women-owned firms on ADOT transportation contracts from October 2013 through September 2018. In total, Keen Independent’s utilization analysis included 14,399 contracts totaling \$4.2 billion over this time period, including FHWA-, state-, FAA- and FTA-funded contracts.<sup>1</sup> Keen Independent’s analysis of these contracts included more than 11,848 subcontracts.

The study team collected information about ADOT projects as well as work awarded for local agency projects that use funds administered through ADOT (“LPA” contracts). ADOT’s state-funded transportation contracts were included in the analysis to be able to examine additional highway construction, engineering and related contracts that did not include DBE contract goals (ADOT does not apply this program to any state-funded contracts). Chapter 3 and Appendix C explain the methods used to collect these data and determine the racial, ethnic and gender ownership characteristics of individual firms.

Note that ADOT awards work through a variety of contract agreements; to simplify, the utilization analysis refers to all such work as “contracts.”<sup>2</sup>

**Calculation of “utilization.”** The study team measured MBE/WBE “utilization” as the percentage of prime contract and subcontract dollars awarded to MBE/WBEs during the study period

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<sup>1</sup> Total includes 498 South Mountain Freeway prime contracts and subcontracts for a total of \$1.0 billion dollars.

<sup>2</sup> Also, prime contractors, not ADOT or local agencies, “award” subcontracts to subcontractors. To streamline the discussion, ADOT and local agency “award” of contract elements is used here and throughout the report.

(see Figure 6-1). Keen Independent calculated MBE/WBE utilization for a group of contracts by dividing the contract dollars going to MBE/WBEs by the contract dollars for all firms.

To avoid double-counting contract dollars and better gauging utilization of different types of firms, Keen Independent based the utilization of prime contractors on the amount of the contract retained by the prime contractor after deducting subcontract amounts. In other words, a \$1 million contract that involved \$400,000 in subcontracting only counts as \$600,000 to the prime contractor in the utilization analysis.

**Different results than in ADOT Uniform Reports of DBE Commitments/Awards and Payments.** USDOT requires agencies such as ADOT to submit reports about DBE utilization on its FHWA-funded transportation contracts

twice each year. Keen Independent's utilization analysis goes beyond what ADOT reports to FHWA, FAA and FTA. As a result, Keen Independent's estimates of DBE participation during the study period differ from the overall DBE participation ADOT reported to FHWA, FAA and FTA over a similar time period.

- **All MBE/WBEs, not just certified DBEs.** Per USDOT regulations, ADOT's Uniform Reports focus exclusively on certified DBEs. The study team's analysis includes the utilization of MBE/WBEs that may have once been DBE-certified and graduated (or let their certifications lapse) and the utilization of MBE/WBEs that have never been DBE-certified. (Keen Independent separately reports DBE utilization.<sup>3</sup>)
- **All transportation contracts, not just USDOT-funded contracts.** Because USDOT requires ADOT to prepare DBE utilization reports on its USDOT-funded transportation contracts, ADOT's Uniform Reports do not include state-funded contracts unlike Keen Independent's utilization analysis.
- **More complete contract information.** Through ADOT's assistance during the disparity study, and as part of ADOT's ongoing improvements to its contract data collection and reporting, the study team was able to analyze more complete data than ADOT had in its Uniform Reports, especially in earlier part of the study period.

**Figure 6-1.**  
**Defining and measuring "utilization"**

"Utilization" of MBE/WBEs refers to the share of prime contract and subcontract dollars that an agency awarded to MBE/WBEs during a particular time period. Keen Independent measures the utilization of all MBE/WBEs, regardless of certification. The study team reports utilization for firms owned by different racial, ethnic and gender groups.

Keen Independent measures MBE/WBE utilization as percentage of total prime contract and subcontract dollars. For example, if 5 percent of prime contract and subcontract dollars went to WBEs during the study period, WBE utilization would be 5 percent.

Information about MBE/WBE utilization is instructive on its own, but it is even more useful when it is compared with the utilization that might be expected based on the availability of MBE/WBEs for ADOT work. The study team presents such comparisons as part of the "disparity analysis" later in Chapter 6.

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<sup>3</sup> Although businesses that are owned and operated by socially and economically disadvantaged white men can become certified as DBEs, Keen Independent identified no DBE-certified white male-owned businesses that ADOT utilized during the study period. In other words, all DBEs that ADOT utilized during the study period were MBE/WBEs. Thus, utilization results for certified DBEs are a subset of the utilization results for all MBE/WBEs.

## B. MBE/WBE and DBE Utilization on ADOT Contracts

Figure 6-2 presents overall MBE/WBE utilization (as a percentage of total dollars) on ADOT transportation-related contracts awarded during the study period. Results are for the 14,399 prime contracts and subcontracts for FHWA-, state-, FAA- and FTA-funded contracts. The darker portion of the bar presents the utilization of MBE/WBEs that were DBE-certified. The lighter portion of each bar indicates utilization of minority- and women-owned firms that were not DBE-certified at the time of those contracts.

Figure 6-2.

MBE/WBE and DBE share of prime contract/subcontract dollars for ADOT/LPA FHWA-, state-, FAA- and FTA-funded transportation contracts, October 2013–September 2018

**Notes:**

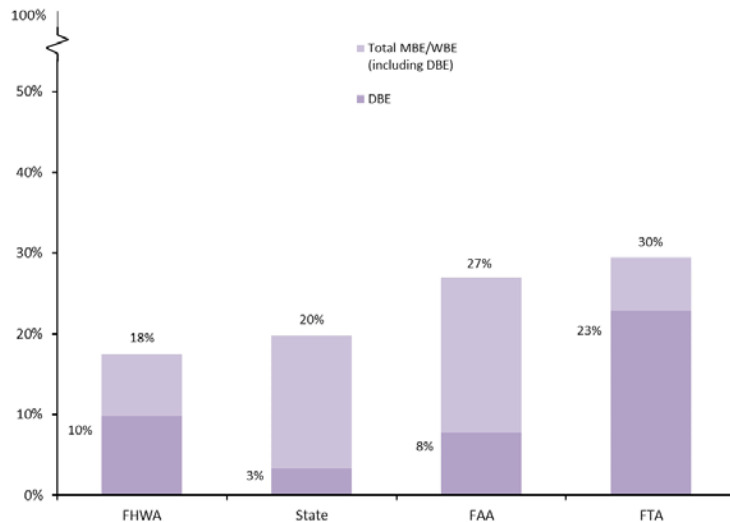
Dark portion of bar is certified DBE utilization.

Includes South Mountain Freeway projects.

Number of contracts/subcontracts analyzed is 14,399.

**Source:**

Keen Independent from data on ADOT and LPA contracts October 2013–September 2018.



**FHWA-funded contracts.** Keen Independent examined 12,407 FHWA-funded prime contracts and subcontracts from October 2013 through September 2018. In total, there was \$3.7 billion in contract dollars for these contracts.<sup>4</sup> FHWA-funded contracts were the largest portion of ADOT contracts included in the study.

MBE/WBEs received \$644 million, or 17.5 percent of ADOT FHWA-funded contract dollars during study period. About \$361 million (10%) of contract dollars went to MBE/WBEs that were DBE-certified during that time period.<sup>5</sup> Minority- and women-owned firms not certified as DBEs accounted for \$283 million or 7.7 percentage points of the total 17.5 percent MBE/WBE participation.

Some of the MBE/WBEs that are not DBE-certified appear that they might be eligible for certification (see Appendix C). These “potential DBEs” accounted for 5.9 percentage points of total utilization for FHWA-funded contracts.

<sup>4</sup> Note that because ADOT and USDOT treat each contract with any FHWA dollars as “FHWA-funded,” the study team did so as well (some of the funding on these contracts was state dollars).

<sup>5</sup> DBE certified for at least some portion of the study period. Does not include firms first certified as DBEs after December 2019.

The percentage of contract dollars going to MBE/WBEs is slightly lower for FHWA-funded contracts when the South Mountain Freeway project is excluded. Minority- and women-owned firms received 17 percent of the contract dollars for FHWA-funded transportation contracts during the study period, of which 9.0 percentage points went to DBEs.

Keen Independent's results for DBE participation are slightly different from what ADOT indicated in its Uniform Reports. ADOT reported \$2.9 billion in FHWA-funded contracts from October 2013 through September 2018, of which \$325 million went to DBEs. (These results are for contract and subcontract awards.) Based on ADOT reports, DBEs received 11.3 percent of total FHWA-funded contract dollars.

**State-funded contracts.** The study team obtained data on 1,524 state-funded transportation construction and engineering-related prime contracts and subcontracts for October 2013 through September 2018. These contracts totaled \$461 million, about 11 percent of the total dollars examined in the utilization analysis. Minority- and women-owned firms received 19.8 percent of the contract dollars for state-funded contracts during the study period, of which about 3 percentage points of which went to DBEs.

ADOT does not prepare DBE utilization reports for state-funded contracts.

**FHWA- and state-funded contracts with and without DBE goals.** ADOT set DBE contract goals on many of its FHWA-funded contracts during the study period and there were some FHWA-funded contracts that did not have contract goals. None of ADOT's state-funded transportation contracts had contract goals. Figure 6-3 compares MBE/WBE participation on those contracts with goals and those without (that were FHWA- or state-funded).

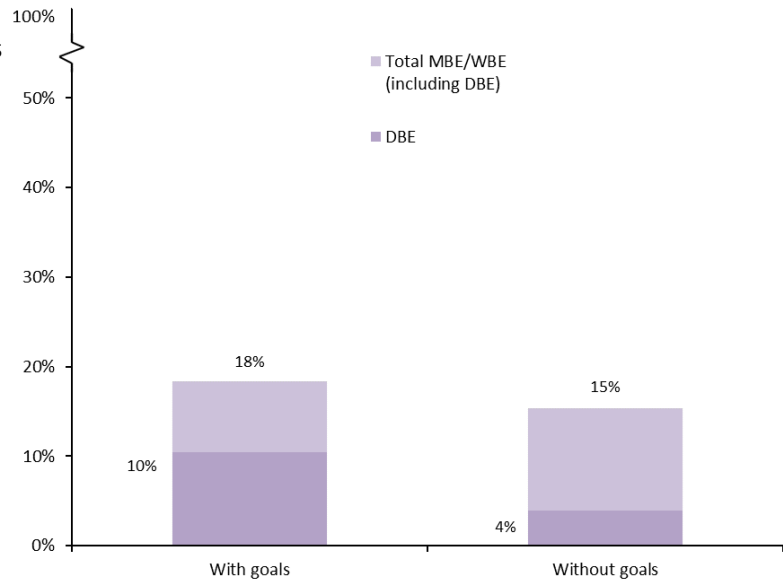
Keen Independent's analysis shows higher MBE/WBE utilization on contracts with DBE contract goals than those without contract goals.

- About 18 percent of contract dollars went to MBE/WBEs when ADOT set a DBE contract goal. Of this total, more than one-half of the participation came from MBE/WBEs that were certified as DBEs.
- Without DBE contract goals, MBE/WBE participation was 15 percent (with only 4 percentage points for firms certified as DBEs). ADOT might consider these results when projecting the amount of DBE participation it can achieve through neutral means (see Chapter 8).

Figure 6-3.  
MBE/WBE and DBE share of dollars  
for FHWA-funded contracts with  
DBE contract goals and FHWA- and  
state-funded contracts without  
contract goals, October 2013–  
September 2018

Note:  
Dark portion of bar is certified DBE utilization.  
Number of contracts/subcontracts analyzed  
is 10,761 with DBE contract goals and  
3,170 without contract goals.  
Includes South Mountain Freeway contracts.

Source:  
Keen Independent from data on ADOT and  
LPA FHWA- and state-funded prime contracts  
and subcontracts, October 2013–September  
2018.



**FAA-funded contracts.** The study team identified 147 FAA-funded contracts during the study period totaling \$26 million. About 27 percent of those contract dollars went to MBE/WBEs, with 8 percentage points going to DBEs.

MBE/WBEs not certified as DBEs that might be eligible for certification were 12 percentage points of the total participation of minority- and women-owned firms on FAA-funded contract dollars.

The contract data the study team collected appears more comprehensive than what ADOT may have had for previous reports to FAA. ADOT provided the study team Uniform Reports for FAA-funded contracts for FFY 2017 through FFY 2019. These Uniform Reports indicated \$1.5 million in total FAA-funded contracts in these years and 8.7 percent participation of certified DBEs.

**FTA-funded contracts.** Keen Independent identified \$30 million in FTA-funded contracts for the study period (321 prime contracts and subcontracts). These include \$18.7 million in transit services contracts and \$4.2 million for petroleum and fuel purchases. Almost one-third of FTA-funded contract dollars went to MBE/WBEs (29.5%), with most of those being DBE certified (22.9%). This relatively high utilization was not because of DBE contract goals as ADOT operated a neutral program for its FTA-funded contracts.

For FTA-funded contracts, MBE/WBEs not certified as DBEs that might be eligible for certification were 5.5 percentage points of the total MBE/WBE participation.

ADOT provided the study team FFY 2017 through FFY 2019 Uniform Reports for FTA-funded contracts that indicated about \$6.9 million in contracts and 23.2 percent DBE participation (based on awards).



### C. Utilization by Racial, Ethnic and Gender Group for FHWA-, State-, FAA- and FTA-Funded Contracts

Keen Independent also separated utilization results by race, ethnicity and gender ownership. The top portion of each of the following tables examines results for minority- and women-owned firms regardless of DBE-certification status. The bottom part of each table focuses on dollars going to certified DBEs and to non-DBEs (including non-DBE firms that are minority- or female-owned). For each set of contracts, the figures show:

- Total number of prime contracts and subcontracts awarded to the group (e.g., 127 FHWA-funded prime contracts and subcontracts to African American-owned firms);
- Combined dollars of prime contracts going to the group (e.g., \$11,037,000 to African American-owned firms); and
- The percentage of combined contract dollars for the group (e.g., African American-owned firms received 0.3 percent of total FHWA-funded contract dollars).

The below tables also describe the results for FHWA- and state-funded contracts with and without the South Mountain Freeway project. (ADOT set a separate DBE goal for this project given the magnitude and uniqueness of this project.)

**FHWA-funded contracts.** Figure 6-4 provides detailed results for FHWA-funded contracts including South Mountain Freeway contracts. For each MBE/WBE group, most participation was from businesses not certified as DBEs.

- White women-owned companies received \$287 million, about 8 percent of ADOT FHWA-funded contract dollars.
- Hispanic American-owned companies received about 6 percent of FHWA-funded contract dollars.
- Native American-owned companies obtained about 2.1 percent of the dollars of FHWA-funded contracts.
- Combined, other MBE/WBE groups received about 1 percent of ADOT FHWA-funded contract dollars.

Figure 6-4.

MBE/WBE and DBE share of ADOT/LPA prime contracts and subcontracts for FHWA-funded contracts including South Mountain Freeway project, October 2013–September 2018

	FHWA		
	Number of contracts*	\$1,000s	Percent of dollars
<b>MBE/WBEs</b>			
African American-owned	127	\$ 11,037	0.3 %
Asian-Pacific American-owned	255	28,594	0.8
Subcontinent Asian American-owned	88	5,211	0.1
Hispanic American-owned	1,453	233,841	6.4
Native American-owned	317	77,738	2.1
Total MBE	2,240	\$ 356,421	9.7 %
WBE (white women-owned)	2,632	287,574	7.8
<b>Total MBE/WBE</b>	<b>4,872</b>	<b>\$ 643,995</b>	<b>17.5 %</b>
Total majority-owned	7,535	3,031,094	82.5
<b>Total</b>	<b>12,407</b>	<b>\$ 3,675,089</b>	<b>100.0 %</b>
<b>DBEs</b>			
African American-owned	56	\$ 3,427	0.1 %
Asian-Pacific American-owned	178	21,297	0.6
Subcontinent Asian American-owned	13	1,476	0.0
Hispanic American-owned	771	143,942	3.9
Native American-owned	278	76,582	2.1
Total MBE	1,296	\$ 246,724	6.7 %
WBE (white women-owned)	1,296	114,491	3.1
<b>Total DBE-certified</b>	<b>2,592</b>	<b>\$ 361,215</b>	<b>9.8 %</b>
Non-DBE	9,815	3,313,874	90.2
<b>Total</b>	<b>12,407</b>	<b>\$ 3,675,089</b>	<b>100.0 %</b>

Note: \*Number of prime contracts and subcontracts.

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

WBE results include \$69.8 million for Coffman Specialties.

Source: Keen Independent from data on ADOT and LPA contracts, October 2013–September 2018.

Figure 6-5 describes the participation of MBE/WBE participation on FHWA-funded contracts excluding the South Mountain Freeway project. Businesses owned by white women and Hispanic Americans obtained much of the work going to MBE/WBEs. About one-half of MBE/WBE participation was from certified DBEs.

Figure 6-5.

MBE/WBE and DBE share of ADOT/LPA prime contracts and subcontracts for FHWA-funded contracts excluding South Mountain Freeway project, October 2013–September 2018

	FHWA excluding South Mountain Freeway		
	Number of contracts*	\$1,000s	Percent of dollars
<b>MBE/WBEs</b>			
African American-owned	96	\$ 7,040	0.3 %
Asian-Pacific American-owned	237	21,650	0.8
Subcontinent Asian American-owned	80	3,743	0.1
Hispanic American-owned	1,338	146,313	5.4
Native American-owned	303	52,041	1.9
Total MBE	2,054	\$ 230,788	8.5 %
WBE (white women-owned)	2,554	236,372	8.8
<b>Total MBE/WBE</b>	<b>4,608</b>	<b>\$ 467,159</b>	<b>17.3 %</b>
Total majority-owned	7,301	2,232,916	82.7
<b>Total</b>	<b>11,909</b>	<b>\$ 2,700,075</b>	<b>100.0 %</b>
<b>DBEs</b>			
African American-owned	45	\$ 1,749	0.1 %
Asian-Pacific American-owned	161	15,168	0.6
Subcontinent Asian American-owned	9	149	0.0
Hispanic American-owned	727	86,700	3.2
Native American-owned	266	50,905	1.9
Total MBE	1,208	\$ 154,672	5.7 %
WBE (white women-owned)	1,258	88,913	3.3
<b>Total DBE-certified</b>	<b>2,466</b>	<b>\$ 243,584</b>	<b>9.0 %</b>
Non-DBE	9,443	2,456,491	91.0
<b>Total</b>	<b>11,909</b>	<b>\$ 2,700,075</b>	<b>100.0 %</b>

Note: \*Number of prime contracts and subcontracts.

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

Includes \$49.9 million for Coffman Specialties counted as a WBE.

Source: Keen Independent from data on ADOT and LPA contracts, October 2013–September 2018.

**State-funded contracts.** Figure 6-6 shows that MBE/WBEs received 19.8 percent of contract dollars on state-funded contracts. Most of the participation of MBE/WBEs was from firms not certified as DBEs. About 3 percent of contract dollars went to DBEs, as shown in the bottom portion of Figure 6-6. ADOT has not used contract goals on state-funded contracts.

White women-owned firms (10.1%) and Hispanic American-owned firms (7.5%) accounted for most of the utilization of MBE/WBEs on state-funded contracts. However, Coffman Specialties accounted for 6.4 percentage points of the participation of WBEs and there is strong indication that the firm is more correctly categorized as majority-owned.

Figure 6-6.

MBE/WBE and DBE share of ADOT prime contracts and subcontracts for state-funded contracts, October 2013–September 2018

	State		
	Number of contracts*	\$1,000s	Percent of dollars
MBE/WBEs			
African American-owned	17	\$ 240	0.1 %
Asian-Pacific American-owned	19	1,830	0.4
Subcontinent Asian American-owned	17	3,711	0.8
Hispanic American-owned	155	34,707	7.5
Native American-owned	24	4,036	0.9
Total MBE	232	\$ 44,525	9.7 %
WBE (white women-owned)	214	46,600	10.1
Total MBE/WBE	446	\$ 91,125	19.8 %
Total majority-owned	1,078	369,959	80.2
Total	1,524	\$ 461,084	100.0 %
DBEs			
African American-owned	8	\$ 138	0.0 %
Asian-Pacific American-owned	13	1,816	0.4
Subcontinent Asian American-owned	0	0	0.0
Hispanic American-owned	74	6,003	1.3
Native American-owned	20	3,983	0.9
Total MBE	115	\$ 11,940	2.6 %
WBE (white women-owned)	105	3,355	0.7
Total DBE-certified	220	\$ 15,295	3.3 %
Non-DBE	1,304	445,789	96.7
Total	1,524	\$ 461,084	100.0 %

Note: \*Number of prime contracts and subcontracts.

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

Includes \$29.6 million for Coffman Specialties counted as WBE.

Source: Keen Independent from data on ADOT and LPA contracts, October 2013–September 2018.

**FHWA- and state-funded contracts with and without DBE goals.** Figure 6-7 provides detailed utilization information for FHWA-funded contracts with goals and combined FHWA- and state-funded contracts without goals. For both sets of contracts, Figure 6-7 shows the number of prime contracts and subcontracts awarded, contract dollars awarded and the percentage of contract dollars awarded to different groups of minority- and women-owned companies. Contracts going to all minority- and women-owned firms, regardless of whether they were DBE-certified, are counted in the top portion of Figure 6-7. The bottom portion of Figure 6-7 presents racial, ethnic and gender ownership for DBEs.

By each metric, the greatest participation on both sets of contracts was firms owned by white women and Hispanic Americans. Of the \$3.3 million in FHWA-funded contracts that had DBE contract goals applied, \$273 million (8.3%) went to white women-owned firms, and \$219 million (6.6%) went to Hispanic American-owned firms. About 7 percent of the contract dollars for the \$831 million of FHWA- and state-funded contracts without goals also went to white women-owned businesses, and \$49 million (5.9%) to Hispanic American-owned businesses.

Figure 6-7.

MBE/WBE and DBE share of dollars for contracts with and without DBE contract goals for FHWA- and state-funded contracts, October 2013–September 2018

	FHWA-funded contracts with goals			FHWA- and state-funded contracts w/o goals		
	Number of procurements*	\$1,000s	Percent of dollars	Number of procurements*	\$1,000s	Percent of dollars
<b>MBE/WBEs</b>						
African American	118	\$ 10,976	0.3 %	26	\$ 302	0.0 %
Asian-Pacific American-owned	197	22,312	0.7	77	8,111	1.0
Subcontinent Asian American-owned	74	4,946	0.1	31	3,975	0.5
Hispanic American-owned	1,353	219,223	6.6	255	49,326	5.9
Native American-owned	290	76,279	2.3	51	5,495	0.7
Total MBE	2,032	\$ 333,736	10.1 %	440	\$ 67,210	8.1 %
WBE (white women-owned)	2,286	273,346	8.3	560	60,828	7.3
<b>Total MBE/WBE</b>	<b>4,318</b>	<b>\$ 607,082</b>	<b>18.4 %</b>	<b>1,000</b>	<b>\$ 128,038</b>	<b>15.4 %</b>
Total majority-owned	6,443	2,697,405	81.6	2,170	703,648	84.6
<b>Total</b>	<b>10,761</b>	<b>\$ 3,304,487</b>	<b>100.0 %</b>	<b>3,170</b>	<b>\$ 831,686</b>	<b>100.0 %</b>
<b>DBEs</b>						
African American	49	\$ 3,380	0.1 %	15	\$ 185	0.0 %
Asian-Pacific American-owned	142	16,174	0.5	49	6,939	0.8
Subcontinent Asian American-owned	11	1,454	0.0	2	22	0.0
Hispanic American-owned	718	139,797	4.2	127	10,148	1.2
Native American-owned	256	75,141	2.3	42	5,424	0.7
Total MBE	1,176	\$ 235,946	7.1 %	235	\$ 22,719	2.7 %
WBE (white women-owned)	1,105	\$ 107,911	3.3 %	296	\$ 9,934	1.2 %
White male-owned DBE	0	0	0.0	0	0	0.0
<b>Total DBE-certified</b>	<b>2,281</b>	<b>\$ 343,857</b>	<b>10.4 %</b>	<b>531</b>	<b>\$ 32,653</b>	<b>3.9 %</b>
Non-DBE	8,480	2,960,630	89.6	2,639	799,033	96.1
<b>Total</b>	<b>10,761</b>	<b>\$ 3,304,487</b>	<b>100.0 %</b>	<b>3,170</b>	<b>\$ 831,686</b>	<b>100.0 %</b>

Note: Number of contracts/subcontracts analyzed is 10,761 with DBE contract goals and 3,170 without contract goals.

Includes South Mountain Freeway contracts.

Coffman Specialties is counted as a white women-owned firm.

Source: Keen Independent from data on FHWA- and state-funded prime contracts and subcontracts, October 2013–September 2018.

Figure 6-8 presents results counting Coffman Specialties as a majority-owned firm.<sup>6</sup> With this adjustment, participation of white women-owned businesses decreases from 8.3 percent to 6.2 percent for FHWA-funded contracts that had DBE goals, and from 7.3 percent to 3.8 percent for FHWA- and state-funded contracts without goals.

Figure 6-8.

MBE/WBE and DBE share of dollars for contracts with and without DBE contract goals for FHWA- and state-funded contracts, October 2013–September 2018

	FHWA-funded contracts with goals			FHWA- and state-funded contracts w/o goals		
	Number of procurements*	\$1,000s	Percent of dollars	Number of procurements*	\$1,000s	Percent of dollars
<b>MBE/WBEs</b>						
African American	118	\$ 10,976	0.3 %	26	\$ 302	0.0 %
Asian-Pacific American-owned	197	22,312	0.7	77	8,111	1.0
Subcontinent Asian American-owned	74	4,946	0.1	31	3,975	0.5
Hispanic American-owned	1,353	219,223	6.6	255	49,326	5.9
Native American-owned	290	76,279	2.3	51	5,495	0.7
Total MBE	2,032	\$ 333,736	10.1 %	440	\$ 67,210	8.1 %
WBE (white women-owned)	2,281	203,589	6.2	558	31,217	3.8
<b>Total MBE/WBE</b>	<b>4,313</b>	<b>\$ 537,325</b>	<b>16.3 %</b>	<b>998</b>	<b>\$ 98,427</b>	<b>11.8 %</b>
Total majority-owned	6,448	2,767,162	83.7	2,172	733,259	88.2
<b>Total</b>	<b>10,761</b>	<b>\$ 3,304,487</b>	<b>100.0 %</b>	<b>3,170</b>	<b>\$ 831,686</b>	<b>100.0 %</b>
<b>DBEs</b>						
African American	49	\$ 3,380	0.1 %	15	\$ 185	0.0 %
Asian-Pacific American-owned	142	16,174	0.5	49	6,939	0.8
Subcontinent Asian American-owned	11	1,454	0.0	2	22	0.0
Hispanic American-owned	718	139,797	4.2	127	10,148	1.2
Native American-owned	256	75,141	2.3	42	5,424	0.7
Total MBE	1,176	\$ 235,946	7.1 %	235	\$ 22,719	2.7 %
WBE (white women-owned)	1,105	\$ 107,911	3.3 %	296	\$ 9,934	1.2 %
White male-owned DBE	0	0	0.0	0	0	0.0
<b>Total DBE-certified</b>	<b>2,281</b>	<b>\$ 343,857</b>	<b>10.4 %</b>	<b>531</b>	<b>\$ 32,653</b>	<b>3.9 %</b>
Non-DBE	8,480	2,960,630	89.6	2,639	799,033	96.1
<b>Total</b>	<b>10,761</b>	<b>\$ 3,304,487</b>	<b>100.0 %</b>	<b>3,170</b>	<b>\$ 831,686</b>	<b>100.0 %</b>

Note: Number of contracts/subcontracts analyzed is 10,761 with DBE contract goals and 3,170 without contract goals.  
Includes South Mountain Freeway contracts.

Coffman Specialties is counted as majority-owned firm.

Source: Keen Independent from data on FHWA- and state-funded prime contracts and subcontracts, October 2013–September 2018.

<sup>6</sup> Coffman Specialties appears to have once been WBE-certified in California in the 1990s but was denied DBE certification in Arizona due to issues concerning ownership and control of the firm. Therefore, it might be appropriate to examine utilization without this company included as a WBE.

**FAA-funded contracts.** Keen Independent examined 147 FAA-funded contracts and subcontracts at Grand Canyon National Park Airport. Figure 6-9 includes results for those FAA-funded contracts. MBE utilization was 7.7 percent and WBE utilization was 19.3 percent of FAA-funded contract dollars during the study period. (ADOT did not use DBE contract goals on these projects.)

**FTA-funded contracts.** MBE/WBEs participation accounted for almost 30 percent of utilization on FTA-funded prime contracts and subcontracts. White women-owned firms obtained 25 percent of total FTA-funded contract dollars and MBEs received about 5 percent of those contract dollars. (As with FAA-funded contracts, ADOT did not set DBE contract goals on FTA-funded contracts.)

Figure 6-9.

MBE/WBE and DBE share of ADOT/LPA prime contract and subcontract dollars for FAA- and FTA-funded contracts, October 2013–September 2018

	FAA			FTA		
	Number of contracts*	\$1,000s	Percent of dollars	Number of contracts*	\$1,000s	Percent of dollars
<b>MBE/WBEs</b>						
African American-owned	2	\$ 751	2.9 %	1	\$ 48	0.2 %
Asian-Pacific American-owned	1	39	0.2	0	0	0.0
Subcontinent Asian American-owned	0	0	0.0	1	1	0.0
Hispanic American-owned	14	1,200	4.6	12	1,301	4.3
Native American-owned	1	13	0.1	6	15	0.0
Total MBE	18	\$ 2,004	7.7 %	20	\$ 1,364	4.5 %
WBE (white women-owned)	23	5,033	19.3	35	7,664	25.1
<b>Total MBE/WBE</b>	<b>41</b>	<b>\$ 7,037</b>	<b>27.0 %</b>	<b>55</b>	<b>\$ 9,028</b>	<b>29.5 %</b>
Total majority-owned	106	19,042	73.0	266	21,553	70.5
<b>Total</b>	<b>147</b>	<b>\$ 26,079</b>	<b>100.0 %</b>	<b>321</b>	<b>\$ 30,581</b>	<b>100.0 %</b>
<b>DBEs</b>						
African American-owned	2	\$ 751	2.9 %	1	\$ 7	0.0 %
Asian-Pacific American-owned	1	39	0.2	0	0	0.0
Subcontinent Asian American-owned	0	0	0.0	1	1	0.0
Hispanic American-owned	4	966	3.7	0	0	0.0
Native American-owned	1	13	0.1	0	0	0.0
Total MBE	8	\$ 1,769	6.8 %	2	\$ 7	0.0 %
WBE (white women-owned)	7	244	0.9	26	7,007	22.9
<b>Total DBE-certified</b>	<b>15</b>	<b>\$ 2,013</b>	<b>7.7 %</b>	<b>28</b>	<b>\$ 7,014</b>	<b>22.9 %</b>
Non-DBE	132	24,066	92.3	293	23,567	77.1
<b>Total</b>	<b>147</b>	<b>\$ 26,079</b>	<b>100.0 %</b>	<b>321</b>	<b>\$ 30,581</b>	<b>100.0 %</b>

Note: \*Number of prime contracts and subcontracts.

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

Source: Keen Independent from data on ADOT and LPA contracts, October 2013–September 2018.

## D. Disparity Analysis for ADOT Contracts

To conduct the disparity analysis, Keen Independent compared the actual utilization of MBE/WBEs on ADOT transportation prime contracts and subcontracts with the percentage of contract dollars that MBE/WBEs might be expected to receive based on their availability for that work. (Availability is also referred to as the “utilization benchmark.”) Keen Independent made those comparisons for individual MBE/WBE groups. Chapter 5 explains how the study team developed benchmarks from the availability data.

Keen Independent expressed both utilization and availability as percentages of the total dollars associated with a particular set of contracts, making them directly comparable (e.g., 5% utilization compared with 4% availability).

Keen Independent then calculated a “disparity index” to help compare utilization and availability results among MBE/WBE groups and across different sets of contracts. Figure 6-10 describes how Keen Independent calculated disparity indices.

- A disparity index of 100 indicates an exact match between actual utilization and what might be expected based on MBE/WBE availability for a specific set of contracts (often referred to as “parity”).
- A disparity index of less than 100 may indicate a disparity between utilization and availability, and disparities less than 80 are described as “substantial” in this report.<sup>7</sup>

**Figure 6-10.**  
Calculation of disparity indices

The disparity index provides a straightforward way of assessing how closely actual utilization of an MBE/WBE group matches what might be expected based on its availability for a specific set of contracts. With the disparity index, one can directly compare results for one group to that of another group, and across different sets of contracts. Disparity indices are calculated using the following formula:

$$\frac{\% \text{ actual utilization} \times 100}{\% \text{ availability}}$$

For example, if actual utilization of MBEs on a set of ADOT contracts was 2 percent and the availability of MBEs for those contracts was 4 percent, then the disparity index would be 2 percent divided by 4 percent, which would then be multiplied by 100 to equal 50. In this example, MBEs would have actually received 50 cents of every dollar that they might be expected to receive based on their availability for the work.

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<sup>7</sup> Some courts deem a disparity index below 80 as being “substantial” and have accepted it as evidence of adverse impacts against MBE/WBEs. For example, see *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, \_\_\_ F.3d \_\_\_, 2013 WL 1607239 (9<sup>th</sup> Cir. April 16, 2013).; *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 (11<sup>th</sup> Circuit 1997); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10<sup>th</sup> Cir. 1994). Also see Appendix B for additional discussion.



**Results for MBE/WBEs on FHWA-funded contracts.** For FHWA-funded contracts for the study period, the 9.70 percent participation of minority-owned firms was about one-half of what might be expected from the analysis of relative MBE availability for these contracts (20.29%). The disparity index for MBEs overall was 48, indicating a substantial disparity ( $9.70\% \div 20.29$  multiplied by 100).

There were disparities between the utilization and availability of each group of minority-owned firms except for Hispanic American-owned businesses (see Figure 6-11).

Utilization of WBEs (7.82%) exceeded availability for these contracts (5.33%). Note that many FHWA-funded contracts had DBE contract goals, which may have increased MBE/WBE participation. Even with the goals, there was still a disparity between overall utilization of MBE/WBEs (17.52%) and MBE/WBE availability for those contracts (25.62%).

Figure 6-11.

MBE utilization and availability for FHWA-funded contracts,  
October 2013–September 2018

	Utilization	Availability	Disparity index
African American-owned	0.30 %	2.15 %	14
Asian-Pacific American-owned	0.78	3.83	20
Subcontinent Asian American-owned	0.14	0.55	26
Hispanic American-owned	6.36	5.75	111
Native American-owned	2.12	8.02	26
Total MBE	9.70 %	20.29 %	48
WBE (white women-owned)	7.82	5.33	147
<b>Total MBE/WBE</b>	<b>17.52 %</b>	<b>25.62 %</b>	<b>68</b>
Total majority-owned	82.48	74.38	111
<b>Total firms</b>	<b>100.00 %</b>	<b>100.00 %</b>	

Note: Number of contracts/subcontracts analyzed is 12,407.

Includes South Mountain Freeway projects.

Source: Keen Independent from data on ADOT and LPA contracts, October 2013–September 2018.

**Results for MBE/WBEs on state-funded contracts.** Figure 6-12 examines utilization and availability for state-funded contracts. In this case, utilization was substantially below availability for African American-, Asian-Pacific American- and Native American-owned companies. Although still less than 1 percent of all state-funded contract dollars, utilization of Subcontinent Asian American-owned firms was more than what might be expected from the availability analysis (0.66%). Utilization of Hispanic American-owned companies was about what might be expected from the availability analysis. (The following page further explores results that combine state-funded contracts and those FHWA-funded contracts without contract goals.)

As discussed previously in this chapter, the relatively high utilization of WBEs on state-funded contracts (10.11%) is because this table includes Coffman Specialties as a white woman-owned firm. If this firm were included in the results for majority-owned businesses, utilization of WBEs would be only 4 percent of ADOT state-funded contract dollars and there would be a disparity for white women-owned firms.<sup>8</sup> (Chapter 7 further examines results for WBEs, including analyses where this firm is counted as a majority-owned company.)

Figure 6-12.  
MBE utilization and availability for state-funded contracts,  
October 2013–September 2018

	Utilization	Availability	Disparity index
African American-owned	0.05 %	3.17 %	2
Asian-Pacific American-owned	0.40	4.84	8
Subcontinent Asian American-owned	0.80	0.66	122
Hispanic American-owned	7.53	7.77	97
Native American-owned	0.88	7.08	12
Total MBE	9.66 %	23.53 %	41
WBE (white women-owned)	10.11	8.90	114
<b>Total MBE/WBE</b>	<b>19.76 %</b>	<b>32.43 %</b>	<b>61</b>
Total majority-owned	80.24	67.57	119
<b>Total firms</b>	<b>100.00 %</b>	<b>100.00 %</b>	

Note: Number of contracts/subcontracts analyzed is 1,524.

Source: Keen Independent from data on ADOT and LPA contracts, October 2013–September 2018.

<sup>8</sup> It is also important to note that Coffman Specialties declined to respond to the availability survey when contacted. If the firm has responded, availability of WBEs would be higher than shown for both FHWA- and state-funded contracts.

### Results for MBE/WBEs on FHWA- and state-funded contracts with and without DBE goals.

Figure 6-13 compares utilization and availability of minority- and women-owned businesses for FHWA-funded contracts with and without DBE contract goals counting Coffman Specialties as a white women-owned firm.

For FHWA-funded contracts with DBE goals, there were substantial disparities between the utilization and availability of each minority-owned firms except for Hispanic American- and women-owned businesses.

For FHWA- and state-funded contracts without DBE goals, there were substantial disparities for each of the minority firms. There was also a disparity in the utilization and availability of white women-owned firms.

Figure 6-13.

MBE/WBE utilization and availability with and without DBE contract goals for FHWA- and state-funded contracts by specific racial groups, October 2013–September 2018

	With goals			Without goals		
	Utilization	Availability	Disparity index	Utilization	Availability	Disparity index
<b>MBE/WBEs</b>						
African American-owned	0.33 %	1.68 %	20	0.04 %	4.57 %	1
Asian-Pacific American-owned	0.68	3.97	17	0.98	3.81	26
Subcontinent Asian American-owned	0.15	0.42	36	0.48	1.11	43
Hispanic American-owned	6.63	5.46	122	5.93	8.01	74
Native American-owned	2.31	7.91	29	0.66	7.93	8
Total MBE	10.10 %	19.44 %	52	8.08 %	25.43 %	32
WBE (white women-owned)	8.27	5.19	159	7.31	7.88	93
<b>Total MBE/WBE</b>	<b>18.37 %</b>	<b>24.63 %</b>	<b>75</b>	<b>15.39 %</b>	<b>33.31 %</b>	<b>46</b>
Total majority-owned	81.63	75.37	108	84.61	66.69	127
<b>Total</b>	<b>100.00 %</b>	<b>100.00 %</b>		<b>100.00 %</b>	<b>100.00 %</b>	

Note: Number of contracts/subcontracts analyzed is 10,761 with DBE contract goals and 3,170 without contract goals.

Includes South Mountain Freeway contracts.

Coffman Specialties is counted as a white women-owned firm.

Source: Keen Independent from data on FHWA- and state-funded prime contracts and subcontracts, October 2013–September 2018.

Figure 6-14 compares utilization and availability of minority- and women-owned businesses for FHWA-funded contracts with and without DBE contract goals and counting Coffman Specialties as a majority-owned firm.

When DBE goals were not applied to FHWA- and state-funded contracts, there were substantial disparities for each group of MBEs and for white women-owned firms. These results provide the most instructive indication of whether there would be disparities for minority- and women-owned firms on ADOT FHWA-funded contracts overall if it did not use DBE contract goals.

Figure 6-14.

MBE/WBE utilization and availability with and without DBE contract goals for FHWA- and state-funded contracts by specific racial groups, October 2013–September 2018

	With goals			Without goals		
	Utilization	Availability	Disparity index	Utilization	Availability	Disparity index
<b>MBE/WBEs</b>						
African American-owned	0.33 %	1.68 %	20	0.04 %	4.57 %	1
Asian-Pacific American-owned	0.68	3.97	17	0.98	3.81	26
Subcontinent Asian American-owned	0.15	0.42	36	0.48	1.11	43
Hispanic American-owned	6.63	5.46	122	5.93	8.01	74
Native American-owned	2.31	7.91	29	0.66	7.93	8
Total MBE	10.10 %	19.44 %	52	8.08 %	25.43 %	32
WBE (white women-owned)	6.16	5.19	119	3.75	7.88	48
Total MBE/WBE	16.26 %	24.63 %	66	11.83 %	33.31 %	36
Total majority-owned	83.74	75.37	111	88.17	66.69	132
Total	100.00 %	100.00 %		100.00 %	100.00 %	

Note: Number of contracts/subcontracts analyzed is 10,761 with DBE contract goals and 3,170 without contract goals.

Includes South Mountain Freeway contracts.

Coffman Specialties is counted as a majority-owned firm.

Source: Keen Independent from data on FHWA- and state-funded prime contracts and subcontracts, October 2013–September 2018.

**Results for MBE/WBEs on FAA-funded contracts.** MBEs received 7.68 percent of FAA-funded contracts, less than the 22.9 percent that might be expected based on the availability analysis for these contracts (see Figure 6-15). There were disparities for each MBE group, and except for African American-owned firms, each disparity was substantial. However, 19 percent of FAA-funded contract dollars went to WBEs, almost twice the participation indicated from the availability analysis.

Figure 6-15.

MBE and WBE utilization and availability for FAA-funded contracts,  
October 2013–September 2018

	Utilization	Availability	Disparity index
African American-owned	2.88 %	3.36 %	86
Asian-Pacific American-owned	0.15	4.88	3
Subcontinent Asian American-owned	0.00	1.42	0
Hispanic American-owned	4.60	7.86	59
Native American-owned	0.05	5.47	1
Total MBE	7.68 %	22.99 %	33
WBE (white women-owned)	19.30	9.56	202
<b>Total MBE/WBE</b>	<b>26.98 %</b>	<b>32.55 %</b>	<b>83</b>
Total majority-owned	73.02	67.45	108
<b>Total firms</b>	<b>100.00 %</b>	<b>100.00 %</b>	

Note: Number of contracts/subcontracts analyzed is 147.

Source: Keen Independent from data on ADOT and LPA contracts, October 2013–September 2018.

**Results for MBE/WBEs on FTA-funded contracts.** MBEs only received 4.46 percent of FTA-funded contracts, less than what might be expected based on the availability analysis for MBEs for these contracts (10.84%). There were substantial disparities for all minority groups. White women-owned firms received 25 percent of contract dollars, higher than the 12 percent that might be expected based on the availability analysis for FTA-funded contracts (see Figure 6-16).

Figure 6-16.

MBE and WBE utilization and availability for FTA-funded contracts,  
October 2013–September 2018

	Utilization	Availability	Disparity index
<b>Business ownership</b>			
African American-owned	0.16 %	1.78 %	9
Asian-Pacific American-owned	0.00	0.53	0
Subcontinent Asian American-owned	0.00	0.76	0
Hispanic American-owned	4.25	6.75	63
Native American-owned	0.05	1.02	5
Total MBE	4.46 %	10.84 %	41
WBE (white women-owned)	25.06	11.99	209
<b>Total MBE/WBE</b>	<b>29.52 %</b>	<b>22.83 %</b>	<b>129</b>
Total majority-owned	70.48	77.17	91
<b>Total firms</b>	<b>100.00 %</b>	<b>100.00 %</b>	

Note: Number of contracts/subcontracts analyzed is 321.

Source: Keen Independent from data on ADOT and LPA contracts, October 2013–September 2018.

## E. Statistical Significance of Disparity Analysis Results

Testing for statistical significance relates to testing the degree to which a researcher can reject “random chance” as an explanation for any observed differences.

Random chance in data sampling is the factor that researchers consider most in determining the statistical significance of results. However, the study team attempted to contact every firm in the relevant geographic market area identified as possibly doing business within relevant subindustries (as described in Chapter 5), mitigating many of the concerns associated with random chance in data sampling as they may relate to Keen Independent’s availability analysis. The utilization analysis also approaches a “population” of contracts. Therefore, one might consider any disparity identified when comparing overall utilization with availability to be “statistically significant.”

Figure 6-17 explains the high level of statistical confidence in the utilization and availability results. As outlined on the next page, the study team also used a sophisticated statistical simulation tool to further examine statistical significance of disparity results.

Figure 6-17.

### Confidence intervals for availability and utilization measures

As described in Appendix D, Keen Independent successfully reached 4,859 business establishments in the availability survey, — a number of completed surveys that might be considered large enough to be treated as a “population,” not a sample. However, if the results are treated as a sample, the reported 23.0 percent representation of MBEs among all available firms is accurate within about  $\pm 0.9$  percentage points. The level of accuracy for WBEs is similar ( $\pm 0.8$  of the overall figure of 16.8 percent). By comparison, many survey results for proportions reported in the popular press are accurate within  $\pm 5$  percentage points. (Keen Independent applied a 95 percent confidence level and the finite population correction factor when determining these confidence intervals.)

Keen Independent attempted to collect data for all relevant ADOT and LPA Program transportation construction and engineering-related contracts during the study period and no confidence interval calculation applies for the utilization results.

**Monte Carlo analysis.** There were many opportunities in the sets of prime contracts and subcontracts for MBE/WBEs to be awarded work. Some contract elements involved large dollar amounts and others involved only a few thousand dollars.

Monte Carlo analysis was a useful tool for the study team to use for statistical significance testing in the disparity study, because there were many individual chances at winning ADOT and local agency transportation prime contracts and subcontracts during the study period, each with a different payoff. Figure 6-18 describes Keen Independent's use of Monte Carlo analysis.

**Results.** Figure 6-19 on the following page presents the Monte Carlo results for MBEs by contract funding type.

For FHWA-funded contracts, the Monte Carlo simulations did not replicate the disparities for MBEs in any of the 10,000 simulation runs. Therefore, one can be confident that chance in contract and subcontract award can be rejected as an explanation for the observed disparity for minority-owned businesses in FHWA-funded contracts. Similarly, chance cannot explain the utilization of MBEs on state- or FAA-funded contracts.

Monte Carlo analysis for FTA-funded contracts simulated utilization in 1 percent of the simulation runs, which is also so small that chance can be rejected as a possible explanation for the utilization of MBEs on FTA-funded contracts.

In addition, Figure 6-20 on the following page presents the Monte Carlo results for MBEs and WBEs, respectively, for FHWA- and state-funded contracts without goals.

It is important to note that this test may not be necessary to establish statistical significance of results (see discussion in Figure 6-18 and elsewhere in this Chapter), and it may not be appropriate for very small populations of firms.<sup>9</sup>

#### Figure 6-18. Monte Carlo analysis

The study team began the Monte Carlo analysis by examining individual contract elements. For each contract element, Keen Independent's availability database provided information on individual businesses that were 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 firm had an equal chance of "receiving" that contract element. For example, the odds of an MBE receiving that contract element were equal to the number of MBEs available for the contract element divided by the total number of firms available for the contract. The Monte Carlo simulation then randomly chose a business from the pool of available businesses to "receive" that 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 MBEs for that set of contract elements.

The entire Monte Carlo simulation was then repeated 10,000 times. The combined output from all 10,000 simulations represented a probability distribution of the overall utilization of MBEs if contracts were awarded randomly based on the availability of businesses working in the Arizona transportation contracting industry.

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<sup>9</sup> Even if there were zero utilization of a particular group, Monte Carlo simulation might not reject chance in contract awards as an explanation for that result if there were a small number of firms in that group or a small number of contract elements included in the analysis. Results can also be affected by the size distribution of prime contracts and subcontracts.

Figure 6-19.

Monte Carlo results for MBEs by contract funding type, October 2013–September 2018

	FHWA-funded	State-funded	FTA-funded	FAA-funded
Disparity index	48	41	41	33
Utilization	9.7 %	9.7 %	4.5 %	7.7 %
Number of simulations less than or equal to observed utilization	0	0	100	82
Percentage of simulations less than or equal to observed utilization	0.0 %	0.0 %	1.0 %	0.8 %
Reject chance as an explanation	Yes	Yes	Yes	Yes

Note: FHWA results include South Mountain Freeway contracts.

Source: Keen Independent from data on FHWA-, state-, FAA- and FTA-funded contracts, October 2013–September 2018.

### Statistical significance of results for FHWA- and state-funded contracts without goals.

Similar to the analyses discussed above, Keen Independent prepared Monte Carlo simulations for FHWA- and state-funded contracts without goals. One can reject chance in the procurement process for MBEs. If Coffman Specialties is counted as a majority-owned company, chance in the procurement process can be rejected as a cause of the disparity for WBEs as well. Figure 6-20 provides those results

Figure 6-20.

Monte Carlo results for MBE and WBE utilization on FHWA- and state-funded contracts without goals, October 2013–September 2018

	MBEs	WBEs
Disparity index	32	48
Utilization	8.1 %	3.8 %
Number of simulations less than or equal to observed utilization	0	2
Percentage of simulations less than or equal to observed utilization	0.0 %	0.0 %
Reject chance as an explanation	Yes	Yes

Note: FHWA results include South Mountain Freeway contracts.

Coffman Specialties is categorized as majority-owned.

Source: Keen Independent from data on FHWA- and state-funded contracts, October 2013–September 2018.



## **CHAPTER 7.**

### **Further Exploration of MBE/WBE and DBE Utilization on FHWA- and State-funded Contracts**

Building upon the analysis presented in Chapter 6, Keen Independent further examined the utilization of minority- and women-owned firms for different types and locations of ADOT contracts. Chapter 7 also reports participation of DBEs.<sup>1</sup> Results focus on FHWA- and state-funded contracts as the work involved in these two sets of contracts are similar and account for 99 percent of the dollars in the disparity study. Unless otherwise specified, results combine ADOT and LPA contracts.

Chapter 7 examines MBE/WBE and DBE utilization on FHWA- and state-funded contracts for different subsets of contracts:

- A. Construction and engineering contracts;
- B. ADOT contracts and LPA contracts;
- C. October 2013–September 2015 and October 2015–September 2018 time periods;
- D. Northern, Central and Southern regions;
- E. Prime contracts and subcontracts;

Part F builds on the analysis of MBE/WBE and DBE participation on prime contracts to assess whether there are barriers to MBE/WBE participation on ADOT construction contracts. Keen Independent presents analyses of case studies of MBE/WBE bidding on a sample of contracts.

Part G provides similar information for ADOT engineering contracts.

Part H of Chapter 7 analyzes ADOT's operation of the Federal DBE Program for FHWA-funded contracts, including examination of any overconcentration of DBE participation by type of work. The study team also identifies the DBEs during the study period that obtained the most work.

Part I summarizes results, including whether any results from the disparity analysis presented in Chapter 6 vary across the subsets of contracts considered in Chapter 7.

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<sup>1</sup> Keen Independent calculated DBE participation on ADOT contracts using a somewhat different method than ADOT did in its Uniform Reports. DBE participation reported in this disparity study pertains to utilization of firms certified by DBEs at any point during the study period. ADOT calculates DBE participation for firms certified as DBEs at the time of specific contracts. That is one reason Keen Independent calculations of DBE participation are slightly higher than what is reported for commitments/awards in ADOT's Uniform Reports.

## A. Construction and Engineering Contracts

Keen Independent analyzed whether there were differences in overall MBE/WBE participation for different types, sizes and locations of FHWA- and state-funded contracts, as shown in the following tables. These results exclude South Mountain Freeway due to the large size and unique nature of this project.

Figure 7-1 presents MBE/WBE participation for construction contracts and engineering contracts. Overall MBE/WBE participation was higher on engineering contracts (about 27%) than construction contracts (17%). Participation of DBEs was also slightly higher on engineering contracts (11%) than construction contracts (8%).

**Figure 7-1.**  
MBE/WBE and DBE share of dollars  
for FHWA- and state-funded  
construction and engineering  
contracts, October 2013–September  
2018

**Note:**

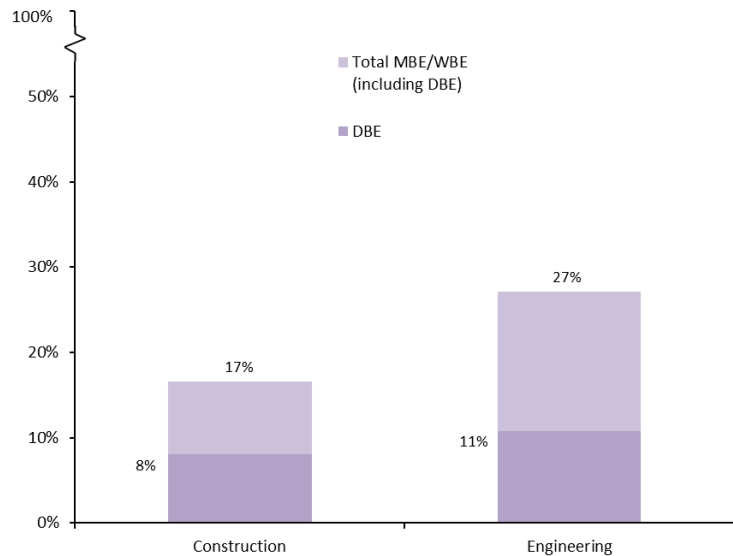
Dark portion of bar is certified DBE utilization.

Number of contracts/subcontracts analyzed is 9,045 for construction and 3,899 for engineering.

Does not include South Mountain Freeway contracts.

**Source:**

Keen Independent from data on ADOT and LPA FHWA- and state-funded prime contracts and subcontracts, October 2013–September 2018.



## B. Utilization in ADOT Contracts and Local Public Agency Contracts

Most of the FHWA- and state-funded transportation contracts examined in this disparity study were for ADOT projects (\$2.9 billion out of the \$3.2 billion in contract dollars analyzed). Other contracts totaling \$0.2 billion are for local public agencies (LPAs). Keen Independent researched whether local public agency projects had a similar level of MBE/WBE and DBE participation as ADOT projects. (Note that eight large cities and counties bid and award their own LPA contracts, but ADOT handles LPA contracts on behalf of smaller public agencies.)

As shown in Figure 7-2, DBE participation on ADOT contracts was slightly lower (8%) than in LPA contracts (9%). Overall MBE/WBE utilization was higher on LPA projects (30%) than on ADOT projects (17%).

**Figure 7-2.**  
MBE/WBE and DBE share of dollars  
for FHWA- and state-funded ADOT  
and LPA projects, October 2013–  
September 2018

**Note:**

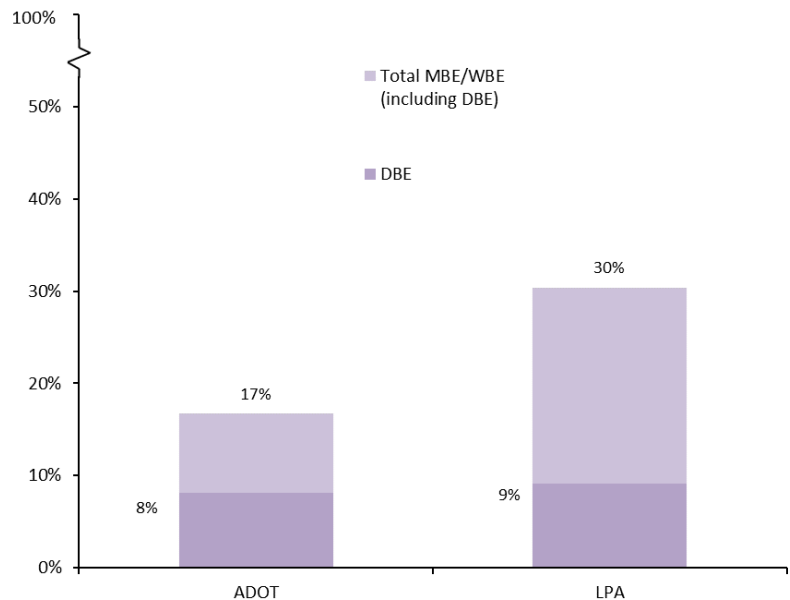
Dark portion of bar is certified DBE utilization.

Number of contracts/subcontracts analyzed is 11,711 for ADOT contracts and 1,722 for LPA contracts.

Does not include South Mountain Freeway contracts.

**Source:**

Keen Independent from data on ADOT and LPA FHWA- and state-funded prime contracts and subcontracts, October 2013–September 2018.



### C. Utilization in October 2013–September 2015 and October 2015–September 2018 Time Periods

Keen Independent analyzed whether overall MBE/WBE participation changed between the first two years and the last three years of the study period. As shown in Figure 7-3, MBE/WBE participation was slightly higher on contracts from October 2015 through September 2018 than on contracts from October 2013 through September 2015. The percentage DBE participation was higher for September 2015 to October 2018 contracts (9%) than earlier contracts (7%).

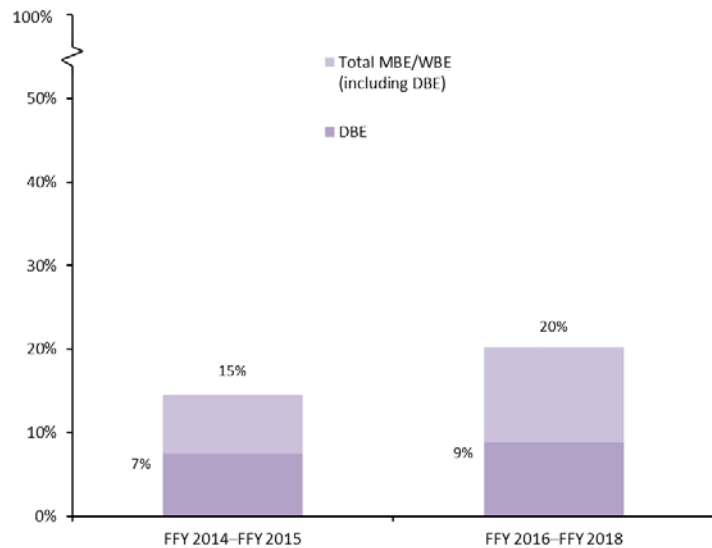
Figure 7-3.  
MBE/WBE and DBE share of dollars  
for FHWA- and state-funded  
contracts awarded October 2013–  
September 2015; and  
October 2015–September 2018

**Note:**

Dark portion of bar is certified DBE utilization.  
Number of contracts/subcontracts analyzed is  
6,076 for October 2013–September 2015 and  
7,357 for October 2015–September 2018.  
Does not include South Mountain contracts.

**Source:**

Keen Independent from data on ADOT and LPA  
FHWA- and state-funded prime contracts and  
subcontracts, October 2013–September 2018.



## D. Utilization in Northern, Central and Southern Regions

Figure 7-4 shows that utilization of minority- and women-owned firms was highest in Central Arizona at 21 percent compared to 14 percent in the Southern Arizona and Northern Arizona (results do not include South Mountain Freeway). However, DBE utilization was similar across the regions (8%).

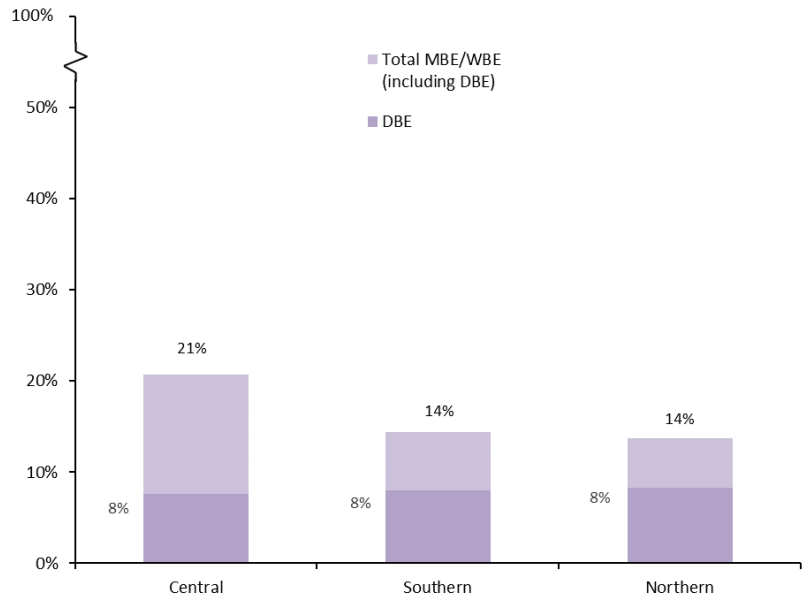
**Figure 7-4.**  
MBE/WBE and DBE share of dollars  
for FHWA- and state-funded  
contracts in Northern, Central and  
Southern regions

**Note:**

Dark portion of bar is certified DBE utilization.  
Number of contracts/subcontracts analyzed is 6,974 for Central Arizona, 3,227 for Southern Arizona and 4,467 Northern Arizona.  
Does not include South Mountain contracts.

**Source:**

Keen Independent from data on ADOT and LPA FHWA- and state-funded prime contracts and subcontracts, October 2013–September 2018.



## E. Utilization in Prime Contracts and Subcontracts

Figure 7-5 shows that MBE/WBEs obtained about 35 percent of ADOT subcontract dollars on FHWA- and state-funded contracts, with DBEs accounting for about two-thirds of this amount (23 percentage points).

MBE/WBEs received 9 percent of prime contract dollars.<sup>2</sup> Only 1 percent of prime contract dollars went to certified DBEs.

**Figure 7-5.**  
MBE/WBE and DBE share of dollars  
for FHWA- and state-funded prime  
contracts and subcontracts

**Note:**

Dark portion of bar is certified DBE utilization.

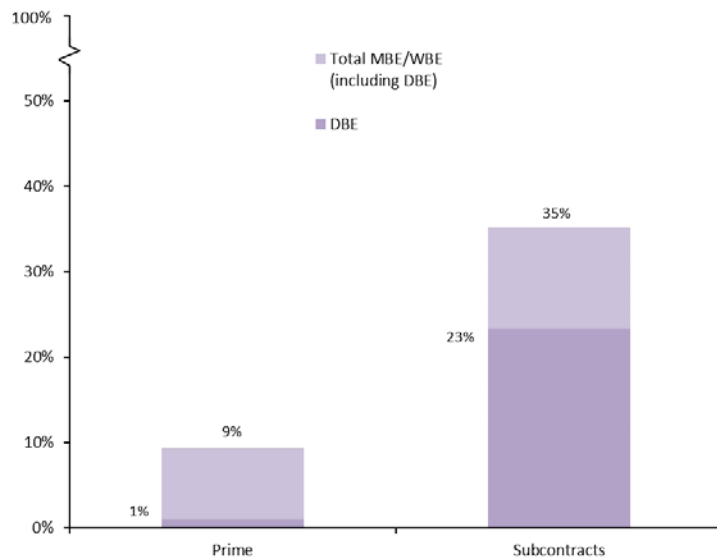
Number of prime contracts analyzed is 2,224.

Number of subcontracts analyzed is 11,209.

Does not include South Mountain contracts.

**Source:**

Keen Independent from data on ADOT and LPA FHWA- and state-funded prime contracts and subcontracts, October 2013–September 2018.



<sup>2</sup> The study team analyzed dollars going to prime contractors based on amounts retained by prime contractors after subtracting the value of subcontracts.

Keen Independent also analyzed MBE/WBE and DBE participation on large and small prime contracts during the October 2013 through September 2018 study period:

- MBE/WBEs received 9.2 percent of prime contract dollars on large contracts (\$100,000 or more); and
- On small contracts, 25.6 percent of prime contract dollars went to minority- and women-owned firms.

Figure 7-6.

MBE/WBE and DBE share of dollars for FHWA- and state-funded prime contracts by size of contract, October 2013 through September 2018

	FHWA- and state-funded large prime contracts			FHWA- and state-funded small prime contracts		
	Number of procurements*	\$1,000s	Percent of dollars	Number of procurements*	\$1,000s	Percent of dollars
<b>MBE/WBEs</b>						
African American	2	\$ 0	0.0 %	1	\$ 0	0.0 %
Asian-Pacific American-owned	14	13,838	0.7	13	713	3.1
Subcontinent Asian American-owned	6	3,611	0.2	13	348	1.5
Hispanic American-owned	77	63,034	3.0	36	1,326	5.8
Native American-owned	2	570	0.0	4	266	1.2
Total MBE	101	\$ 81,054	3.8 %	67	\$ 2,653	11.6 %
WBE (white women-owned)	114	113,047	5.3	114	3,214	14.0
<b>Total MBE/WBE</b>	<b>215</b>	<b>\$ 194,101</b>	<b>9.2 %</b>	<b>181</b>	<b>\$ 5,867</b>	<b>25.6 %</b>
Total majority-owned	1,194	1,925,046	90.8	634	17,061	74.4
<b>Total</b>	<b>1,409</b>	<b>\$ 2,119,147</b>	<b>100.0 %</b>	<b>815</b>	<b>\$ 22,928</b>	<b>100.0 %</b>
<b>DBEs</b>						
African American	0	\$ 0	0.0 %	1	\$ 0	0.0 %
Asian-Pacific American-owned	9	9,888	0.5	6	395	1.7
Subcontinent Asian American-owned	0	0	0.0	5	127	0.6
Hispanic American-owned	13	3,722	0.2	21	461	2.0
Native American-owned	2	570	0.0	4	266	1.2
Total MBE	24	\$ 14,180	0.7 %	37	\$ 1,249	5.4 %
WBE (white women-owned)	26	\$ 3,810	0.2 %	65	\$ 1,725	7.5 %
White male-owned DBE	0	0	0.0	0	0	0.0
<b>Total DBE-certified</b>	<b>50</b>	<b>\$ 17,991</b>	<b>0.8 %</b>	<b>102</b>	<b>\$ 2,974</b>	<b>13.0 %</b>
Non-DBE	1,359	2,101,157	99.2	713	19,954	87.0
<b>Total</b>	<b>1,409</b>	<b>\$ 2,119,147</b>	<b>100.0 %</b>	<b>815</b>	<b>\$ 22,928</b>	<b>100.0 %</b>

Note: Number of contracts/subcontracts analyzed is 1,409 large prime contracts and 815 small prime contracts.

Does not include South Mountain Freeway contracts.

Coffman Specialties is counted as a white women-owned firm.

Source: Keen Independent from data on FHWA- and state-funded prime contracts and subcontracts, October 2013–September 2018.

## **F. Analysis of Potential Barriers to MBE/WBE/DBE Participation in ADOT Construction Contracts**

Keen Independent analyzed participation of minority- and women-owned firms as prime contractors on ADOT construction contracts during the October 2013 through September 2018 study period.

### **Utilization of MBE/WBEs and DBEs as prime contractors on ADOT construction contracts.**

Minority- and women-owned firms won 137 or 15 percent of the 929 FHWA- and state-funded construction prime contracts during the study period. Because MBE/WBEs won smaller contracts, on average, MBE/WBEs only received 7.6 percent of construction prime contract dollars, or \$132 million out of \$1.7 billion of the dollars retained by prime contractors (i.e., not subcontracted).

DBEs won 11 construction prime contracts totaling \$750,000 during the study period (0.04% of the total dollars).

**ADOT bid process for construction contracts.** ADOT awards construction contracts to low bidders (that are deemed responsive and responsible). It is possible that some aspects of the bidding process present barriers to small business participation as prime contractors, including for MBE/WBEs.

Keen Independent examined ADOT requirements for bidding on its construction contracts, processes for notifying potential bidders of construction contract opportunities, and methods for selecting a prime contractor to perform the work in order to explore this possibility.

**State code.** Arizona Revised Statutes Title 34 and Arizona Administrative Code Title 17 govern public construction and services ancillary to that mission, such as consulting. ADOT follows these requirements and other state law pertaining to public works contracts in its contracting practices.

**Bonding.** Bid, payment and performance bonds are required under Arizona state law for public works contracts. (Bid bonds are required to be 10 percent of the proposed bid.) In-depth interviews with business owners and managers and the results of the availability interviews with Arizona businesses identified bonding as a barrier for small businesses (see Chapter 4 and Appendix J).

**Advertisement of invitations to bid.** Public bidding of ADOT construction contracts is generally required by Arizona state law. ADOT advertises construction contract bid opportunities on its website. Private bid services such as BidExpress may also provide information on ADOT contracts that are available to bid.

It does not appear difficult to learn of ADOT contract opportunities if potential bidders are familiar with ADOT's process for communicating those opportunities. However, when surveyed, WBEs were much more likely than majority-owned firms to report difficulties learning about ADOT bid opportunities (and local agency bid opportunities).



**Bid process.** Firms seeking to bid on ADOT construction prime contracts follow the process below:

- The firm must be prequalified for ADOT projects, and for a project of the appropriate size;
- The firm must obtain project and bidding materials from ADOT; and
- The firm must submit a bid, typically through ADOT's electronic bidding system.

Prequalification is discussed below.

**Prequalification requirement for construction prime contractors.** Any firm wishing to bid as a prime contractor on an ADOT construction project must first be prequalified (unless waived by ADOT). To become prequalified, a firm must submit a prequalification application, which is assessed by a Contractor Prequalification Board comprised of ADOT employees.

The prequalification application requires:

- General information about the firm;
- A financial statement from a public accountant;
- A statement of experience containing details of completed projects;
- Company licenses;
- A table of construction equipment owned or controlled by the company; and
- Other information about the company.

Applications for prequalification must be submitted at least 15 calendar days prior to the bid opening date of a project a contractor wishes to bid to allow time for their prequalification application to be reviewed and either approved or denied. Once approved, prequalification is valid for fifteen months from the date of the submitted financial statement.

Should the Contractor Prequalification Board approve a firm's prequalification application, it then set a prequalification limit — the dollar limitation of each contract, based on the Department's estimate of contract value, for which a contractor may submit a proposal to the Department.

Prequalification limits are determined based on:

- The contents and nature of the submitted financial statement, including net worth (and whether the company's financial statements have been reviewed or whether they have been examined by its independent accountant);
- The amount of experience the firm has with transportation construction for public agencies;
- Experience with ADOT;
- Additional assets pledged in behalf of a contractor or letters from a contractor's surety company;
- Any past unsatisfactory work performance record with ADOT or defaults on a previous contract with any public agency; and
- Other information in the prequalification application that the Board deems relevant.

Terms such as “unknown firm” [to ADOT] and “known firm” [to ADOT] are used in the prequalification rules because Arizona Administrative Code R17-3-202 gives preference in prequalification limits to firms that have completed a construction contract for ADOT in the past five years. (If so, the firm might be given a prequalification limit up to twice as high as firms that have not.) The factor that considers past experience with ADOT may perpetuate advantages to firms that have been successful in obtaining ADOT construction contracts in the past.

**Analysis of bids on ADOT construction contracts.** Keen Independent analyzed bid information for a sample of 127 ADOT construction contracts from October 2013 through September 2018 (see Appendix C for a description of this methodology). In total, 453 bids were submitted for these 127 contracts. MBE/WBEs submitted 51 of the 453 bids:

- A total of 18 bids on these prime contracts (4% of all bids) came from minority-owned firms (four different firms); and
- Thirty-three bids (7% of all bids) came from WBEs (six different firms).

The proportion of bids from MBEs and WBEs was low compared with the share of firms available for prime construction contracts that were MBEs (26%) and WBEs (10%).<sup>3</sup>

Figure 7-7.

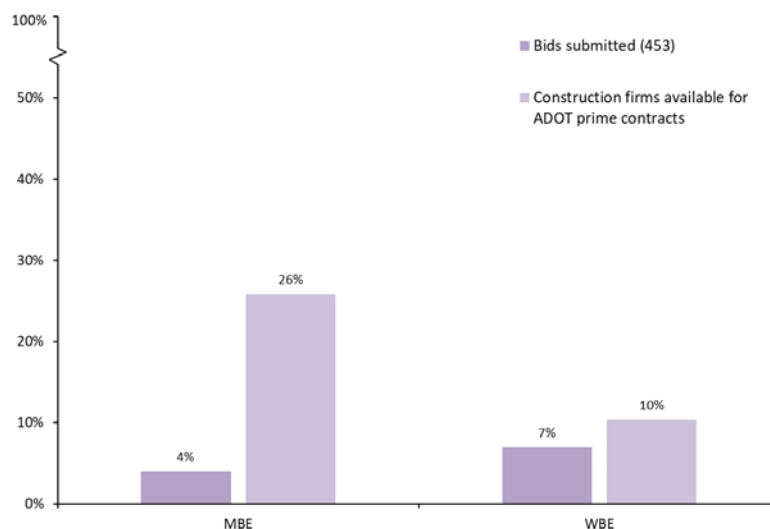
MBE/WBE bids as a share of total bids submitted on ADOT construction contracts

Note:

Based on analysis of 453 bids on 127 contracts with the October 2013–September 2018 study period. Does not include South Mountain contracts.

Source:

Keen Independent Research from ADOT contract records.



There is also some indication that minority-owned firms that did bid on ADOT construction contracts were less likely to be successful than other firms. As shown in Figure 7-8, 11 percent of the bids submitted by MBEs resulted in contract awards, below the 39 and 28 percent win rate found for WBEs and majority-owned firms bidding on ADOT contracts.

<sup>3</sup> Note that this is based on a count of firms identified in the availability analysis that were available for ADOT construction prime contracts; it is not dollar-weighted.

The analysis does not indicate that MBE bids were unfairly treated by ADOT; it may be that MBEs were less price-competitive. However, if this difference in winning percentage persisted for all contracts, not just the sample of 127, it might lead to discouragement of bids from minority-owned firms.

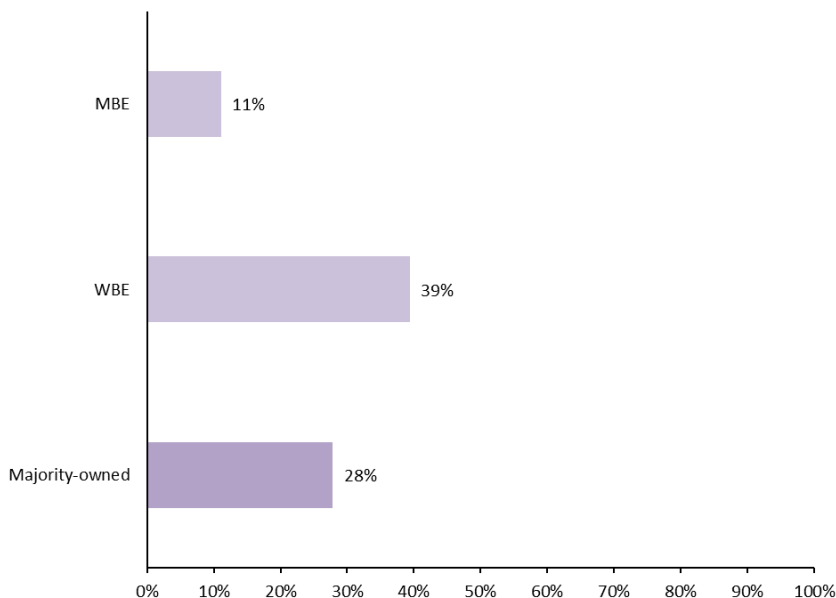
**Figure 7-8.**  
**Percentage of bids that results**  
**in contract awards on ADOT**  
**construction contracts**

**Note:**

Can also be interpreted as “odds of winning” based on analysis of 453 bids on 127 contracts within the October 2013–September 2018 study period.

**Source:**

Keen Independent Research from ADOT contract records.



## **G. Analysis of Potential Barriers to MBE/WBE/DBE Participation in ADOT Engineering Prime Contracts**

Keen Independent also explored participation of minority- and women-owned firms in the 1,019 engineering prime contracts during the study period (FHWA- and state-funded only).

### **Utilization of MBE/WBEs and DBEs as prime consultants on ADOT engineering contracts.**

Minority- and women-owned firms were awarded 234 of the engineering prime contracts, or 23 percent of the total number of contracts. About \$63 million in prime contract dollars (after deducting subcontracts) went to MBE/WBEs, 21 percent of total prime contract dollars for engineering contracts.

- DBEs won 134 of these prime contracts. DBEs accounted for 6.4 percent of the total prime contract dollars examined (\$19 million of the \$302 million total prime contract dollars for these contracts).
- In fact, engineering prime contract dollars going to DBEs exceeded the construction prime contract dollars awarded to DBEs (\$750,000), even though there was almost six times more construction prime contract dollars than engineering prime contract dollars in the study period.

However, it is instructive to note that just 2 percent of engineering contract dollars went to white women-owned firms and 17 percent went to minority-owned companies. WBEs did not appear to be as successful as MBEs in obtaining engineering prime contracts. This was largely because of relatively small prime contract amounts for WBEs (\$84,000 in average retained dollars per prime contract) compared with other minority firms (\$474,000 in average retained dollars per prime contract).

**ADOT contract award process for engineering contracts.** ADOT uses a Qualification-Based Selection (QBS) process to award engineering contracts. The QBS process requires consulting firms to first prequalify, then submit Statement of Qualifications (SOQ) for specific projects, at which point they are competitively evaluated by a Consultant Selection Panel. ECS is the responsible party for ensuring that the procedures and the administration of contracts are compliant with applicable State and Federal regulations. ECS facilitates the advertisement/solicitation, selection, negotiation, execution, management and administration of professional architectural and engineering services contracts.

Firms competing for ADOT engineering contracts must first be prequalified by ADOT. ADOT begins a new prequalification period every two years, and firms that apply during that time will be prequalified for that period. According to the ADOT website, firms' applications are rarely, if ever, entirely rejected.

Consultants seeking ADOT prequalification must specify their general class of work (i.e., bridge design) and their "area classes." ADOT considers firm qualifications based on specific area class (often for multiple area classes) and may approve a firm for some area classes and not others. Prequalification for consultants typically takes up to ten business days.

The prequalification application is both completed and submitted online using ADOT's electronic Contract Management System (eCMS). The prequalification application requires:

- General information about the firm;
- Information about the specific area classes the firm, and each key member of the firm, are qualified to perform;
- Information about past projects the firm has completed; and
- Other various information.

Prequalification for engineering contracts does not necessarily mean that a firm will receive ADOT work. Once they are prequalified for specific area classes, firms must submit a SOQ for specific ADOT contracts. A prime consultant's qualifications can be supplemented by subconsultants participating in a team and only firms seeking to be prime consultants require prequalification.

**Prequalification.** Compared to ADOT's prequalification of construction contractors, which focuses on the *amount* of work ADOT will allow a contractor to perform at one time, ADOT's consultant prequalification process focuses on the *types* of work it will allow a firm to conduct.

The Consultant Selection Panel evaluates, selects and negotiates the SOQs including the project scope of work, schedule, consultant fee, etc. Each member of the panel conducts an independent evaluation of each firm and gives each proposal a score based upon their evaluation. The scoring rubric is included in the request for SOQs. Evaluation criteria and total number of points available change from project to project, but the ADOT panel typically evaluates consultants based on the following criteria:

- **Project understanding and approach.** One of the evaluation factors is how successfully, clearly and precisely the consultant expressed an understanding of the nature and scope of work and the major tasks and issues as well as how well they identified any problems they are likely to encounter.
- **Experience and qualifications.** Evaluators consider the experience and qualifications of the proposed consultant team considering the scope of the project, work classes involved and ADOT policies.
- **Firm capability.** ADOT reviews the ability of the firm to do the work, including specialized qualifications and the capacity of the consultant team to accomplish the work given current staff workloads.
- **Past performance.** A consultant's performance is regularly evaluated while completing a project for ADOT and a poor evaluation score on that project may result in up to five points being deducted from their score during the selection process.

Other factors, such as the firm's availability or current workload may also be considered.

In some cases, an oral-interview process may be outlined in the Request for Qualifications (RFQ), in which case ADOT may choose to interview all proposers or only the three highest-ranked proposers. Each panel member considers interviews in the overall score.

Once all proposals have been independently scored by all panel members and any interviews have been conducted, the panel meets to discuss the scoring. Panel members may at this point adjust their scoring based on the discussion. Scores are then compiled, and firms are ranked based on the highest to lowest average score. Firms must score at least 70 percent of the maximum available points in order to be eligible for award of the contract. The firm with the highest average score is awarded the contract. All participants are notified of the award within five business days.

Procedures are in place if consultants wish to protest an award. All firms that submitted a proposal are entitled to review the scores and proposals of the firm(s) selected for the contract.

In accordance with regulations regarding qualifications-based procurement, ADOT negotiates price after the consultant is selected.

**Analysis of proposals on ADOT engineering contracts.** Keen Independent analyzed the relative number of proposals submitted by MBEs and WBEs for a sample of engineering contracts during the study period.

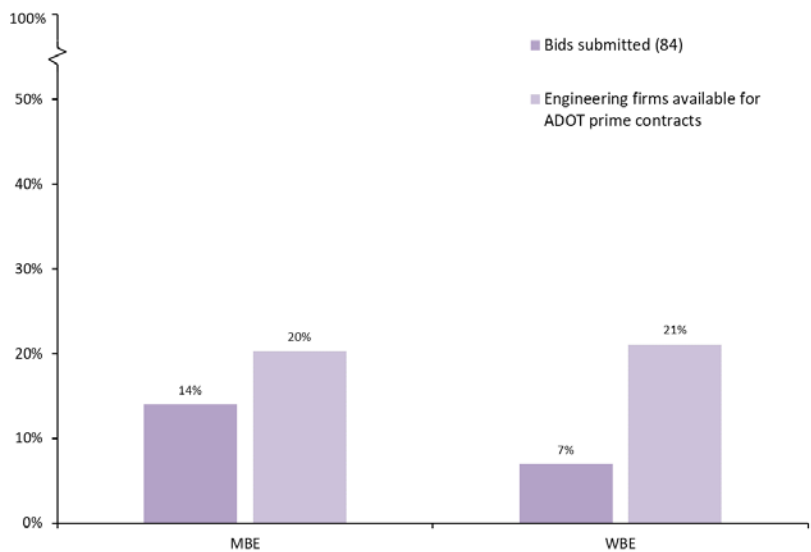
The study team was able to collect and analyze proposal evaluation data for 24 ADOT engineering projects for contracts executed during the study period. Of the 84 proposals submitted, 12 (14%) were submitted by MBEs and 6 (7%) were submitted by WBEs.

Based on the availability analysis, 20 percent of companies available for ADOT engineering prime contracts were MBEs and 21 percent were WBEs. The relative number of proposals for minority- and women-owned firms appears lower than what might be expected from their relative availability for this work. Figure 7-9 displays these results.

Figure 7-9.  
MBE/WBE proposals as a share  
of total proposals submitted on a  
sample of ADOT engineering  
contracts

Note:  
Based on analysis of 84 proposals on  
24 contracts within the October 2013–  
September 2018 study period.

Source:  
Keen Independent Research from ADOT  
contract records.



In the 24 sampled engineering contracts, WBEs submitted six proposals and were awarded one project. Therefore, the success rate for WBEs was 17 percent, as shown in Figure 7-10. Four of the 12 proposals from MBEs resulted in a contract award (33% success).

Figure 7-10.

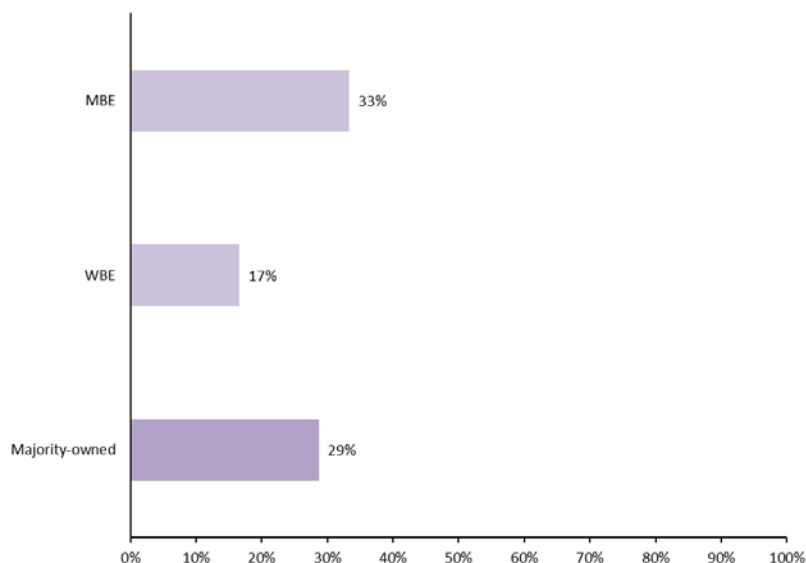
Proportion of proposals that resulted in ADOT contract awards

Note:

Can also be interpreted as “odds of winning” based on analysis of 84 proposals bids on 24 contracts randomly sampled within the October 2013–September 2018 study period.

Source:

Keen Independent Research from ADOT contract records.



## H. ADOT Operation of the Federal DBE Program, Including Overconcentration Analysis

This part of Chapter 7 examines:

- ADOT’s operation of the DBE contract goals program;
- Any overconcentration of DBEs;
- Participation of individual DBEs in ADOT contracts;
- DBE participation as prime contractors; and
- Race- and gender-neutral efforts.

**DBE contract goals program.** The Federal DBE Program provides for recipients of FHWA, FAA and FTA funds to set an overall goal for DBE participation and use DBE contract goals to meet any portion of their overall goal they do not project being able to meet using race-neutral means.<sup>4</sup> However, federal regulations direct those operating the program to reduce or eliminate the use of contract goals to ensure that they do not result in exceeding the overall goal.<sup>5</sup>

<sup>4</sup> 49 CFR Section 26.51(d).

<sup>5</sup> 49 CFR Section 26.51(f)(2). And, if an agency exceeds its overall goal in two consecutive years through the use of contract goals, it must reduce its use of contract goals proportionately in the following year (see 49 CFR Section 26.51(f)(4)).

Because of the *Western States Paving* court decision in 2005 and subsequent guidance from USDOT, ADOT did not set DBE contract goals from January 2006 through fall 2010 (see Chapter 2 for further explanation). Since that time, ADOT has set DBE contract goals for some of its FHWA-funded construction and engineering-related contracts, but not its FAA- and FTA-funded contracts. Keen Independent briefly reviews ADOT's application of DBE contract goals here.

**Federal regulations governing use of DBE contract goals.** The Federal DBE Program outlines proper use of DBE contract goals, including:

- Only setting DBE contract goals on USDOT-funded contracts that have subcontracting possibilities;<sup>6</sup>
- Not having to set a DBE contract goal on every USDOT-funded contract;<sup>7</sup>
- The fact that a DBE goal for a specific contract is set separately from the overall DBE goal, and that it may be higher or lower than the overall goal depending on factors such as the type of work involved, the location of the work and the availability of DBEs for the work of the particular contract;<sup>8</sup> and
- A DBE contract goal should not be divided into subgoals for specific DBE groups.<sup>9</sup>

Bidders or proposers comply with a DBE contract goal by making good faith efforts to meet it. A bidder or proposer can show this in one of two ways:

1. By showing it has obtained enough DBE participation to meet the contract goal; or
2. Documenting that it made adequate good faith efforts to meet the goal, even though it did not succeed in doing so.<sup>10</sup>

Federal regulations allow for an agency to require such information at time of bid or proposal or up to five days after bid opening.<sup>11</sup> The regulations provide for some flexibility for what a proposer needs to provide under negotiated procurements such as design-build contracts.<sup>12</sup> Regulations also establish procedures for calculating the value of the DBE participation for specific types of subcontractors and suppliers.<sup>13</sup> For example, only if a DBE performs a “commercially useful function” can it be counted toward the goal.

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<sup>6</sup> 49 CFR Section 26.51(e)(1).

<sup>7</sup> 49 CFR Section 26.51(e)(2).

<sup>8</sup> Ibid.

<sup>9</sup> 49 CFR Section 26.51(e)(4).

<sup>10</sup> 49 CFR Section 26.53(a).

<sup>11</sup> 49 CFR Section 26.53(b)(3)(i).

<sup>12</sup> 49 CFR Section 26.53(b)(3)(ii).

<sup>13</sup> 49 CFR Section 26.55.



If the agency determines that a bidder or proposer did not make good faith efforts to meet the contract goal, it must provide that bidder or proposer an opportunity for administrative reconsideration.<sup>14</sup>

Once the prime contractor has identified a DBE subcontractor to meet a contract goal, it may not terminate that DBE or substitute another DBE without the agency's prior consent. An agency may only give such consent if there is good cause for terminating the listed DBE (federal regulations provide direction on what constitutes "good cause").<sup>15</sup>

**ADOT operation of DBE contract goals program.** ADOT uses DBE contract goals for FHWA-funded contracts in compliance with the federal regulations in 49 CFR Part 26. Key features are described below.

- ADOT sets DBE contract goals on a contract-by-contract basis. It sometimes sets goals higher than its overall DBE goal for FHWA-funded contracts and sometimes sets goals lower than its overall goal. On some contracts, it does not set a DBE contract goal.<sup>16</sup> ADOT does not divide a DBE contract goal by DBE group, in accordance with federal regulations.
- ADOT uses goal-setting methodology that considers the types of work involved in a contract, location of the contract, size of the contract, availability of DBEs for specific types of work and other factors (encompassing each of the factors listed in federal regulations concerning setting DBE contract goals<sup>17</sup>). It only considers currently certified DBEs when establishing a DBE contract goal. As an example of "other factors," ADOT can reduce a contract goal for pavement preservation projects or other types of contracts where it is more difficult to obtain DBE participation.

ADOT's Business Engagement and Compliance Office (BECO) is responsible for proposing an initial DBE contract goal through the quantitative and qualitative factors described above (using a committee structure). BECO then submits the goal to the contracting department, which can request reconsideration of a DBE contract goal if necessary. (This process is also applied for local agency contracts using FHWA funds.) ADOT developed this approach and factors it considers in goal-setting through consultation with DBEs, large prime contractors and others.

- ADOT has a process for considering good faith efforts submissions from any bidder or proposer that is unable to meet the DBE contract goal. Bidders on construction contracts almost always meet the DBE contract goal; they very rarely attempt to comply with the program by showing good faith efforts to meet a goal that they were unable to meet.

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<sup>14</sup> 49 CFR Section 26.53(d).

<sup>15</sup> 49 CFR Section 26.53(f)(1).

<sup>16</sup> Based on discussions with ADOT staff and review of ADOT goal-setting procedures.

<sup>17</sup> 49 CFR Section 26.53(e)(2).

- For engineering on-call contracts, ADOT informs proposers on these contracts of an overall DBE goal for the contract and that they will be required to meet it or make good faith efforts to do so as they perform specific task orders under the contract. Since prime consultants do not know the exact scope of work for task orders they will receive when they are awarded a contract, they can augment their teams of subconsultants to meet a DBE goal for a task order. Prime consultants can indicate they cannot meet a DBE goal on a task order even though they made good faith efforts to do so. When they do, ADOT works with a prime consultant to comply with the DBE goal for the task order.
- In sum, it appears that ADOT has procedures in place to effectively set DBE contract goals and consider bidders' and proposers' good faith efforts to meet those goals.

**Analysis of any overconcentration of DBEs.** The Federal DBE Program requires agencies implementing the program to take certain steps if they determine that “DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work” (see 49 CFR Section 26.33(a)). The Federal DBE Program does not specifically define “overconcentration.”

Keen Independent examined the representation of DBEs and work going to DBEs in three ways:

1. Share of ADOT contract dollars within a type of work going to DBEs;
2. Distribution of DBE dollars by work type; and
3. Representation of DBEs among all firms available for specific types of contracts and subcontracts.

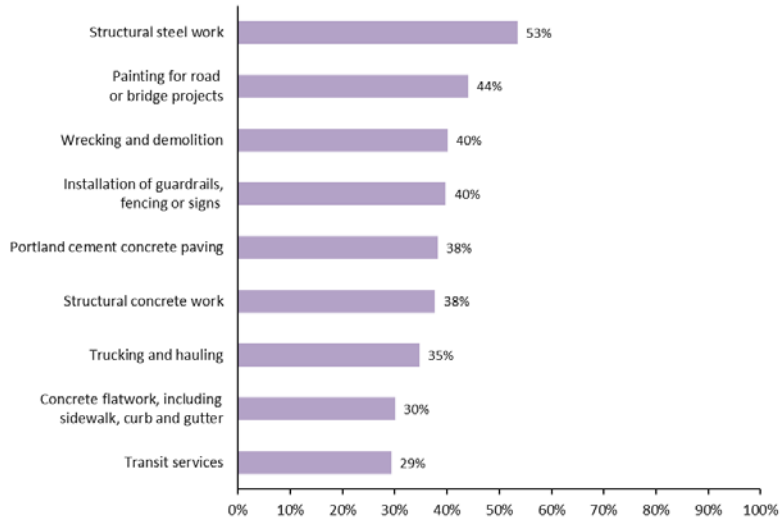
**Share of ADOT contract dollars within a type of work going to DBEs.** For each specific type of work examined in the study, the study team calculated the share of dollars going to firms certified as DBEs at any time during the study period. Figure 7-11 shows that DBEs accounted for more than 30 percent of the total work in seven types of work. Steel work shows the highest percentage of DBE participation (53%) due to dollars received by Paradise Rebar and Endo Steel.

Within the study period, 44 percent of road and bridge project painting contract dollars, 40 percent of wrecking and demolition contract dollars, 40 percent of guardrail, fencing and sign installation contract dollars and 38 percent of Portland cement concrete paving contract dollars were awarded to DBEs.

Figure 7-11.  
DBE share of total contract  
dollars on FHWA-, state-, FAA-  
and FTA-funded contracts,  
October 2013–September 2018

Note:  
Number of prime contracts/subcontracts  
analyzed is 13,901.  
Does not include South Mountain  
Freeway contracts.

Source:  
Keen Independent Research from ADOT  
contract records.



**Distribution of DBE contract dollars across types of work.** Another way to examine potential overconcentration of DBEs is whether DBE participation is only found in certain types of work. That might be another indicator that DBE contract goals overly burden non-DBEs in those subindustries.

In the study period, steel work accounted for 17 percent of DBE participation, trucking and hauling was 11 percent of DBE dollars and 10 percent of DBE participation came from architecture and engineering and from guardrail, signs and fencing installation. Twenty-nine other types of work individually represented between 1 and 6 percent of DBE dollars, indicating broad participation of DBEs across types of work. This minimizes the possibility that any particular type of non-DBE is unduly burdened by the DBE contract goals program. Figure 7-12 presents these results.

Figure 7-12.  
DBE share of total  
contract dollars on  
FHWA-, state-, FAA- and  
FTA-funded contracts,  
July 2007–June 2013

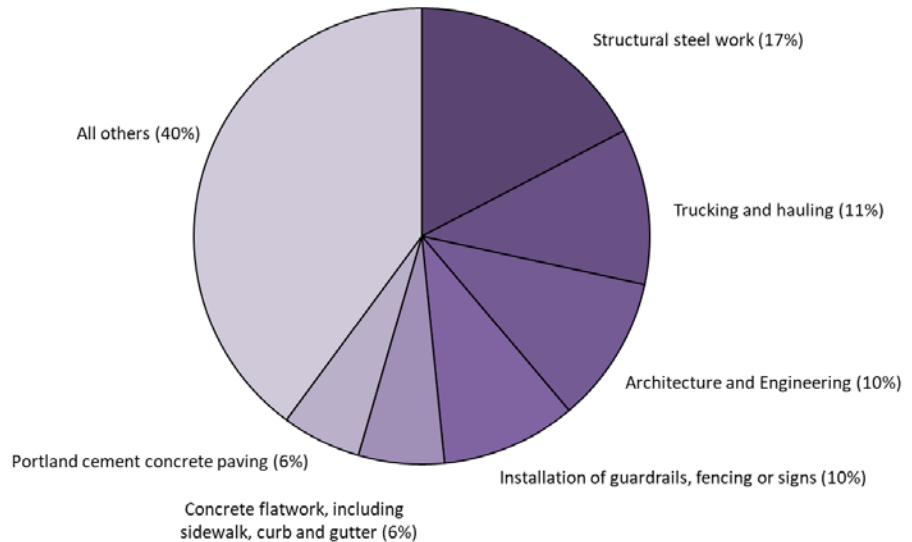
Note:

Number of prime  
contracts/subcontracts analyzed  
is 13,901.

Does not include South  
Mountain Freeway contracts.

Source:

Keen Independent Research  
from ADOT contract records.



**Representation of DBEs among firms available for particular types of contracts or subcontracts.**

Finally, Keen Independent analyzed whether DBEs accounted for a dominant share of firms available for particular types, sizes or locations of ADOT prime contracts and subcontracts. The study team performed this analysis by:

- Determining the number of DBEs and total firms available for each prime contract and subcontract examined in the study.
- Divided the number of DBEs by total firms for each contract and subcontract to calculate the percentage of available firms for each contract that were DBEs (i.e., DBE representation = number of available DBEs ÷ total number of available firms).

There were a few types of contracts for which DBEs represented 20 percent of the firms in the availability database matching that work, location and contract size, but none where DBEs were more than 20 percent of available firms. Based on firms in the availability analysis for this disparity study, DBEs did not constitute a dominant portion of firms available for any type of ADOT work.

**Participation of individual DBEs in ADOT contracts.** Seven DBEs accounted for more than one-half of the total FHWA-funded contract dollars going to DBEs during the study period.

Figure 7-13.

DBEs accounting for the most dollars of FHWA-funded contracts, October 2013–September 2018

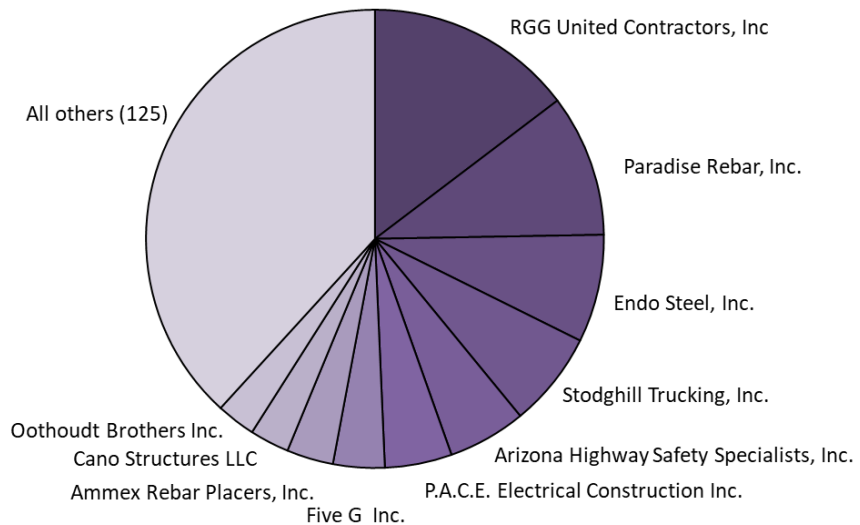
Note:

Number of prime contracts/subcontracts analyzed is 11,909.

Does not include South Mountain Freeway contracts.

Source:

Keen Independent Research from ADOT contract records.



**DBE participation as prime contractors.** Keen Independent examined the FHWA-funded prime contracts that were awarded to DBE prime contractors.

The study team analyzed the 117 FHWA-funded prime contracts that went to DBE prime contractors. Five firms — Premier Engineering Corporation, NFra, Stormwater Plans, DEIH and United Civil Group — accounted for more than two-thirds of these contract dollars. There were 16 other DBEs that won as prime contractors for FHWA-funded contracts, but in total accounted for relatively small dollars of those contracts.

**Race- and gender-neutral efforts.** Race- and gender-neutral programs are a major component of the Federal DBE Program. Federal regulations in 49 CFR Section 26.51(b) provide examples of race-neutral means of facilitating DBE participation, which we summarize below:

1. Arranging solicitations, times for the presentation of bids, quantities, specifications and delivery schedules in ways that facilitate participation by DBEs and other small businesses;
2. Providing assistance in overcoming limitations such as inability to obtain bonding or financing;
3. Providing technical assistance and other services;
4. Carrying out information and communications programs on contracting procedures and specific contract opportunities;

5. Implementing a supportive services program to develop and improve immediate and long-term business management, recordkeeping, and financial and accounting capability for DBEs and other small businesses;
6. Providing services to help DBEs, and other small business, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;
7. Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;
8. Ensuring distribution of a DBE directory; and
9. Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

In addition, agencies such as ADOT must have prompt payment mechanisms (requiring prime contractor payment of subcontractors within 30 days from receipt of each payment made to the prime contractor).<sup>18</sup>

Agencies must also have a program element that fosters competition by small business concerns, taking steps such as eliminating unnecessary bundling of contract requirements.<sup>19</sup> Other small business program elements can be:

- Establishing a small business set-aside for prime contracts;
- Requiring bidders on multi-year design-build contractors or other large contracts to specify elements of the contract that are of a size that small businesses, including DBEs, can reasonably perform;
- On projects not having DBE contract goals requiring prime contractors to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work;
- Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs to compete for and perform prime contracts; and
- Ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.

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<sup>18</sup> 49 CFR Section 26.29.

<sup>19</sup> 49 CFR Section 26.39.

In addition, the Federal DBE Program provides guidance on establishing a mentor-protégé program to further the development of DBEs.<sup>20</sup>

The study team's review of ADOT neutral initiatives identified efforts across many of these areas. In addition, other groups in Arizona provide assistance that ADOT can leverage for DBE and other small business contractors and consultants.

**1. Bid notification and bidding/proposal process to encourage participation of DBEs and other small business.** ADOT has made substantial efforts to provide information of any firm interested in potential prime contracts and subcontracts.

- By visiting ADOT's website, firms interested in working as prime contractors or subcontractors on ADOT construction contracts can obtain:
  - Information about currently available construction projects;
  - Information about future projects;
  - Lists of companies that are plan holders for contracts out for bid (especially useful for subcontractors and suppliers); and
  - Lists of firms that are prequalified with ADOT (also useful to subcontractors and suppliers).
- Companies can also receive email notifications about current projects. Having an account at BidExpress allows companies to receive emails about current and upcoming project that may interest them. (Note that BidExpress is not a free service.)
- ADOT operates the AZ UTRACS web portal for online Bidder's List/Vendor Registration, DBE certification and Annual Update, Small Business Concern Registration, DBE/SBC and Vendor Directories and online DBE compliance.
- ADOT provides free online construction plans and specifications.
- Businesses interested in engineering and other professional services contracts can also obtain information from the ADOT website. ADOT also provides a list of prequalified consultants (again, helpful to potential subconsultants).
- Goods and services vendors can register with ProcureAZ, the State of Arizona's online procurement portal. After vendors identify the types of goods and services they provide, they are automatically notified of bid opportunities.
- ADOT issues bi-weekly e-newsletters on DBE news and events, ADOT contract opportunities and other topics.

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<sup>20</sup> Appendix D to 49 CFR Part 26 — Mentor-Protégé Program Guidelines.

- Its DBE/SBC News website/blog features ADOT and statewide bidding, training and teaming opportunities.
- ADOT encourages online bidding across its contracting and procurement. This can also make it easier for small businesses to easily submit bids and proposals. (ADOT uses the BidExpress platform for online bidding; it requires a one-time fee for account set up and monthly fees for regular use.)
- To communicate bid opportunities on LPA contracts, ADOT maintains links to procurement websites to cities and counties across Arizona.
- ADOT maintains an email and outreach service for prime consultants and contractors looking for DBEs to work on their projects.
- Department staff participate in procurement fairs and similar events throughout the state.
- ADOT holds regular meetings with the construction and professional services industries, and has created the Professional Services DBE Task Force and the Construction DBE Task Force.
- ADOT's DBE Program staff trains internal staff, consultants, constructors and local public agency staff on DBE recruitment, utilization and compliance. ADOT also maintains a complaint process related to DBE issues.

## **2. Providing assistance in overcoming limitations such as inability to obtain bonding or financing.**

ADOT provides workshops and other training for DBEs and other small businesses regarding bonding and financing. For example:

- ADOT has held bonding workshops in coordination with USDOT. Some DBEs have successfully obtained bonding through this effort.
- ADOT also has regular webinars and in-person training opportunities covering topics such as finance, bidding, marketing and operations (some of which are held in conjunction with AGC).
- ADOT holds joint meetings and training sessions with the Arizona Chapter of the Associated General Contractors of America (AGC) and with the American Council of Engineering Companies of Arizona (ACEC).
- The DBE/SBC News website/blog includes discussion of financing opportunities.



ADOT small business and DBE training provides information about opportunities to receive financing assistance through other organizations. A major component of this assistance is U.S. Small Business Administration loan programs offered through local banks and other private and not-for-profit organizations.

- For example, the Business Development Finance Corporation has locations in Phoenix and Tucson. Chicanos Por La Causa, Inc. in Phoenix offers small business financing (including SBA microloans of \$2,000 to \$5,000) and technical support.
- The PPEP Microbusiness and Housing Development Corporation provides loans between \$500 and \$75,000 to small business owners located in Southern Arizona.
- There are many other organizations throughout the state that assist minority- and women-owned firms and other small businesses that need training regarding financing or offer SBA loan programs.

**3. Providing technical assistance and other services.** ADOT has a well-developed technical assistance program and can provide referrals to other local organizations. Examples of other local sources of assistance include the following.

- **Chambers of commerce.** There are more than 70 chambers of commerce in the state, including minority and women's business organizations, that offer training and networking opportunities. There are membership organizations focusing on businesses owned by American Indians, Chinese Americans, Korean Americans, Philippine Americans, Hispanic Americans and African Americans.
- **Trade associations and professional groups.** There are many trade associations and professional groups related to transportation-related construction and professional services in Arizona. Organizations such as the Arizona Chapter of the Associated General Contractors of America (AGC) serve a broad range of firms engaged in transportation construction and other heavy construction. The American Council of Engineering Companies of Arizona (ACEC) is one example of a trade association serving engineering companies in the state. There are associations of minority contractors with Arizona chapters (e.g., Associated Minority Contractors of America) and associations of women business owners with Arizona locations (e.g., National Association of Women Business Owners). There are also local organizations such as the Minority and Small Business Alliance of Southern Arizona.

These types of organizations offer a broad range of training, other technical assistance and networking opportunities to transportation-related construction and engineering companies in Arizona. Groups such as AGC and ACEC have partnered with ADOT to provide targeted training and networking opportunities to DBEs. The groups mentioned above are just examples of trade associations and professional groups in the state; there are many more.

- **Small business assistance organizations.** Examples of small business assistance organizations are provided below.
  - There are more than 20 centers across the state in the Arizona Small Business Development Center Network. These centers provide business counseling, planning assistance, help concerning financing, classes and assistance bidding on government contracts.
  - SCORE has offices in communities throughout Arizona where it offers mentoring, business counseling, and workshops on topics including the basics of starting a business, how to administer and manage a business, marketing and social media, and business-related computer skills and tools.
  - Serving businesses in Southern Arizona, the PPEP Microbusiness and Housing Development Corporation offers training on topics such as management, pricing, market analysis, financial statements, marketing and social media, budgeting, legal services, and long-term planning.

Some business development centers focus on minority-owned companies. Examples include:

- The Minority Business Development Center in Phoenix provides minority certification assistance, procurement training, bonding assistance, management and organization consulting, access to capital, and marketing, bidding and networking assistance through partnership with the U.S. Department of Commerce.
  - The National Center for American Indian Enterprise Development (NCAIED) has a Procurement Technical Assistance Center in Window Rock. It offers training, planning assistance, mentoring and technical assistance regarding marketing to all levels of government and to prime contractors. (NCAIED's national headquarters are in Mesa.)
- **Small business incubators.** Business incubators offer workspace for emerging businesses but also training, mentoring, networking and financing assistance. Examples of business incubators in Arizona include:
    - Arizona State University SkySong in Scottsdale;
    - Gangplank Business Initiatives centers in Chandler and Avondale;
    - Moonshot at NACET in Flagstaff; and
    - The Opportunity through Entrepreneurship Foundation center in Phoenix.

**4. Carrying out information and communications programs on contracting procedures and specific contract opportunities.** In addition to the activities discussed under Point #1 above, ADOT's activities include:

- Outreach events about specific projects;
- DBE training and one-on-one consulting sessions on construction and engineering related issues;
- “Bidding Boot Camp” training provided by the Arizona Chapter of the AGC; and
- Training at pre-bid, post award and pre-construction meetings.

Other local organizations are also available to provide such assistance. For example, the National Center for American Indian Enterprise Development (NCAIED) has a Procurement Technical Assistance Center in Window Rock.

**5. Implementing a supportive services program to develop and improve immediate and long-term business management, recordkeeping, and financial and accounting capability for DBEs and other small businesses.** ADOT has a well-developed supportive services program to provide these types of assistance to DBEs and other small businesses. It includes:

- Workshops and conferences;
- Project-specific networking events;
- Development of a Financial/Insurance/Bonding Services handbook;
- Friday Fundamentals webinars;
- DBE Academy Online;
- Mentor-protégé program;
- Outreach newsletters;
- Bid matching; and
- Free online plans and specification review.

The DBE Supportive Services staff also provide referrals for business assistance and help with how to win contracts. One-on-one business counseling is also available.

6. Providing services to help DBEs, and other small business, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasing significant projects, and achieve eventual self-sufficiency. ADOT has a tri-level Business Development Program for new and emerging DBEs, Pacesetter (mid-level) and Master (advanced) level DBEs.

7. Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low. ADOT's Business Development Program and other assistance include programs for start-up firms. In addition, ADOT has conducted outreach to potential DBEs to encourage and provide initial guidance on DBE certification. Such recruitment can help new and growing firms participate in the technical assistance and other services of the DBE Program.

8. Ensuring distribution of a DBE directory. ADOT provides online access to DBE, SBC and vendor directories.

9. Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media. ADOT's training efforts include emerging technology, especially assistance with accessing information about contracting opportunities through the ADOT website as well as online bidding.

**Prompt payment.** Under state law, ADOT requires prime contractor payment of their subcontractors and subconsultants within seven days from receipt of payment by ADOT. It is ADOT policy not to hold retention from prime contractors. Prime contractors must make prompt and final payment to each subcontractor all monies, including retention, due the subcontractor within 14 days after the subcontractor has satisfactorily completed all of its work. ADOT imposes standard fines on any prime contractor violating this provision.

**Small Business Concern (SBC) Program.** ADOT has established an SBC program to promote use of registered SBC through an SBC directory and provide small businesses many of the same networking and educational opportunities as DBEs. In its contract solicitations and contracts, ADOT encourages prime consultants and contractors to foster small business inclusion.

Other ADOT efforts to promote inclusion of small businesses can positively affect SBCs.

**Mentor-protégé program.** ADOT informs DBEs and other firms of available mentor-protégé programs operated by other organizations.

**Conclusions from analysis of neutral measures.** Review of current race- and gender-neutral initiatives shows considerable ADOT efforts alone and in partnership with others. In addition, public, not-for-profit and private institutions provide networking, training and technical assistance, financing and other small business services. This assistance outside of ADOT efforts is substantial.

## **I. Summary from the Further Exploration of MBE/WBE and DBE Utilization**

Chapter 7 examined dimensions of MBE/WBE participation on ADOT transportation contracts. The percentage of contract dollars going to MBE/WBEs was higher for:

- Engineering contracts compared with construction contracts;
- Local public agency contracts compared with ADOT-awarded contracts;
- FFY 2016 through FFY 2018 contracts compared with contracts in the previous two federal fiscal years;
- Central Arizona contracts compared with contracts in the northern or southern portions of the state;
- Subcontracts compared with prime contracts; and
- Small prime contracts compared with large prime contracts.

Analysis of ADOT's operation of the Federal DBE Program indicates that it follows the requirements of the program, including its contract goal-setting process, provisions for good faith efforts and implementation of neutral measures. ADOT has an SBC component in its operation of the Federal DBE Program.

From review of bids and proposals for ADOT construction and engineering prime contracts, it appears that MBE/WBEs account a relatively small share of total submissions.

There was no evidence of DBE overconcentration based on the analysis in this chapter.

## CHAPTER 8.

### Summary of Evidence and Program Recommendations

Chapters 9 through 11 present information that will assist ADOT as it sets overall DBE goals and projects the portion of these goal to be met through neutral means. These chapters examine goals and projections for future FHWA-funded contracts (Chapter 9), FAA-funded contracts (Chapter 10) and FTA-funded contracts (Chapter 11).

Before proceeding to these analyses, it is useful to summarize the information presented in earlier chapters concerning the marketplace and the disparity analyses for ADOT transportation contracts as well as discuss additional race- and gender-neutral remedies that ADOT might consider.

#### A. Summary of Evidence from Marketplace and Disparity Analyses

The discussion below presents an overview of study findings with respect to the evidence found in the marketplace analyses and the disparity analyses.

**Marketplace analyses.** As discussed in Chapter 4 and supporting appendices, there is quantitative and qualitative information indicating that there is not a level playing field for minority- and women-owned businesses in the Arizona transportation contracting industry.

Marketplace analyses identified instances of disparities in outcomes for:

- Each minority group and for women in Arizona; and
- Businesses owned by each minority group and white women in Arizona.

There is also qualitative evidence that stereotyping and other forms of race and gender discrimination affected minority- and women-owned firms.

Such information should be considered when interpreting the results of the disparity analysis and considering ADOT's future operation of the Federal DBE Program for USDOT-funded contracts.

**Disparity analyses for minority-owned firms on ADOT contracts.** Keen Independent examined ADOT and LPA Program transportation contracts from October 2013 through September 2018.

There was a pattern of substantial disparities between the utilization and availability of each group of minority-owned companies.

**African American-owned firms.** African American-owned companies were 4 percent of the firms indicating qualifications and interest in ADOT and local agency transportation contracts in the 2019 availability survey.<sup>1</sup>

Comparison of utilization and availability of African American-owned firms for ADOT transportation contracts indicates strong evidence of disparities. Results of the disparity analyses for African American-owned businesses are summarized below.

- There were disparities between the utilization and availability of African American-owned companies for ADOT's FHWA- and state-funded highway construction and engineering contracts, FAA-funded contracts and FTA-funded contracts. Except for FAA-funded contracts, each disparity was substantial.
- For contracts with DBE contract goals, only 0.3 percent of contract dollars went to African American-owned firms (substantial disparity).
- Combining FHWA- and state-funded contracts without contract goals, utilization of African American-owned firms accounted for just 0.04 percent of contract dollars. The resulting disparity index was 1, meaning that African American-owned firms earned 1 cent out of every \$1 anticipated based on the availability analysis.
- African American-owned firms received just three of the 2,224 FHWA- and state-funded prime contracts examined for the study period.

**Asian-Pacific American-owned firms.** Asian-Pacific American-owned businesses comprised about 1 percent of the firms in the availability database for this study. There was a pattern of disparities in the utilization of Asian-Pacific American-owned companies in ADOT contracts.

- There were disparities between the utilization and availability of Asian-Pacific American-owned companies for ADOT's FHWA- and state-funded highway construction and engineering contracts, FAA-funded contracts and FTA-funded contracts. In each case, the disparity was substantial.
- For contracts with DBE contract goals, about 0.7 percent of contract dollars went to Asian-Pacific American-owned firms (substantial disparity).
- Combining FHWA- and state-funded contract without contract goals, utilization of Asian-Pacific American-owned firms was about 1 percent of contract dollars, which was less than the 3.8 percent anticipated from the availability analysis. The resulting disparity index was 26, indicating a substantial disparity.

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<sup>1</sup> After considering types, sizes and regions for contracts and subcontracts for which those companies were available, the availability benchmarks were lower.

**Subcontinent Asian American-owned firms.** Subcontinent Asian American-owned firms were about 1 percent of the firms in the availability database. There was a pattern of disparities in the utilization of Subcontinent Asian American-owned companies on ADOT contracts.

- There was a substantial disparity between the utilization and availability of Subcontinent Asian American-owned companies on ADOT's FHWA-funded contracts. Utilization of Subcontinent Asian American-owned companies on state-funded contracts exceeded what might be expected from the availability analysis.
- After reviewing the 147 prime contracts and subcontracts involved in ADOT's FAA-funded projects, not one was identified as going to a Subcontinent Asian American-owned company (substantial disparity).
- Among the 321 contracts and subcontracts that were FTA-funded, one for about \$1,000 went to a Subcontinent Asian American-owned firm. This amount of participation rounded to 0.0 percent of total FTA-funded contract dollars, which represented a substantial disparity.
- For contracts with DBE contract goals, about 0.2 percent of contract dollars went to Subcontinent Asian American-owned firms (substantial disparity).
- Combining FHWA- and state-funded contracts without contract goals, utilization of Subcontinent Asian American-owned firms was 0.48 percent of contract dollars. The disparity index was 43, meaning that Subcontinent Asian American-owned firms received less than one-half of the contract dollars that might be expected based on the availability analysis (substantial disparity).

**Hispanic American-owned firms.** Hispanic American-owned businesses comprised 14 percent of the firms in the availability database for this study. Without contract goals, there was a pattern of disparities in the utilization of Hispanic American-owned firms on ADOT transportation contracts.

- The percentage of contract dollars on FHWA-funded contracts going to Hispanic American-owned firms (6.36%) exceeded what might be expected from the availability analysis (5.75%).

This result appeared to be due to ADOT's use of DBE contract goals on these contracts, as there was a substantial disparity for Hispanic American-owned companies on ADOT's FHWA- and state-funded contracts without contract goals (disparity index of 74).

- There were disparities between the utilization and availability of Hispanic American-owned companies for ADOT's FAA-funded contracts and FTA-funded contracts. Each disparity was substantial.



**Native American-owned firms.** Firms owned by American Indians and other Native Americans were about 2 percent of the firms in the availability database. There was a pattern of disparities in the utilization of Native American-owned companies in ADOT contracts.

- There were disparities between the utilization and availability of Native American-owned companies for ADOT's FHWA- and state-funded highway construction and engineering contracts, FAA-funded contracts and FTA-funded contracts. Each of these disparities was substantial.
- For contracts with DBE contract goals, about 2 percent of contract dollars went to Native American-owned firms (substantial disparity).
- Combining FHWA- and state-funded contracts without contract goals, utilization of Native American-owned firms was 0.66 percent of contract dollars. The resulting disparity index was 8, indicating that Native American-owned firms earned 8 cents out of every \$1 anticipated based on the availability analysis.
- Native American-owned firms received only six of the 2,224 FHWA- and state-funded prime contracts examined for the study period.

**Summary.** For African American-, Asian-Pacific American-, Subcontinent Asian American-, Hispanic American- and Native American-owned firms, the results of this study suggest that ADOT consider continuation of its current race-conscious program for FHWA-funded contracts and continued eligibility of each racial and ethnic group of DBEs for participation in that program.

**Disparity analyses for white women-owned firms on ADOT contracts.** Keen Independent also analyzed utilization and availability of white women-owned firms in ADOT contracts.

About 17 percent of the firms indicating qualifications and interest in ADOT transportation contracts were white women-owned companies. The share of contract dollars that might be expected to go to white women-owned firms for different groups of contracts was lower than 17 percent after considering the types, sizes and locations of ADOT contracts and subcontracts and the firms available to perform that work.

**FAA- and FTA-funded contracts.** It was clear from the analysis of FAA- and FTA-funded contracts that there was no disparity overall in the participation of white women-owned companies in those contracts.

- Utilization of WBEs (19%) exceeded what might be expected from the availability analysis for FAA-funded contracts (10%).
- For FTA-funded contracts, WBE participation (25%) also exceeded what might be expected based on availability (12%).

These results support continued use of neutral efforts to encourage participation of white women-owned firms in FAA- and FTA-funded contracts. Results do not support inclusion of white women-owned companies in any DBE contract goals for such contracts (which ADOT does not currently employ and are not recommended in this study).

**FHWA- and state-funded contracts.** Results of the disparity analysis for white women-owned firms for FHWA- and state-funded contracts depend on whether DBE contract goals were in place.

- Utilization of WBEs (7.8%) exceeded what might be expected from the availability analysis for FHWA-funded contracts (5.3%). This was mostly due to relatively high utilization for FHWA-funded contracts with DBE contract goals (8.3%).
- For FHWA- and state-funded contracts without contract goals, utilization of white women-owned firms (7.3%) was somewhat below what might be expected based on the availability analysis for these contracts (7.9%). The disparity index was 93.
- The above results count as a WBE a company that was denied certification as a DBE in Arizona due to issues concerning ownership and control of the firm. This action brings into question whether that firm should be legitimately counted in the results for white women-owned businesses.

Therefore, Keen Independent also performed a disparity analysis for ADOT contracts without goals counting this firm as a majority-owned company. WBEs received 3.8 percent of contract dollars, substantially less than what was anticipated from the availability analysis.<sup>2</sup> The resulting disparity index was 48, indicating a substantial disparity.

This issue also emerged in the 2015 ADOT Disparity Study, which showed similar results for white women-owned firms depending on how this one firm was counted. ADOT chose to continue inclusion of white women-owned firms as eligible for participation in DBE contract goals based on results of that study. These results were shared with USDOT, which approved ADOT's plan for operating the Federal DBE Program.

In sum, the combined marketplace evidence and results of the disparity analysis for white women-owned firms on ADOT's FHWA- and state-funded contract without contract goals support continued use of gender-conscious methods for encouraging participation of white women-owned businesses in FHWA-funded contracts.

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<sup>2</sup> The utilization results dropped, but since the firm declined to complete an availability survey when asked to do so, availability results are not affected.

## B. Additional Neutral Program Elements

Chapter 7 of the 2015 ADOT Disparity Study identified the considerable business assistance programs and other race- and gender-neutral efforts ADOT had in place at that time. ADOT has further enhanced assistance to DBEs and other small businesses since 2015, including:

- Additional outreach to certify DBEs;
- Small Business Resource Center;
- DBE Business Development Program;
- One-on-One Business Counseling;
- Lunch and Learn Sessions;
- Business Coach on Demand online training; and
- “Just One More” campaign to encourage prime contractors to use one more DBE than needed to meet a DBE contract goal.

Other organizations across the state also provide small business assistance (see Appendix K of this report).

There are only a few general areas of race- and gender-neutral initiatives employed by other state DOTs that ADOT has not implemented. Some of the most notable are:

1. Small business contract goals programs;
2. Small prime contracts programs;
3. Changes to state prequalification systems for contractors;
4. Unbundling of contracts;
5. Working capital loan programs; and
6. Bonding programs.

The balance of Chapter 8 examines these opportunities in further detail. ADOT might further explore these options and consider whether any could be adopted or if they could be tested in pilot programs. ADOT would need to determine whether state legislation would be needed to authorize certain programs.

**1. Small business contract goals program.** ADOT might consider setting contract goals for small businesses (SBEs) on its USDOT-funded contracts in the same way that it does for DBEs. DBEs would automatically qualify for the program, but other firms could apply for small business certification as well. ADOT would set an SBE or a DBE goal on a contract, but not both.

The New Jersey DOT operates an Emerging Small Business Enterprise (ESBE) program in accordance with 49 CFR Part 26.39. Certification as an ESBE is the same as for a DBE, except that race and gender are not considered (about 40 firms were certified through this program as of mid-2019). NJ DOT sets contract goals on USDOT-funded construction and engineering contracts that can be met by DBEs or ESBEs. New Jersey DOT operates this program in conjunction with its DBE contract goals program. It sometimes sets a DBE contract goal on a contract and sometimes sets an ESBE goal for a contract.

**2. Small prime contracts program.** Some state DOTs can reserve small construction and professional services contracts for small businesses. Florida DOT, for example, can restrict bidding to small businesses for certain construction and professional contracts under \$1 million. ADOT might consider a pilot program for some of its small contracts.

**3. Changes to state prequalification system for contractors.** Any firm wishing to bid as a prime contractor on an ADOT construction project must first be prequalified (unless waived by ADOT). Factors to consider in the prequalification are set forth in Arizona Administrative Code R17-3-202.

The state regulations give preference in prequalification limits to firms that have completed a construction contract for ADOT in the past five years. Those firms with ADOT experience might be given a prequalification limit up to twice as high as firms that have not. This factor may perpetuate advantages to firms that have been successful in obtaining ADOT construction contracts in the past and disadvantage those that have been less successful. DBE participation as prime contractors is very low, as demonstrated in Chapter 7.

Some states have prequalification systems that do not directly advantage firms that have done past work with the state DOT. Other states do not prequalify for public works construction contracts and instead rely on bonding requirements to ensure that firms bidding on the contract are qualified and able to perform the work.

**4. Unbundling of contracts.** Several state DOTs have successfully unbundled some of their larger construction and engineering contracts. For example:

- Montana Department of Transportation unbundled its bridge projects into projects of less than \$2 million each. This increased competition from small companies, including DBEs, for these contracts.
- State DOTs such as Nebraska have goals for the number of construction contracts they award under a certain size (Nebraska DOT's goal is for number of contracts awarded each year below \$1 million).

ADOT might continue to look for ways to unbundle both its construction and engineering contracts when streamlined procurement methods would be advantageous to the Department and there enough bidders for these contracts to ensure competitive pricing.

**4. Working capital loan program.** The Wisconsin DOT has operated a working capital loan program since the 1980s. WisDOT provides a loan guarantee and banks issue the loans.

DBEs awarded WisDOT contracts or subcontracts can apply for the loan, with the contract and the WisDOT guarantee combining to provide collateral for the loan. Loans can be up to \$200,000. A CPA assists the DBE in preparing a loan application to a bank. The bank evaluates the loan application and makes the final decision on issuing the loan. Funds are provided as a line of credit that the DBE can draw upon as needed. Payments made to the DBE are through a two-party check.

**5. Bonding program.** The Colorado Department of Transportation partnered with Lockton Companies to launch the Bond Assistance Program in July 2019, a bond guarantee program for construction contracts of \$3 million or less. CDOT provides a guarantee of 50 percent.

Firms certified as emerging small businesses, including DBEs, are eligible to participate. A potential participant starts the process by undergoing an assessment of whether it is bondable. A firm can participate in the program on one contract only. The surety fee is 2 percent of the contract, and the ESB must participate in a funds control program with the management company (0.75 percent fee).

Obtaining bonding through the program also helps a contractor meet CDOT's prequalification requirements to bid on a construction contract. For firms not yet prequalified, it provides proof of bonding. For firms that are prequalified, it can be used to increase the size of contract on which the firm can bid as a prime.

Florida DOT has a similar Bond Guarantee Program.

**6. Mentor-protégé program.** Mentor-protégé programs encourage small firms to learn from successful, mature firms. Three state DOTs appeared to have developed successful programs, one that encourages mentoring and two that give mentor firms preference in their bidding on state-funded contracts.

- Washington State DOT has implemented a Capacity Building Mentorship Program, which matches successful prime contractors and consultants with small businesses, including DBEs. WSDOT staff report initial success regarding the number of primes participating in this program and attribute this success to WSDOT's communication that mentoring could become mandatory if the voluntary participation was lacking.
- The Colorado Department of Transportation provides points to prime consultants proposing on CDOT work if they mentor firms.
- The Ohio Department of Transportation operates a DBE Contract Developmental Goals Program for consultant services that provides points to proposers if they agree to mentor a DBE firm during implementation of an ODOT contract. These developmental goals apply to qualifications-based awards.

In addition to receiving points in the evaluation of its proposal, ODOT allows prime consultants to include a line item for direct and indirect costs incurred by the prime consultant and the DBE subconsultant for specific training and assistance to the DBE through the life of the contract.

FHWA has apparently approved this program for application to USDOT-funded contracts.

As noted above, mentor-protégé programs require commitment from the prime contractor and prime consultant communities. ADOT would need to partner with industry for such a program to be effective in Arizona.

## C. Conclusions

When determining how to operate the Federal DBE Program for the coming years, ADOT should examine quantitative and qualitative information including marketplace research and the disparity analyses for its contracts. Some of this information is provided in this disparity study; ADOT should consider additional public input and other sources of information as well.

Based on the information in the disparity study, there appears to be:

- A continued need for ADOT efforts to open contracting opportunities to small businesses in general.
- Quantitative and qualitative evidence that minority-owned firms in the Arizona transportation contracting industry are at a disadvantage in the marketplace and when pursuing ADOT and LPA Program work. (This evidence includes disadvantages and disparities in ADOT contracting for MBE groups included in the Federal DBE Program.)
- Quantitative and qualitative evidence that white women-owned firms in the Arizona transportation contracting industry are at a disadvantage in the marketplace, and evidence of gender-based disparities when pursuing ADOT FHWA- and state-funded contracts without contract goals.

ADOT should review these results and other information as it sets an overall DBE goal for FHWA-funded contracts for the next three fiscal years (and future overall DBE goals for FAA- and FTA-funded contracts), projects the portion of the goal to be met through neutral means, and determines how it will operate the Federal DBE Program during this period.

The combined evidence supports continued use of:

- Continued use of race- and gender-neutral methods for encouraging participation of DBEs in ADOT's FAA- and FTA-funded contracts; and
- Neutral and race- and gender-conscious methods for encouraging participation of DBEs in ADOT's FHWA-funded contracts.

These conclusions are based on information in the draft report and may be refined after review of public comments and other input as Keen Independent prepares the final report.

## **CHAPTER 9.**

### **Overall Annual DBE Goal and Projections for FHWA-Funded Contracts**

As discussed in previous chapters, ADOT is required to set an overall annual goal for DBE participation in its FHWA-funded transportation contracts. Federal regulations govern how these goals are determined. Agencies such as ADOT must determine “the level of DBE participation you would expect absent the effects of discrimination.”<sup>1</sup>

The Final Rule effective February 28, 2011 revised requirements for goal setting so that agencies that implement the Federal DBE Program only need to develop and submit overall annual DBE goals every three years. ADOT had an overall annual goal of 9.55 percent for FHWA-funded contracts for FFY 2018–FFY 2020 and will submit a revised goal for federal fiscal years 2021 through 2023 based on this disparity study. The new goal will apply as of October 1, 2020.

Chapter 9 provides information for ADOT to consider as it sets its overall annual DBE goal for FHWA-funded contracts and its projection of how much of the goal to be met through race-neutral measures. This chapter is organized in three parts based on the process that 49 CFR Part 26.45 outlines for agencies to set their overall goals and project the portion to be met through neutral means:

- A. Establishing a base figure;
- B. Consideration of a step 2 adjustment; and
- C. Portion of overall DBE goal for FHWA-funded contracts to be met through neutral means.

#### **A. Establishing a Base Figure**

Establishing a base figure is the first step in calculating an overall annual goal for DBE participation in ADOT’s FHWA-funded transportation contracts.

As presented in Chapter 5, current and potential DBEs could be expected to receive 16.15 percent of ADOT FHWA-funded transportation contracts based on analysis of FHWA-funded contracts from October 2013 through September 2018 (not including the South Mountain Freeway project) and current availability of firms to perform that work.<sup>2</sup>

Chapter 5 explains the methodology for the base figure calculation in considerable detail.

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<sup>1</sup> 49 CFR Section 26.45(b).

<sup>2</sup> As discussed in Chapter 5, potential DBEs include current DBEs and those MBE/WBEs that are DBE-certified or appear that they could be based on annual revenue limits described in 49 CFR Part 26.

As point of reference, Keen Independent also calculated the base figure only counting currently certified DBEs (and not firms potentially certified as DBEs). The base figure calculation based on current DBEs would be 13.76 percent.

## **B. Consideration of a Step 2 Adjustment**

Per the Federal DBE Program, ADOT considered potential step 2 adjustments to the base figure as part of determining its overall annual DBE goal for FHWA-funded contracts. ADOT must explain its consideration of possible step 2 adjustments in its Goal and Methodology document.

The Federal DBE Program outlines factors that an agency must consider when assessing whether to make any step 2 adjustments 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 factors.<sup>3</sup>

Keen Independent completed an analysis of each of the above step 2 factors and was able to quantify the effect of certain factors on the base figure. Other information examined was not as easily quantifiable but is still relevant to ADOT as it determines whether to make any step 2 adjustments.

**1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years.** USDOT's "Tips for Goal-Setting" suggests that agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years (i.e., the percentage of contract dollars going to DBEs).

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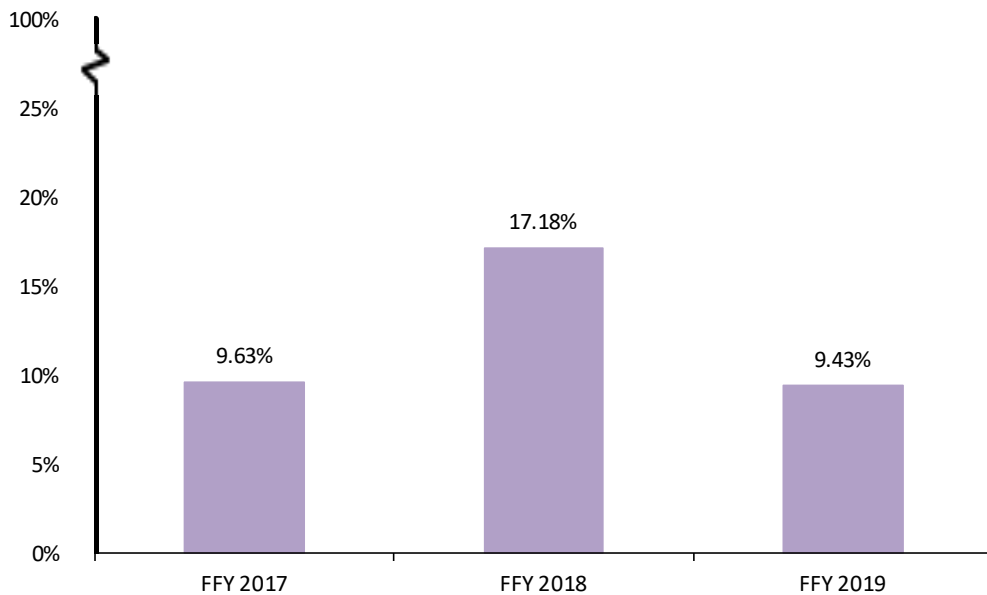
<sup>3</sup> 49 CFR Section 26.45.



DBE participation based on ADOT Uniform Reports to FHWA. As presented in Figure 9-1, based on payments data from ADOT Uniform Reports of DBE Awards or Commitments and Payments reported to FHWA, the median DBE participation from FFY 2017 through FFY 2019 is 9.63 percent. This value suggests a possible downward step 2 adjustment based on this factor.

Figure 9-1.

DBE participation on FHWA-funded contracts based on ADOT Uniform Reports to FHWA, fiscal years 2017 through 2019



Source: ADOT Uniform Reports of DBE Award or Commitments and Payments.

DBE participation based on Keen Independent utilization analysis for FHWA- and state-funded contracts. Keen Independent's analysis identified 8.97 percent median DBE participation on FHWA-funded contracts from October 2013 through September 2018. This value suggests a possible downward step 2 adjustment based on this factor.

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

Chapter 4 summarizes information about conditions in the Arizona transportation contracting industry for minorities, women and MBE/WBEs. Detailed quantitative analyses of marketplace conditions in Arizona are presented in Appendices E through H. Keen Independent's analyses indicate that there are barriers that certain minority groups and women face related to entry and advancement and business ownership in the Arizona construction and engineering industries. Such barriers may affect the availability of MBE/WBEs to obtain and perform ADOT and local agency transportation contracts.

It may not be possible to quantify the cumulative effect that barriers in employment, education, and training may have had in depressing the availability of minority- and women-owned firms in the Arizona transportation contracting industry. However, the effects of barriers in business ownership can be quantified, as explained below.

The study team used regression analyses to investigate whether race, ethnicity and gender affected rates of business ownership among workers in the Arizona construction and engineering industries. The regression analyses allowed the study team to examine those effects while statistically controlling for various personal characteristics including education and age (Appendix F provides detailed results of the business ownership regression analyses).<sup>4</sup>

- Those analyses revealed that African Americans, Asian Americans, Native Americans and white women working in construction were less likely than nonminorities and white men to own construction businesses, even after accounting for various gender-neutral personal characteristics. Each of these disparities was statistically significant.
- In addition, there was a statistically significant disparity in firm ownership for other minorities and white women in the Arizona engineering industry.

Keen Independent analyzed the impact that barriers in business ownership would have on the base figure if African Americans, Asian Americans, Native Americans and white women owned businesses at the same rate as similarly situated nonminorities and white men. This type of inquiry is sometimes referred to as a “but for” analysis because it estimates the availability of MBE/WBEs *but for* the effects of race- and gender-based discrimination.

Figure 9-2 calculates the impact on overall MBE/WBE availability, resulting in possible upward adjustment of the base figure to 22.94 percent. The analysis included the same contracts that the study team analyzed to determine the base figure (i.e., FHWA-funded construction and engineering prime contracts and subcontracts that ADOT and local agencies awarded from October 2013 through September 2018). Calculations are explained below.

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<sup>4</sup> The study team examined U.S. Census data on business ownership rates using methods similar to analyses examined in court cases involving state departments of transportation in California, Illinois, and Minnesota.

Figure 9-2.

Potential step 2 adjustment to ADOT’s overall DBE goal for FHWA-funded contracts considering disparities in the rates of business ownership

Current and potential DBEs	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of overall DBE availability**
<b>Construction</b>					
African American	0.26 %	61	0.43 %	0.40 %	
Asian American	4.19	65	6.45 %	6.04 %	
Native American	1.54	36	4.28	4.01	
Other minorities	4.94	n/a	4.94	4.63	
White women	3.49	69	5.06	4.74	
Minorities and women	14.42 %	n/a	21.15 %	19.81 %	17.64 %
All other businesses	85.58	n/a	85.58	80.19	
<b>Total firms</b>	<b>100.00 %</b>	<b>n/a</b>	<b>106.73 %</b>	<b>100.00 %</b>	
<b>Engineering and other subindustries</b>					
Hispanic American	5.23 %	n/a	5.23 %	3.87 %	
Other minorities	18.79	37	50.78	37.61	
White women	6.13	67	9.15	6.78	
Minorities and women	30.15 %	n/a	65.16 %	48.26 %	5.31 %
All other businesses	69.85	n/a	69.85	51.74	
<b>Total firms</b>	<b>100.00 %</b>	<b>n/a</b>	<b>135.01 %</b>	<b>100.00 %</b>	
<b>Total for current and potential DBEs</b>	<b>16.15 %</b>	<b>n/a</b>	<b>n/a</b>		<b>22.94 %</b>
<b>Difference from base figure</b>					<b>6.79 %</b>

Note: Numbers may not add to 100.00% due to rounding.

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

\*\* Components of the goal 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 = 89%, engineering = 11%).

Source: Keen Independent based on FHWA-funded contracts for October 2013 through September 2018 and statistical analysis of U.S. Census Bureau American Community Survey data for Arizona for 2013–2017.

The study team completed these “but for” analyses separately for construction and engineering contracts and then weighted the results based on the proportion of FHWA-funded contract dollars that ADOT awarded for construction and engineering for October 2013 through September 2018 (i.e., an 89% weight for construction and 11% weight for engineering).<sup>5</sup> The rows and columns of Figure 9-2 present the following information from Keen Independent’s “but for” analyses:

- a. **Current availability.** Column (a) presents the current availability of MBE/WBEs by group for construction and for engineering and other subindustries. Each row presents the percentage availability for MBEs and WBEs. The current combined availability of MBE/WBEs for ADOT FHWA-funded transportation contracts for October 2013 through September 2018 is 16.15 percent, as shown in bottom row of column (a).

<sup>5</sup> Analysis does not include South Mountain Freeway contracts.

- b. **Disparity indices for business ownership.** As presented in Appendix F, African Americans, Asian Americans, Native Americans and white women were less likely to own construction firms than similarly situated nonminorities and white men. This difference was statistically significant for each of those groups.

Keen Independent calculated simulated business ownership rates if those groups owned businesses at the same rate as nonminorities and white males who share similar personal characteristics. The study team then calculated a business ownership disparity index for each group by dividing the observed business ownership rate by the benchmark business ownership rate and then multiplying the result by 100.

Column (b) of Figure 9-2 presents disparity indices related to business ownership for the different racial/ethnic and gender groups. For example, as shown in column (b), Asian Americans own construction businesses at 65 percent of the rate that would be expected based on the simulated business ownership rates of white males who share similar personal characteristics. Appendix F explains how the study team calculated the disparity indices.

- c. **Availability after initial adjustment.** Column (c) presents availability estimates for MBEs and WBEs 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.
- d. **Availability after scaling to 100%.** Column (d) shows adjusted availability estimates that were re-scaled so that the sum of the availability estimates equals 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) — and multiplying by 100. For example, the re-scaled availability estimate for Asian Americans shown for construction was calculated in the following way:  $(6.45\% \div 106.73\%) \times 100 = 6.04\%$ .
- e. **Components of overall DBE goal with upward adjustment.** Column (e) of Figure 9-2 shows the component of the total base figure attributed to the adjusted MBE and WBE availability for construction versus engineering and other subindustries. The study team calculated each component by taking the total availability estimate shown in column (d) for construction and for engineering/other — and multiplying it by the proportion of total FHWA-funded contract dollars in each industry (i.e., 89% for construction and 11% for engineering). For example, the study team used the 19.81 percent shown for MBE/WBE availability for construction firms in column (d) and multiplied it by 89 percent for a result of 17.64 percent. A similar weighting of MBE/WBE availability for engineering/other produced a value of 5.31 percent.

The values in column (e) were then summed to equal the overall base figure adjusted for barriers in business ownership, which is 22.94 percent as shown in the bottom of column (e).

Finally, Keen Independent calculated the difference between the “but for” MBE/WBE availability (22.94%) and the current availability (16.15%) to calculate the potential upward adjustment. This difference, and potential upward adjustment, is 6.79 percentage points (22.94% - 16.15% = 6.79%).

**3. Any disparities in the ability of DBEs to get financing, bonding and insurance.** Analysis of access to financing and bonding revealed quantitative and qualitative evidence of disadvantages for minorities, women and MBE/WBEs.

- Any barriers to obtaining financing and bonding might affect opportunities for minorities and women to successfully form and operate construction and engineering businesses in the Arizona marketplace.
- Any barriers that MBE/WBEs face in obtaining financing and bonding would also place those businesses at a disadvantage in obtaining ADOT and local agency construction and engineering prime contracts and subcontracts.

Note that financing and bonding are closely linked, as discussed in Chapter 4 and Appendix J.

There is also evidence that some firms cannot bid on certain public sector projects because they cannot afford the levels of insurance required by the agency. This barrier appears to affect small businesses, which might disproportionately impact minority- and women-owned firms. Additionally, MBEs and WBEs were somewhat more likely to report that insurance requirements on contracts were a barrier to bidding.

The information about financing, bonding and insurance supports an upward step 2 adjustment in ADOT’s overall annual goal for DBE participation in FHWA-funded contracts.

**4. Other factors.** The Federal DBE Program suggests that federal aid recipients also examine “other factors” when determining whether to make any step 2 adjustments to their base figure.<sup>6</sup>

Among the “other factors” examined in this study was the success of MBE/WBEs relative to majority-owned businesses in the Arizona marketplace. There is quantitative evidence that certain groups of MBE/WBEs are less successful than majority-owned firms, and face greater barriers in the marketplace, even after considering neutral factors. Chapter 4 summarizes that evidence and Appendix H presents supporting quantitative analyses. There is also qualitative evidence of barriers to the success of minority- and women-owned businesses, as summarized in Chapter 4. Some of this qualitative information suggests that discrimination on the basis of race, ethnicity and gender affects minority- and women-owned firms in the Arizona transportation contracting industry.

There is no straightforward way to project the number of MBE/WBEs available for ADOT work but for the effects of these other factors.

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<sup>6</sup> 49 CFR Section 26.45.

**Approaches for making step 2 adjustments.** Quantification of potential downward or upward step 2 adjustments is summarized below.

**1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years.** Analysis of this factor might indicate a downward step 2 adjustment if ADOT analyzed its estimates of past DBE participation (based on payments) — for recent years, the median DBE participation on FHWA-funded contracts was 9.63 percent (from Figure 9-1).

USDOT “Tips for Goal-Setting” suggests taking one-half of the difference between the base figure and evidence of current capacity as one approach to calculate the step 2 adjustment for that factor.

The difference between the 16.15 percent base figure (calculated in Chapter 5) and 9.63 percent DBE participation is 6.52 percentage points ( $16.15\% - 9.63\% = 6.52\%$ ). One-half of this difference is a downward adjustment of 3.26 percentage points ( $6.15\% \div 2 = 3.26\%$ ). The goal would then be calculated as follows:  $16.15\% - 3.26\% = 12.89\%$ . (These calculations are presented in Figure 9-3).

**2. Information related to employment, self-employment, education, training, and unions.** The study team was not able to quantify all of the information regarding barriers to entry for MBE/WBEs. Quantification of the business ownership factor indicates an upward step 2 adjustment of 6.79 percentage points to reflect the “but-for” analyses of business ownership rates presented in Figure 9-2. If ADOT made this adjustment, the overall DBE goal for FHWA-funded contracts would be 22.94 percent ( $16.15\% + 6.79\% = 22.94\%$ ). Figure 9-3 summarizes these calculations.

Figure 9-3.

Potential step 2 adjustments to ADOT’s overall DBE goal for FHWA-funded contracts, FFY 2021–FFY 2023

Step 2 adjustment component	Value	Explanation
<b>Lower range of overall DBE goal</b>		
Base figure	16.15 %	From base figure analysis
Evidence of current capacity	- 9.63	DBE Uniform Reports
Difference	6.52 %	
	÷ 2	Reduce by one-half
Adjustment	3.26 %	Downward adjustment for current capacity
Base figure	16.15 %	From base figure analysis
Adjustment for current capacity	- 3.26	Downward step 2 adjustment
<b>Overall DBE goal</b>	<b>12.89 %</b>	Lower range of DBE goal
<b>Upper range of overall DBE goal</b>		
Base figure	16.15 %	From base figure analysis
Adjustment for "but for" factors	+ 6.79	"But for" step 2 adjustment for business ownership
<b>Overall DBE goal</b>	<b>22.94 %</b>	Upper range of DBE goal

Note: Numbers may not add to totals due to rounding.

Source: Keen Independent analysis.

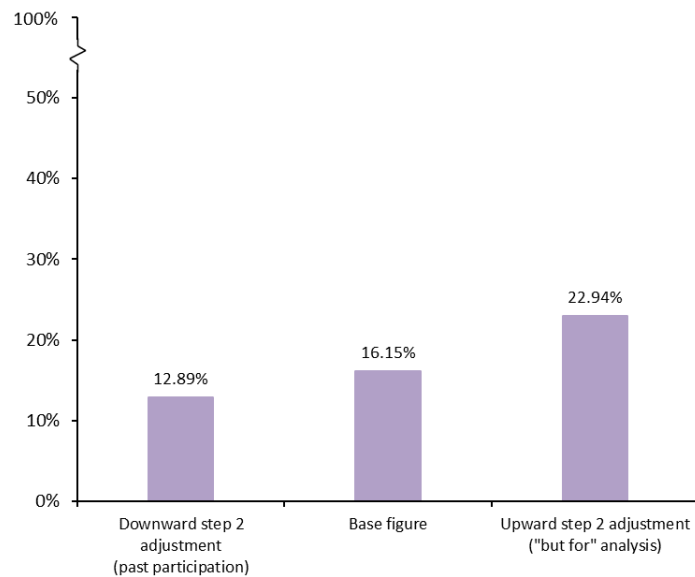
3. Any disparities in the ability of DBEs to get financing, bonding and insurance. Analysis of financing, bonding and insurance indicates that an upward adjustment is appropriate. However, the impact of these factors on availability could not be quantified.

4. Other factors. Although the impact of the barriers to success of MBE/WBEs could not be specifically quantified (see Chapter 7 and Appendix H), the evidence supports an upward adjustment.

**Summary.** ADOT will need to consider whether to make a downward, upward or no step 2 adjustment when determining its overall DBE goal. If ADOT makes a downward step 2 adjustment reflecting current capacity to perform work, its overall DBE goal for FHWA-funded contracts would be 12.89 percent. If ADOT decides to not make a downward adjustment and to make an upward adjustment that reflects analyses of business ownership rates, its overall DBE goal would be 22.94 percent. Figure 9-4 summarizes the potential adjustments described in this chapter.

**Figure 9-4.**  
Potential step 2 adjustments  
to ADOT's overall DBE goal for  
FHWA-funded contracts

Source:  
Keen Independent analysis.



### C. Portion of DBE Goal for FHWA-Funded Contracts to be Met through Neutral Means

The Federal DBE Program requires state and local transportation agencies to meet the maximum feasible portion of their overall DBE goals using race- and gender-neutral measures.<sup>7</sup> Race- and gender-neutral measures are initiatives that encourage the participation of all businesses, or all small businesses, and are not specifically limited to MBE/WBEs or DBEs.

Agencies must determine whether they can meet their overall DBE goals solely through neutral means or whether race- and gender-conscious measures — such as DBE contract goals — are also needed. As part of doing so, agencies must project the portion of their overall DBE goals that they expect to meet (a) through race- and gender-neutral means, and (b) through race- and gender-conscious programs (if any).

<sup>7</sup> 49 CFR Section 26.51.

- If an agency determines that it can meet its overall DBE goal solely through race- and gender-neutral means, then it would propose using only neutral measures as part of its program. The agency would project that 100 percent of its overall DBE goal would be met through neutral means and that 0 percent would be met through race- and gender-conscious means.
- If an agency determines that a combination of race- and gender-neutral and race- and gender-conscious measures are needed to meet its overall DBE goal, then the agency would propose using a combination of neutral and conscious measures as part of its program. The agency would project that some percent of its overall DBE goal would be met through neutral means and that the remainder would be met through race- and gender-conscious means.

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, including the following:

- USDOT Questions and Answers about 49 CFR Part 26 addresses factors for federal aid recipients to consider when projecting the portion of their overall DBE goals that they will meet through race- and gender-neutral means.<sup>8</sup>
- USDOT “Tips for Goal-Setting” also suggests factors for federal aid recipients to consider when making such projections.<sup>9</sup>
- A past FHWA template for how it considers approving DBE goal and methodology submissions included a section on projecting the percentage of overall DBE goals to be met through neutral and conscious means. An excerpt from that template is provided in Figure 9-5.

Figure 9-5.

Excerpt from Explanation of Approval of [State] DBE Goal Setting Process for FY [Year]

You must also explain the basis for the State’s race-neutral/race-conscious division and why it is the State’s best estimate of the maximum amount of participation that can be achieved through race-neutral means. There are a variety of types of information that can be relied upon when determining a recipient’s race-neutral/race-conscious division. Appropriate information should give a sound analysis of the recipient’s market, the race-neutral measures it employs and information on contracting in the recipient’s contracting area. Information that could be relied on includes: the extent of participation of DBEs in the recipient’s contracts that do not have contract goals; past prime contractors’ achievements; excess DBE achievements over past goals; how many DBE primes have participated in the state’s programs in the past; or information about state, local or private contracting in similar areas that do not use contracting goals and how many minority and women’s businesses participate in programs without goals.

Source:

FHWA, Explanation for Approval of [State] DBE Program Goal Setting Process for FY [Year].

<sup>8</sup> See <https://www.transportation.gov/sites/dot.gov/files/docs/mission/civil-rights/disadvantaged-business-enterprise/55851/official-questions-and-answers-disadvantaged-business-enterprise-program-regulation-49-cfr-26-4-25.pdf>

<sup>9</sup> See [https://www.transportation.gov/sites/dot.gov/files/docs/Tips\\_for\\_Goal-Setting\\_in\\_DBE\\_Program\\_20141106.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/Tips_for_Goal-Setting_in_DBE_Program_20141106.pdf)



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

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?<sup>10</sup>
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?

The balance of Chapter 9 is organized around each of those general areas of questions.

**1. Is there evidence of discrimination within the local transportation contracting marketplace for any racial, ethnic or gender groups?** The 2020 Disparity Study considered conditions in the local marketplace to address this question. Quantitative and qualitative information is summarized below.

**Marketplace conditions.** As discussed in Chapter 4, Keen Independent examined conditions in the Arizona marketplace, including:

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

There was quantitative evidence of disparities in outcomes for minority- and women-owned firms in general and for certain MBE/WBE groups concerning the above issues. Qualitative information indicated some evidence that discrimination may have been a factor in these outcomes.

**Results of the disparity analysis for FHWA-funded contracts.** Chapter 6 of this report examines disparity in ADOT contracting. Utilization of certain MBE groups and minority-owned businesses in general on ADOT FHWA- and state-funded contracts was substantially below what might be expected from the availability analysis.

For Hispanic American-owned firms and white women-owned firms, some of the analyses indicated disparities and some did not. Further exploration of utilization for contracts with and without goals identified generally consistent results for certain MBEs (see Chapter 7).

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<sup>10</sup> USDOT guidance suggests evaluating (a) certain DBE participation as prime contractors if the 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 contracting where contract goals are not used.

There is also substantial evidence that there is not a level playing field for women and women-owned firms in the Arizona marketplace. Disparities for women and women-owned firms include:

- Low entry into construction and engineering jobs;
- Lower construction business formation rates (regression analysis controlling for neutral factors);
- Lower business loan approval rates;
- Higher rate of not applying for business loans due to fear of loan denial (regression analysis controlling for neutral factors);
- Lower mean loan values;
- Higher interest rates;
- More likely to report difficulty in obtaining lines of credit or loans;
- More likely to report insurance requirements as a barrier; and
- Lower business earnings (regression analysis after controlling for neutral factors).

**Summary.** ADOT should review the information about marketplace conditions presented in Chapter 4 and Appendices E through H, as well as other information it may have, when considering the extent to which it can meet its overall DBE goal through neutral measures. The combined information from the marketplace analyses and the disparity analyses indicates substantial evidence of different outcomes for the following groups of minority-owned firms included in the Federal DBE Program: African American-, Asian-Pacific American-, Subcontinent Asian American- and Native American-owned firms. Similar disparities were not observed for Hispanic American-owned firms or white women-owned firms.

ADOT might consider all of this information when determining whether it will include white women-owned firms and Hispanic-owned firms as eligible for any race- and gender-conscious programs such as meeting DBE contract goals. If it does not include white women-owned and Hispanic American-owned DBEs in its DBE contract goals program, it would need to request a waiver from FHWA.

**2. What has been the agency's past experience in meeting its overall DBE goal?** ADOT's reported certified DBE participation based on DBE commitments/awards on FHWA-funded contracts is summarized in Figure 9-5 on the following page. As shown, reported DBE participation based on DBE commitments/awards on FHWA-funded contracts was higher than the goal for FFY 2017 through FFY 2019.

ADOT also reported participation based on payments to DBEs. As presented in the far-right column of Figure 9-5, ADOT exceeded its overall DBE goals in two of the three fiscal years examined when participation was measured based on payments. ADOT fell short of its DBE goal in FFY 2019 but was within one-half of a percentage point of achieving its goal.

Figure 9-5.

ADOT overall DBE goal and reported DBE participation on FHWA-funded contracts, FFY 2017 through FFY 2019

Federal fiscal year	DBE goal	DBE commitments/awards	DBE payments	Difference from DBE goal	
				Awards	Payments
2017	8.90 %	16.37 %	9.63 %	7.47 %	0.73 %
2018	9.55	12.76	17.18	3.21	7.63
2019	9.55	11.46	9.43	1.91	-0.12

Source: ADOT Uniform Reports of DBE Awards/Commitments and Payments.

### 3. What has DBE participation been when ADOT has not applied DBE contract goals (or other race-conscious remedies)?

Keen Independent examined three sources of information to assess race-neutral DBE participation:

- ADOT-reported race-neutral DBE participation on FHWA-funded contracts for the most recent years;
- Keen Independent estimates of DBE participation on FHWA- and state-funded contracts for which no DBE contract goals applied; and
- Information concerning DBE participation as prime contractors on FHWA-funded contracts.

The discussion in the following two pages examines these three sets of participation figures.

**Race-neutral DBE participation in recent ADOT Uniform Reports.** Per USDOT instructions, ADOT counts as “neutral” participation any prime contracts going to DBEs as well as subcontracts to DBEs beyond what was needed to meet DBE contract goals set for a project or that were otherwise awarded in a race-neutral manner.

ADOT’s Uniform Reports of DBE Awards/Commitments and Payments submitted to FHWA for the three most recent federal fiscal years indicate median race-neutral participation of 4.72 percent. Figure 9-6 presents these results.

Figure 9-6.

ADOT-reported race-neutral and race-conscious DBE participation on FHWA-funded contracts for FFY 2017 through FFY 2019

Federal fiscal year	DBE commitments/awards		
	Total	Race-neutral	Race-conscious
2017	16.37 %	6.88 %	9.49 %
2018	12.76	4.72	8.04
2019	11.46	3.35	8.11

Source: ADOT Uniform Reports of DBE Awards/Commitments and Payments.

**DBE participation on contracts without DBE contract goals.** Keen Independent also analyzed DBE participation on ADOT's FHWA- and state-funded contracts without DBE contract goals. As reported in Chapter 7, ADOT achieved 3.9 percent DBE participation on these contracts from October 2013 through September 2018.

**DBE participation as prime contractors.** Keen Independent also analyzed DBE participation based on FHWA- and state-funded prime contract dollars. From October 2013 through September 2018, the median DBE participation on prime contracts was about 1 percent for FHWA-funded contracts.

**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 determining the extent to which it could meet its overall DBE goal through the use of neutral measures, ADOT must review the race- and gender-neutral measures that it and other organizations have in place, and those it has planned or could consider for future implementation.

Keen Independent's analysis of neutral remedies in Chapter 7 indicates that ADOT has already implemented an extensive set of neutral measures. Examples of additional measures that other state DOTs have enacted are discussed in Chapter 8. ADOT could increase its neutral participation if it enacted measures such as SBE contract goals and a small prime contracts program for SBEs. It is unclear whether ADOT would need state legislation to authorize those or other initiatives discussed in Chapter 8.

ADOT can also increase its neutral participation if more of the minority- and women-owned firms that currently receive work on FHWA-funded contracts became certified as DBEs. Keen Independent estimates that these potential DBEs may have received as much as 5.9 percent of FHWA-funded contract dollars from October 2013 through September 2018.

At this time, it is difficult to quantify how much additional measures can increase race-neutral participation of DBEs in ADOT's FHWA-funded contracts for FFY 2020 through FFY 2022.

## **Summary**

Chapter 9 provides information to ADOT as it considers (1) its overall DBE goal for FFY 2021 through FFY 2023 for FHWA-funded contracts, and (2) its projection of the portion of its overall DBE goal to be achieved through neutral means.

**1. Overall DBE goal for FHWA-funded contracts.** As explained in this chapter, ADOT might consider setting its goal at the downward-adjusted figure of 12.89 percent DBE participation.

### **2. Should ADOT project that it can meet all of its overall DBE goal through neutral means?**

ADOT must consider whether it can achieve its overall DBE goal through neutral means or whether race-conscious programs are needed. Such a determination depends in part on the level of the overall DBE goal. If ADOT's overall DBE goal for FHWA-funded contracts is in the range of 12.89 percent or higher, the evidence presented in this report indicates that ADOT might not meet its DBE goal solely through neutral means.

ADOT should consider all of the information in this report and other sources when reaching its decision on any use of race- and gender-conscious programs (such as DBE contract goals).

- There is information indicating disparities in outcomes for minorities other than Hispanic Americans and also some qualitative evidence of discrimination within the local transportation contracting marketplace, as summarized in Chapter 4.
- For the past three federal fiscal years ADOT's reported race-neutral participation has been 6.88 percent (FFY 2017), 4.72 percent (FFY 2018) and 3.35 percent (FFY 2019). Each of these figures for race-neutral participation is well below a future overall DBE goal in the range of 12.89 percent or higher.
- ADOT has extensive neutral measures in place and there are many small business assistance programs offered by other institutions throughout the state. ADOT might increase its neutral participation through measures discussed in Chapter 8 as well as encouraging more of the MBE/WBEs currently receiving work to become DBE-certified. It is possible that some of the measures in Chapter 8 would need state legislative action before ADOT could implement them.
- It is unlikely that additional measures ADOT could immediately institute would increase neutral DBE participation to 12.89 percent or more of FHWA-funded contract dollars. Even with success of more neutral programs, ADOT might need to use DBE contract goals for some FHWA-funded contracts for FFY 2020 through FFY 2022.

**3. If ADOT uses a combination of neutral means and DBE contract goals, how much of the overall DBE goal can ADOT project to be met through neutral means?** In fall 2017, ADOT set an overall DBE goal of 9.55 percent for FHWA-funded contracts for FFY 2018 through FFY 2020 and projected that 5.01 percentage points of its overall goal would be met through neutral means.

For the following reasons, ADOT might consider a race-neutral projection of about 5 percentage points for its overall DBE goal for FFY 2021 through FFY 2023:

- The median race-neutral portion of ADOT's DBE participation was 4.72 percent based on ADOT's reports for FFY 2017 through FFY 2019 (presented earlier in this chapter).
- ADOT neutral initiatives are already considerable and will continue to expand.
- Keen Independent's analysis of DBE participation on FHWA- and state-funded contracts without contract goals indicated 3.93 percent race-neutral DBE utilization.

As noted above, ADOT projected a 5.01 percentage point neutral and 4.54 percentage point race-conscious split when it prepared its overall DBE goal of 9.55 percent for FFY 2018 through FFY 2020 after the 2017 Availability Study. The first column Figure 9-7 presents these recent projections.

The second column of numbers in Figure 9-7 is an example of projections using an overall DBE goal of 12.89 percent and a 4.72 percentage point race-neutral projection for FFY 2021 through FFY 2023. The race-conscious portion of the goal is 8.17 percentage points.

Figure 9-7.

ADOT overall DBE goal and projections of race-neutral participation for FHWA-funded contracts for FFY 2021 through FFY 2023

Component of overall DBE goal	FFY 2018-FFY 2020	FFY 2021 - FFY 2023		
		Downward adjustment	Base figure	Upward adjustment
Overall goal	9.55 %	12.89 %	16.15 %	22.94 %
Neutral projection	- <u>5.01</u>	- <u>4.72</u>	- <u>4.72</u>	- <u>4.72</u>
Race-conscious projection	4.54 %	8.17 %	11.43 %	18.22 %

Source: Keen Independent analysis.

## **CHAPTER 10.**

### **Overall Annual DBE Goal and Projections for FAA-Funded Contracts**

The Federal Aviation Administration (FAA) directly provides funds to ADOT for certain aviation-related contracts.<sup>1</sup> Therefore, ADOT must operate the Federal DBE Program for FAA-funded contracts.

The Final Rule effective February 28, 2011 revised requirements for goal-setting so that agencies that implement the Federal DBE Program must develop and submit overall annual DBE goals every three years. ADOT implemented an overall annual DBE goal of 8.05 percent for FAA-funded contracts for FFY 2019–FFY 2021 based on the 2017 Availability Study report. ADOT has operated a solely race-neutral program during this goal period. ADOT will submit a new goal for federal fiscal years 2022 through 2024. The new goal will apply as of October 1, 2021.

Chapter 10 provides information to ADOT that will help it set this overall DBE goal and make other decisions concerning its operation of the Federal DBE Program for FAA-funded contracts. Chapter 10 contains three parts based on the process for setting overall DBE goals outlined in 49 CFR Part 26.45:

- A. Establishing a base figure;
- B. Consideration of a step 2 adjustment; and
- C. Portion of overall DBE goal for FAA-funded contracts to be met through neutral means.

#### **A. Establishing a Base Figure**

As for FHWA-funded contracts discussed in Chapter 9, establishing a base figure is the first step in calculating an overall annual goal for DBE participation in ADOT's FAA-funded contracts.

Chapter 5 presented results from the availability analysis for FAA-funded contracts during the October 2013 through September 2018 study period. Current and potential DBEs could be expected to receive 19.72 percent of ADOT FAA-funded transportation contract dollars during the study period based on those analyses. ADOT might consider 19.72 percent as the base figure for its DBE goal. Chapter 5 explains the methodology for the base figure calculation in considerable detail.

As point of reference, Keen Independent also calculated the base figure only counting currently certified DBEs. The base figure for FAA-funded contracts only including current DBEs is 15.86 percent.

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<sup>1</sup> The Keen Independent study team identified 147 FAA-funded contracts between October 2013 and September 2018 for a total of \$26.1 million.

## B. Consideration of a Step 2 Adjustment

Per the Federal DBE Program, ADOT must consider potential step 2 adjustments to the base figure when determining its overall DBE goal for FAA-funded contracts. Federal regulations outline factors that an agency must consider:

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 factors.<sup>2</sup>

Keen Independent completed an analysis of each of the above step 2 factors and was able to quantify the effect of certain factors on the base figure. Other information examined was not as easily quantifiable but is still relevant to ADOT as it determines whether to make any step 2 adjustments.

**1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years.** USDOT's "Tips for Goal-Setting" suggests that agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years (i.e., the percentage of contract dollars going to DBEs).

**DBE participation based on payments reported in ADOT Uniform Reports to FAA.** As presented in Figure 10-1, based on payment data from ADOT Uniform Reports of DBE Commitments/Awards and Payments reported to FAA, ADOT's median past DBE participation for FFY 2015 through FFY 2019 is 1.65 percent. This value suggests a possible downward step 2 adjustment based on this factor.

**DBE participation based on commitments/awards reported in ADOT Uniform Reports to FAA.** The study team also calculated median DBE participation based on commitment/award data from ADOT Uniform Reports. Based on award information, ADOT's median past DBE participation for FFY 2015 through FFY 2019 is 1.33 percent, a value which suggests a possible downward step 2 adjustment based on this factor.

**DBE participation based on Keen Independent utilization analysis for FAA-funded contracts.** Keen Independent's analysis identified 1.00 percent median DBE participation on FAA-funded contracts from October 2013 through September 2018. This value suggests a possible downward step 2 adjustment based on this factor.

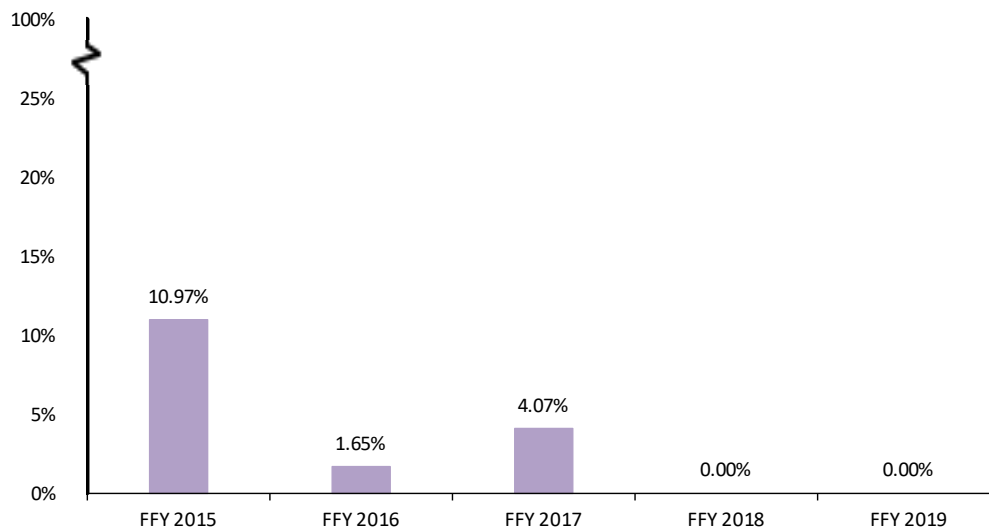
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<sup>2</sup> 49 CFR Section 26.45.



Figure 10-1.

DBE participation on FAA-funded contracts based on Uniform Reports to FAA,  
FFY 2015–FFY 2019



Source: ADOT Uniform Reports to FAA for September 2014 through October 2019.

**Summary.** ADOT might consider these data when determining whether to make a step 2 adjustment based on past DBE participation. Keen Independent recommends using the 1.65 percent past participation figure (based on payments in ADOT’s Uniform Reports) when calculating a possible step 2 adjustment.

## **2. Information related to employment, self-employment, education, training and unions.**

Chapter 4 summarizes information about conditions in the Arizona transportation contracting industry for minorities, women and MBE/WBEs. Detailed quantitative analyses of marketplace conditions in Arizona are presented in Appendices E through H. Keen Independent’s analyses indicate that there are barriers that certain minority groups and women face related to entry and advancement and business ownership in the Arizona construction and engineering industries. Such barriers may affect the availability of MBE/WBEs to obtain and perform ADOT and local agency transportation contracts.

It may not be possible to quantify the cumulative effect that barriers in employment, education and training may have had in depressing the availability of minority- and women-owned firms in the Arizona transportation contracting industry. However, the effects of barriers in business ownership can be quantified, as previously explained in Chapter 9.

The study team used regression analyses to investigate whether race, ethnicity and gender affected rates of business ownership among workers in the Arizona construction and engineering industries. The regression analyses allowed the study team to examine those effects while statistically controlling for various personal characteristics including education and age (Appendix F provides detailed results of the business ownership regression analyses).<sup>3</sup>

- Those analyses revealed that African Americans, Asian Americans, Native Americans and white women working in construction were less likely than nonminorities and white men to own construction businesses, even after accounting for various race- and gender-neutral personal characteristics. Each of these disparities was statistically significant.
- In addition, there were statistically significant disparities in firm ownership for other minorities and white women in the Arizona engineering industry.

Chapter 9 of this report describes each component of the “but for” analysis Keen Independent prepared to estimate the impact of barriers in business ownership on the base figure for ADOT’s USDOT-funded contracts. The analysis determines the increase in the goal if African Americans, Asian Americans, Native Americans and white women owned businesses at the same rate as similarly situated nonminorities and white men. This type of inquiry is sometimes referred to as a “but for” analysis because it estimates the availability of MBE/WBEs *but for* the effects of race- and gender-based discrimination.

As described in detail in Chapter 9, the study team separately completed “but for” analyses for construction and for engineering contracts and then weighted the results based on the proportion of contract dollars that ADOT awarded for construction and engineering for October 2013 through September 2018. Chapter 9 examined dollar-weighted availability for FHWA-funded contracts. Keen Independent followed the same process for dollar-weighted availability for FAA-funded contracts, which is reported here. The analysis included the same contracts that the study team analyzed to determine the base figure (i.e., FAA-funded contracts that ADOT awarded from October 2013 through September 2018).

Figure 10-2 calculates the impact of disparities in business ownership rates on current and potential DBE availability for FAA-funded contracts, resulting in a possible upward adjustment for a goal of 28.16 percent. The calculations indicate a possible upward step 2 adjustment of 8.44 percentage points. This might be an appropriate upward step 2 adjustment if ADOT chose to make such an adjustment to its overall DBE goal for FAA-funded projects.

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<sup>3</sup> The study team examined U.S. Census data on business ownership rates using methods similar to analyses examined in court cases involving state departments of transportation in California, Illinois and Minnesota.

Figure 10-2.

Potential step 2 adjustment to overall DBE goal for FAA-funded contracts considering disparities in the rates of business ownership

Current and potential DBEs	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of overall DBE availability**
<b>Construction</b>					
African American	0.14 %	61	0.23 %	0.22 %	
Asian American	4.38	65	6.74	6.33	
Native American	1.05	36	2.92	2.74	
Other minorities	4.30	n/a	4.30	4.04	
White women	4.92	69	7.13	6.69	
Minorities and women	14.79 %	n/a	21.32 %	20.01 %	13.97 %
All other businesses	85.21	n/a	85.21	79.99	
<b>Total firms</b>	<b>100.00 %</b>	<b>n/a</b>	<b>106.53 %</b>	<b>100.00 %</b>	
<b>Engineering and other subindustries</b>					
Hispanic American	7.60 %	n/a	7.60 %	5.72 %	
Other minorities	17.34	37	46.86	35.29	
White women	6.67	67	9.96	7.50	
Minorities and women	31.61 %	n/a	64.42 %	48.51 %	13.75 %
All other businesses	68.39	n/a	68.39	51.49	
<b>Total firms</b>	<b>100.00 %</b>	<b>n/a</b>	<b>132.81 %</b>	<b>100.00 %</b>	
<b>Goods and other services</b>					
Hispanic American	3.03 %	n/a	3.03 %	3.03 %	
Other minorities	8.08	n/a	8.08	8.08	
White women	13.13	n/a	13.13	13.13	
Minorities and women	24.24 %	n/a	24.24 %	24.24 %	0.44 %
All other businesses	75.76	n/a	75.76	75.76	
<b>Total firms</b>	<b>100.00 %</b>	<b>n/a</b>	<b>100.00 %</b>	<b>100.00 %</b>	
<b>Total for current and potential DBEs</b>	<b>19.72 %</b>	<b>n/a</b>	<b>n/a</b>		<b>28.16 %</b>
<b>Difference from base figure</b>					<b>8.44 %</b>

Note: Numbers may not add to 100.00% due to rounding.

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

\*\* Components of the goal were calculated as the value after adjustment and scaling to 100 percent, multiplied by the percentage of total FAA-funded contract dollars in each industry (construction = 69.8%, engineering = 28.3%, goods and other services 1.8%).

Source: Keen Independent based on FAA-funded contracts for October 2013 through September 2018 and statistical analysis of U.S. Census Bureau American Community Survey data for Arizona for 2013–2017.

**3. Any disparities in the ability of DBEs to get financing, bonding and insurance.** Analysis of access to financing and bonding revealed quantitative and qualitative evidence of disadvantages for minorities, women and MBE/WBEs.

- Any barriers to obtaining financing and bonding might affect opportunities for minorities and women to successfully form and operate construction and engineering businesses in the Arizona marketplace.
- Any barriers that MBE/WBEs face in obtaining financing and bonding would also place those businesses at a disadvantage in obtaining ADOT and local agency construction and engineering prime contracts and subcontracts.

Note that financing and bonding are closely linked, as discussed in Chapter 4 and Appendix J.

There is also evidence that some firms cannot bid on certain public sector projects because they cannot afford the levels of insurance required by the agency. This barrier appears to affect small businesses, which might disproportionately impact minority- and women-owned firms. Additionally, MBEs and WBEs were somewhat more likely to report that insurance requirements on contracts were a barrier to bidding.

The information about financing, bonding and insurance supports an upward step 2 adjustment in ADOT's overall annual goal for DBE participation in FAA-funded contracts.

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

Among the “other factors” examined in this study was the success of MBE/WBEs relative to majority-owned businesses in the Arizona marketplace. There is quantitative evidence that certain groups of MBE/WBEs are less successful than majority-owned firms, and face greater barriers in the marketplace, even after considering neutral factors. Chapter 4 summarizes that evidence and Appendix H presents supporting quantitative analyses. There is also qualitative evidence of barriers to the success of minority- and women-owned businesses, as summarized in Chapter 4. Some of this qualitative information suggests that discrimination on the basis of race, ethnicity and gender affects minority- and women-owned firms in the Arizona transportation contracting industry.

There is no straightforward way to project the number of MBE/WBEs available for ADOT work but for the effects of these other factors.

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

**Approaches for making step 2 adjustments.** Quantification of potential step 2 adjustments is discussed below.

**1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years.** Analysis of this factor might indicate a downward step 2 adjustment if ADOT analyzed its estimates of past DBE participation (based on payments) — for recent years, the median DBE participation on FAA-funded contracts was 1.65 percent (from Figure 10-1).

USDOT “Tips for Goal-Setting” suggests taking one-half of the difference between the base figure and evidence of current capacity as one approach to calculate the step 2 adjustment for that factor.

The difference between the 19.72 percent base figure (calculated in Chapter 5) and 1.65 percent DBE participation is 18.07 percentage points ( $19.72\% - 1.65\% = 18.07\%$ ). One-half of this difference is a downward adjustment of 9.04 percentage points ( $18.07\% \div 2 = 9.04\%$ ). The goal would then be calculated as follows:  $19.72\% - 9.04\% = 10.69\%$ . (These calculations are presented in Figure 10-3).

Figure 10-3.

Potential step 2 adjustments to ADOT’s overall DBE goal for FAA-funded contracts, FFY 2022–FFY 2024

Step 2 adjustment component	Value	Explanation
<b>Lower range of overall DBE goal</b>		
Base figure	19.72 %	From base figure analysis
Evidence of current capacity	- 1.65	Past DBE participation (Uniform DBE reports)
Difference	18.07 %	
	÷ 2	Reduce by one-half
Adjustment	9.04 %	Downward adjustment for current capacity
Base figure	19.72 %	From base figure analysis
Adjustment for current capacity	- 9.04	Downward step 2 adjustment
<b>Overall DBE goal</b>	<b>10.69 %</b>	Lower range of DBE goal
<b>Upper range of overall DBE goal</b>		
Base figure	19.72 %	From base figure analysis
Adjustment for "but for" factors	+ 8.44	"But for" step 2 adjustment for business ownership
<b>Overall DBE goal</b>	<b>28.16 %</b>	Upper range of DBE goal

Note: Numbers may not add to totals due to rounding.

Source: Keen Independent analysis.

2. Information related to employment, self-employment, education, training and unions. The study team was not able to quantify all of the information regarding barriers to entry for MBE/WBEs. Quantification of the business ownership factor indicates an upward step 2 adjustment of 8.44 percentage points to reflect the “but for” analyses of business ownership rates presented in Figure 10-2. If ADOT made this adjustment, the overall DBE goal for FAA-funded contracts would be 28.16 percent ( $19.72\% + 8.44\% = 28.16\%$ ). Figure 10-3 in the previous page summarizes these calculations.

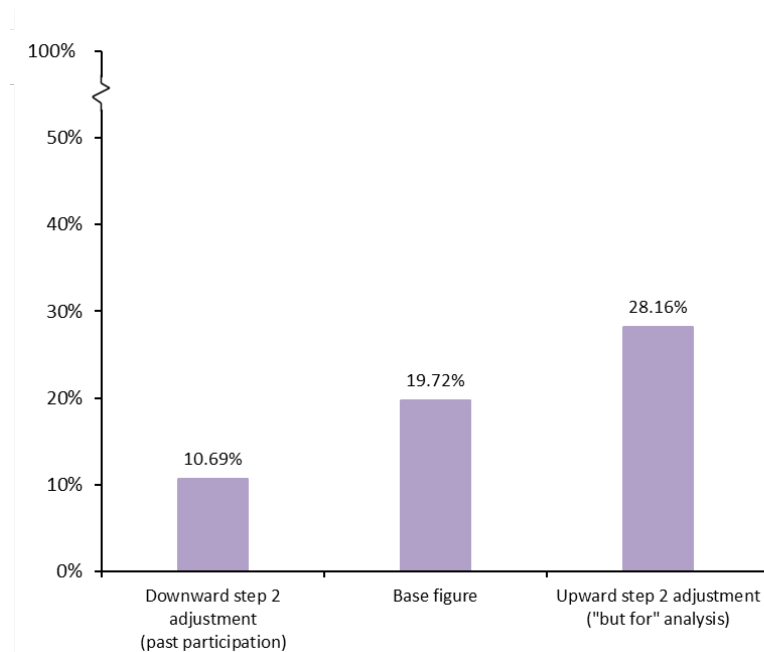
3. Any disparities in the ability of DBEs to get financing, bonding and insurance. Analysis of financing, bonding and insurance indicates that an upward adjustment is appropriate. However, the impact of these factors on availability could not be quantified.

4. Other factors. Impact of the many barriers to success of MBE/WBEs in Arizona could not be specifically quantified. However, the evidence supports an upward adjustment.

**Summary.** ADOT will need to consider whether to make a downward, upward or no step 2 adjustment when determining its overall DBE goal. If ADOT makes a downward step 2 adjustment reflecting current capacity to perform work, its overall DBE goal for FAA-funded contracts would be 10.69 percent. If ADOT decides to not make a downward adjustment and to instead make an upward adjustment that reflects analyses of business ownership rates, its overall DBE goal would be 28.16 percent. Figure 10-4 summarizes the potential adjustments described in this chapter.

Figure 10-4.  
Potential step 2  
adjustments  
to ADOT’s overall DBE  
goal for FAA-funded  
contracts

Source:  
Keen Independent analysis.



## **C. Portion of DBE Goal for FAA-Funded Contracts to be Met through Neutral Means**

As explained in Chapter 9, the Federal DBE Program requires state and local transportation agencies to meet the maximum feasible portion of their overall DBE goals using race- and gender-neutral measures. Along with setting an overall goal for DBE participation, agencies must project the portion of that goal they expect to meet (a) through race- and gender-neutral means, and (b) through race- and gender-conscious programs (if any). 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, as outlined in detail in Chapter 9. (The extensive discussion in Chapter 9 is not repeated here.) For each of the six most recent fiscal years ADOT has operated an entirely race-neutral DBE program for its FAA-funded contracts.

**1. Is there evidence of discrimination within the local transportation contracting marketplace for any racial, ethnic or gender groups?** To address this question, Keen Independent considered conditions in the local marketplace (summarized in Chapter 4) and analyses of MBE/WBE availability and utilization (see Chapters 5 and 6). Quantitative and qualitative information is summarized below.

**Marketplace conditions.** As discussed in Chapter 4, Keen Independent examined conditions in the Arizona marketplace, including:

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

There was quantitative evidence of disparities in outcomes for minority- and women-owned firms in general and for certain MBE/WBE groups concerning the above issues. Qualitative information indicated some evidence that discrimination may have been a factor in these outcomes.

ADOT should review the information about marketplace conditions presented in Chapter 4 and Appendices E through J, as well as other information it may have, when considering the extent to which it can meet its overall DBE goal through neutral measures.

**Results of the disparity analysis for FAA-funded contracts.** Chapter 6 of this report examines utilization and availability of minority- and women-owned firms in ADOT's FAA-funded contracts. About 27 percent of FAA-funded contract dollars went to minority- and women-owned firms combined. Most of the MBE/WBE utilization was firms not currently certified that appeared that they could be DBE-certified.

Overall MBE/WBE utilization was somewhat below the 33 percent that might be expected based on the availability analysis for these contracts. Utilization of white women-owned firms (19.3%) exceeded what might be expected from the availability analysis (9.6%), but utilization of MBEs (7.7%) was substantially below what might be expected based on availability for this work (23.0%). There were disparities for each MBE group. Except for African American-owned firms, these disparities were substantial.

**Summary.** ADOT should review the information about marketplace conditions presented in Chapter 4 and Appendices E through H, as well as other information it may have, when considering the extent to which it can meet its overall DBE goal through neutral measures. The combined information from the marketplace analyses indicates evidence of unequal outcomes for minority- and women-owned firms. The disparity analysis for FAA-funded contracts shows relatively high overall utilization of minority- and women-owned firms (27%) but disparities between the utilization and availability of MBEs.

## 2. What has been the agency's past experience in meeting its overall DBE goal?

Keen Independent analyzed ADOT's Uniform Reports DBE Commitments/Awards and Payments to FAA for the most recent five completed fiscal years. As presented in Figure 10-5 on the following page, based on payments to DBEs, ADOT met its overall DBE goal in only one of the five fiscal years examined. Participation in FFY 2015 was 10.97 percent, which exceeded the overall DBE goal of 4.87 percent for that year.

ADOT also reported certified DBE participation based on DBE commitments/awards on FAA-funded contracts. As shown in Figure 10-5, reported DBE participation based on DBE commitments/awards on FAA-funded contracts was lower than the overall goal in FFYs 2015, 2016, 2017 and 2019 but exceeded the DBE goal in FFY 2018.

Figure 10-5.

ADOT overall DBE goal and reported DBE participation on FAA-funded contracts, FFY 2015 through FFY 2019

Federal fiscal year	DBE goal	DBE commitments/awards	DBE payments	Difference from DBE goal	
				Awards	Payments
2015	4.87 %	2.65 %	10.97 %	-2.22 %	6.10 %
2016	4.87	1.33	1.65	-3.54	-3.22
2017	4.87	0.00	4.07	-4.87	-0.80
2018	4.87	8.74	0.00	3.87	-4.87
2019	8.05	0.00	0.00	-8.05	-8.05

Source: ADOT Uniform Reports of DBE Awards/Commitments and Payments.

Finally, Keen Independent examined total DBE participation from its own analysis of utilization for October 2013 through September 2018. DBE participation was 7.7 percent of FAA-funded contract dollars over this time period.

## 3. What has DBE participation been when ADOT has not applied DBE contract goals

**(or other race-conscious remedies)?** All of the DBE participation for FAA-funded contracts discussed in this chapter was achieved without the application of DBE contract goals or other race-conscious programs.



**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 determining the extent to which it could meet its overall DBE goal through the use of neutral measures, ADOT must review the race- and gender-neutral measures that it and other organizations have in place, and those it has planned or could consider for future implementation.

Keen Independent's analysis of neutral remedies in Chapter 7 indicates that ADOT has implemented an extensive set of neutral measures. ADOT is continuing to examine additional neutral measures. One of these measures might be setting small business contract goals for certain FAA-funded contracts, as discussed in Chapter 8.

## Summary

Chapter 10 provides information to ADOT as it considers (1) its overall DBE goal for FFY 2022 through FFY 2024 for FAA-funded contracts, and (2) its projection of the portion of its overall DBE goal to be achieved through neutral means.

**1. Overall DBE goal for FAA-funded contracts.** As explained in this chapter, ADOT might consider setting its goal at the downward-adjusted figure of 10.69 percent DBE participation. This represents more than a 2 percentage point increase from its current overall DBE goal of 8.05 percent.

## **2. Should ADOT project that it can meet all of its overall DBE goal through neutral means?**

ADOT should consider all of the information in this report and other relevant sources when reaching its decision on any use of race- and gender-conscious programs (such as DBE contract goals).

- There is information indicating disparities in the utilization of MBEs in FAA-funded contracts (see Chapter 6) and also quantitative and qualitative evidence that there is not a level playing field for minority- and women-owned firms (see Chapter 4 and supporting appendices).
- ADOT has extensive neutral measures in place, and there are many small business assistance programs offered by other institutions throughout the state. Chapter 8 discusses additional neutral measures for ADOT consideration.
- MBE/WBE utilization was approximately 27 percent for FAA-funded contracts, with much of that participation coming from minority- and women-owned firms that might be able to certify as DBEs. If ADOT were to encourage more MBE/WBEs to become DBE-certified, it could be possible for ADOT to achieve a DBE goal in the range of 10.69 percent without the use of DBE contract goals.

ADOT projected it would meet all of its overall goal through neutral measures when it prepared its overall DBE goal of 8.05 percent for FFY 2019 through FFY 2021. The first column of Figure 10-6 presents these recent projections.

The second column of Figure 10-6 shows an overall DBE goal of 10.69 percent for FAA-funded contracts for FFY 2020 through FFY 2024 and a projection that all of it would be met through neutral means. This level of overall DBE goal reflects a downward step 2 adjustment.

The two columns on the right-hand side of Figure 10-6 calculate the amount of neutral participation that would be necessary to meet an overall DBE of 19.72 percent (from the base figure analysis) or 28.16 percent (if ADOT made an upward step 2 adjustment).

Figure 10-6.

Current ADOT overall DBE goal and projections of race-neutral participation for FAA-funded contracts for FFY 2022 through FFY 2024

Component of overall DBE goal	FFY 2019- FFY 2021	FFY 2022 - FFY 2024		
		Downward adjustment	Base figure	Upward adjustment
Overall goal	8.05 %	10.69 %	19.72 %	28.16 %
Neutral projection	- <u>8.05</u>	- <u>10.69</u>	- <u>19.72</u>	- <u>28.16</u>
Race-conscious projection	0.00 %	0.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

## **CHAPTER 11.**

### **Overall Annual DBE Goal and Projections for FTA-Funded Contracts**

As with FHWA and FAA, the Federal Transit Administration (FTA) directly provides funds to ADOT for certain contracts.<sup>1</sup> Therefore, ADOT must operate the Federal DBE Program for FTA-funded contracts.

The Final Rule effective February 28, 2011 revised requirements for goal setting so that agencies that implement the Federal DBE Program must develop and submit overall annual DBE goals every three years. ADOT adopted an overall annual DBE goal of 11.00 percent for FTA-funded contracts for FFY 2019–FFY 2021 based on the 2017 Availability Study report. ADOT operated a solely race-neutral program during this goal period. ADOT will submit a new goal for federal fiscal years 2022 through 2024. The new goal will apply as of October 1, 2021.

Chapter 11 provides information to ADOT that will help it set this overall DBE goal and make other decisions concerning its operation of the Federal DBE Program for FTA-funded contracts. This chapter contains three parts based on the process for establishing overall goals outlined in 49 CFR Part 26.45:

- A. Establishing a base figure;
- B. Consideration of a step 2 adjustment; and
- C. Portion of overall DBE goal for FTA-funded contracts to be met through neutral means.

#### **A. Establishing a Base Figure**

As for FHWA-funded contracts (Chapter 9) and FAA-funded contracts (Chapter 10), establishing a base figure is the first step in calculating an overall annual goal for DBE participation in ADOT's FTA-funded contracts.

Chapter 5 presented results from the availability analysis for FTA-funded contracts during the October 2013 through September 2018 study period. Current and potential DBEs could be expected to receive 14.64 percent of ADOT FTA-funded transportation contract dollars during the study period based on those analyses. ADOT might consider 14.64 percent as the base figure for its future overall DBE goal. Chapter 5 explains the methodology for the base figure calculation in considerable detail.

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<sup>1</sup> Keen Independent identified \$30 million in FTA-funded contracts between October 2013 and September 2018 (321 prime contracts and subcontracts). These include \$18.7 million in transit services contracts and \$4.2 million in petroleum and fuel.

As point of reference, Keen Independent also calculated the base figure only counting currently certified DBEs. The base figure for FTA-funded contracts only including current DBEs is 12.25 percent.

## **B. Consideration of a Step 2 Adjustment**

Per the Federal DBE Program, ADOT must consider potential step 2 adjustments to the base figure when determining its overall DBE goal for FTA-funded contracts. Federal regulations outline factors that an agency must consider:

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 factors.<sup>2</sup>

Keen Independent completed an analysis of each of the above step 2 factors and was able to quantify the effect of certain factors on the base figure. Other information examined was not as easily quantifiable but is still relevant to ADOT as it determines whether to make any step 2 adjustments.

**1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years.** USDOT's "Tips for Goal-Setting" suggests that agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years (i.e., the percentage of contract dollars going to DBEs).

**DBE participation based on payments reported in ADOT Uniform Reports to FTA.** Based on payment data from ADOT Uniform Reports of DBE Commitments/Awards and Payments reported to FTA, ADOT's median past DBE participation for FFY 2015 through FFY 2019 is 29.25 percent. This value suggests a possible upward step 2 adjustment based on this factor. Figure 11-1 examines this previous utilization.

**DBE participation based on commitments/awards reported in ADOT Uniform Reports to FTA.** The study team also calculated median DBE participation based on commitment/award data from ADOT Uniform Reports. Based on award information, ADOT's median past DBE participation for FFY 2015 through FFY 2019 is 27.61 percent, a value which suggests a possible upward step 2 adjustment based on this factor.

**DBE participation based on Keen Independent utilization analysis for FTA-funded contracts.** Keen Independent's analysis identified 24.38 percent median DBE participation on FTA-funded contracts from October 2013 through September 2018. This value also suggests a possible upward step 2 adjustment based on this factor.

Examining total participation for FFY 2014 through FFY 2018, DBEs received 22.9 percent of FTA-funded contract dollars.

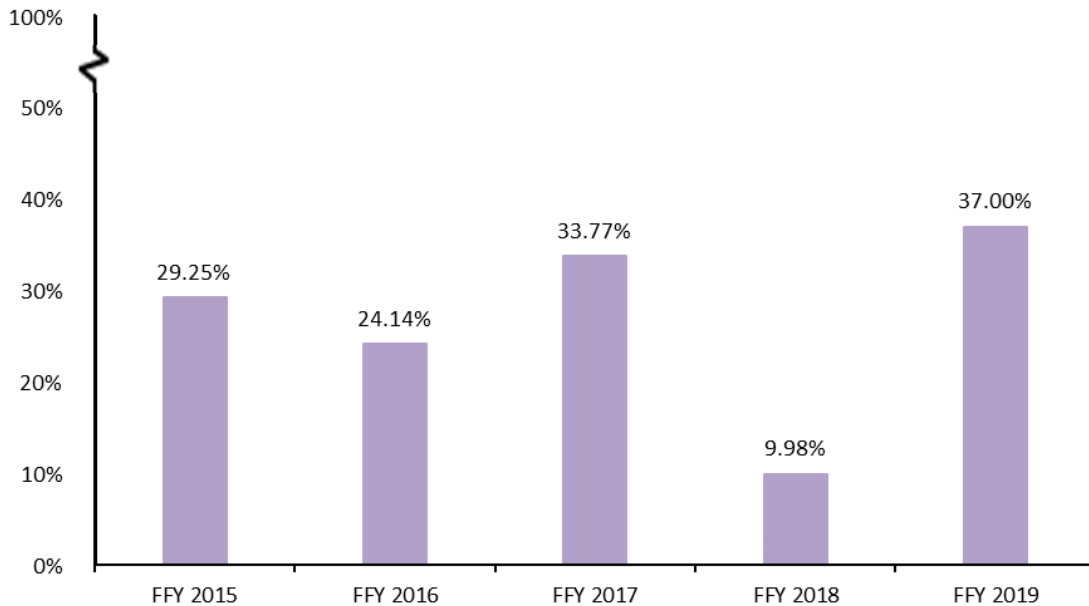
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<sup>2</sup> 49 CFR Section 26.45.

**Summary.** ADOT might consider these data when determining whether to make a step 2 adjustment based on past DBE participation. Keen Independent recommends using the 29.25 percent past participation figure (based on payments in ADOT’s Uniform Reports) when calculating a possible step 2 adjustment.

Figure 11-1.

DBE participation on FTA-funded contracts based on Uniform Reports to FTA, fiscal years 2015 through 2019



Source: ADOT Uniform Reports to FTA for September 2014 through October 2019.

## **2. Information related to employment, self-employment, education, training and unions.**

Chapter 4 summarizes information about conditions in the Arizona transportation contracting industry for minorities, women and MBE/WBEs. Detailed quantitative analyses of marketplace conditions in Arizona are presented in Appendices E through H. Keen Independent’s analyses indicate that there are barriers that certain minority groups and women face related to entry and advancement and business ownership in the Arizona construction and engineering industries. Such barriers may affect the availability of MBE/WBEs to obtain and perform ADOT and local agency transportation contracts.

It may not be possible to quantify the cumulative effect that barriers in employment, education and training may have had in depressing the availability of minority- and women-owned firms in the Arizona transportation contracting industry. However, the effects of barriers in business ownership can be quantified, as previously explained in Chapter 9.

The study team used regression analyses to investigate whether race, ethnicity and gender affected rates of business ownership among workers in the Arizona construction and engineering industries. The regression analyses allowed the study team to examine those effects while statistically controlling for various personal characteristics including education and age (Appendix F provides detailed results of the business ownership regression analyses).<sup>3</sup>

- Those analyses revealed that African Americans, Asian Americans, Native Americans and white women working in construction were less likely than nonminorities and white men to own construction businesses, even after accounting for various race- and gender-neutral personal characteristics. Each of these disparities was statistically significant.
- In addition, there was a statistically significant disparity in firm ownership for other minorities and white women in the Arizona engineering industry.
- Keen Independent did not perform business ownership regression models for the goods and other services industries.

As discussed in Chapter 9 of this report, Keen Independent analyzed the impact that barriers in business ownership would have on the base figure for ADOT contracts if African Americans, Asian Americans, Native Americans and white women owned businesses at the same rate as similarly situated nonminorities and white men. This type of inquiry is sometimes referred to as a “but for” analysis because it estimates the availability of MBE/WBEs *but for* the effects of race- and gender-based discrimination.

As described in detail in Chapter 9, the study team separately completed “but for” analyses for construction and for engineering contracts and then weighted the results based on the proportion of FTA-funded contract dollars that ADOT awarded for construction and engineering for October 2013 through September 2018. The analysis included the same contracts that the study team analyzed to determine the base figure (i.e., FTA-funded contracts that ADOT awarded from October 2013 through September). Keen Independent followed the same steps to conduct the “but for” analyses as described for FHWA-funded contracts in Chapter 9. (Note that the calculations do not consider any disparities in business ownership rates for people of color and women working in the goods and other services industry as business ownership analyses for this industry were not performed in the study.)

Figure 11-2 calculates the impact of disparities in business ownership rates on current and potential DBE availability for FTA-funded contracts, resulting in a possible upward adjustment for a goal of 17.06 percent. (The calculations indicate a possible upward step 2 adjustment of 2.42 percentage points.) This might be an appropriate step 2 adjustment if ADOT chose to make such an adjustment.

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<sup>3</sup> The study team examined U.S. Census data on business ownership rates using methods similar to analyses examined in court cases involving state departments of transportation in California, Illinois and Minnesota.

Figure 11-2.

Potential step 2 adjustment to overall goal for FTA-funded contracts considering disparities in the rates of business ownership

	a.	b.	c.	d.	e.
Current and potential DBEs	Current availability	Disparity index for business ownership	Availability after initial adjustment*	Availability after scaling to 100%	Components of overall DBE availability**
<b>Construction</b>					
African American	3.45 %	61	5.66 %	4.82 %	
Asian American	1.90	65	2.92	2.49	
Native American	7.35	36	20.42	17.40	
Other minorities	4.90	n/a	4.90	4.17	
White women	2.39	69	3.46	2.95	
Minorities and women	19.99 %	n/a	37.36 %	31.83 %	2.27 %
All other businesses	80.01	n/a	80.01	68.17	
<b>Total firms</b>	<b>100.00 %</b>	n/a	<b>117.37 %</b>	<b>100.00 %</b>	
<b>Engineering and other subindustries</b>					
Hispanic American	4.80 %	n/a	4.80 %	3.70 %	
Other minorities	12.28	37	33.19	25.56	
White women	18.18	67	27.13	20.89	
Minorities and women	35.26 %	n/a	65.12 %	50.15 %	5.30 %
All other businesses	64.74	n/a	64.74	49.85	
<b>Total firms</b>	<b>100.00 %</b>	n/a	<b>129.86 %</b>	<b>100.00 %</b>	
<b>Goods and services</b>					
Hispanic American	1.14 %	n/a	1.14 %	1.14 %	
Other minorities	0.67	n/a	0.67	0.67	
White women	9.73	n/a	9.73	9.73	
Minorities and women	11.54 %	n/a	11.54 %	11.54 %	9.50 %
All other businesses	88.46	n/a	88.46	88.46	
<b>Total firms</b>	<b>100.00 %</b>	n/a	<b>100.00 %</b>	<b>100.00 %</b>	
<b>Total for current and potential DBEs</b>	<b>14.64 %</b>	n/a	n/a		<b>17.06 %</b>
<b>Difference from base figure</b>					<b>2.42 %</b>

Note: Numbers may not add to 100.00% due to rounding.

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

\*\* Components of the goal were calculated as the value after adjustment and scaling to 100 percent, multiplied by the percentage of total FTA-funded contract dollars in each industry (construction = 7.1%, engineering = 10.6%, goods and other services 82.3%).

Source: Keen Independent based on FTA-funded contracts for October 2014 through September 2018 and statistical analysis of U.S. Census Bureau American Community Survey data for Arizona for 2013–2017.

**3. Any disparities in the ability of DBEs to get financing, bonding and insurance.** Analysis of access to financing and bonding revealed quantitative and qualitative evidence of disadvantages for minorities, women and MBE/WBEs.

- Any barriers to obtaining financing and bonding might affect opportunities for minorities and women to successfully form and operate construction and engineering businesses in the Arizona marketplace.
- Any barriers that MBE/WBEs face in obtaining financing and bonding would also place those businesses at a disadvantage in obtaining ADOT and local agency construction and engineering prime contracts and subcontracts.

Note that financing and bonding are closely linked, as discussed in Chapter 4 and Appendix J.

There is also evidence that some firms cannot bid on certain public sector projects because they cannot afford the levels of insurance required by the agency. This barrier appears to affect small businesses, which might disproportionately impact minority- and women-owned firms. Additionally, MBEs and WBEs were somewhat more likely to report that insurance requirements on contracts were a barrier to bidding.

The information about financing, bonding and insurance supports an upward step 2 adjustment in ADOT's overall annual goal for DBE participation in FTA-funded contracts.

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

Among the “other factors” examined in this study was the success of MBE/WBEs relative to majority-owned businesses in the Arizona marketplace. There is quantitative evidence that certain groups of MBE/WBEs are less successful than majority-owned firms, and face greater barriers in the marketplace, even after considering neutral factors. Chapter 4 summarizes that evidence and Appendix H presents supporting quantitative analyses. There is also qualitative evidence of barriers to the success of minority- and women-owned businesses, as summarized in Chapter 4. Some of this qualitative information suggests that discrimination on the basis of race, ethnicity and gender affects minority- and women-owned firms in the Arizona transportation contracting industry.

There is no straightforward way to project the number of MBE/WBEs available for ADOT work but for the effects of these other factors.

**Approaches for making step 2 adjustments.** Quantification of potential step 2 adjustments is discussed below.

**1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years.** Analysis of this factor might indicate an upward step 2 adjustment if ADOT analyzed its estimates of past DBE participation (based on payments) — for recent years, the median DBE participation on FTA-funded contracts was 29.25 percent (from Figure 11-1).

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



USDOT “Tips for Goal-Setting” suggests taking one-half of the difference between the base figure and evidence of current capacity as one approach to calculate the step 2 adjustment for that factor.

The difference between the 14.64 percent base figure (calculated in Chapter 5) and 29.25 percent DBE participation is 14.61 percentage points ( $29.25\% - 14.64\% = 14.61\%$ ). One-half of this difference is an upward adjustment of 7.31 percentage points ( $14.61\% \div 2 = 7.31\%$ ). The goal would then be calculated as follows:  $14.64\% + 7.31\% = 21.95\%$ . (These calculations are presented in Figure 11-3).

Figure 11-3.

Potential step 2 adjustments to ADOT’s overall DBE goal for FTA-funded contracts, FFY 2022–FFY 2024

Step 2 adjustment component	Value	Explanation
<b>Potential upward adjustment for demonstrated capacity</b>		
Evidence of current capacity	29.25 %	Past DBE participation (Uniform DBE reports)
Base figure	- 14.64	From base figure analysis
Difference	14.61 %	
	÷ 2	Reduce by one-half
Adjustment	7.31 %	Upward adjustment for current capacity
Base figure	14.64 %	From base figure analysis
Adjustment for current capacity	+ 7.31	Upward step 2 adjustment
<b>Overall DBE goal</b>	<b>21.95 %</b>	Upward adjustment for demonstrated capacity
<b>Potential upward adjustment for disparity in business ownership</b>		
Base figure	14.64 %	From base figure analysis
Adjustment for "but for" factors	+ 2.42	"But for" step 2 adjustment for business ownership
<b>Overall DBE goal</b>	<b>17.06 %</b>	Upward adjustment for disparity in business ownership
<b>Potential upward adjustment for demonstrated capacity and disparity in business ownership</b>		
Base figure	14.64 %	From base figure analysis
Adjustment for current capacity	+ 7.31	Adjustment for current capacity
Adjustment for "but for" factors	+ 2.42	"But for" step 2 adjustment for business ownership
<b>Overall DBE goal</b>	<b>24.37 %</b>	Total upward adjustment

Note: Numbers may not add to totals due to rounding.

Source: Keen Independent analysis.

**2. Information related to employment, self-employment, education, training, and unions.** The study team was not able to quantify all of the information regarding barriers to entry for MBE/WBEs. Quantification of the business ownership factor indicates an upward step 2 adjustment of 2.42 percentage points to reflect the “but-for” analyses of business ownership rates presented in Figure 11-2. If ADOT made this adjustment, the overall DBE goal for FTA-funded contracts would be 17.06 percent ( $14.64\% + 2.42\% = 17.06\%$ ). Figure 11-3 summarizes these calculations.

**3. Any disparities in the ability of DBEs to get financing, bonding and insurance.** Analysis of financing, bonding and insurance indicates that an upward adjustment is appropriate. However, the impact of these factors on availability could not be quantified.

**4. Other factors.** The impact of the many barriers to success of MBE/WBEs in Arizona could not be specifically quantified. However, the evidence supports an upward adjustment.

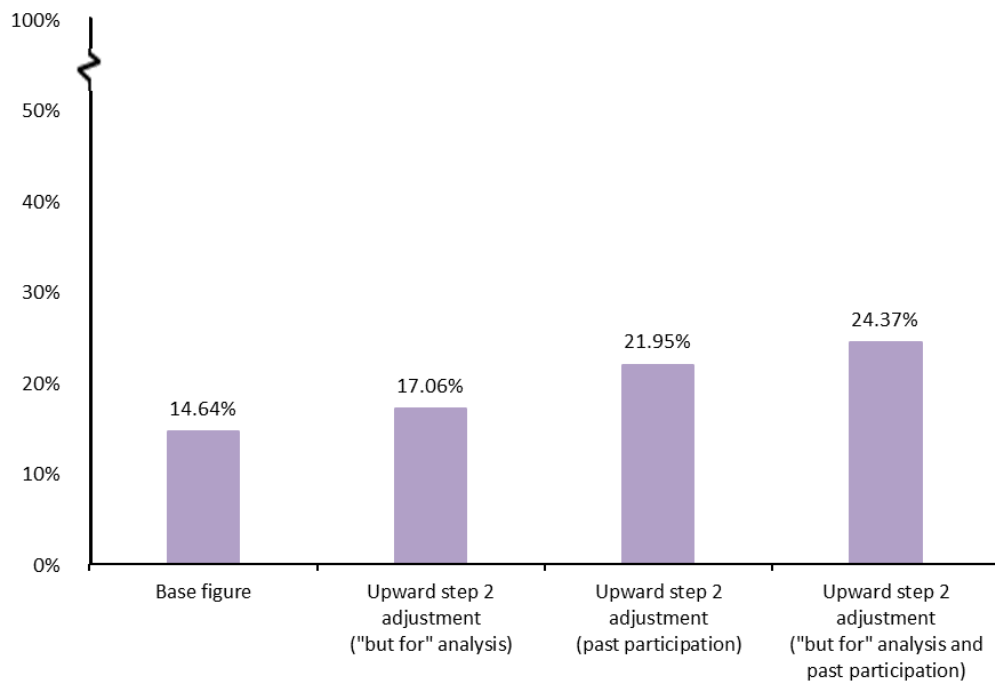
**Summary.** ADOT will need to consider whether or not to make a step 2 adjustment when determining its overall DBE goal.

- **Adjustment for past DBE participation.** If ADOT makes an upward step 2 adjustment reflecting current capacity to perform work, its overall DBE goal for FTA-funded contracts would be 21.95 percent.
- **Adjustment for disparity in business ownership.** If ADOT instead makes an upward adjustment based on estimated MBE/WBE availability but for the effects of race- and gender-based discrimination, its DBE goal would be 17.06 percent.
- **Combined step 2 adjustment.** ADOT could also choose to adjust the base figure using both demonstrated DBE capacity and disparity in business ownership. The overall DBE goal would then be 24.37 percent, calculated as follows:  $14.64\% + 7.31\% + 2.42\% = 24.37\%$ . These calculations are presented in the bottom portion of Figure 11-3 on the previous page.

Figure 11-4 on the following page summarizes these potential adjustments described in this chapter.

Figure 11-4.

Potential step 2 adjustments to overall DBE goal for FTA-funded contracts



Source: Keen Independent analysis.

### C. Portion of DBE Goal for FTA-Funded Contracts to be Met through Neutral Means

The Federal DBE Program requires state and local transportation agencies to meet the maximum feasible portion of their overall DBE goals using race- and gender-neutral measures. Along with setting an overall goal for DBE participation, agencies must project the portion of that goal they expect to meet (a) through race- and gender-neutral means, and (b) through race- and gender-conscious programs (if any). 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, as outlined in detail in Chapter 9. ADOT operated an entirely race-neutral DBE program for its FTA-funded contracts for the years examined in this study.

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

Keen Independent considered conditions in the local marketplace (summarized in Chapter 4) and analyses of MBE/WBE availability and utilization (see Chapters 5 and 6). Quantitative and qualitative information is summarized below.

**Marketplace conditions.** As discussed in Chapter 4, Keen Independent examined conditions in the Arizona marketplace, including:

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

There was quantitative evidence of disparities in outcomes for minority- and women-owned firms in general and for certain MBE/WBE groups concerning the above issues. Qualitative information indicated some evidence that discrimination may have been a factor in these outcomes.

ADOT should review the information about marketplace conditions presented in Chapter 4 and Appendices E through J, as well as other information it may have, when considering the extent to which it can meet its overall DBE goal through neutral measures.

**Results of the disparity analysis for FTA-funded contracts.** Chapter 6 of this report examines utilization and availability of minority- and women-owned firms in ADOT's FTA-funded contracts. About 30 percent of FTA-funded contract dollars went to minority- and women-owned firms combined, which was somewhat above the 23 percent that might be expected based on the availability analysis for these contracts. Much of the utilization of MBEs and WBEs came from firms that appear that they could be certified as DBEs.

Utilization of white women-owned firms (25.1%) exceeded what might be expected from the availability analysis (12.0%).

Utilization of MBEs (4.5%) was substantially below what might be expected based on availability for this work (10.8%). There were substantial disparities between utilization and availability for each MBE group.

**Summary.** ADOT should review the information about marketplace conditions presented in Chapter 4 and Appendices E through J, as well as other information it may have, when considering the extent to which it can meet its overall DBE goal through neutral measures. The combined information from the marketplace analyses indicates evidence of unequal outcomes for minority- and women-owned firms. The disparity analysis for FTA-funded contracts shows relatively high overall utilization of minority- and women-owned firms but disparities between the utilization and availability of MBEs.

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

Keen Independent analyzed ADOT's Uniform Reports DBE Commitments/Awards and Payments to FTA for the most recent five completed fiscal years. As presented in the far-right column of Figure 11-5, based on payments to DBEs, ADOT met its overall DBE goal in each of the five fiscal years examined.

ADOT also reported certified DBE participation based on DBE commitments/awards on FTA-funded contracts, as summarized in Figure 11-5. As shown, reported DBE participation based on DBE commitments/awards on FTA-funded contracts exceeded the DBE goal in each of the past five fiscal years.

Figure 11-5.

ADOT overall DBE goal and reported DBE participation on FTA-funded contracts, FFY 2015 through FFY 2019

Federal fiscal year	DBE goal	DBE commitments/ awards	DBE payments	Difference from DBE goal	
				Awards	Payments
2015	7.25 %	76.62 %	29.25 %	69.37 %	22.00 %
2016	7.25	19.21	24.14	11.96	16.89
2017	7.25	16.40	33.77	9.15	26.52
2018	7.25	32.12	9.98	24.87	2.73
2019	11.00	27.61	37.00	16.61	26.00

Source: ADOT Uniform Reports of DBE Awards/Commitments and Payments.

### 3. What has DBE participation been when ADOT has not applied DBE contract goals

**(or other race-conscious remedies)?** For each of the fiscal years in the previous goal period, all DBE participation for FTA-funded contracts has been achieved without the application of DBE contract goals or other race-conscious programs.

As presented in Chapter 6 of this report, Keen Independent utilization analysis of FTA-funded contracts during the study period indicates that MBE/WBEs received about 30 percent of contract dollars from October 2013 through September 2018. The study team found that many of the MBE/WBEs receiving contract dollars could potentially meet criteria to be certified as DBEs but were not certified during the study period. The 30 percent MBE/WBE participation figure indicates that if ADOT were to encourage these firms to become certified, the agency might meet a goal of 14.64 percent (or perhaps even a considerably higher goal) without the use of DBE contract goals.

### 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 determining the extent to which it could meet its overall DBE goal through the use of neutral measures, ADOT must review the race- and gender-neutral measures that it and other organizations have in place, and those it has planned or could consider for future implementation.

Keen Independent's analysis of neutral remedies in Chapter 7 indicates that ADOT has implemented an extensive set of neutral measures. There are other neutral measures that ADOT might consider, including small business contract goals for FTA-funded contracts with subcontract opportunities, as discussed in Chapter 8

## Summary

Chapter 11 provides information to ADOT as it considers (1) its overall DBE goal for FFY 2022 through FFY 2024 for FTA-funded contracts, and (2) its projection of the portion of its overall DBE goal to be achieved through neutral means.

**1. Overall DBE goal for FTA-funded contracts.** As explained in this chapter, ADOT might consider setting its goal at the base figure of 14.64 percent DBE participation. This goal would be more than 3 percentage points higher than its current goal of 11.00 percent for FTA-funded contracts.

**2. Should ADOT project that it can meet all of its overall DBE goal through neutral means?**

ADOT should consider all of the information in this report and other sources when reaching its decision on any use of race- and gender-conscious programs (such as DBE contract goals).

- There is information indicating disparities for minorities and women and qualitative evidence of discrimination within the local transportation contracting marketplace.
- ADOT has extensive neutral measures in place and there are many small business assistance programs offered by other institutions in the state. There are additional neutral measures ADOT might consider, including small business contract goals.
- DBE utilization was approximately 23 percent for FTA-funded contracts during the FFY 2014 through FFY 2018 study period.
- Further analyses indicated that many of the MBEs and WBEs that received FTA-funded contract dollars that are not DBE-certified could be if they applied. This alone would increase reported DBE participation.

ADOT projected it would meet all of its 11.00 percent goal for FTA-funded contracts through neutral measures when it prepared its current overall DBE goal of 11.00 percent for FFY 2019 through FFY 2021. The first column Figure 11-6 presents these recent projections.

The second column of numbers in Figure 11-6 is an example of projections using a completely neutral overall DBE goal of 14.64 percent for FFY 2022 through FFY 2024. The remaining three columns of Figure 11-6 present possible adjusted DBE goals that ADOT might consider. The second through fourth columns also present projections of neutral achievement assuming that the program would be operated on a race- and gender-neutral basis.

Figure 11-6.

Current ADOT overall DBE goal and projections of race-neutral participation for FTA-funded contracts for FFY 2022 through FFY 2024

Component of overall DBE goal	FFY 2019-FFY 2021	FFY 2022 - FFY 2024			
		Base figure	Upward adjustment ("but for" analysis)	Upward adjustment (past participation)	Combined Step 2 adjustment
Overall goal	11.00 %	14.64 %	17.06 %	21.95 %	24.37 %
Neutral projection	- 11.00	- 14.64	- 17.06	- 21.95	- 24.37
Race-conscious projection	0.00 %	0.00 %	0.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

## APPENDIX A.

### Definition of Terms

Appendix A provides explanations and definitions useful to understanding the 2020 Disparity Study. The following definitions are only relevant in the context of these reports.

**Anecdotal evidence.** Anecdotal evidence includes personal accounts and perceptions of incidents — including any incidents of discrimination — told from each individual interviewee’s or participant’s perspective.

**Arizona Department of Transportation (ADOT).** ADOT is the steward of the State of Arizona’s transportation system. ADOT is responsible for building, maintaining and operating the state highway system. In addition, ADOT works with various partners to maintain and improve local transportation infrastructure. ADOT also provides other transportation services such as transportation safety.

**Availability analysis.** The availability analysis examines the number of minority-, women-owned and majority-owned businesses ready, willing and able to perform transportation-related construction and engineering work for ADOT or local agencies in Arizona.

“Availability” is often expressed as the percentage of contract dollars that might be expected to go to minority- or women-owned firms if based on analysis of the specific type, location, size and timing of each ADOT prime contract and subcontract and the relative number of minority- and women-owned firms available for that work.

**Business.** A business is a for-profit company, including all of its establishments (synonymous with “firm” and “company”).

**Business listing.** A business listing is a record in the Dun & Bradstreet (D&B) database (or other database) of business information. A D&B record is a “listing” until the study team determines it to actually be a business establishment with a working phone number.

**Business establishment.** A business establishment (or simply, “establishment”) is a place of business with an address and working phone number. One business can have many business establishments.

**Code of Federal Regulations or CFR.** Code of Federal Regulations (“CFR”) is a codification of the federal agency regulations. An electronic version can be found at <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>

**Contract.** A contract is a legally binding relationship between the seller of goods or services and a buyer.

**Contract element.** A contract element is either a prime contract or subcontract that the study team included in its analyses.

**Consultant.** A business performing professional services contracts.

**Contractor.** A contractor is a business performing construction contracts.

**Controlled.** Controlled means exercising management and executive authority for a company.

**Disadvantaged Business Enterprise (DBE).** A small business that is 51 percent or more owned and controlled by one or more individuals who are both socially and economically disadvantaged according to the guidelines in the Federal DBE Program (49 CFR Part 26). Membership in certain race and ethnic groups identified under “minority-owned business enterprise” in this appendix may meet the presumption of socially and economically disadvantaged. Women are also presumed to be socially and economically disadvantaged. Examination of economic disadvantage also includes investigating the three-year average gross revenues and the business owner’s personal net worth (at the time of this report, a maximum of \$1.32 million excluding equity in the business and primary personal residence).

Some minority- and women-owned businesses do not qualify as DBEs because of gross revenue or net worth limits.

A business owned by a nonminority male can be certified as a DBE if the enterprise meets the requirements in 49 CFR Part 26.

**Disparity.** A disparity is a difference or gap between an actual outcome and a reference point or benchmark. For example, a difference between an outcome for one racial/ethnic group and an outcome for non-Hispanic whites may constitute a disparity.

**Disparity analysis.** A disparity analysis compares actual outcomes with what might be expected based on other data. Analysis of whether there is a “disparity” between the utilization and availability of minority- and women-owned businesses is one tool in examining whether there is evidence consistent with discrimination against such businesses.

**Disparity index.** A disparity index is calculated by dividing percent utilization (numerator) by percent availability (denominator) and then multiplying the result by 100. A disparity index of 100 indicates “parity.” Smaller disparity indices indicate larger disparities. For example, the disparity index would be “50” if the utilization of a particular group was 5 percent of contract dollars and its availability was 10 percent. For this study, a disparity index that is less than 80 is “substantial.”

**Dun & Bradstreet (D&B).** D&B is the leading global provider of lists of business establishments and other business information (see [www.dnb.com](http://www.dnb.com)). Hoover’s is the D&B company that provides these lists.



**Employer firms.** Employer firms are firms with paid employees other than the business owner and family members.

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

**Establishment.** See “business establishment.”

**Federal Aviation Administration (FAA).** The FAA is an agency of the United States Department of Transportation that administers federal funding to support all aspects of civil aviation in the United States including airports and air traffic control centers.

**Federal Disadvantaged Business Enterprise (DBE) Program.** Federal DBE Program refers to the Disadvantaged Business Enterprise Program established by the United States Department of Transportation after enactment of the Transportation Equity Act for the 21st Century (TEA-21) as amended in 1998. The regulations for the Federal DBE Program are set forth in 49 CFR Part 26.

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

**Federal Transit Administration (FTA).** The FTA is an agency of the United States Department of Transportation that administers federal funding to support local public transportation systems including buses, subways, light rail, passenger ferry boats, and other forms of transportation.

**Firm.** See “business.”

**Federally funded contract.** A federally funded contract is any contract or project funded in whole or in part (one dollar or more) with United States Department of Transportation financial assistance. As used in this study, it is synonymous with “USDOT-funded contract.”

**Industry.** An industry is a broad classification for businesses providing related goods or services.

**Local agency.** A local agency is any city, county, town, tribal government, regional transportation commission or other local government receiving money through ADOT.

**Majority-owned business.** A majority-owned business is a for-profit business that is not owned and controlled by minorities or women (see definition of “minorities” below).

**MBE.** See minority-owned business.

**Minorities.** Minorities are individuals who belong to one of the racial/ethnic groups identified in the federal regulations in 49 CFR Section 26.5:

- Black Americans (or “African Americans” in this study), which include persons having origins in any of the black racial groups of Africa;
- Hispanic Americans, which include persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
- Native Americans, which include persons who are American Indians, Eskimos, Aleuts or Native Hawaiians;
- Asian-Pacific Americans, which include persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, Hong Kong, and other countries and territories in the Pacific set forth in 49 CFR Section 26.5; and
- Subcontinent Asian Americans, which include persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka.

For this study, some analyses of Asian-Pacific Americans and Subcontinent Asian Americans combine these groups as “Asian Americans.”

**Minority-owned business (MBE).** An MBE is a business with at least 51 percent ownership and control by minorities. Minority groups in this study are those listed in 49 CFR Section 26.5. For purposes of this study, a business need not be certified as such to be counted as a minority-owned business. Businesses owned by minority women are also counted as MBEs in this study (where that information is available).

**North American Industry Classification System (NAICS) codes.** NAICS codes identify the primary line of business of a business enterprise. See <http://www.census.gov/epcd/www/naics.html>.

**Non-DBEs.** Non-DBEs are firms that are not certified as DBEs, regardless of the race/ethnicity or gender of the owner.

**Non-response bias.** Non-response bias occurs when the observed responses to a survey question differ from what would have been obtained if all individuals in a population, including non-respondents, had answered the question.

**Owned.** Owned indicates at least 51 percent ownership of a company. For example, a “minority-owned” business is at least 51 percent owned by one or more minorities.

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

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

**Prime contract.** A prime contract is a contract between a prime contractor or a prime consultant and the end user, such as ADOT.

**Prime contractor.** A prime contractor is a construction firm that performs a prime contract for an end user, such as ADOT.

**Project.** A project refers to an ADOT or local agency transportation construction and/or engineering endeavor. A project could include one or multiple prime contracts and corresponding subcontracts.

**Race-and gender-conscious measures.** Race-and gender-conscious measures are programs in which businesses owned by some racial/ethnic groups may participate but nonminority-owned firms may not, or that apply to businesses owned by women but not men. A DBE contract goal is one example of a race- and gender-conscious measure.

Note that the term is a shortened version of “race-, ethnicity-, and gender-conscious measures.”

For ease of communication, the study team has truncated the term to “race- and gender-conscious measures.”

**Race- and gender-neutral measures.** Race and gender-neutral measures apply to businesses regardless of the race/ethnicity or gender of firm 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 or any disadvantaged business regardless of race or gender of ownership. (A broader list of examples can be found in 49 CFR Section 26.51(b).)

Note that the term is more accurately “race-, ethnicity- and gender-neutral” measures. However, for ease of communication, the study team has shortened the term to “race- and gender-neutral measures.”

**Relevant geographic market area.** The relevant geographic market area is the geographic area in which the businesses receiving most ADOT and local agency contracting dollars are located. The relevant geographic market area is also referred to as the “local marketplace.” Case law related to MBE/WBE programs requires disparity analyses to focus on the “relevant geographic market area.”<sup>1</sup>

**Remedy.** A remedy is a contracting program measure that is designed to address barriers to full participation of a particular group of businesses.

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<sup>1</sup> See, e.g., *Croson*, 448 U.S. at 509; 49 CFR Section 26.35; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995.

**Small business.** A small business is a business with low revenues or size (based on revenue or number of employees) relative to other businesses in the industry. “Small business” does not necessarily mean that the business is certified as such.

**Small Business Administration (SBA).** The SBA refers to the United States Small Business Administration, which is an independent agency of the United States government that assists small businesses.

**State-funded contract.** A state-funded contract is any contract or project that is funded with State of Arizona or other local funds and no federal funds. As these contracts do not include federal funds, the Federal DBE Program does not apply.

**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 a reasonable 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 the prime consultant’s contract for customer such as ADOT.

**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 the prime contractor’s contract for a customer such as ADOT.

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

**Subrecipient.** A subrecipient is a local agency receiving financial assistance from the United States Department of Transportation passed through ADOT.

**Supplier.** A supplier is a firm that sold supplies to a prime contractor as part of a larger project (or in some cases sold supplies directly to ADOT).

**United States Department of Transportation (USDOT).** USDOT refers to the United States Department of Transportation, which includes the Federal Highway Administration, the Federal Transit Administration, the Federal Aviation Administration and the Federal Rail Administration. Note that the Federal DBE Program does not apply to contracts solely using funds from Federal Rail Administration, and such contracts would not be included in the Disparity Study.

**Utilization.** Utilization refers to the percentage of total contracting dollars of a particular type of work going to a specific group of businesses (e.g., DBEs).

**WBE.** See women-owned business.

**Women-owned business (WBE).** A WBE is a business with at least 51 percent ownership and control by nonminority women. A business need not be certified as such to be included as a WBE in this study. For this study, businesses owned and controlled by minority women are counted as minority-owned businesses.

## APPENDIX B.

### Legal Framework and Analysis

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”),<sup>1</sup> and the United States Department of Transportation (“USDOT” or “DOT”) regulations promulgated to implement TEA-21 known as the Federal Disadvantaged Business Enterprise (“Federal DBE”) Program,<sup>2</sup> which DBE Program was continued and reauthorized by the Fixing America’s Surface Transportation Act (FAST Act).<sup>3</sup> Most recently, in October 2018, Congress passed the FAA Reauthorization Act.<sup>4</sup> The appendix also reviews recent cases involving state and local minority and women-owned business enterprise (“MBE/WBE”) programs, which are instructive to the study. The appendix provides a summary of the legal framework for the disparity study as applicable to the Arizona Department of Transportation.

#### A. Introduction

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

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study, the Federal DBE Program and Federal ACDBE Program (49 CFR Part 23 — Participation of Disadvantaged Business Enterprise in Airport Concessions) and their implementation by state DOTs and state and local recipients of federal funds, MBE/WBE/DBE programs, and the strict scrutiny analysis. In particular, this analysis reviews in Part D below recent Ninth Circuit Court of Appeals decisions that are instructive to the study, including the recent decisions in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation* (“*Caltrans*”), *et al.*,<sup>7</sup>

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<sup>1</sup> Moving Ahead for Progress in the 21st Century Act (“MAP-21”), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat. 405; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107.

<sup>2</sup> 49 CFR Part 26 Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs (“Federal DBE Program”).

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

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

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

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

<sup>7</sup> *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013).

*Western States Paving Co. v. Washington State DOT*,<sup>8</sup> *Orion Insurance Group, and Ralph G. Taylor v. Washington State Office of Minority and Woman's Business Enterprises, United States DOT, et al.*,<sup>9</sup> *Mountain West Holding Co. v. Montana, Montana DOT, et al.*,<sup>10</sup> and the District Court decision in *M.K. Weeden Construction v. Montana, Montana DOT, et al.*<sup>11</sup>

The significant 2005 decision in *Western States Paving v. Washington DOT, USDOT and FHWA* set forth legal standards in the Ninth Circuit Court of Appeals for state DOTs to satisfy the strict scrutiny standard for determining whether there is a compelling governmental interest to have a narrowly tailored race and ethnic conscious DBE program in compliance with the Federal DBE Program, and for cases involving challenges to the Federal DBE Program and its implementation by state DOTs. As discussed in this introduction and in the detailed analysis Part D below, the *Western States Paving* decision resulted in a specific USDOT Official Guidance for states in the Ninth Circuit, including Arizona, to follow. (See page 69 below for a detailed summary of the decision.)

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

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<sup>8</sup> *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

<sup>9</sup> *Orion Insurance Group, Taylor v. WSOMWBE, U.S. DOT, et al.*, 2018 WL 6695345 (9th Cir. 2018), Memorandum opinion (not for publication and not precedent); Petition for Writ of Certiorari filed with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

<sup>10</sup> *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication and not precedent) (9th Cir. May 16, 2017). The case on remand was voluntarily dismissed by stipulation of the parties (March 2018).

<sup>11</sup> *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013).

<sup>12</sup> *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert. denied*, 2017 WL 497345 (2017).

<sup>13</sup> *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied*, 2016 WL 193809 (2016); *Dunnet Bay Construction Co. v. Illinois DOT, et. al.* 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay*, 2015 WL 4934560 (7th Cir. 2015).

<sup>14</sup> *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

<sup>15</sup> *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

<sup>16</sup> *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

<sup>17</sup> *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VIP*”).

<sup>18</sup> *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010).

<sup>19</sup> *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

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

The analyses of the Ninth Circuit decisions in *AGC, SDC v. Cal. DOT*, *Western States Paving, Orion Insurance Group*, and *Mountain West Holding, Inc.*, and the District Court decision in *M.K. Weeden*, and these other recent cases from other jurisdictions are instructive to the disparity study because they are the most recent and significant decisions by federal courts setting forth the legal framework applied 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 a DBE Program by Arizona DOT submitted in compliance with the Federal DBE regulations.

As stated above and shown in detail below in Part D, the *Western States Paving* decision is a leading case in the Ninth Circuit establishing legal standards for satisfying the strict scrutiny test regarding whether there is the compelling governmental interest in a state's transportation marketplace to have a narrowly tailored race and ethnic conscious DBE program in compliance with the Federal DBE Program, that the state DOT DBE Program is narrowly tailored and properly implements the federal regulations at 49 CFR Part 26 and the Federal DBE Program, and the standard relevant to cases involving challenges to the Federal DBE Program and its implementation by state DOTs. In *Western States Paving*, the Ninth Circuit upheld the validity of the Federal DBE Program, but the Court held invalid Washington State DOT's DBE Program implementing the DBE Federal Program. The Court held that mere compliance with the Federal DBE Program by state recipients of federal funds, absent independent and sufficient state-specific evidence of discrimination in the state's transportation contracting industry marketplace, did not satisfy the strict scrutiny analysis.

Following *Western States Paving*, the USDOT, in particular for agencies, transportation authorities, airports and other governmental entities implementing the Federal DBE Program in states within the jurisdiction of the Ninth Circuit Court of Appeals, recommended the use of disparity studies by recipients of federal financial assistance to examine whether or not there is evidence of discrimination and its effects, and how remedies might be narrowly tailored in developing their DBE Program to comply with the Federal DBE Program.<sup>20</sup> The USDOT suggests consideration of both statistical and anecdotal evidence. The USDOT instructs that recipients should ascertain evidence for discrimination and its effects separately for each group presumed to be disadvantaged in 49 CFR Part 26.<sup>21</sup> The USDOT's Guidance provides that recipients should consider evidence of discrimination and its effects.<sup>22</sup>

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<sup>20</sup> Questions and Answers Concerning Response to *Western States Paving Company v. Washington State Department of Transportation* (January 2006) [hereinafter USDOT Guidance], available at 71 Fed. Reg. 14,775 and [http://www.fhwa.dot.gov/civilrights/dbe\\_memo\\_a5.htm](http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm); see 49 CFR § 26.9; see, also, 49 CFR Section 26.45.

<sup>21</sup> USDOT Guidance, available at [http://www.fhwa.dot.gov/civilrights/dbe\\_memo\\_a5.htm](http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm) (January 2006)

<sup>22</sup> *Id.*

The USDOT's Guidance is recognized by the federal regulations as "valid, and express the official positions and views of the Department of Transportation"<sup>23</sup> for states in the Ninth Circuit.

In *Western States Paving*, the United States intervened to defend the Federal DBE Program's facial constitutionality, and, according to the Court, stated "that [the Federal DBE Program's] race-conscious measures can be constitutionally applied only in those states where the effects of discrimination are present."<sup>24</sup> Accordingly, the USDOT advised federal aid recipients that any use of race-conscious measures must be predicated on evidence that the recipient has concerning discrimination or its effects within the local transportation contracting marketplace.<sup>25</sup>

In *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation ("Caltrans"), et al.*, (*"AGC, SDC v. Cal. DOT" or "Caltrans"*), the Ninth Circuit in 2013 upheld the validity of California DOT's DBE Program implementing the Federal DBE Program, and found that Caltrans followed the standards set forth in the *Western States Paving* case.. The Ninth Circuit Court of Appeals and the United States District Court for the Eastern District of California in *AGC, San Diego Chapter, Inc. v. California DOT, et al.* held that Caltrans' implementation of the Federal DBE Program is constitutional.<sup>26</sup> The Ninth Circuit found that Caltrans' DBE Program implementing the Federal DBE Program was constitutional and survived strict scrutiny by: (1) having a strong basis in evidence of discrimination within the California transportation contracting industry based in substantial part on the evidence from the Disparity Study conducted for Caltrans; and (2) being "narrowly tailored" to benefit only those groups that have actually suffered discrimination.

The District Court had held that the "Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry," satisfied the strict scrutiny standard, and is "clearly constitutional" and "narrowly tailored" under *Western States Paving* and the Supreme Court cases.<sup>27</sup>

There have been three other recent cases in the Ninth Circuit instructive for the study, as follows:

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<sup>23</sup> *Id.*, 49 CFR § 26.9; *See*, 49 CFR § 23.13.

<sup>24</sup> *Western States Paving*, 407 F.3d at 996; *see, also*, Br. for the United States, at 28 (April 19, 2004).

<sup>25</sup> DOT Guidance, available at 71 Fed. Reg. 14,775 and [http://www.fhwa.dot.gov/civilrights/dbe\\_memo\\_a5.htm](http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm) (January 2006).

<sup>26</sup> *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, 713 F.3d 1187 (9th Cir. April 16, 2013); *Associated General Contractor of America, San Diego Chapter, Inc. v. California DOT*, U.S.D.C. E.D. Cal., Civil Action No.S:09-cv-01622, Slip Opinion (E.D. Cal. April 20, 2011) *appeal dismissed based on standing, on other grounds* Ninth Circuit held Caltrans' DBE Program constitutional, *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. April 16, 2013).

<sup>27</sup> *Id.*, *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, Slip Opinion Transcript of U.S. District Court at 42-56.



In *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*<sup>28</sup>, the Ninth Circuit and the district court applied the decision in *Western States*<sup>29</sup>, and the decision in *AGC, San Diego v. California DOT*<sup>30</sup>, as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state’s implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program.<sup>31</sup> The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state’s implementation of the DBE Program “is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.”<sup>32</sup> The Ninth Circuit in *Mountain West* also pointed out it had held that “even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.”<sup>33</sup>

Montana, the Court found, bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state’s DBE contracting program, “(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be ‘limited to those minority groups that have actually suffered discrimination.’”<sup>34</sup> Discrimination may be inferred from “a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors.”<sup>35</sup>

The Ninth Circuit reversed the District Court’s grant of summary judgment to Montana based on issues of fact as to the evidence and remanded the case for trial. The *Mountain West* case was settled and voluntarily dismissed by the parties on remand in 2018.

It is noteworthy that the Ninth Circuit in *Mountain West* stated in its Memorandum Opinion that the case is not appropriate for official publication and is not precedent. The Memorandum order expressly provides: “This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.” Thus, the decision may not be cited as binding precedential authority in the Ninth Circuit.

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<sup>28</sup> 2017 WL 2179120 (9th Cir. 2017), Memorandum opinion, (Not for Publication and not precedent), dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014).

<sup>29</sup> 407 F.3d 983 (9th Cir. 2005).

<sup>30</sup> 713 F.3d 1187 (9th Cir. 2013).

<sup>31</sup> 2014 WL 6686734 at \*2 (D. Mont. 2014).

<sup>32</sup> *Mountain West*, 2014 WL 6686734 at \*2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at \*2 (9th Cir. 2017) Memorandum, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

<sup>33</sup> *Mountain West*, 2017 WL 2179120 at \*2, Memorandum, at 6, and 2014 WL 6686734 at \*2, quoting *Western States*, 407 F.3d at 997-999.

<sup>34</sup> *Mountain West*, 2017 WL 2179120 at \*2 (9th Cir.), Memorandum, at 6-7, quoting *Assoc. Gen. Contractors of Am. v. Cal. Dep’t of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (quoting *W. States Paving*, 407 F.3d at 997-99).

<sup>35</sup> *Mountain West*, 2017 WL 2179120 at \*2 (9th Cir.), Memorandum, at 6-7, quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

The District Court decision in the Ninth Circuit in Montana, *M.K. Weeden*<sup>36</sup>, followed the *AGC, SDC v. Caltrans* Ninth Circuit decision, and held as valid and constitutional the Montana Department of Transportation's implementation of the Federal DBE Program.

In a very recent case in the Ninth Circuit, *Orion Insurance Group; Ralph G. Taylor, Plaintiffs v. Washington State Office of Minority & Women's Business Enterprises, United States DOT, et. al.*<sup>37</sup> Plaintiffs, Orion Insurance Group ("Orion") and its owner Ralph Taylor, alleged violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90 percent European, 6 percent Indigenous American and 4 percent Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE. Plaintiffs submitted to OMWBE Orion's application for DBE certification under federal law. Taylor identified himself as Black and Native American in the Affidavit of Certification.

Orion's DBE application was denied because there was insufficient evidence that: he was a member of a racial group recognized under the regulations; was regarded by the relevant community as either Black or Native American; or that he held himself out as being a member of either group. OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

The District court held OMWBE did not act arbitrarily or capriciously when it found the presumption was rebutted that Taylor was socially and economically disadvantaged because there was insufficient evidence he was either Black or Native American. By requiring individualized determinations of social and economic disadvantage, the court found the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

The District court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause, and the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause. The court found no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

The District court dismissed claims that the definitions of "Black American" and "Native American" in the DBE regulations are impermissibly vague. Plaintiffs' claims were dismissed against the State Defendants for violation of Title VI because Plaintiffs failed to show the State engaged in intentional racial discrimination. The DBE regulations' requirement that the State make decisions based on race was held constitutional.

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<sup>36</sup> M.K. Weeden, 2013 WL 4774517.

<sup>37</sup> 2018 WL 6695345 (9th Cir. December 19, 2018)(Memorandum)(Not for Publication).

On appeal, the Ninth Circuit in affirming the District court held it correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity, Taylor’s discrimination claims under 42 U.S.C. §1983 because the federal defendants did not act “under color or state law,” Taylor’s claims for damages because the United States has not waived its sovereign immunity, and Taylor’s claims for equitable relief under 42 U.S.C. §2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

The Ninth Circuit held OMWBE did not act in an arbitrary and capricious manner when it determined it had a “well-founded reason” to question Taylor’s membership claims, determined that Taylor did not qualify as a “socially and economically disadvantaged individual,” and when it affirmed the state’s decision was supported by substantial evidence and consistent with federal regulations. The court held the USDOT “articulated a rational connection” between the evidence and the decision to deny Taylor’s application for certification.

It also is noteworthy that the Ninth Circuit in *Orion* stated in its Memorandum decision that the case is not appropriate for official publication and is not precedent. Thus, the case may not be cited as controlling precedential authority in the Ninth Circuit.

Also, recently the Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. USDOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,<sup>38</sup> and in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*,<sup>39</sup> upheld the implementation of the Federal DBE Program by the Illinois DOT.<sup>40</sup> The court held Dunnet Bay lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting v. Illinois DOT, et al.* decision because there was no evidence IDOT exceeded its authority under federal law.<sup>41</sup> The Seventh Circuit in *Midwest Fence* also held the Federal DBE Program is facially constitutional. The court agreed with the Eighth, Ninth, and Tenth Circuits that the Federal DBE Program is narrowly tailored on its face, and thus survives strict scrutiny.<sup>42</sup>

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

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

In *Croson*, the U.S. Supreme Court struck down the City of Richmond’s “set-aside” program as unconstitutional because it did not satisfy the strict scrutiny analysis applied to “race-based” governmental programs.<sup>43</sup> J.A. Croson Co. (“Croson”) challenged the City of Richmond’s minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more Minority Business Enterprises (“MBE”). In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

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<sup>38</sup> 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

<sup>39</sup> 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

<sup>40</sup> 799 F. 3d 676, 2015 WL 4934560 (7th Cir. 2015).

<sup>41</sup> *Id.*

<sup>42</sup> 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

<sup>43</sup> 488 U.S. 469 (1989).

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

The Court determined that the plan neither served a “compelling governmental interest” nor offered a “narrowly tailored” remedy to past discrimination. The Court found no “compelling governmental interest” because the City had not provided “a strong basis in evidence for its conclusion that [race-based] remedial action was necessary.”<sup>44</sup> The Court held the City presented no direct evidence of any race discrimination on its part in awarding construction contracts or any evidence that the City’s prime contractors had discriminated against minority-owned subcontractors.<sup>45</sup> The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was “narrowly tailored” for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the over inclusiveness of certain minorities in the “preference” program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.<sup>46</sup>

The Court stated that reliance on the disparity between the number of prime contracts awarded to minority firms and the minority population of the City of Richmond was misplaced. There is no doubt, the Court held, that “[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination” under Title VII.<sup>47</sup> But it is equally clear that “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.”<sup>48</sup>

The Court concluded that where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task. The Court noted that “the city does not even know how many MBE’s in the relevant market are qualified to undertake prime or subcontracting work in public construction projects.”<sup>49</sup> “Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.”<sup>50</sup>

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<sup>44</sup> 488 U.S. at 500, 510.

<sup>45</sup> 488 U.S. at 480, 505.

<sup>46</sup> 488 U.S. at 507-510.

<sup>47</sup> 488 U.S. at 501, *quoting Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308, 97 S.Ct. 2736, 2741.

<sup>48</sup> 488 U.S. at 501 *quoting Hazelwood*, 433 U.S. at 308, n. 13, 97 S.Ct., at 2742, n. 13.

<sup>49</sup> 488 U.S. at 502.

<sup>50</sup> *Id.*

The Supreme Court stated that it did not intend its decision to preclude a state or local government from “taking action to rectify the effects of identified discrimination within its jurisdiction.”<sup>51</sup> The Court held that “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.”<sup>52</sup>

The Court said: “If the City of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion.”<sup>53</sup> “Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria.” “In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”<sup>54</sup>

The Court further found “if the City could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the City could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”<sup>55</sup>

## **2. *Adarand Constructors, Inc. v. Peña* (“*Adarand I*”), 515 U.S. 200 (1995)**

In *Adarand I*, the U.S. Supreme Court extended the holding in *Croson* and ruled that all federal government programs that use racial or ethnic criteria as factors in procurement decisions must pass a test of strict scrutiny in order to survive constitutional muster.

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

## **C. The Legal Framework Applied to the Federal DBE and ACDBE Programs, 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 the disparity study because they concern the strict scrutiny analysis, the legal framework in this area, challenges to the validity of MBE/WBE/DBE programs, an analysis of disparity studies, and implementation of the Federal DBE and ACDBE Programs by state DOTs and recipients of federal financial assistance (USDOT funds) based on 49 CFR Part 26 and 49 CFR Part 23.

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<sup>51</sup> 488 U.S. at 509.

<sup>52</sup> *Id.*

<sup>53</sup> 488 U.S. at 509.

<sup>54</sup> *Id.*

<sup>55</sup> 488 U.S. at 492.

## 1. The Federal DBE Program (and ACDBE Program)

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.<sup>56</sup> Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century (“TEA-21”), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 (“SAFETEA”). In July 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act (“MAP-21”).<sup>57</sup> In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).<sup>58</sup> Most recently, in October 2018, Congress passed the FAA Reauthorization Act.<sup>59</sup>

The Federal DBE Program as amended changed certain requirements for federal aid recipients and accordingly changed how recipients of federal funds implemented the Federal DBE Program for federally-assisted contracts. The federal government determined that there is a compelling governmental interest for race- and gender-based programs at the national level, and that the program is narrowly tailored because of the federal regulations, including the flexibility in implementation provided to individual federal aid recipients by the regulations. State and local governments are not required to implement race- and gender-based measures where they are not necessary to achieve DBE goals and those goals may be achieved by race- and gender-neutral measures.<sup>60</sup>

The Federal DBE Program and ACDBE Program established responsibility for implementing the DBE and ACDBE Programs to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE and/or ACDBE goals specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The Federal DBE and ACDBE Programs outline certain steps a state or local government recipient can follow in establishing a goal, and USDOT (FHWA and FAA) considers and must approve the goal and the recipient’s DBE and ACDBE programs. The implementation of the Federal DBE and ACDBE Programs are substantially in the hands of the state DOT and state or local government recipient and is set forth in detail in the federal regulations, including 49 CFR § 26.45 and 49 CFR §§23.41-51.

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<sup>56</sup> *Appendix-The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050, 26,051-63 & nn. 1-136 (May 23, 1996) (hereinafter “The Compelling Interest”); see *Adarand VII*, 228 F.3d at 1167-1176, citing *The Compelling Interest*.

<sup>57</sup> Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

<sup>58</sup> Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

<sup>59</sup> Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

<sup>60</sup> 49 CFR § 26.51. See, 49 CFR §23.25.

Provided in 49 CFR § 26.45 and 49 CFR §§ 23.41-51 are instructions as to how recipients of federal funds should set the overall goals for their DBE and ACDBE Programs. In summary, the recipient establishes a base figure for relative availability of DBEs and ACDBEs.<sup>61</sup> This is accomplished by determining the relative number of ready, willing, and able DBEs and ACDBEs in the recipient's market.<sup>62</sup> Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.<sup>63</sup> There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d) and 49 CFR § 23.51(d). These include, among other types, the current capacity of DBEs and ACDBEs to perform work on the recipient's contracts as measured by the volume of work DBEs and ACDBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs and ACDBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs and ACDBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.<sup>64</sup> This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE and ACDBE participation one would expect absent the effects of discrimination.<sup>65</sup>

Further, the Federal DBE Program and ACDBE Program require state and local government recipients of federal funds to assess how much of the DBE and ACDBE goal can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.<sup>66</sup> A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.<sup>67</sup>

Federal aid recipients are to certify DBEs and ACDBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.<sup>68</sup>

**F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21.** In October 2018, December 2015 and in July 2012, Congress passed the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made "Findings" that "discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets," in "federally-assisted surface transportation markets," and that the continuing barriers "merit the continuation" of the Federal ACDBE Program and the Federal DBE Program.<sup>69</sup> Congress also found in the F.A.A. Reauthorization Act of 2018, the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which

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<sup>61</sup> 49 CFR § 26.45(a), (b), (c); 49 CFR § 23.51(a), (b), (c).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at § 26.45(d); *Id.* at § 23.51(d).

<sup>64</sup> *Id.*

<sup>65</sup> 49 CFR § 26.45(b)-(d); 49 CFR § 23.51.

<sup>66</sup> 49 CFR § 26.51; 49 CFR § 23.51(a).

<sup>67</sup> 49 CFR § 26.51(b); 49 CFR § 23.25.

<sup>68</sup> 49 CFR §§ 26.61-26.73; 49 CFR §§ 23.31-23.39.

<sup>69</sup> Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

“provide a strong basis that there is a compelling need for the continuation of the” Federal ACDBE Program and the Federal DBE Program.<sup>70</sup>

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

- Extends the FAA DBE and ACDBE programs for five years.
- Contains an additional prompt payment provision.
- Increases in the size cap for highway, street, and bridge construction for construction firms working on airport improvement projects.
- Establishes Congressional findings of discrimination that provides a strong basis there is a compelling need for the continuation of the airport DBE program and the ACDBE program to address race and gender discrimination in airport related business.

#### **SEC. 150 DEFINITION OF SMALL BUSINESS CONCERN.**

Section 47113(a)(1) of title 49, United States Code, is amended as follows:

(1) ‘Small business concern’

A. Has the meaning given the term in section 3 of the Small Business Act (15 U.S.C. 632); but in the case of a concern in the construction industry, a concern shall be considered a small business concern if the concern meets the size standard for the NAICS Code 237310, as adjusted by the SBA

#### **SEC. 157 MINORITY AND DISADVANTAGED BUSINESS PARTICIPATION.**

(a) Findings. Congress finds the following:

- (1) While significant progress has occurred due to the establishment of the airport disadvantaged business enterprise program (sections 47107(e) and 47113 of title 49, United States Code), discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets across the nation. These continuing barriers merit the continuation of the airport disadvantaged business enterprise program.
- (2) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits. This testimony and documentation shows that race- and gender-neutral efforts alone are insufficient to address the problem.

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<sup>70</sup> Id. at Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, § 1101(b)(1) (2015).



- (3) This testimony and documentation demonstrates that discrimination across the nation poses a barrier to full and fair participation in airport-related businesses of women business owners and minority business owners in the racial groups detailed in 49 C.F.R. Parts 23 and 26, and has impacted firm development and many aspects of airport-related business in the public and private markets.
- (4) This testimony and documentation provides a strong basis that there is a compelling need for the continuation of the airport DBE program and the ACDBE program to address race and gender discrimination in airport related business.

#### **“Fixing America’s Surface Transportation Act” or the “FAST Act” (December 4, 2015)**

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

#### **SEC. 1101. AUTHORIZATION OF APPROPRIATIONS.**

(b) Disadvantaged Business Enterprises —

(1) FINDINGS- Congress finds that —

- (A) while significant progress has occurred due to the establishment of the disadvantaged business enterprise program, discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States;
- (B) the continuing barriers described in subparagraph (A) merit the continuation of the disadvantaged business enterprise program;
- (C) Congress has received and reviewed testimony and documentation of race and gender discrimination from numerous sources, including congressional hearings and roundtables, scientific reports, reports issued by public and private agencies, news stories, reports of discrimination by organizations and individuals, and discrimination lawsuits, which show that race- and gender-neutral efforts alone are insufficient to address the problem;
- (D) the testimony and documentation described in subparagraph (C) demonstrate that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners and has impacted firm development and many aspects of surface transportation-related business in the public and private markets; and

- (E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.

(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 three fiscal years in excess of \$23,980,000, as adjusted annually by the Secretary for inflation.<sup>71</sup>

Therefore, Congress in the FAST Act passed on December 3, 2015, 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 women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States; (2) the continuing barriers described in § 1101(b), subparagraph (A) above merit the continuation of the disadvantaged business enterprise program; and (3) there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.<sup>72</sup>

**USDOT Final Rule, 79 Fed. Reg. 59566 (October 2, 2014)**

**DBE: Program Implementation Modifications for 49 CFR Part 26 (Effective Nov. 3, 2014).<sup>73</sup>**

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.<sup>74</sup>

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<sup>71</sup> Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

<sup>72</sup> *Id.*

<sup>73</sup> 79 F.R. 59566-59122 (October 2, 2014).

<sup>74</sup> 77 F.R. 54952-55024 (September 6, 2012).

The USDOT noted the DBE Program was reauthorized in the Moving Ahead for Progress in the 21st 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.<sup>75</sup>

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

- (1) The Rule revised 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 USDOT statutory reauthorization, MAP-21;
- (2) The Rule revised the certification-related program provisions and standards; and
- (3) The Rule amended and modified 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.<sup>76</sup>

The new and revised forms included the USDOT 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 included reporting requirements under MAP-21, adding a new provision authorizing summary suspensions of DBEs under certain circumstances, and new record retention requirements.<sup>77</sup>

Several of the areas revised included:

- 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;
- 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;

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<sup>75</sup> 77 F.R. 54952.

<sup>76</sup> 79 F.R. 59566-59622 (October 2, 2014).

<sup>77</sup> *Id.*

- 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.<sup>78</sup>

In terms of forms and data collection, the 2014 Rule attempted to simplify the Uniform Certification Application; established a new USDOT personal net worth form to be used by applicants; established a uniform report of DBE awards or commitments and payments; captured data on minority women-owned DBEs and actual payments to DBEs reporting; and provided for a new submission required by MAP-21 on the percentage of DBEs in the state owned by nonminority women, and men.<sup>79</sup>

The 2014 Rule made 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.<sup>80</sup>

The Rule also provided 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.<sup>81</sup>

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<sup>78</sup> 79 F.R. 59566-59622.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

### **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 clarified the leadership roles and responsibilities of the various offices and Operating Administrations within the USDOT responsible for supporting and overseeing the implementation of the Federal DBE Program. The Order further established a framework for coordination, overall policy development, and program oversight among these offices. The Order provided 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 established a framework for coordination, overall policy development, and program oversight among these offices. The Order provided 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 clarified 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 established 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 provided 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](http://www.civilrights.dot.gov/disadvantaged-business-enterprise).

## MAP-21 (July 2012).

In the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress provided “Findings” that “discrimination and related barriers” “merit the continuation of the” Federal DBE Program.<sup>82</sup> In MAP-21, Congress specifically found as follows:

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

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

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

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

(E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.”<sup>83</sup>

Thus, Congress in MAP-21 determined based on testimony and documentation of race and gender discrimination that there was “a compelling need for the continuation of the” Federal DBE Program.<sup>84</sup>

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<sup>82</sup> Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

<sup>83</sup> Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

<sup>84</sup> *Id.*

## **USDOT Final Rule, 76 Fed. Reg. 5083 (January 28, 2011).**

The United States Department of Transportation promulgated a Final Rule on January 28, 2011, effective February 28, 2011, 76 Fed. Reg. 5083 (January 28, 2011) (“2011 Final Rule”) amending the Federal DBE Program at 49 CFR Part 26.

The Department stated in the 2011 Final Rule with regard to disparity studies and in calculating goals, that it agrees “it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (e.g., firms apparently owned and controlled by minorities or women that have not been certified under the DBE program) as well as certified DBEs. This is consistent with good practice in the field as well as with DOT guidance.”<sup>85</sup>

The United States DOT in the 2011 Final Rule stated that there was a continuing compelling need for the DBE program.<sup>86</sup> The DOT concluded that, as court decisions have noted, the DOT’s DBE regulations and the statutes authorizing them, “are supported by a compelling need to address discrimination and its effects.”<sup>87</sup> The DOT said that the “basis for the program has been established by Congress and applies on a nationwide basis ...” noted that both the House and Senate Federal Aviation Administration (“FAA”) Reauthorization Bills contained findings reaffirming the compelling need for the program, and referenced additional information presented to the House of Representatives in a March 26, 2009 hearing before the Transportation and Infrastructure Committee, and a Department of Justice document entitled “The Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: A Decade Later An Update to the May 23, 1996 Review of Barriers for Minority- and Women-Owned Businesses.”<sup>88</sup> This information, the DOT stated, “confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.”<sup>89</sup>

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<sup>85</sup> 76 F.R. at 5092.

<sup>86</sup> 76 F.R. at 5095.

<sup>87</sup> 76 F.R. at 5095.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

## 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.<sup>90</sup> The implementation of the Federal DBE Program and ACDBE Program by state DOTs and recipients of federal funds are subject to and must follow the strict scrutiny analysis if they utilize race- and ethnicity-based measures.<sup>91</sup> The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.<sup>92</sup>

### a. The Compelling Governmental Interest Requirement.

The first prong of the strict scrutiny analysis requires a governmental entity to have a “compelling governmental interest” in remedying past identified discrimination in order to implement a race- and ethnicity-based program.<sup>93</sup> State and local governments cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.<sup>94</sup> Rather, state and local governments must measure discrimination in their state or local market. However, that is not necessarily confined by the jurisdiction’s boundaries.<sup>95</sup>

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.<sup>96</sup> The federal courts also have held that Congress had

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<sup>90</sup> *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Peña (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; see, e.g. *H. B. Rowe*, 615.3d 233, 241-242 (4th Cir. 2010); *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6th Cir. 2000); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3d Cir. 1993).

<sup>91</sup> *Adarand I*, 515 U.S. 200, 227 (1995); *Mountain West Holding*, 2017 WL 2179120; *Midwest Fence*, 840 F.3d 930; *Dunnet Bay*, 799 F.3d 676; *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 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *M.K. Weeden Construction*, 2013 WL 4774517; *South Florida*, 544 F.Supp. 2d 1336; *Geod Corp.*, 746 F.Supp. 2d 642.

<sup>92</sup> *Adarand I*, 515 U.S. 200, 227 (1995); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3d Cir. 1993).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*; see e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

<sup>95</sup> See, e.g., *Concrete Works I*, 36 F.3d at 1520.

<sup>96</sup> *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; See *Midwest Fence*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), and *affirming*, 84 F. Supp. 3d 705, 2015 WL 1396376.



ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).<sup>97</sup>

It is instructive to the study to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”<sup>98</sup> The evidence found to satisfy the compelling interest standard included numerous congressional investigations and hearings, and outside studies of statistical and anecdotal evidence (e.g., disparity studies).<sup>99</sup> The evidentiary basis on which Congress relied to support its finding of discrimination includes:

- **Barriers to minority business formation.** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of “good ol’ boy” networks, from which minority firms have traditionally been excluded, and the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.<sup>100</sup>

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<sup>97</sup> *Id.* In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so “outdated” so as to provide an insufficient basis in evidence for the Department of Defense program (*i.e.*, whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense (“DOD”) regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe’s* Motion for Summary Judgment and granting Defendant United States Department of Defense’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program – was “stale” as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision below in Part G. *see, also*, the discussion below in Part G of the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al.*, 885 F.Supp.2d 237, (D.D.C.). Recently, in *Rothe Development, Inc. v. U.S. Dept of Defense and U.S. S.B.A.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), the United States Court of Appeals, District of Columbia Circuit, upheld the constitutionality of the Section 8(a) Program on its face, finding the Section 8(a) statute was race-neutral. The Court of Appeals affirmed on other grounds the district court decision that had upheld the constitutionality of the Section 8(a) Program. The district court had found the federal government’s evidence of discrimination provided a sufficient basis for the Section 8(a) Program. 107 F.Supp. 3d 183, 2015 WL 3536271 (D. D.C. June 5, 2015). See the discussion of the 2016 and 2015 decisions in *Rothe* in Part G below.

<sup>98</sup> *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; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>99</sup> *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”); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>100</sup> *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.

- **Barriers to competition for existing minority enterprises.** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor’s work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.<sup>101</sup>
- **Local disparity studies.** Congress found that local studies throughout the country tend to show a disparity between utilization and availability of minority-owned firms, raising an inference of discrimination.<sup>102</sup>
- **Results of removing affirmative action programs.** Congress found evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears, which courts have found strongly supports the government’s claim that there are significant barriers to minority competition, raising the specter of discrimination.<sup>103</sup>
- **FAST Act and MAP-21.** In December 2015 and in July 2012, Congress passed the FAST Act and MAP-21, respectively (see above), which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted surface transportation markets,” and that the continuing barriers “merit the continuation” of the Federal DBE Program.<sup>104</sup> Congress also found in both the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal DBE Program.<sup>105</sup>

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<sup>101</sup> *Adarand VII*, at 1170-72; see *DynaLantic*, 885 F.Supp.2d 237.

<sup>102</sup> *Id.* at 1172-74; see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>103</sup> *Adarand VII*, 228 F.3d at 1174-75; see *H. B. Rowe*, 615 F.3d 233, 247-258 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

<sup>104</sup> Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

<sup>105</sup> *Id.* at § 1101(b)(1).

**Burden of proof.** Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race-ethnic- 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.<sup>106</sup> If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.<sup>107</sup> The challenger bears the ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."<sup>108</sup>

In applying the strict scrutiny analysis, the courts hold that the burden is on the government to show both a compelling interest and narrow tailoring.<sup>109</sup> It is well established that "remediating the effects of past or present racial discrimination" is a compelling interest.<sup>110</sup> In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."<sup>111</sup>

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."<sup>112</sup> "An inference of discrimination may be made with empirical evidence that demonstrates 'a significant statistical disparity between a number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality's prime contractors.'"<sup>113</sup> Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.<sup>114</sup>

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<sup>106</sup> See *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Roth 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 VIP"), 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Contractors Ass'n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

<sup>107</sup> *Adarand VII*, 228 F.3d at 1166; *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Contractors Ass'n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>108</sup> See, e.g., *Adarand VII*, 228 F.3d at 1166; *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Contractors Ass'n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>109</sup> *Id.*; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990; See also *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>110</sup> *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989); see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Contractors Ass'n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

<sup>111</sup> *Croson*, 488 U.S. at 500; see e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *Contractors Ass'n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>112</sup> *Midwest Fence*, 2015 W.L. 1396376 at \*7 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932 (7th Cir. 2016); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *H. B. Rowe v. NCDOT*, 615 F.3d 233 (4th Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994); *Geyer Signal, Inc.*, 2014 WL 1309092 (D. Minn. 2014); see also, *Contractors Ass'n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

<sup>113</sup> See, e.g., *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187 (9th Cir. 2013); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 2015 W.L. 1396376 at \*7, *quoting Concrete Works*; 36 F.3d

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.<sup>115</sup> Once the governmental entity has shown acceptable proof of a compelling interest and remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.<sup>116</sup> Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE, ACDBE or MBE/WBE Program to demonstrate the unconstitutionality of an affirmative-action type program.<sup>117</sup>

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.<sup>118</sup> This rebuttal can be accomplished by providing a neutral explanation for the disparity between MBE/WBE/DBE utilization and availability, showing that the government’s data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data.<sup>119</sup> Conjecture and unsupported criticisms of the government’s methodology are

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1513, 1522 (quoting *Croson*, 488 U.S. at 509), affirmed 840 F.3d 932 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 973 (8th Cir. 2003); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

<sup>114</sup> *Croson*, 488 U.S. at 509; see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1196; *Midwest Fence*, 2015 WL 1396376 at \*7, affirmed, 840 F.3d 932 (7th Cir. 2016); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

<sup>115</sup> *Adarand Constructors, Inc. v. Peña*, (“*Adarand IIP*”), 515 U.S. 200 at 235 (1995); See, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

<sup>116</sup> *Majeske*, 218 F.3d at 820; see, e.g., *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Midwest Fence*, 2015 WL 1396376 \*7, affirmed, 840 F.3d 932; *Geyer Signal, Inc.*, 2014 WL 1309092; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

<sup>117</sup> *Id.*; *Adarand VII*, 228 F.3d at 1166.

<sup>118</sup> 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)); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 2015 WL 1396376 at \*7, affirmed, 840 F.3d 932 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>119</sup> 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)); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 2015 WL 1396376 at \*7, affirmed, 840 F.3d 932 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; see generally, *Engineering Contractors*, 122 F.3d at 916; *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

insufficient.<sup>120</sup> The courts have held that mere speculation the government's evidence is insufficient or methodologically flawed does not suffice to rebut a government's showing.<sup>121</sup>

The courts have stated that “it is insufficient to show that ‘data was susceptible to multiple interpretations,’ instead, plaintiffs must ‘present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.’”<sup>122</sup> The courts hold that in assessing the evidence offered in support of a finding of discrimination, it considers “both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself.”<sup>123</sup>

The courts have noted that “there is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.”<sup>124</sup> 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.<sup>125</sup> Instead, the Supreme Court stated that a government may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.<sup>126</sup> 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.<sup>127</sup>

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<sup>120</sup> See e.g., *H.B. Rowe v. North Carolina DOT* 615 F.3d 233, at 241-242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 2015 WL 1396376 at \*7, *affirmed*, 840 F.3d 932 (7th Cir. 2016); see also, *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974; *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>121</sup> *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d 233, at 242; see *Concrete Works*, 321 F.3d at 991; see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Kossman Contracting Co., Inc. v. City of Houston*, 2016 W.L. 1104363 (S.D. Tex. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>122</sup> *Geyer Signal, Inc.*, 2014 WL 1309092, quoting *Sherbrooke Turf*, 345 F.3d at 970.

<sup>123</sup> *Id.*, quoting *Adarand Constructors, Inc.*, 228 F.3d at 1166; see, e.g., *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 597 (3d Cir. 1996).

<sup>124</sup> *H.B. Rowe*, 615 F.3d at 241, quoting *Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“CAEP II”), 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“CAEP I”), 6 F.3d 996, 1002-1007 (3d Cir. 1993).

<sup>125</sup> *H.B. Rowe Co.*, 615 F.3d at 241; see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958; see, *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“CAEP II”), 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“CAEP I”), 6 F.3d 996, 1002-1007 (3d Cir. 1993).

<sup>126</sup> *Croson*, 488 U.S. 509, see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241; *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“CAEP II”), 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“CAEP I”), 6 F.3d 996, 1002-1007 (3d Cir. 1993).

<sup>127</sup> *H.B. Rowe*, 615 F.3d at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“CAEP II”), 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“CAEP I”), 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

The courts have stated the strict scrutiny standard is applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.”<sup>128</sup> In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.”<sup>129</sup>

Thus, courts have held that to justify a race-conscious measure, a government must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary.<sup>130</sup>

**Statistical evidence.** Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a state DOT or recipient of USDOT funds complying with the Federal DBE Program or ACDBE Program, to prove narrow tailoring by the state DOT or recipient implementing the Federal DBE Program or ACDBE Program at the state DOT or recipient level.<sup>131</sup> “Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”<sup>132</sup>

One form of statistical evidence is the comparison of a government’s utilization of MBE/WBEs compared to the relative availability of qualified, willing and able MBE/WBEs.<sup>133</sup> The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and women-owned firms may raise an inference of discriminatory exclusion.<sup>134</sup> However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.<sup>135</sup>

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<sup>128</sup> See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*, 615 F.3d at 241; 615 F.3d 233 at 241.

<sup>129</sup> See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, also *H. B. Rowe*; quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

<sup>130</sup> See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); *H. B. Rowe*, 615 F.3d 233 at 241 quoting *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993).

<sup>131</sup> See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Concrete Works*, 321 F.3d 950, 959 (10th Cir. 2003); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

<sup>132</sup> *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); see *Midwest Fence*, 840 F.3d 932, 948-954; *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

<sup>133</sup> *Croson*, 488 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rotbe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver* (“*Concrete Works IP*”), 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>134</sup> See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rotbe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of*

Other considerations regarding statistical evidence include:

- **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE (and ACDBE) availability measures the relative number of MBE/WBEs and DBEs (and ACDBEs) among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.<sup>136</sup> There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,<sup>137</sup> “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”<sup>138</sup>
- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.<sup>139</sup>
- **Disparity index.** An important component of statistical evidence is the “disparity index.”<sup>140</sup> A disparity index is defined as the ratio of the percent utilization to the percent availability times 100. A disparity index below 80 has been accepted as evidence of adverse impact. This has been referred to as “The Rule of Thumb” or “The 80 percent Rule.”<sup>141</sup>
- **Two standard deviation test.** The standard deviation figure describes the probability that the measured disparity is the result of mere chance. Some courts have held that a statistical disparity corresponding to a standard deviation of less than two is not considered statistically significant.<sup>142</sup>

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*E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>135</sup> *Western States Paving*, 407 F.3d at 1001.

<sup>136</sup> See, e.g., *Croson*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>137</sup> *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia* (“CAEP II”), 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 448 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>138</sup> *Id.*

<sup>139</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

<sup>140</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

<sup>141</sup> See, e.g., *Rici v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence*, 840 F.3d 932, 950 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *H.B. Rowe Co.*, 615 F.3d 233, 243-245; *Rothe*, 545 F.3d at 1041; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

<sup>142</sup> See, e.g., *H.B. Rowe Co. v. NCDOT*, 615 F.3d 233, 243-245; *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

In terms of statistical evidence, Courts have held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence,” but rather it may rely on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.<sup>143</sup>

**Marketplace discrimination and data.** The Tenth Circuit in *Concrete Works* held the district court erroneously rejected the evidence the local government presented on marketplace discrimination.<sup>144</sup> The court rejected the district court’s “erroneous” legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in its 1994 decision in *Concrete Works II* and the plurality opinion in *Croson*.<sup>145</sup> The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area.”<sup>146</sup> In *Concrete Works II*, the court stated that “we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.”<sup>147</sup>

The court stated that the local government could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination.<sup>148</sup> Thus, the local government was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden.<sup>149</sup>

Additionally, the court had previously concluded that the local government’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination.<sup>150</sup> Thus, the court held the local government’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination.<sup>151</sup>

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significant and may create a presumption of discriminatory conduct; *Peightal v. Metropolitan Eng’g Contractors Ass’n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

<sup>143</sup> *H. B. Rowe*, 615 F.3d 233 at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion), and *citing Concrete Works*, 321 F.3d at 958; *see, e.g., Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); *see also Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>144</sup> 321 F.3d at 973.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*, *quoting Concrete Works II*, 36 F.3d at 1529 (emphasis added).

<sup>147</sup> *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), *quoting Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

<sup>148</sup> *Id.* at 973.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 974, *quoting Concrete Works II*, 36 F.3d at 1529.

<sup>151</sup> *Id.*



The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which the local government relied were significantly flawed because they measured discrimination in the overall local government MSA construction industry, not discrimination by the municipality itself.<sup>152</sup> The court found that the district court's conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant.<sup>153</sup>

Consistent with the court's mandate in *Concrete Works II*, the local government attempted to show at trial that it "indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business."<sup>154</sup> The Tenth Circuit ruled that the local government can demonstrate that it is a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry" by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination.<sup>155</sup>

The court in *Concrete Works* rejected the argument that the lending discrimination studies and business formation studies presented by the local government were irrelevant. In *Adarand VII*, the Tenth Circuit concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination."<sup>156</sup>

The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the local government MSA construction industry, studies showing that discriminatory barriers to business formation exist in the local government construction industry are relevant to the municipality's showing that it indirectly participates in industry discrimination.<sup>157</sup>

The local government also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the

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<sup>152</sup> *Id.* at 974.

<sup>153</sup> *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

<sup>154</sup> *Id.*

<sup>155</sup> *Concrete Works*, 321 F.3d at 976, quoting *Croson*, 488 U.S. at 492.

<sup>156</sup> *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68.

<sup>157</sup> *Id.* at 977.

assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.<sup>158</sup>

**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.<sup>159</sup> But, the courts point out, including the Ninth Circuit, that personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.<sup>160</sup> It has been held that anecdotal evidence of a local or state government's institutional practices that exacerbate discriminatory market conditions are often particularly probative, and that the combination of anecdotal and statistical evidence is "potent."<sup>161</sup>

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE (and ACDBE) owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE (and ACDBE) owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs (and ACDBEs) on non-goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.<sup>162</sup>

Courts have accepted and recognize that anecdotal evidence is the witness' narrative of incidents told from his or her perspective, including the witness' thoughts, feelings, and perceptions, and thus anecdotal evidence need not be verified.<sup>163</sup>

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<sup>158</sup> *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

<sup>159</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnel Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

<sup>160</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe*, 615 F.3d 233, 248-249; *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); see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

<sup>161</sup> *Concrete Works I*, 36 F.3d at 1520; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

<sup>162</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1198; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76; see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993). 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).

## b. The Narrow Tailoring Requirement.

The second prong of the strict scrutiny analysis requires that a race- or ethnicity-based program or legislation implemented to remedy past identified discrimination in the relevant market be “narrowly tailored” to reach that objective.

The narrow tailoring requirement has several components and the courts, including the Ninth Circuit Court of Appeals, analyze several criteria or factors in determining whether a program or legislation satisfies this requirement including:

- The necessity for the relief and the efficacy of alternative race-, ethnicity- and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.<sup>164</sup>

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

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.<sup>165</sup>

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<sup>163</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at \*21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

<sup>164</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng'g Contractors Ass'n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d Cir. 1993); see also, *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>165</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 243-245, 252-255; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*,

## Implementation of the Federal DBE Program (and ACDBE Program): Narrow tailoring.

The second prong of the strict scrutiny analysis, as discussed above, requires the implementation of the Federal DBE Program (and ACDBE Program) by state DOTs and recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular state DOT’s or recipient’s transportation contracting and procurement market.<sup>166</sup>

In *Western States Paving*, the Ninth Circuit held the state DOT or recipient of federal funds must have independent evidence of discrimination within the recipient’s own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action.<sup>167</sup> Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.<sup>168</sup>

In *Western States Paving*, and in *AGC, SDC v. Caltrans*, the Court found that even where evidence of discrimination is present in a recipient’s market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race- or ethnicity-conscious program, for each of the minority groups to be included in any race- or ethnicity-conscious elements in a recipient’s implementation of the Federal DBE Program, there must be evidence that the minority group suffered discrimination within the recipient’s marketplace.<sup>169</sup>

In *Northern Contracting* decision (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold “that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT’s program.”<sup>170</sup> The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis.

The Seventh Circuit Court of Appeals held that the state DOT’s [Illinois DOT] application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.<sup>171</sup> The Seventh Circuit Court of Appeals analyzed IDOT’s compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth

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228 F.3d at 1181; *Kornbass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248; see also *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>166</sup> *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199 (9th Cir. 2013); *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71; see, e.g., *Midwest Fence*, 840 F.3d 932, 949-953.

<sup>167</sup> *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

<sup>168</sup> *Id.* at 995-1003. The Seventh Circuit Court of Appeals in *Northern Contracting* stated in a footnote that the court in *Western States Paving* “misread” the decision in *Milwaukee County Pavers*. 473 F.3d at 722, n. 5.

<sup>169</sup> 407 F.3d at 996-1000; See *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

<sup>170</sup> 473 F.3d at 722.

<sup>171</sup> *Id.* at 722.

in the federal regulations.<sup>172</sup> The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).<sup>173</sup> Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.<sup>174</sup>

The 2015 and 2016 Seventh Circuit Court of Appeals decisions in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et. al.* and *Midwest Fence Corp. v. USDOT, Federal Highway Administration, Illinois DOT* followed the ruling in *Northern Contracting* that a state DOT implementing the Federal DBE Program is insulated from a constitutional challenge absent a showing that the state exceeded its federal authority.<sup>175</sup> The court held the Illinois DOT DBE Program implementing the Federal DBE Program was valid, finding there was not sufficient evidence to show the Illinois DOT exceeded its authority under the federal regulations.<sup>176</sup> The court found *Dunnet Bay* had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.<sup>177</sup> In addition, the court in *Midwest Fence* upheld the constitutionality of the Federal DBE Program, and upheld the Illinois DOT DBE Program and Illinois State Tollway Highway Authority DBE Program that did not involve federal funds under the Federal DBE Program.<sup>178</sup>

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

The courts, including the Ninth Circuit, require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.<sup>179</sup> And the courts have held unconstitutional those race- and ethnicity-conscious programs implemented without consideration of race- and ethnicity-neutral alternatives to increase minority business participation in state and local contracting.<sup>180</sup>

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<sup>172</sup> *Id.* at 723-24.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*; *See, e.g., Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932 (7th Cir. 2016); *Geod Corp. v. New Jersey Transit Corp., et al.*, 746 F.Supp.2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

<sup>175</sup> *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F. 3d 676, 2015 WL 4934560 at \*\*18-22 (7th Cir. 2015).

<sup>176</sup> *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at \*\*18-22.

<sup>177</sup> *Id.*

<sup>178</sup> 840 F.3d 932 (7th Cir. 2016).

<sup>179</sup> *See, e.g., Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179; *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n*, 6 F.3d at 1008-1009 (3d. Cir. 1993); *Coral Constr.*, 941 F.2d at 923.

<sup>180</sup> *See, Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); *Eng'g Contractors Ass'n*, 122 F.3d at 927; *Virdi*, 2005 WL 13892 (11th Cir. 2005); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass'n*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

In holding the Federal DBE regulations were narrowly tailored, the Eighth Circuit stated those regulations “place strong emphasis on ‘the use of race-neutral means to increase minority business participation in government contracting’”<sup>181</sup>

The Eleventh Circuit described the “the essence of the ‘narrowly tailored’ inquiry [as] the notion that explicitly racial preferences ... must only be a ‘last resort’ option.”<sup>182</sup> Courts, including the Ninth Circuit, have found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.”<sup>183</sup>

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik* (“*Drabik II*”), stated: “*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, ‘for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting ... or whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”<sup>184</sup>

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*<sup>185</sup> also found that race- and ethnicity-based measures should be employed as a last resort. The majority opinion stated: “Narrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives,’ and yet in Seattle several alternative assignment plans — many of which would not have used express racial classifications — were rejected with little or no consideration.”<sup>186</sup> The Court found that the District failed to show it seriously considered race-neutral measures.

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

The Court in *Croson* followed by decisions from federal courts of appeal found that local and state governments have at their disposal a “whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.”<sup>187</sup>

The federal regulations and the courts require that state DOTs and recipients of federal financial assistance governed by 49 CFR Part 26 and 49 CFR Part 23 implement or seriously consider race-, ethnicity- and gender-neutral remedies prior to the implementation of race-, ethnicity- and

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<sup>181</sup> *Sherbrooke Turf, Inc.*, 345 F. 3d at 972, quoting *Adarand Constrs., Inc.*, 515 U.S. at 237-38.

<sup>182</sup> *Eng’g Contractors Ass’n*, 122 F.3d at 926 (internal citations omitted); see also *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion); *Webster v. Fulton County*, 51 F. Supp.2d 1354, 1380 (N.D. Ga. 1999), *aff’d per curiam* 218 F.3d 1267 (11th Cir. 2000).

<sup>183</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; see also *Adarand I*, 515 U.S. at 237-38.

<sup>184</sup> *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

<sup>185</sup> 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007).

<sup>186</sup> 551 U.S. 701, 734-37, 127 S.Ct. at 2760-61; see also *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 305 (2003).

<sup>187</sup> *Croson*, 488 U.S. at 509-510.

gender-conscious remedies.<sup>188</sup> The courts also have found the regulations require a state to meet the maximum feasible portion of its overall goal by using race neutral means.<sup>189</sup>

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

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.<sup>190</sup>

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<sup>188</sup> 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, 49 CFR § 23.25; 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.

<sup>189</sup> 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)); see, 49 CFR § 26.51; 49 CFR § 23.25.

The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity- and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”<sup>191</sup>

**Additional factors considered under narrow tailoring.** In addition to the required consideration of the necessity for the relief and the efficacy of alternative remedies (race- and ethnicity-neutral efforts), the courts require evaluation of additional factors as listed above.<sup>192</sup> For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;<sup>193</sup> (2) good faith efforts provisions;<sup>194</sup> (3) waiver provisions;<sup>195</sup> (4) a rational basis for goals;<sup>196</sup> (5) graduation provisions;<sup>197</sup> (6) remedies only for groups for which there were findings of discrimination;<sup>198</sup> (7) sunset provisions;<sup>199</sup> and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.<sup>200</sup>

Several federal court decisions have upheld the Federal DBE Program and its implementation by state DOTs and recipients of federal funds, including satisfying the narrow tailoring factors.<sup>201</sup>

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<sup>190</sup> See, e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 CFR § 26.51(b); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

<sup>191</sup> *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

<sup>192</sup> See *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

<sup>193</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality* (“AGC of Ca.”), 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

<sup>194</sup> See, e.g., *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

<sup>195</sup> *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917; see, e.g., *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

<sup>196</sup> *Id.*; *Sherbrooke Turf*, 345 F.3d at 971-973; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

<sup>197</sup> *Id.*

<sup>198</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 253-255; *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 593-594, 605-609 (3d. Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1009, 1012 (3d. Cir. 1993); *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016); *Sherbrooke Turf*, 2001 WL 150284 (unpublished opinion), *aff’d* 345 F.3d 964.

<sup>199</sup> See, e.g., *H. B. Rowe*, 615 F.3d 233, 254; *Sherbrooke Turf*, 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559; . see also, *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016).

<sup>200</sup> *Coral Constr.*, 941 F.2d at 925.

<sup>201</sup> See, e.g., *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert. denied*, 2017 WL 497345 (2017); *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied*, 2016 WL 193809 (2016); *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006); *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. May 16, 2017); *Northern Contracting, Inc. v.*



### 3. Intermediate scrutiny analysis

Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.<sup>202</sup>

The courts have interpreted this intermediate scrutiny standard to require that gender-based classifications be:

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.<sup>203</sup>

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard requires the state actor to present “sufficient probative” evidence in support of its stated rationale for the program.<sup>204</sup>

Intermediate scrutiny, as interpreted by the Ninth Circuit and other federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective.<sup>205</sup> The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.<sup>206</sup>

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*Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”); *Dunnet Bay Construction Co. v. Illinois DOT*, et. al. 2014 WL 552213 (C. D. Ill. 2014), affirmed by *Dunnet Bay*, 2015 WL 4934560 (7th Cir. 2015); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 WL 1309092 (D. Minn. 2014); *M. K. Weeden Construction v. State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d 642 (D. N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

<sup>202</sup> See e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195 (9th Cir. 2013); *H. B. Rowe*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Geyer Signal, Inc.*, 2014 WL 1309092.

<sup>203</sup> See e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”).

<sup>204</sup> *Id.* The Seventh Circuit Court of Appeals, however, in *Builders Ass’n of Greater Chicago v. County of Cook, Chicago*, did not hold there is a different level of scrutiny for gender discrimination or gender based programs. 256 F.3d 642, 644-45 (7th Cir. 2001). The Court in *Builders Ass’n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors*.

<sup>205</sup> See e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”).

<sup>206</sup> *Coral Constr. Co.*, 941 F.2d at 931-932; see *Eng’g Contractors Ass’n*, 122 F.3d at 910.

Certain courts have 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.”<sup>207</sup>

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

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

The Fourth Circuit cites with approval the guidance from the Eleventh Circuit that has held “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort .... Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”<sup>208</sup>

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.”<sup>209</sup> The Third Circuit found this standard required the City of Philadelphia to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.<sup>210</sup> The Court in *Contractors Ass’n of E. Pa. (CAEP I)* held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.<sup>211</sup>

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding women-owned construction businesses was insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for women-owned construction businesses in City contracting, such as

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<sup>207</sup> 122 F.3d at 929 (internal citations omitted.)

<sup>208</sup> 615 F.3d 233, 242; 122 F.3d at 929 (internal citations omitted).

<sup>209</sup> *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

<sup>210</sup> *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

<sup>211</sup> *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

that presented for minority-owned businesses.<sup>212</sup> Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance.<sup>213</sup> But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.<sup>214</sup> The only other testimony on this subject, the Court found in *CAEP I*, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing.<sup>215</sup> This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

#### 4. Rational basis analysis

Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.<sup>216</sup> When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a court is required to inquire whether the challenged classification has a legitimate purpose and whether it was reasonable for the legislature to believe that use of the challenged classification would promote that purpose.<sup>217</sup>

Courts in applying the rational basis test generally find that a challenged law is upheld “as long as there could be some rational basis for enacting [it],” that is, that “the law in question is rationally related to a legitimate government purpose.”<sup>218</sup> So long as a government legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.<sup>219</sup>

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<sup>212</sup> *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d Cir. 1993).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> See, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Loncar v. Ducey*, 244 Ariz. 519, 523, 422 P.2d 1059, 1063 (Ct. App. Ariz. 2018).

<sup>217</sup> See, *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Ass’n of E. Pa.*, 6 F.3d at 1011 (3d Cir. 1993); see, *Loncar v. Ducey*, 244 Ariz. 519, 523, 422 P.3d 1059, 1063 (Ct. App. Ariz. 2018); *State v. Panos*, 239 Ariz. 116, 118-119, 366 P.3d 1006, 1008-1009 (Ct. App. Ariz. 2016).

<sup>218</sup> See, e.g., *Kadmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998) see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity) see, *Loncar v. Ducey*, 244 Ariz. 519, 523, 422 P.3d 1059, 1063 (Ct. App. Ariz. 2018); *State v. Panos*, 239 Ariz. 116, 118-119, 366 P.3d 1006, 1008-1009 (Ct. App. Ariz. 2016).

<sup>219</sup> *Id.*; *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013), (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)); see, *Loncar v. Ducey*, 244 Ariz. 519, 523, 422 P.3d 1059, 1063 (Ct. App. Ariz. 2018); *State v. Panos*, 239 Ariz. 116, 118-119, 366 P.3d 1006, 1008-1009 (Ct. App. Ariz. 2016).

“[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.”<sup>220</sup> Moreover, “courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.”<sup>221</sup>

Under a rational basis review standard, a legislative classification will be upheld “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”<sup>222</sup> Because all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”<sup>223</sup>

Under the federal standard of review a court will presume the “legislation is valid and will sustain it if the classification drawn by the statute is rationally related to a legitimate [government] interest.”<sup>224</sup>

A fairly recent federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals) in a procurement under the Federal Acquisition Regulations (“FAR”).<sup>225</sup>

*Firstline* involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration (“TSA”) issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: “Government anticipates an overall Small Business goal of 40 percent,” and that “[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5 percent;

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<sup>220</sup> *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 189 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted) *see, Loncar v. Ducey*, 244 Ariz. 519, 523, 422 P.3d 1059, 1063 (Ct. App. Ariz. 2018); *State v. Panos*, 239 Ariz. 116, 118-119, 366 P.3d 1006, 1008-1009 (Ct. App. Ariz. 2016).

<sup>221</sup> *Heller v. Doe*, 509 U.S. 312, 321 (1993) *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *see, Loncar v. Ducey*, 244 Ariz. 519, 523, 422 P.3d 1059, 1063 (Ct. App. Ariz. 2018); *State v. Panos*, 239 Ariz. 116, 118-119, 366 P.3d 1006, 1008-1009 (Ct. App. Ariz. 2016).

<sup>222</sup> *Heller v. Doe*, 509 U.S. 312, 320 (1993); *see, e.g., Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012) *see, Loncar v. Ducey*, 244 Ariz. 519, 523, 422 P.3d 1059, 1063 (Ct. App. Ariz. 2018); *State v. Panos*, 239 Ariz. 116, 118-119, 366 P.3d 1006, 1008-1009 (Ct. App. Ariz. 2016).

<sup>223</sup> *Id.*

<sup>224</sup> *Chance Mgmt., Inc. v. S. Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *see also Lawrence v. Texas*, 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (“Under our rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest . . . . Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster.” (internal citations and quotations omitted)) (O’Connor, J., concurring); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8th Cir. 2012) (“Under rational basis review, the classification must only be rationally related to a legitimate government interest.”).

<sup>225</sup> 2012 WL 5939228 (Fed. Cl. 2012).

Woman Owned[:] 5 percent; HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent.”<sup>226</sup>

The court applied the rational basis test in construing the challenge to the establishment by the TSA of a 40 percent small business participation goal as unlawful and irrational.<sup>227</sup> The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”<sup>228</sup>

The court found that “an agency may rationally establish aspirational small business subcontracting goals for prospective offerors ....” Consequently, the Court held one rational method by which the Government may attempt to maximize small business participation is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovative ways to structure and maximize small business subcontracting within their proposals.<sup>229</sup> The court, in an exercise of judicial restraint, found the “40 percent goal is a rational expression of the Government’s policy of affording small business concerns...the maximum practicable opportunity to participate as subcontractors ....”<sup>230</sup>

## 5. Pending Cases (at the time of this report)

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

### **Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al., U.S.**

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

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

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

At the time of this report, Defendants have filed a Motion to Dismiss the Second Amended Complaint, which is pending. Also, the parties are engaged in discovery.

**Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd.; Florida East Coast Chapter of the AGC of America, Inc.**, Case No. 502018CA010511; In the 15th Judicial Circuit in and for Palm Beach County, Florida. In this case, the County sued Mason Tillman Associates (MTA) to turn over background documents from disparity studies it conducted for the Solid Waste Authority and for the county as a whole. Those documents include the names of women and minority business owners who, after MTA promised them anonymity, described discrimination they say they faced trying to get county contracts. Those documents were sought initially as part of a records request by the Associated General Contractors of America (AGC).

The County filed suit after its alleged unsuccessful efforts to get MTA to provide documents needed to satisfy a public records request from AGC. The Florida ECC of AGC (AGC) also requested information related to the disparity study that MTA prepared for the County.

The AGC requests documents from the County and MTA related to its study and its findings and conclusions. AGC requests documents including the availability database, underlying data, anecdotal interview identities, transcripts and findings, and documents supporting the findings of discrimination.

At the time of this report, MTA has filed a Motion to Dismiss, which is pending.

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

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

## **D. Recent Decisions Involving State or Local Government MBE/WBE/DBE Programs in the Ninth Circuit Court of Appeals**

**1. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9th Cir. December 19, 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court denied (June 24, 2019)**

Plaintiffs, Orion Insurance Group ("Orion") and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law. The USDOT and Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), moved for a summary dismissal of all the claims.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90 percent European, 6 percent Indigenous American and 4 percent Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE.

Plaintiffs submitted to OMWBE Orion's application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.

OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

**District Court decision.** The district court held OMWBE did not act arbitrarily or capriciously when it found the presumption that Taylor was socially and economically disadvantaged was rebutted because of insufficient evidence he was either Black or Native American. By requiring individualized determinations of social and economic disadvantage, the court held the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

**Void for vagueness claim.** Plaintiffs asserted that the regulatory definitions of “Black American” and “Native American” are void for vagueness. The district court dismissed the claims that the definitions of “Black American” and “Native American” in the DBE regulations are impermissibly vague.

**Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State.** Plaintiffs’ claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations’ requirement that the state make decisions based on race, the district court held were constitutional.

**The Ninth Circuit on appeal affirmed the District Court.** The Ninth Circuit held the district court correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity. The Ninth Circuit also held the district court correctly dismissed Taylor’s discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act “under color or state law” as required by the statute.

In addition, the Ninth Circuit concluded the district court correctly dismissed Taylor’s claims for damages because the United States has not waived its sovereign immunity on those claims. The Ninth Circuit found the district court correctly dismissed Taylor’s claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

**Claims under the Administrative Procedure Act.** The Ninth Circuit stated the OMWBE did not act in an arbitrary and capricious manner when it determined it had a “well founded reason” to question Taylor’s membership claims, and that Taylor did not qualify as a “socially and economically disadvantaged individual.” Also, the court found OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.

The Ninth Circuit held the USDOT did not act in an arbitrary and capricious manner when it affirmed the state’s decision because the decision was supported by substantial evidence and consistent with federal regulations. The USDOT “articulated a rational connection” between the evidence and the decision to deny Taylor’s application for certification.

**Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d.** The Ninth Circuit held the district court correctly granted summary judgment to the federal and state Defendants on Taylor’s equal protection claims because Defendants did not discriminate against Taylor, and did not treat Taylor differently from others similarly situated. In addition, the court found the district court properly granted summary judgment to the state defendants on Taylor’s discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor’s claims.

Having granted summary judgment on Taylor’s claims under federal law, the Ninth Circuit concluded the district court properly declined to exercise jurisdiction over Taylor’s state law claims.

**Petition for Writ of Certiorari.** Plaintiffs/Appellants filed a Petition for Writ of Certiorari with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.



**2. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U. S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014)**

**Note:** The Ninth Circuit Court of Appeals Memorandum provides: “This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.”

**Introduction.** Mountain West Holding Company installs signs, guardrails, and concrete barriers on highways in Montana. It competes to win subcontracts from prime contractors who have contracted with the State. It is not owned and controlled by women or minorities. Some of its competitors are disadvantaged business enterprises (DBEs) owned by women or minorities. In this case it claims that Montana’s DBE goal-setting program unconstitutionally required prime contractors to give preference to these minority or female-owned competitors, which Mountain West Holdings Company argues is a violation of the Equal Protection Clause, 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

**Factual and procedural background.** In *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2014 WL 6686734 (D. Mont. Nov. 26, 2014); Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. (“Mountain West”), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation (“MDT”) and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit’s 2005 decision in *Western States Paving v. Washington DOT, et al.*, MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all “relevant” minority groups were underutilized in “professional services” and Asian-Pacific Americans and Hispanic Americans were underutilized in “business categories combined,” but it also concluded that all “relevant” minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are “significantly overrepresented” in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserts that there was no evidence that all relevant minority groups had suffered discrimination in Montana's transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

*AGC, San Diego v. California DOT and Western States Paving Co. v. Washington DOT.* The Ninth Circuit and the district court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 713 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state's implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at \*2 (D. Mont. November 26, 2014). The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state's implementation of the DBE Program "is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry." *Mountain West*, 2014 WL 6686734 at \*2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at \*2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that "even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination." *Mountain West*, 2017 WL 2179120 at \*2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at \*2, quoting *Western States*, 407 F.3d at 997-999.

**MDT study.** MDT obtained a firm to conduct a disparity study that was completed in 2009. The district court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in "professional services" contracts, significant underutilization of Asian-Pacific Americans and Hispanic Americans in "business categories combined," slight underutilization of nonminority women in "business categories combined," and overutilization of all groups in subcontractor "construction" contracts. *Mountain West*, 2014 WL 6686734 at \*2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The district court stated the anecdotal evidence suggested various forms of discrimination existed within Montana's transportation contracting industry, including evidence of an exclusive "good ole boy network" that made it difficult for DBEs to break into the market. *Id.* at \*3. The district court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

**Montana's DBE utilization after ceasing the use of contract goals.** The district court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at \*3. The utilization rate dropped, according to the district court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent. *Id.* In response to this decline, for fiscal years 2011-2014, the district court said MDT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana's overall goal of 5.83 percent DBE utilization.

MDT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* USDOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

**Mountain West's claims for relief.** Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at \*3. Mountain West's claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana's DBE program. *Id.*

**The two-prong test to demonstrate that a DBE program is narrowly tailored.** The Court, *citing* AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West*, 2017 WL 2179120 at \*2, Memorandum, May 16, 2017, at 6-7.

**District Court Holding in 2014 and the Appeal.** The district court granted summary judgment to the State, and Mountain West appealed. *See Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014) , *dismissed in part, reversed in part, and remanded*, U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum 2017 WL 2179120 at \*\*1-4 (9th Cir. May 16, 2017). Montana also appealed the district court’s threshold determination that Mountain West had a private right of action under Title VI, and it appealed the district court’s denial of the State’s motion to strike an expert report submitted in support of Mountain West’s motion.

**Ninth Circuit Holding.** The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West’s appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court’s determination that Mountain West has a private right to enforce Title VI, affirmed the district court’s decision to consider the disputed expert report by Mountain West’s expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at \*\*1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

**Mootness.** The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West’s claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at \*2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West’s Title VI claim for damages is not moot. 2017 WL 2179120 at \*\*1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

The appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West’s claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at \*\*1 (9th Cir.), Memorandum, May 16, 2017, at 4.

**Private Right of Action and Discrimination under Title VI.** The Court concluded for the reasons found in the district court’s order that Mountain West may state a private claim for damages against Montana under Title VI. *Id.* at \*2. The district court had granted summary judgment to Montana on Mountain West’s claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible “only if they are narrowly tailored measures that further compelling governmental interests.” *Mountain West*, 2017 WL 2179120 (9th Cir.) at \*2, Memorandum, May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (*quoting Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at \*2, n.2, Memorandum, May 16, 2017, at 6, n. 2; *see*, 407 F.3d at 987.

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'" *Mountain West*, 2017 WL 2179120 at \*2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, quoting, *Assoc. Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (quoting *W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Mountain West*, 2017 WL 2179120 at \*2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, quoting, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a "good ol' boys" network within the State's contracting industry. *Mountain West*, 2017 WL 2179120 at \*3 (9th Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light of genuine disputes of material fact as to the study's analysis, and because the second two categories of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120 at \*3 (9th Cir.), Memorandum, May 16, 2017, at 7.

**Disputes of fact as to study.** *Mountain West's* expert testified that the study relied on several questionable assumptions and an opaque methodology to conclude that professional services contracts were awarded on a discriminatory basis. *Id.* at \*3. The Ninth Circuit pointed out a few examples that it found illustrated the areas in which there are disputes of fact as to whether the study sufficiently supported Montana's actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. *W. States Paving*, 407 F.3d at 1000-01. *Mountain West* argues that the study did not explain whether or how it accounted for a given firm's size, age, geography, or other similar factors. The report's authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study's statistical results *Mountain West*, 2017 WL 2179120 at \*3 (9th Cir.), Memorandum, May 16, 2017, at 8.
2. The study relied on a telephone survey of a sample of Montana contractors. *Mountain West* argued that (a) it is unclear how the study selected that sample, (b) only a small percentage of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at \*3 (9th Cir. May 16, 2017), Memorandum at 8-9.

3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that “some of the population samples were very small and the result may not be significant statistically.” 2017 WL 2179120 at \*3 (9th Cir. May 16, 2017), Memorandum at 8-9.
4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts, but professional services contracts composed less than 10 percent of total contract volume in the State’s transportation contracting industry. 2017 WL 2179120 at \*3 (9th Cir. May 16, 2017), Memorandum at 9.
5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study’s comparison was appropriate. 2017 WL 2179120 at \*3 (9th Cir. May 16, 2017), Memorandum at 9.

**The post-2005 decline in participation by DBEs.** The Ninth Circuit was unable to affirm the district court’s order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender- based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at \*3 (9th Cir.), Memorandum, May 16, 2017, at 9, *quoting Western States*, 407 F.3d at 999 (“If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both nonminorities and any minority groups that have actually been targeted for discrimination.”); *id.* at 1001 (“The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs.”). *Id.*

The Ninth Circuit also cited to the USDOT statement made to the Court in *Western States. Mountain West*, 2017 WL 2179120 at \*3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting* U.S. Dep’t of Transp., *Western States Paving Co. Case Q&A* (Dec. 16, 2014) (“In calculating availability of DBEs, [a state’s] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.”).

**Anecdotal evidence of discrimination.** The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at \*3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) (“While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”); and *quoting Croson*, 488 U.S. at 509 (“[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to Mountain West’s case, it concluded that the record provides an inadequate basis for summary judgment in Montana’s favor. 2017 WL 2179120 at \*3.

**Conclusion.** The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at \*4 (9th Cir.), Memorandum, May 16, 2017, at 11.

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

The Associated General Contractors of America, Inc., San Diego Chapter, Inc. , (“AGC”) sought declaratory and injunctive relief against the California Department of Transportation (“Caltrans”) and its officers on the grounds that Caltrans’ Disadvantaged Business initial Enterprise (“DBE”) program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans’ DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans’ DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans’ substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans’ program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans’ DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

**Court Applies *Western States Paving Co. v. Washington State DOT* decision.** In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT’s program because it was not narrowly tailored. *Id.*, citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for “narrow tailoring”:

*“(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination.” Id. 1191, citing Western States Paving Co., 407 F.3d at 997-998.*

**Evidence gathering and the 2007 Disparity Study.** On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id.* at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California’s transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a “disparity index.” *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id.* at 1191. The Court stated: “Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and women-owned businesses should be expected to receive 13.5 percent of contact dollars from Caltrans administered federally assisted contracts.” *Id.* at 1191-1192.

The Court said the research firm “examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction).” *Id.* at 1192.

The Court pointed out a key difference between federally funded and state funded contracts is that race-conscious goals were in place for the federally funded contracts during the 2002–2006 period, but not for the state funded contracts. *Id.* at 1192. Thus, the Court stated: “state funded contracts functioned as a control group to help determine whether previous affirmative action programs skewed the data.” *Id.*

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans’ administrative districts, and computed aggregate disparities based on statewide data. *Id.* at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian-Pacific, and Native American firms. *Id.* However, the research firm found that there were not substantial disparities for these minorities in *every* subcategory of contract. *Id.* The Court noted that the disparity study also found substantial disparities in utilization of women-owned firms for some categories of contracts. *Id.* After publication of the disparity study, the Court pointed out the research firm calculated disparity indices for all women-owned firms, including female minorities, showing substantial disparities in the utilization of all women-owned firms similar to those measured for white women. *Id.*

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm’s findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id.*



**Caltrans' DBE Program.** Caltrans concluded that the evidence from the disparity study supported an inference of discrimination in the California transportation contracting industry. *Id.* at 1192-1193. Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian-Pacific American-, Native American-, and women-owned firms. *Id.* The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. *Id.*

Caltrans submitted its proposed DBE program to the USDOT for approval, including a request for a waiver to implement the program only for the four identified groups. *Id.* at 1193. The Caltrans' DBE program included 66 race-neutral measures that Caltrans already operated or planned to implement, and subsequent proposals increased the number of race-neutral measures to 150. *Id.* The USDOT granted the waiver, but initially did not approve Caltrans' DBE program until in 2009, the DOT approved Caltrans' DBE program for fiscal year 2009.

**District Court proceedings.** AGC then filed a complaint alleging that Caltrans' implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans' DBE program. The district court on motions of summary judgment held that Caltrans' program was "clearly constitutional," as it "was supported by a strong basis in evidence of discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. *Id.* at 1193.

**Subsequent Caltrans study and program.** While the appeal by the AGC was pending, Caltrans commissioned a new disparity study from BBC to update its DBE program as required by the federal regulations. *Id.* at 1193. In August 2012, BBC published its second disparity report, and Caltrans concluded that the updated study provided evidence of continuing discrimination in the California transportation contracting industry against the same four groups and Hispanic Americans. *Id.* Caltrans submitted a modified DBE program that is nearly identical to the program approved in 2009, except that it now includes Hispanic Americans and sets an overall goal of 12.5 percent, of which 9.5 percent will be achieved through race- and gender-conscious measures. *Id.* The USDOT approved Caltrans' updated program in November 2012. *Id.*

**Jurisdiction issue.** Initially, the Ninth Circuit Court of Appeals considered whether it had jurisdiction over the AGC's appeal based on the doctrines of mootness and standing. The Court held that the appeal is not moot because Caltrans' new DBE program is substantially similar to the prior program and is alleged to disadvantage AGC's members "in the same fundamental way" as the previous program. *Id.* at 1194.

The Court, however, held that the AGC did not establish associational standing. *Id.* at 1194-1195: The Court found that the AGC did not identify any affected members by name nor has it submitted declarations by any of its members attesting to harm they have suffered or will suffer under Caltrans' program. *Id.* at 1194-1195. Because AGC failed to establish standing, the Court held it must dismiss the appeal due to lack of jurisdiction. *Id.* at 1195.

**Caltrans' DBE Program held constitutional on the merits.** The Court then held that even if AGC could establish standing, its appeal would fail. *Id.* at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id.* at 1195-1200.

The Court stated that race-conscious remedial programs must satisfy strict scrutiny and that although strict scrutiny is stringent, it is not “fatal in fact.” *Id.* at 1194-1195 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (*Adarand III*)). The Court quoted *Adarand III*: “The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Id.* (quoting *Adarand III*, 515 U.S. at 237.)

The Court pointed out that gender-conscious programs must satisfy intermediate scrutiny which requires that gender-conscious programs be supported by an ‘exceedingly persuasive justification’ and be substantially related to the achievement of that underlying objective. *Id.* at 1195 (citing *Western States Paving*, 407 F.3d at 990 n. 6.).

The Court held that Caltrans' DBE program contains both race- and gender-conscious measures, and that the “entire program passes strict scrutiny.” *Id.* at 1195.

**Application of strict scrutiny standard articulated in *Western States Paving*.** The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving*. The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be “limited to those minority groups that have actually suffered discrimination.” *Id.* at 1195-1196 (quoting *Western States Paving*, 407 F.3d at 997-99).

**Evidence of discrimination in California contracting industry.** The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id.* at 1196. The U.S. Supreme Court has suggested that a “significant statistical disparity” could be sufficient to justify race-conscious remedial programs. *Id.* at \*7 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring “the cold numbers convincingly to life.” *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT's DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington's data “did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state.” *Id.* (quoting *Western States Paving*, 407 F.3d at 999-1001). The Court said that it struck down Washington's program after determining that the record was devoid of any evidence suggesting that minorities currently suffer — or have ever suffered — discrimination in the Washington transportation contracting industry.” *Id.*

Significantly, the Court held in this case as follows: “In contrast, Caltrans’ affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry.” *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. *Id.* The Court found the disparity study “accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs.” *Id.* (citing *Western States*, 407 F.3d at 1000).

The Court also held: “Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, *see Croson*, 488 U.S. at 509, and certainly Caltrans’ statistical evidence combined with anecdotal evidence passes constitutional muster.” *Id.* at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of “specific acts” of “deliberate” discrimination by Caltrans employees or prime contractors. *Id.* at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that “[t]he degree of specificity required in the findings of discrimination ... may vary.” *Id.* at 1197 (quoting *Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (citing *Croson*, 488 U.S. at 509). The Court rejected AGC’s argument that Caltrans’ program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.* The Court found that AGC’s argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out “patterns of discrimination.” *Id.* quoting *Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into “a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1197 quoting *Croson* 488 U.S. at 492.

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC's argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at \*9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the "good ol boy" network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id.* at 1198, citing *Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that *every* minority-owned business is discriminated against. *Id.* The Court concluded: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC's contention that Caltrans' evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC's early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all women-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans' decision to include all women in its DBE program. *Id.* at 1195.

**Program tailored to groups who actually suffered discrimination.** The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state's contracting industry. *Id.* at 1198. The Court found Caltrans' DBE program is limited to those minority groups that have actually suffered discrimination. *Id.* The Court held that the 2007 disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of contract categories. *Id.* at 1198-1199. *Id.* These disparities, according to the Court, support an inference of discrimination against those groups. *Id.*

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans' program "adheres precisely to the narrow tailoring requirements of *Western States*." *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are “sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors.” *Id.*

**Consideration of race-neutral alternatives.** The Court rejected the AGC assertion that Caltrans’ program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id.* at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id.*

Second, the Court found that even if this requirement does apply to Caltrans’ program, narrow tailoring only requires “serious, good faith consideration of workable race-neutral alternatives.” *Id.* at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC’s claim that Caltrans’ program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

**Certification affidavits for Disadvantaged Business Enterprises.** The Court rejected the AGC argument that Caltrans’ program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California*. *Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id.* at 1200.

**Application of program to mixed state- and federally-funded contracts.** The Court also rejected AGC’s challenge that Caltrans applies its program to transportation contracts funded by both federal and state money. *Id.* at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for mix-funded contracts. *Id.*

**Conclusion.** The Court concluded that the AGC did not have standing, and that further, Caltrans’ DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California transportation contracting industry, and 2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at 1200. The Court then dismissed the appeal. *Id.*

**4. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women’s Business Enterprises, United States DOT, et. al., 2017 WL 3387344 (W.D. Wash. 2017)**

Plaintiffs, Orion Insurance Group (“Orion”), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise (“DBE”) under federal law. 2017 WL 3387344. Plaintiffs moved the Court for an order that summarily declared that the Defendants violated the Administrative Procedure Act (APA), declared that the denial of the DBE certification for Orion was unlawful, and reversed the decision that Orion is not a DBE. *Id.* at \*1. The United States Department of Transportation (“USDOT”) and the Acting Director of USDOT, (collectively the “Federal Defendants”) move for a summary dismissal of all the claims asserted against them. *Id.* The Washington State Office of Minority & Women’s Business Enterprises (“OMWBE”), (collectively the “State Defendants”) moved for summary dismissal of all claims asserted against them. *Id.*

The court held Plaintiffs’ motion for partial summary judgment was denied, in part, and stricken, in part, the Federal Defendants’ motion for summary judgment was granted, and the State Defendants’ motion for summary judgment was granted, in part, and stricken, in part. *Id.*

**Factual and procedural history.** In 2010, Plaintiff Ralph Taylor received results from a genetic ancestry test that estimated that he was 90 percent European, 6 percent Indigenous American and 4 percent Sub-Saharan African. Mr. Taylor acknowledged that he grew up thinking of himself as Caucasian, but asserted that in his late 40s, when he realized he had Black ancestry, he “embraced his Black culture.” *Id.* at \*2.

In 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as a MBE under Washington State law. *Id.* at \*2. In the application, Mr. Taylor identified himself as Black, but not Native American. *Id.* His application was initially rejected, but after Mr. Taylor appealed the decision, OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law. *Id.* at \*2.

In 2014, Plaintiffs submitted, to OMWBE, Orion’s application for DBE certification under federal law. *Id.* at \*2. His application indicated that Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification submitted with the federal application. *Id.* Considered with his initial submittal were the results from the 2010 genetic ancestry test that estimated that he was 90 percent European, 6 percent Indigenous American and 4 percent Sub-Saharan African. *Id.* Mr. Taylor submitted the results of his father’s genetic results, which estimated that he was 44 percent European, 44 percent Sub-Saharan African and 12 percent East Asian. *Id.* Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray, identified as a “Negro,” who was around 86 years old, with no other supporting documentation to indicate she was an ancestor of Mr. Taylor. *Id.* at \*2.

In 2014, Orion’s DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. *Id.* at \*3. OMWBE also found that even if there

was sufficient evidence to find that Mr. Taylor was a member of either of these racial groups, “the presumption of disadvantage has been rebutted,” and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*

Mr. Taylor appealed the denial of the DBE certification to the USDOT. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Id.* at \*\*3-4. *Orion Insurance Group v. Washington State Office of Minority & Women’s Business Enterprises, et al.*, U.S. District Court for the Western District of Washington case number 15-5267 BHS. In 2015, the USDOT affirmed the denial of Orion’s DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE’s decision. *Id.* at \*4.

This case was filed in 2016. *Id.* at \*4. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) “Discrimination under 42 U.S.C. § 1983” (reference is made to Equal Protection), (C) “Discrimination under 42 U.S.C. § 2000d,” (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49 C.F.R. § 26.5 are void for vagueness. *Id.* Plaintiffs seek damages, injunctive relief: (“[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE’s representatives ... and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE,” and a declaration the “definitions of ‘Black American’ and ‘Native American’ in 49 C.F.R. § 26.5 to be void as impermissibly vague,”) and attorneys’ fees, and costs. *Id.*

**OMWBE did not act arbitrarily or capriciously in denying certification.** The court examined the evidence submitted by Mr. Taylor and by the State Defendants. *Id.* at \*\*7-12. The court held that OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence that he was a member of either the Black or Native American groups. *Id.* at \*8. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.* at \*9. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a “member of a designated disadvantaged group,” the court stated Mr. Taylor “must demonstrate social and economic disadvantage on an individual basis.” *Id.* Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.*

In making these decisions, the court found OMWBE considered the relevant evidence and “articulated a rational connection between the facts found and the choices made.” *Id.* at \*10. By requiring individualized determinations of social and economic disadvantage, the Federal DBE “program requires states to extend benefits only to those who are actually disadvantaged.” *Id.*, citing, *Midwest Fence Corp. v. United States Dep’t of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was “actually disadvantaged” or when it denied Plaintiff’s application. *Id.*

The USDOT affirmed the decision of the state OMWBE to deny DBE status to Orion. *Id.* at \*\*10-11.

**Claims for violation of equal protection.** To the extent that Plaintiffs assert a claim that, on its face, the Federal DBE Program violates the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at \*\*12-13. The Ninth Circuit has held that the Federal DBE Program, including its implementing regulations, does not, on its face, violate the Equal Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). *Id.* The Western States Court held that Congress had evidence of discrimination against women and minorities in the national transportation contracting industry and the Federal DBE Program was a narrowly tailored means of remedying that sex and race based discrimination. *Id.* Accordingly, the court found race-based determinations under the program have been determined to be constitutional. *Id.* The court noted that several other circuits, including the Seventh, Eighth, and Tenth have held the same. *Id.* at \*12, citing, *Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 936 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000).

To the extent that Plaintiffs assert that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at \*12. Plaintiffs argue that, as applied to them, the regulations “weigh adversely and disproportionately upon” mixed-race individuals, like Mr. Taylor. *Id.* This claim should be dismissed, according to the court, as the Equal Protection Clause prohibits only intentional discrimination. *Id.* Even considering materials filed outside the administrative record, the court found Plaintiffs point to no evidence that the application of the regulations here was done with an intent to discriminate against mixed-race individuals, or that it was done with racial animus. *Id.* Further, the court said Plaintiffs offer no evidence that application of the regulations creates a disparate impact on mixed-race individuals. *Id.* Plaintiffs’ remaining arguments relate to the facial validity of the DBE program, and the court held they also should be dismissed. *Id.*

The court concluded that to the extent that Plaintiffs base their equal protection claim on an assertion that they were treated differently than others similarly situated, their “class of one” equal protection claim should be dismissed. *Id.* at \*13. For a class of one equal protection claim, the court stated Plaintiffs must show they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Plaintiffs, the court found, have failed to show that Mr. Taylor was intentionally treated differently than others similarly situated. *Id.* at \*13. Plaintiffs pointed to no evidence of intentional differential treatment by the Defendants. *Id.* Plaintiffs failed to show that others that were similarly situated were treated differently. *Id.*

Further, the court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment. *Id.* at \*13. Both the State and Federal Defendants according to the court, offered rational explanations for the denial of the application. *Id.* Plaintiffs’ Equal Protection claims, asserted against all Defendants, the court held, should be denied. *Id.*

**Void for vagueness claim.** Plaintiffs assert that the regulatory definitions of “Black American” and both the definition of “Native American” that was applied to Plaintiffs and a new definition of “Native American” are void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments’ due process clauses. *Id.* at \*13.



The court pointed out that although it can be applied in the civil context, the Seventh Circuit Court of Appeals has noted that in relation to the DBE regulations, the void for vagueness “doctrine is a poor fit.” *Id.* at \*14, *citing, Midwest Fence Corp. v. United States Dep’t of Transp.*, 840 F.3d 932, 947–48 (7th Cir. 2016). Unlike criminal or civil statutes that prohibit certain conduct, the Seventh Circuit noted that the DBE regulations do not threaten parties with punishment, but, at worst, cause lost opportunities for contracts. *Id.* In any event, the court held Plaintiffs’ claims that the definitions of “Black American” and of “Native American” in the DBE regulations are impermissibly vague should be dismissed. *Id.*

The court found the regulations require that to show membership, an applicant must submit a statement, and then if the reviewer has a “well founded” question regarding group membership, the reviewer must ask for additional evidence. 49 C.F.R. § 26.63 (a)(1). *Id.* at \*14. Considering the purpose of the law, the court stated the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit. *Id.*

The definition of “socially and economically disadvantaged individual” as a “citizen ... who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of groups and without regard to their individual qualities,” the court determined, gives further meaning to the definitions of “Black American” and “Native American” here. *Id.* at \*14. “Otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity.” *Id.* at \*14, *quoting, Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005).

The court held plaintiffs also fail to show that these terms, when considered within the statutory framework, are so vague that they lend themselves to “arbitrary” decisions. *Id.* at \*14. Moreover, even if the court did have jurisdiction to consider whether the revised definition of “Native American” was void for vagueness, the court found a simple review of the statutory language leads to the conclusion that it is not. *Id.* The revised definition of “Native Americans” now “includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiian.” *Id.*, *citing*, 49 C.F.R. § 26.5. This definition, the court said, provides an objective criterion based on the decisions of the tribes, and does not leave the reviewer with any discretion. *Id.* The court thus held that Plaintiffs’ void for vagueness challenges were dismissed. *Id.*

**Claims for violations of 42 U.S.C. §2000d against the State Defendants.** Plaintiffs’ claims against the State Defendants for violation of Title VI (42 U.S.C. § 2000d), the court also held, should be dismissed. *Id.* at \*16. Plaintiffs failed to show that the State Defendants engaged in intentional impermissible racial discrimination. *Id.* The court stated that “Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” *Id.* The court pointed out the DBE regulations’ requirement that the State make decisions based on race has already been held to pass constitutional muster in the Ninth Circuit. *Id.* at \*16, *citing, Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). Plaintiffs made no showing that the State Defendants violated their Equal Protection or other constitutional rights. *Id.* Moreover, Plaintiffs, the court found, failed to show that the State Defendants intentionally acted with discriminatory animus. *Id.*

The court held to the extent the Plaintiffs assert claims that are based on disparate impact, those claims are unavailable because “Title VI itself prohibits only intentional discrimination.” *Id.* at \*17, quoting, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). The court therefore held this claim should be dismissed. *Id.* at \*17.

**Holding.** Therefore, the court ordered that Plaintiffs’ Motion for Partial Summary Judgment was: Denied as to the federal claims; and Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD.

In addition, the Federal Defendants’ Motion for Summary Judgment on the Administrative Procedure Act, Equal Protection, and Void for Vagueness Claims was Granted; and the claims asserted against the Federal Defendants were Dismissed.

The State Defendants’ Cross Motion for Summary Judgment was Granted as to Plaintiffs claims against the State Defendants for violations of the APA, Equal Protection, Void for Vagueness, 42 U.S.C. § 1983, and 42 U.S.C. § 2000d, and those claims were Dismissed. *Id.* Also, the court held the State Defendants’ Cross Motion for Summary Judgment was Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD. *Id.*

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

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. (“Weeden”) against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

**Factual background and claims.** Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT’s DBE Program. 2013 WL 4774517 at \*1. MDT had established an overall goal of 5.83 percent DBE participation in Montana’s highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at \*1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden’s bid actually identified only 81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at \*2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana’s DBE Program. MDT’s DBE Participation Review Committee considered Weeden’s good faith documentation and found that Weeden’s bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at \*2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed

the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at \*2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at \*2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at \*2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

**No proof of irreparable harm and balance of equities favor MDT.** First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at \*3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at \*3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

**No standing.** The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at \*3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at \*3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

**Court applies AGC v. California DOT case; evidence supports narrowly tailored DBE program.**

Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at \*4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013) (holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id.* at 4, citing *Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California — and, by extension, Montana — "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry." 2013 WL 4774517 at \*4, quoting *AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* at \*4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at \*4. Therefore, the Court concluded that given the similarities between Weeden's claim and AGC's equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at \*4.

**Due Process claim.** The Court also rejected Weeden's bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at \*5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT's decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at \*5.

**Holding and Voluntary Dismissal.** The Court denied plaintiff Weeden's application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

## **6. *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.

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

This case involved a challenge by the Associated General Contractors of America, San Diego Chapter, Inc. (“AGC”) against the California Department of Transportation (“Caltrans”), to the DBE program adopted by Caltrans implementing the Federal DBE Program at 49 CFR Part 26. The AGC sought an injunction against Caltrans enjoining its use of the DBE program and declaratory relief from the court declaring the Caltrans DBE program to be unconstitutional.

Caltrans’ DBE program set a 13.5 percent DBE goal for its federally-funded contracts. The 13.5 percent goal, as implemented by Caltrans, included utilizing half race-neutral means and half race-conscious means to achieve the goal. Slip Opinion Transcript at 42. Caltrans did not include all minorities in the race-conscious component of its goal, excluding Hispanic males and Subcontinent Asian American males. *Id. at 42*. Accordingly, the race-conscious component of the Caltrans DBE program applied only to African Americans, Native Americans, Asian-Pacific Americans, and white women. *Id.*

Caltrans established this goal and its DBE program following a disparity study conducted by BBC Research & Consulting, which included gathering statistical and anecdotal evidence of race and gender disparities in the California construction industry. Slip Opinion Transcript at 42.

The parties filed motions for summary judgment. The district court issued its ruling at the hearing on the motions for summary judgment granting Caltrans' motion for summary judgment in support of its DBE program and denying the motion for summary judgment filed by the plaintiffs. Slip Opinion Transcript at 54. The court held Caltrans' DBE program applying and implementing the provisions of the Federal DBE Program is valid and constitutional. *Id.* at 56.

The district court analyzed Caltrans' implementation of the DBE program under the strict scrutiny doctrine and found the burden of justifying different treatment by ethnicity or gender is on the government. The district court applied the Ninth Circuit Court of Appeals ruling in *Western States Paving Company v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005). The court stated that the federal government has a compelling interest "in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry." Slip Opinion Transcript at 43, *quoting Western States Paving*, 407 F.3d at 991, *citing City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

The district court pointed out that the Ninth Circuit in *Western States Paving* and the Tenth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have upheld the facial validity of the Federal DBE Program.

The district court stated that based on *Western States Paving*, the court is required to look at the Caltrans DBE program itself to see if there is a strong basis in evidence to show that Caltrans is acting for a proper purpose and if the program itself has been narrowly tailored. Slip Opinion Transcript at 45. The court concluded that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good-faith consideration of workable race-neutral alternatives." Slip Opinion Transcript at 45.

The district court identified the issues as whether Caltrans has established a compelling interest supported by a strong basis in evidence for its program, and does Caltrans' race-conscious program meet the strict scrutiny required. Slip Opinion Transcript at 51-52. The court also phrased the issue as whether the Caltrans DBE program, "which does give preference based on race and sex, whether that program is narrowly tailored to remedy the effects of identified discrimination...", and whether Caltrans has complied with the Ninth Circuit's guidance in *Western States Paving*. Slip Opinion Transcript at 52.

The district court held "that Caltrans has done what the Ninth Circuit has required it to do, what the federal government has required it to do, and that it clearly has implemented a program which is supported by a strong basis in evidence that gives rise to a compelling interest, and that its race-conscious program, the aspect of the program that does implement race-conscious alternatives, it does under a strict-scrutiny standard meet the requirement that it be narrowly tailored as set forth in the case law." Slip Opinion Transcript at 52.

The court rejected the plaintiff's arguments that anecdotal evidence failed to identify specific acts of discrimination, finding "there are numerous instances of specific discrimination." Slip Opinion Transcript at 52. The district court found that after the *Western States Paving* case, Caltrans went to a racially neutral program, and the evidence showed that the program would not meet the goals of the federally-funded program, and the federal government became concerned about what was going on with Caltrans' program applying only race-neutral alternatives. *Id.* at 52-53. The court then pointed out that Caltrans engaged in an "extensive disparity study, anecdotal evidence, both of which is what was missing" in the *Western States Paving* case. *Id.* at 53.

The court concluded that Caltrans "did exactly what the Ninth Circuit required" and that Caltrans has gone "as far as is required." Slip Opinion Transcript at 53.

The court held that as a matter of law, the Caltrans DBE program is, under *Western States Paving* and the Supreme Court cases, "clearly constitutional," and "narrowly tailored." Slip Opinion Transcript at 56. The court found there are significant differences between Caltrans' program and the program in the *Western States Paving* case. *Id.* at 54-55. In *Western States Paving*, the court said there were no statistical studies performed to try and establish the discrimination in the highway contracting industry, and that Washington simply compared the proportion of DBE firms in the state with the percentage of contracting funds awarded to DBEs on race-neutral contracts to calculate a disparity. *Id.* at 55.

The district court stated that the Ninth Circuit in *Western States Paving* found this to be oversimplified and entitled to little weight "because it did not take into account factors that may affect the relative capacity of DBEs to undertake contracting work." Slip Opinion Transcript at 55. Whereas, the district court held the "disparity study used by Caltrans was much more comprehensive and accounted for this and other factors." *Id.* at 55. The district noted that the State of Washington did not introduce any anecdotal information. The difference in this case, the district court found, "is that the disparity study includes both extensive statistical evidence, as well as anecdotal evidence gathered through surveys and public hearings, which support the statistical findings of the underutilization faced by DBEs without the DBE program. Add to that the anecdotal evidence submitted in support of the summary judgment motion as well. And this evidence before the Court clearly supports a finding that this program is constitutional." *Id.* at 56.

The court held that because "Caltrans' DBE program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry and because the Court finds that it is narrowly tailored, the Court upholds the program as constitutional." Slip Opinion Transcript at 56.

The decision of the district court was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the appeal based on lack of standing by the AGC, San Diego Chapter, but ruled on the merits on alternative grounds holding constitutional Caltrans' DBE Program. *See discussion above of AGC, SDC v. Cal. DOT.*



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

This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. ("plaintiff") was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT ("WSDOT") under the Transportation Equity Act for the 21st Century ("TEA-21"). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id.* at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is "aspirational," and the statutory goal "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent." *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to "adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies." *Id.* at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (citing regulation). TEA-21 requires a generalized, "undifferentiated" minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (e.g., between Hispanics, blacks, and women). *Id.* at 990 (citing regulation).

"A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses." *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to "obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means." *Id.* (citing regulation).

A prime contractor must use “good faith efforts” to satisfy a contract’s DBE utilization goal. *Id.* (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff’s challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington’s implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it “would not yield a different result.” *Id.* at 990, n. 6.

**Facial challenge (Federal Government).** The court first noted that the federal government has a compelling interest in “ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.” *Id.* at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* (“Adarand VII”), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that “[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination.” *Id.* at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff’s facial challenge. *Id.*

**As-applied challenge (State of Washington).** Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington’s transportation contracting industry. *Id.* at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id.* The United States intervened to defend TEA-21’s

facial constitutionality, and “unambiguously conceded that TEA-21’s race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present.” *Id.* at 996; see also Br. for the United States at 28 (April 19, 2004) (“DOT’s regulations ... are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient.” (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress’s nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states’ implementation of TEA-21 was narrowly tailored to achieve Congress’s remedial objective. *Id.* The Eighth Circuit thus looked to the states’ independent evidence of discrimination because “to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed.” *Id.* (internal citations omitted). The Eighth Circuit relied on the states’ statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington’s DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington’s transportation contracting industry. *Id.* at 997-98. “If no such discrimination is present in Washington, then the State’s DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex.” *Id.* at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, *citing Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had “previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination.” *Id.* In *Monterey Mechanical*, the court held that “the overly inclusive designation of benefited minority groups was a ‘red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.’” *Id.*, *citing Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, *citing Builders Ass’n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT’s DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." *Id.*

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (i.e., 9% participation could be achieved through race-neutral means). *Id.* at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id.*

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State's transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action's component. *Id.* The court found that the State's methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without "does not provide any evidence of discrimination against DBEs." *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to "little weight" because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State's argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation

contracting market, its DBE program was not narrowly tailored to Congress's compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court's grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State's liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

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

This case was before the district court pursuant to the Ninth Circuit's remand order in *Western States Paving Co. v. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff's claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff's claim for injunctive relief as moot. The court found "it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*," and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving's claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT's unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the "State defendants." Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification "who averred that they had been subject to 'general societal discrimination.'"

Third, the court dismissed plaintiff's 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff's 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... Title VI." The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff's §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" — and was in fact "specifically race conscious" — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored, and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

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

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity ("AGCC")*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city's bid preference program. 950 F.2d 1401 (9th Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the 5 percent preference given Local Business Enterprises ("LBEs") and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined "MBE" as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. "WBE" was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC's constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the

municipalities' legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, "the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review." *Id.* at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id.* at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available nonminority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available nonminority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are "an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, *citing to Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring "the cold numbers convincingly to life. *Id.* at 1414, *quoting Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an "old boy network" still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a "combination of convincing anecdotal and statistical evidence is potent." *Id.* at 1415 *quoting Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City's findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 *quoting Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 *quoting Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.



The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, *quoting Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

#### **11. *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991)**

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington’s minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (i.e., included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County’s MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a prima facie case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where “gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.” *Id.* at 918, *quoting Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics “convincingly to life.” *Id.* at 919, *quoting International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, *citing Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, *citing Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, *citing Croson*, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical

quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at 5 percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held

that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id.* Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

## **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

### **1. *Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert. denied*, 2017 WL 497345 (2017)**

Plaintiff Midwest Fence Corporation is a guardrails and fencing specialty contractor that usually bids on projects as a subcontractor. 2016 WL 6543514 at \*1. Midwest Fence is not a DBE. *Id.* Midwest Fence alleges that the defendants' DBE programs violated its Fourteenth Amendment right to equal protection under the law, and challenges the United States DOT Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT (IDOT). *Id.* Midwest Fence also challenges the Illinois State Toll Highway Authority (Tollway) and its implementation of its DBE Program. *Id.*

The district court granted all the defendants' motions for summary judgment. *Id.* at \*1. *See Midwest Fence Corp. v. U.S. Department of Transportation, et al.*, 84 F. Supp. 3d 705 (N.D. Ill. 2015) (*see* discussion of district court decision below). The Seventh Circuit Court of Appeals affirmed the grant of summary judgment by the district court. *Id.* The court held that it joins the other federal circuit courts of appeal in holding that the Federal DBE Program is facially constitutional, the program serves a compelling government interest in remedying a history of discrimination in highway construction contracting, the program provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race- and gender-neutral measures before turning to race- and gender-conscious measures. *Id.*

The court of appeals also held the IDOT and Tollway programs survive strict scrutiny because these state defendants establish a substantial basis in evidence to support the need to remedy the effects of past discrimination in their markets, and the programs are narrowly tailored to serve that remedial purpose. *Id.* at \*1.

**Procedural history.** Midwest Fence asserted the following primary theories in its challenge to the Federal DBE Program, IDOT's implementation of it, and the Tollway's own program:

1. The federal regulations prescribe a method for setting individual contract goals that places an undue burden on non-DBE subcontractors, especially certain kinds of subcontractors, including guardrail and fencing contractors like Midwest Fence.
2. The presumption of social and economic disadvantage is not tailored adequately to reflect differences in the circumstances actually faced by women and the various racial and ethnic groups who receive that presumption.
3. The federal regulations are unconstitutionally vague, particularly with respect to good faith efforts to justify a front-end waiver.

*Id.* at \*3-4. Midwest Fence also asserted that IDOT's implementation of the Federal DBE Program is unconstitutional for essentially the same reasons. And, Midwest Fence challenges the Tollway's program on its face and as applied. *Id.* at \*4.

The district court found that Midwest Fence had standing to bring most of its claims and on the merits, and the court upheld the facial constitutionality of the Federal DBE Program. 84 F. Supp. 3d at 722-23 729; *id.* at \*4.

The district court also concluded Midwest Fence did not rebut the evidence of discrimination that IDOT offered to justify its program, and Midwest Fence had presented no “affirmative evidence” that IDOT’s implementation unduly burdened non-DBEs, failed to make use of race-neutral alternatives, or lacked flexibility. 84 F. Supp. 3d at 733, 737; *id.* at \*4.

The district court noted that Midwest Fence’s challenge to the Tollway’s program paralleled the challenge to IDOT’s program, and concluded that the Tollway, like IDOT, had established a strong basis in evidence for its program. 84 F. Supp. 3d at 737, 739; *id.* at \*4. In addition, the court concluded that, like IDOT’s program, the Tollway’s program imposed a minimal burden on non-DBEs, employed a number of race-neutral measures, and offered substantial flexibility. 84 F. Supp. 3d at 739-740; *id.* at \*4.

**Standing to challenge the DBE Programs generally.** The defendants argued that Midwest Fence lacked standing. The court of appeals held that the district court correctly found that Midwest Fence has standing. *Id.* at \*5. The court of appeals stated that by alleging and then offering evidence of lost bids, decreased revenue, difficulties keeping its business afloat as a result of the DBE program, and its inability to compete for contracts on an equal footing with DBEs, Midwest Fence showed both causation and redressability. *Id.* at \*5.

The court of appeals distinguished its ruling in the *Dunnet Bay Construction Co. v. Borggren*, 799 F. 3d 676 (7th Cir. 2015), holding that there was no standing for the plaintiff Dunnet Bay based on an unusual and complex set of facts under which it would have been impossible for the plaintiff Dunnet Bay to have won the contract it sought and for which it sought damages. IDOT did not award the contract to anyone under the first bid and had re-let the contract, thus Dunnet Bay suffered no injury because of the DBE program in the first bid. *Id.* at \*5. The court of appeals held this case is distinguishable from *Dunnet Bay* because Midwest Fence seeks prospective relief that would enable it to compete with DBEs on an equal basis more generally than in *Dunnet Bay*. *Id.* at \*5.

**Standing to challenge the IDOT Target Market Program.** The district court had carved out one narrow exception to its finding that Midwest Fence had standing generally, finding that Midwest Fence lacked standing to challenge the IDOT “target market program.” *Id.* at \*6. The court of appeals found that no evidence in the record established Midwest Fence bid on or lost any contracts subject to the IDOT target market program. *Id.* at \*6. The court stated that IDOT had not set aside any guardrail and fencing contracts under the target market program. *Id.* Therefore, Midwest Fence did not show that it had suffered from an inability to compete on an equal footing in the bidding process with respect to contracts within the target market program. *Id.*

**Facial versus as-applied challenge to the USDOT Program.** In this appeal, Midwest Fence did not challenge whether USDOT had established a “compelling interest” to remedy the effects of past or present discrimination. Thus, it did not challenge the national compelling interest in remedying past discrimination in its claims against the Federal DBE Program. *Id.* at \*6. Therefore, the court of appeals focused on whether the federal program is narrowly tailored. *Id.*

First, the court addressed a preliminary issue, namely, whether Midwest Fence could maintain an as-applied challenge against USDOT and the Federal DBE Program or whether, as the district court held, the claim against USDOT is limited to a facial challenge. *Id.* Midwest Fence sought a declaration that the federal regulations are unconstitutional as applied in Illinois. *Id.* The district court rejected the attempt to bring that claim against USDOT, treating it as applying only to IDOT. *Id.* at \*6 citing *Midwest Fence*, 84 F. Supp. 3d at 718. The court of appeals agreed with the district court. *Id.*

The court of appeals pointed out that a principal feature of the federal regulations is their flexibility and adaptability to local conditions, and that flexibility is important to the constitutionality of the Federal DBE Program, including because a race- and gender-conscious program must be narrowly tailored to serve the compelling governmental interest. *Id.* at \*6. The flexibility in regulations, according to the court, makes the state, not USDOT, primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause. *Id.* at \*6. The court said that a state, not USDOT, is the correct party to defend a challenge to its implementation of its program. *Id.* Thus, the court held the district court did not err by treating the claims against USDOT as only a facial challenge to the federal regulations. *Id.*

**Federal DBE Program: Narrow Tailoring.** The Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits all found the Federal DBE Program constitutional on its face, and the Seventh Circuit agreed with these other circuits. *Id.* at \*7. The court found that narrow tailoring requires “a close match between the evil against which the remedy is directed and the terms of the remedy.” *Id.* The court stated it looks to four factors in determining narrow tailoring: (a) “the necessity for the relief and the efficacy of alternative [race-neutral] remedies,” (b) “the flexibility and duration of the relief, including the availability of waiver provisions,” (c) “the relationship of the numerical goals to the relevant labor [or here, contracting] market,” and (d) “the impact of the relief on the rights of third parties.” *Id.* at \*7 quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987). The Seventh Circuit also pointed out that the Tenth Circuit added to this analysis the question of over- or under-inclusiveness. *Id.* at \*7.

In applying these factors to determine narrow tailoring, the court said that first, the Federal DBE Program requires states to meet as much as possible of their overall DBE participation goals through race- and gender-neutral means. *Id.* at \*7, citing 49 C.F.R. § 26.51(a). Next, on its face, the federal program is both flexible and limited in duration. *Id.* Quotas are flatly prohibited, and states may apply for waivers, including waivers of “any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts,” § 26.15(b). *Id.* at \*7. The regulations also require states to remain flexible as they administer the program over the course of the year, including continually reassessing their DBE participation goals and whether contract goals are necessary. *Id.*

The court pointed out that a state need not set a contract goal on every USDOT-assisted contract, nor must they set those goals at the same percentage as the overall participation goal. *Id.* at \*7. Together, the court found, all of these provisions allow for significant and ongoing flexibility. *Id.* at \*8. States are not locked into their initial DBE participation goals. *Id.* Their use of contract goals is meant to remain fluid, reflecting a state’s progress towards overall DBE goal. *Id.*

As for duration, the court said that Congress has repeatedly reauthorized the program after taking new looks at the need for it. *Id.* at \*8. And, as noted, states must monitor progress toward meeting DBE goals on a regular basis and alter the goals if necessary. *Id.* They must stop using race- and gender-conscious measures if those measures are no longer needed. *Id.*

The court found that the numerical goals are also tied to the relevant markets. *Id.* at \*8. In addition, the regulations prescribe a process for setting a DBE participation goal that focuses on information about the specific market, and that it is intended to reflect the level of DBE participation you would expect absent the effects of discrimination. *Id.* at \*8, *citing* § 26.45(b). The court stated that the regulations thus instruct states to set their DBE participation goals to reflect actual DBE availability in their jurisdictions, as modified by other relevant factors like DBE capacity. *Id.* at \*8.

**Midwest Fence “mismatch” argument: burden on third parties.** Midwest Fence, the court said, focuses its criticism on the burden of third parties and argues the program is over-inclusive. *Id.* at \*8. But, the court found, the regulations include mechanisms to minimize the burdens the program places on non-DBE third parties. *Id.* A primary example, the court points out, is supplied in § 26.33(a), which requires states to take steps to address overconcentration of DBEs in certain types of work if the overconcentration unduly burdens non-DBEs to the point that they can no longer participate in the market. *Id.* at \*8. The court concluded that standards can be relaxed if uncompromising enforcement would yield negative consequences, for example, states can obtain waivers if special circumstances make the state’s compliance with part of the federal program “impractical,” and contractors who fail to meet a DBE contract goal can still be awarded the contract if they have documented good faith efforts to meet the goal. *Id.* at \*8, *citing* § 26.51(a) and § 26.53(a)(2).

Midwest Fence argued that a “mismatch” in the way contract goals are calculated results in a burden that falls disproportionately on specialty subcontractors. *Id.* at \*8. Under the federal regulations, the court noted, states’ overall goals are set as a percentage of all their USDOT-assisted contracts. *Id.* However, states may set contract goals “*only* on those [USDOT]-assisted contracts that have subcontracting possibilities.” *Id.*, *quoting* § 26.51(e)(1)(emphasis added).

Midwest Fence argued that because DBEs must be small, they are generally unable to compete for prime contracts, and this they argue is the “mismatch.” *Id.* at \*8. Where contract goals are necessary to meet an overall DBE participation goal, those contract goals are met almost entirely with *subcontractor* dollars, which, Midwest Fence asserts, places a heavy burden on non-DBE subcontractors while leaving non-DBE prime contractors in the clear. *Id.* at \*8.

The court goes through a hypothetical example to explain the issue Midwest Fence has raised as a mismatch that imposes a disproportionate burden on specialty subcontractors like Midwest Fence. *Id.* at \*8. In the example provided by the court, the overall participation goal for a state calls for DBEs to receive a certain percentage of *total* funds, but in practice in the hypothetical it requires the state to award DBEs for less than all of the available subcontractor funds because it determines that there are no subcontracting possibilities on half the contracts, thus rendering them ineligible for contract goals. *Id.* The mismatch is that the federal program requires the state to set its overall goal on all funds it will spend on contracts, but at the same time the contracts eligible for contract goals must be ones that have subcontracting possibilities. *Id.* Therefore, according to Midwest Fence, in practice the



participation goals set would require the state to award DBEs from the available subcontractor funds while taking no business away from the prime contractors. *Id.*

The court stated that it found “[t]his prospect is troubling.” *Id.* at \*9. The court said that the DBE program can impose a disproportionate burden on small, specialized non-DBE subcontractors, especially when compared to larger prime contractors with whom DBEs would compete less frequently. *Id.* This potential, according to the court, for a disproportionate burden, however, does not render the program facially unconstitutional. *Id.* The court said that the constitutionality of the Federal DBE Program depends on how it is implemented. *Id.*

The court pointed out that some of the suggested race- and gender-neutral means that states can use under the federal program are designed to increase DBE participation in prime contracting and other fields where DBE participation has historically been low, such as specifically encouraging states to make contracts more accessible to small businesses. *Id.* at \*9, *citing* § 26.39(b). The court also noted that the federal program contemplates DBEs’ ability to compete equally requiring states to report DBE participation as prime contractors and makes efforts to develop that potential. *Id.* at \*9.

The court stated that states will continue to resort to contract goals that open the door to the type of mismatch that Midwest Fence describes, but the program on its face does not compel an unfair distribution of burdens. *Id.* at \*9. Small specialty contractors may have to bear at least some of the burdens created by remedying past discrimination under the Federal DBE Program, but the Supreme Court has indicated that innocent third parties may constitutionally be required to bear at least some of the burden of the remedy. *Id.* at \*9.

**Over-Inclusive argument.** Midwest Fence also argued that the federal program is over-inclusive because it grants preferences to groups without analyzing the extent to which each group is actually disadvantaged. *Id.* at \*9. In response, the court mentioned two federal-specific arguments, noting that Midwest Fence’s criticisms are best analyzed as part of its as-applied challenge against the state defendants. *Id.* First, Midwest Fence contends nothing proves that the disparities relied upon by the study consultant were caused by discrimination. *Id.* at \*9. The court found that to justify its program, USDOT does not need definitive proof of discrimination, but must have a strong basis in evidence that remedial action is necessary to remedy past discrimination. *Id.*

Second, Midwest Fence attacks what it perceives as the one-size-fits-all nature of the program, suggesting that the regulations ought to provide different remedies for different groups, but instead the federal program offers a single approach to all the disadvantaged groups, regardless of the degree of disparities. *Id.* at \*9. The court pointed out Midwest Fence did not argue that any of the groups were not in fact disadvantaged at all, and that the federal regulations ultimately require individualized determinations. *Id.* at \*10. Each presumptively disadvantaged firm owner must certify that he or she is, in fact, socially and economically disadvantaged, and that presumption can be rebutted. *Id.* In this way, the court said, the federal program requires states to extend benefits only to those who are actually disadvantaged. *Id.*

Therefore, the court agreed with the district court that the Federal DBE Program is narrowly tailored on its face, so it survives strict scrutiny.

**Claims against IDOT and the Tollway: void for vagueness.** Midwest Fence argued that the federal regulations are unconstitutionally vague as applied by IDOT because the regulations fail to specify what good faith efforts a contractor must make to qualify for a waiver, and focuses its attack on the provisions of the regulations, which address possible cost differentials in the use of DBEs. *Id.* at \*11. Midwest Fence argued that Appendix A of 49 C.F.R., Part 26 at IV(D)(2) is too vague in its language on when a difference in price is significant enough to justify falling short of the DBE contract goal. *Id.* The court found if the standard seems vague, that is likely because it was meant to be flexible, and a more rigid standard could easily be too arbitrary and hinder prime contractors' ability to adjust their approaches to the circumstances of particular projects. *Id.* at \*11.

The court said Midwest Fence's real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. *Id.* at \*12. Midwest Fence contends this creates a *de facto* system of quotas because contractors believe they must meet the DBE goal or lose the contract. *Id.* But Appendix A to the regulations, the court noted, cautions against this very approach. *Id.* The court found flexibility and the availability of waivers affect whether a program is narrowly tailored, and that the regulations caution against quotas, provide examples of good faith efforts prime contractors can make and states can consider, and instruct a bidder to use good business judgment to decide whether a price difference is reasonable or excessive. *Id.* For purposes of contract awards, the court holds this is enough to give fair notice of conduct that is forbidden or required. *Id.* at \*12.

**Equal Protection challenge: compelling interest with strong basis in evidence.** In ruling on the merits of Midwest Fence's equal protection claims based on the actions of IDOT and the Tollway, the first issue the court addresses is whether the state defendants had a compelling interest in enacting their programs. *Id.* at \*12. The court stated that it, along with the other circuit courts of appeal, have held a state agency is entitled to rely on the federal government's compelling interest in remedying the effects of past discrimination to justify its own DBE plan for highway construction contracting. *Id.* But, since not all of IDOT's contracts are federally funded, and the Tollway did not receive federal funding at all, with respect to those contracts, the court said it must consider whether IDOT and the Tollway established a strong basis in evidence to support their programs. *Id.*

**IDOT program.** IDOT relied on an availability and a disparity study to support its program. The disparity study found that DBEs were significantly underutilized as prime contractors comparing firm availability of prime contractors in the construction field to the amount of dollars they received in prime contracts. The disparity study collected utilization records, defined IDOT's market area, identified businesses that were willing and able to provide needed services, weighted firm availability to reflect IDOT's contracting pattern with weights assigned to different areas based on the percentage of dollars expended in those areas, determined whether there was a statistically significant under-utilization of DBEs by calculating the dollars each group would be expected to receive based on availability, calculated the difference between the expected and actual amount of contract dollars received, and ensured that results were not attributable to chance. *Id.* at \*13.

The court said that the disparity study determined disparity ratios that were statistically significant, and the study found that DBEs were significantly underutilized as prime contractors, noting that a figure below 0.80 is generally considered "solid evidence of systematic under-utilization calling for affirmative action to correct it." *Id.* at \*13. The study found that DBEs made up 25.55 percent of

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

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

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

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

The study found that out of 115 disparity indices, 80 showed statistically significant under-utilization of DBEs. *Id.* at \*14. The study discussed statistical disparities in earnings and the formation of businesses by minorities and women, and concluded that a statistically significant adverse impact on earnings was observed in both the economy at large and in the construction and construction-related professional services sector." *Id.* at \*14. The study also found women and minorities are not as likely to start their own business, and that minority business formation rates would likely be substantially and significantly higher if markets operated in a race- and sex-neutral manner. *Id.*

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

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

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

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

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

The court rejected Midwest Fence’s argument that requiring it to provide an independent statistical analysis places an impossible burden on it due to the time and expense that would be required. *Id.* at \*15. The court noted that the burden is initially on the government to justify its programs, and that since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. *Id.* Speculative criticism about potential problems, the court found, will not carry that burden. *Id.*

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

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

In addition, the court rejected Midwest Fence’s argument that the disparity studies do not prove discrimination, noting again that a state need not conclusively prove the existence of discrimination to establish a strong basis in evidence for concluding that remedial action is necessary, and that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Id.* at \*15. The court also rejected Midwest Fence’s attack on the anecdotal evidence stating that the anecdotal evidence bolsters the state defendants’ statistical analyses. *Id.* at \*15.

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

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

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.* The court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

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

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence’s contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at \*17. Midwest Fence’s own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at \*17. In addition, the Tollway granted at least some front-end waivers involving

1.02 percent of contract dollars. *Id.* Without evidence that far more waivers were requested, the court was satisfied that even this low total by the Tollway does not raise a genuine dispute of fact. *Id.*

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

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

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

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely “theoretical.” *Id.* at \*18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use neutral measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that DBE trucking and material suppliers count toward fulfillment of a contract’s DBE goal, even though they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

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

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

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

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

**2. *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, *Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al.*, 2016 WL 193809 (Oct. 3, 2016).**

Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT’s DBE Program discriminates on the basis of race. The district court granted summary 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 Part 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. It’s average annual gross receipts between 2007 and 2009 were over \$52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77 percent. *Id.* at \*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 percent. *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 percent, 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 percent contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

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

The district court granted the IDOT Defendants' motion for summary judgement and denied Dunnet Bay's motion. *Id.* at \*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 Part 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 nonminority-owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and nonminority contractors, can bid on all contracts. *Id.*



The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at \*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 nonminority-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 percent without the required analysis; (2) implementing a "no-waiver" policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22 percent goal was "arbitrary" and that IDOT manipulated the process to justify a preordained goal. *Id.* at \*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 percent of the waiver requests. *Id.* The court stated that IDOT's record of granting waivers refutes any suggestion of a no-waiver policy. *Id.*

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, included Dunnet Bay did not utilize IDOT's supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 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.

**Petition for a Writ of Certiorari.** Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2016. The Petition was denied by the Supreme Court.

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

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's ("IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id.* at 719. The district court granted the USDOT's Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id.* at 720. NCI also forfeited the argument that IDOT's DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT's program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id.* This initial list was corrected for errors in the data by surveying the D&B list. *Id.* In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along with other data, including DBE utilization on IDOT's "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id.* at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id.*

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

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit's opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law "when the 10 percent federal set-aside was more mandatory") was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes more clear now that

the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id.* at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI's collateral attack on the federal regulations was impermissible. *Id.* at 722.

The remainder of the court's opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI's arguments failed. *Id.* First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id.* NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id.* The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id.* at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled "Alternative Methods," and states: "You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market." *Id.* (citing 49 CFR § 26.45(c)(5)). According to the court, the regulations make clear that "relative availability" means "the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate" on DOT contracts. *Id.* The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id.* The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id.*

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id.* The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id.* According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id.*

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id.* at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id.* at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id.* According to the court, the record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id.*

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id.*

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

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT*, and *Gross Seed Company v. Nebraska Department of Roads*, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26 ). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the federal regulations governing the states' implementation of the Federal DBE Program were narrowly tailored, and the state DOT's implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

*Sherbrooke* and *Gross Seed* both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment's Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads ("Nebraska DOR") under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT's and Nebraska DOR's implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, *Sherbrooke* and *Gross Seed* argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side's position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state's implementation

becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id.* The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id.* Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally-funded highway contracts. *See*, 49 CFR § 26.45(f)(1). The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 CFR § 26.45(b). The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See*, 49 CFR § 26.45(d).

The state must meet the "maximum feasible portion" of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See*, 49 CFR § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 CFR § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods "[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination." 49 CFR § 26.51(f).

Absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *See*, 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See*, 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 CFR § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court's narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, *citing Grutter v. Bollinger*, 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$750,000.00 cannot qualify as economically

disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.*; 49 CFR § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See*, 49 CFR § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contracting markets. *Id.* at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

*Sherbrooke* and *Gross Seed* also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, citing 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a prescribed portion of the project to DBEs, and determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id.* The precipitous drop in DBE



participation when no race-conscious methods were employed, the court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id.* On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like Sherbrooke, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (See district court opinions discussed *infra*).

**5. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001)**

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari "as improvidently granted" without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is "narrowly tailored," and therefore upheld the constitutionality of the Federal DBE Program.

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:

*[y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 CFR § 26.51(a)(2000); see also 49 CFR § 26.51(f)(2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, see 49 CFR § 26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See 49 CFR § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 228 F.3d at 1178-1179.*

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state’s construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress’s power to enact nationwide legislation. *Id.* at 1185-1186. The court 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.

## **Recent District Court Decisions**

### **6. *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn 2017)**

In a recent criminal case that is noteworthy because it involved a challenge to the Federal DBE Program, a federal district court in the Western District of Pennsylvania upheld the Indictment by the United States against Defendant Taylor who had been indicted on multiple counts arising out of a scheme to defraud the United States Department of Transportation’s Disadvantaged Business Enterprise Program (“Federal DBE Program”). *United States v. Taylor*, 232 F.Supp. 3d 741, 743 (W.D. Penn. 2017). Also, the court in denying the motion to dismiss the Indictment upheld the federal regulations in issue against a challenge to the Federal DBE Program.

**Procedural and case history.** This was a white collar criminal case arising from a fraud on the Federal DBE Program by Century Steel Erectors (“CSE”) and WMCC, Inc., and their respective principals. In this case, the Government charged one of the owners of CSE, Defendant Donald Taylor, with fourteen separate criminal offenses. The Government asserted that Defendant and CSE used WMCC, Inc., a certified DBE as a “front” to obtain 13 federally funded highway construction contracts requiring DBE status, and that CSE performed the work on the jobs while it was represented to agencies and contractors that WMCC would be performing the work. *Id.* at 743.

The Government contended that WMCC did not perform a “commercially useful function” on the jobs as the DBE regulations require and that CSE personnel did the actual work concealing from general contractors and government entities that CSE and its personnel were doing the work. *Id.* WMCC’s principal was paid a relatively nominal “fixed-fee” for permitting use of WMCC’s name on each of these subcontracts. *Id.* at 744.

**Defendant’s contentions.** This case concerned *inter alia* a motion to dismiss the Indictment. Defendant argued that Count One must be dismissed because he had been mischarged under the “defraud clause” of [18 U.S.C. § 371](#), in that the allegations did not support a charge that he defrauded the United States. *Id.* at 745. He contended that the DBE program is administered through state and county entities, such that he could not have defrauded the United States, which he argued merely provides funding to the states to administer the DBE program. *Id.*

Defendant also argued that the Indictment must be dismissed because the underlying federal regulations, [49 C.F.R. § 26.55\(c\)](#), that support the counts against him were void for vagueness as applied to the facts at issue. *Id.* More specifically, he challenged the definition of “commercially useful function” set forth in the regulations and also contended that Congress improperly delegated its duties to the Executive branch in promulgating the federal regulations at issue. *Id.* at 745.

**Federal government position.** The Government argued that the charge at Count One was supported by the allegations in the Indictment which made clear that the charge was for defrauding the United States’ Federal DBE Program rather than the state and county entities. *Id.* The Government also argued that the challenged federal regulations are neither unconstitutionally vague nor were they promulgated in violation of the principles of separation of powers. *Id.*

**Material facts in Indictment.** The court pointed out that the Pennsylvania Department of Transportation (“PennDOT”) and the Pennsylvania Turnpike Commission (“PTC”) receive federal funds from FHWA for federally funded highway projects and, as a result, are required to establish goals and objectives in administering the DBE Program. *Id.* at 745. State and local authorities, the court stated, are also delegated the responsibility to administer the program by, among other things, certifying entities as DBEs; tracking the usage of DBEs on federally funded highway projects through the award of credits to general contractors on specific projects; and reporting compliance with the participation goals to the federal authorities. *Id.* at 745-746.

WMCC received 13 federally-funded subcontracts totaling approximately \$2.34 million under PennDOT’s and PTC’s DBE program and WMCC was paid a total of \$1.89 million.” *Id.* at 746. These subcontracts were between WMCC and a general contractor, and required WMCC to furnish and erect steel and/or precast concrete on federally funded Pennsylvania highway projects. *Id.* Under PennDOT’s program, the entire amount of WMCC’s subcontract with the general contractor,

including the cost of materials and labor, was counted toward the general contractor's DBE goal because WMCC was certified as a DBE and "ostensibly performed a commercially useful function in connection with the subcontract." *Id.*

The stated purpose of the conspiracy was for Defendant and his co-conspirators to enrich themselves by using WMCC as a "front" company to fraudulently obtain the profits on DBE subcontracts slotted for legitimate DBE's and to increase CSE profits by marketing CSE to general contractors as a "one-stop shop," which could not only provide the concrete or steel beams, but also erect the beams and provide the general contractor with DBE credits. *Id.* at 746 .

As a result of these efforts, the court said the "conspirators" caused the general contractors to pay WMCC for DBE subcontracts and were deceived into crediting expenditures toward DBE participation goals, although they were not eligible for such credits because WMCC was not performing a commercially useful function on the jobs. *Id.* at 747. CSE also obtained profits from DBE subcontracts that it was not entitled to receive as it was not a DBE and thereby precluded legitimate DBE's from obtaining such contracts. *Id.*

**Motion to Dismiss — challenges to Federal DBE Regulations.** Defendant sought dismissal of the Indictment by contesting the propriety of the underlying federal regulations in several different respects, including claiming that [49 C.F.R. § 26.55\(c\)](#) was "void for vagueness" because the phrase "commercially useful function" and other phrases therein were not sufficiently defined. *Id.* at 754. Defendant also presented a non-delegation challenge to the regulatory scheme involving the DBE Program. *Id.* The Government countered that dismissal of the Indictment was not justified under these theories and that the challenges to the regulations should be overruled. The court agreed with the Government's position and denied the motion to dismiss. *Id.* at 754.

The court disagreed with Defendant's assessment that the challenged DBE regulations are so vague that people of ordinary intelligence cannot ascertain the meaning of same, including the phrases "commercially useful function;" "industry practices;" and "other relevant factors." *Id.* at 755, *citing*, [49 C.F.R. § 26.55\(c\)](#). The court noted that other federal courts have rejected vagueness and related challenges to the federal DBE regulations in both civil, *see Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932 (7th Cir. 2016) (rejecting vagueness challenge to [49 C.F.R. § 26.53\(a\)](#) and "good faith efforts" language), and criminal matters, *United States v. Maxwell*, 579 F.3d 1282, at 1302 (11th Cir. 2009).

With respect to the alleged vagueness of the phrase "commercially useful function," the court found the regulations both specifically describes the types of activities that: (1) fall within the definition of that phrase in [§ 26.55\(c\)\(1\)](#); and, (2) are beyond the scope of the definition of that phrase in [§ 26.55\(c\)\(2\)](#). *Id.* at 755, *citing*, [49 C.F.R. §§ 26.55\(c\)\(1\)–\(2\)](#). The phrases "industry practices" and "other relevant factors" are undefined, the court said, but "an undefined word or phrase does not render a statute void when a court could ascertain the term's meaning by reading it in context." *Id.* at 756.

The context, according to the court, is that these federal DBE regulations are used in a comprehensive regulatory scheme by the DOT and FHWA to ensure participation of DBEs in federally funded highway construction projects. *Id.* at 756. These particular phrases, the court pointed out, are also not the most prominently featured in the regulations as they are utilized in a sentence

describing how to determine if the activities of a DBE constitute a “commercially useful function.” *Id.*, citing, [49 C.F.R. § 26.55\(c\)](#).

While Defendant suggested that the language of these undefined phrases was overbroad, the court held it is necessarily limited by [§ 26.55\(c\)\(2\)](#), expressly stating that “[a] DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.” *Id.* at 756, quoting, [49 C.F.R. § 26.55\(c\)](#).

The district court in this case also found persuasive the reasoning of both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, construing the federal DBE regulations in [United States v. Maxwell](#). *Id.* at 756. The court noted that in [Maxwell](#), the defendant argued in a post-trial motion that [§ 26.55\(c\)](#) was “ambiguous” and the evidence presented at trial showing that he violated this regulation could not support his convictions for various mail and wire fraud offenses. *Id.* at 756. The trial court disagreed, holding that:

the rules involving which entities must do the DBE/CSBE work are not ambiguous, or susceptible to different but equally plausible interpretations. Rather, the rules clearly state that a DBE [ ... ] is required to do its own work, which includes managing, supervising and performing the work involved .... And, under the federal program, it is clear that the DBE is also required to negotiate, order, pay for, and install its own materials.

*Id.* at 756, quoting, [United States v. Maxwell](#), 579 F.3d 1282, 1302 (11th Cir. 2009). The defendant in [Maxwell](#), the court said, made this same argument on appeal to the Eleventh Circuit, which soundly rejected it, explaining that:

[b]oth the County and federal regulations explicitly say that a CSBE or DBE is required to perform a commercially useful function. Both regulatory schemes define a commercially useful function as being responsible for the execution of the contract and actually performing, managing, and supervising the work involved. And the DBE regulations make clear that a DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. [49 C.F.R. § 26.55\(c\)\(2\)](#). There is no obvious ambiguity about whether a CSBE or DBE subcontractor performs a commercially useful function when the job is managed by the primary contractor, the work is performed by the employees of the primary contractor, the primary contractor does all of the negotiations, evaluations, and payments for the necessary materials, and the subcontractor does nothing more than provide a minimal amount of labor and serve as a signatory on two-party checks. In short, no matter how these regulations are read, the jury could conclude that what FLP did was not the performance of a “commercially useful function.”

*Id.* at 756, quoting, [United States v. Maxwell](#), 579 F.3d 1282, 1302 (11th Cir. 2009).

Thus, the Western District of Pennsylvania federal district court in this case concluded the Eleventh Circuit in [Maxwell](#) found that the federal regulations were sufficient in the context of a scheme similar to that charged against Defendant Taylor in this case: WMCC was “fronted” as the DBE, receiving a fixed fee for passing through funds to CSE, which utilized its personnel to perform virtually all of the work under the subcontracts. *Id.* at 757.



Federal DBE regulations are authorized by Congress and the Federal DBE Program has been upheld by the courts. The court stated Defendant's final argument to dismiss the charges relied upon his unsupported claims that the USDOT lacked the authority to promulgate the DBE regulations and that it exceeded its authority in doing so. *Id.* at 757. The court found that the Government's exhaustive summary of the legislative history and executive rulemaking that has taken place with respect to the relevant statutory provisions and regulations suffices to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id.*, citing, [49 U.S.C. § 322\(a\)](#) ("The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer."); [23 U.S.C. § 304](#) (The Secretary of Transportation "should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway system."); [23 U.S.C. § 315](#) ("[Subject to certain exceptions related to tribal lands and national forests], the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Title.").

Also, significantly, the court pointed out that the Federal DBE Program has been upheld in various contexts, "even surviving strict scrutiny review," with courts holding that the program is narrowly tailored to further compelling governmental interests. *Id.* at 757, citing, [Midwest Fence Corp.](#), 840 F.3d at 942 (citing [Western States Paving Co. v. Washington State Dep't of Transportation](#), 407 F.3d 983, 993 (9th Cir. 2005); [Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation](#), 345 F.3d 964, 973 (8th Cir. 2003); [Adarand Constructors, Inc. v. Slater](#), 228 F.3d 1147, 1155 (10th Cir. 2000)).

In light of this authority as to the validity of the federal regulations and the Federal DBE Program, the Western District of Pennsylvania federal district court in this case held that Defendant failed to meet his burden to demonstrate that dismissal of the Indictment was warranted. *Id.*

**Conclusion.** The court denied the Defendant's motion to dismiss the Indictment. The Defendant subsequently pleaded guilty. Recently on March 13, 2018, the court issued the final Judgment sentencing the Defendant to Probation for 3 years; ordered Restitution in the amount of \$85,221.21; and a \$30,000 fine. The case also was terminated on March 13, 2018.

**7. *Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al.*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, March 24, 2015), affirmed, 840 F.3d 932 (7th Cir. 2016).**

In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise ("DBE") Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation's ("IDOT") implementation of the Federal DBE Program for federally-funded projects, IDOT's implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority's ("Tollway") separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants' Motion to Dismiss for lack of standing, denying the Federal Defendants' Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants' Motion to Dismiss certain Counts and granting the Tollway Defendants' Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT's implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT's DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway's DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants' Motion to Dismiss Midwest Fence's request for punitive damages.

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 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 *Crosby*, 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 women-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 (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 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 nonminority 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 women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at \*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.* at \*16.

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. *Id.* at \*17. The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT’s method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at \*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. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the “custom census” approach as consistent with the federal regulations. *Id.* at \*17, *citing to Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at \*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 *Northern Contract v. Illinois DOT*. *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. *Id.*

The court pointed out that although Midwest’s expert’s reports “cast doubt on the validity of IDOT’s methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias.” *Id.* at \*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. *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. *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. *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. *Id.* at \*19. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* 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.*

**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.



**8. *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. 2014), affirmed *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015).**

In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten “no waiver” policy, and claiming that the IDOT’s program is not narrowly tailored.

**Motion to Dismiss certain claims granted.** IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT’s DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

**Motions for Summary Judgment.** Subsequent to the Court’s Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT’s implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at \* 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT’s DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project, was based upon Dunnet Bay’s race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

**Factual background.** Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of

22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at \*3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at \*4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at \*4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at \*9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at \*23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at \*23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at \*25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

**IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority.** The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely "on the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.* at \*26, *quoting Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is "insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority." *Id.* at \*26, *quoting Northern Contracting, Inc.*, 473 F.3d at 721.

The Court held that accordingly, any “challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority.” *Id.* at \*26, quoting *Northern Contracting, Inc.*, 473 F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay’s challenges are foreclosed by *Northern Contracting*. *Id.* at \*26.

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **9. *Geyer Signal, Inc. v. Minnesota, DOT*, 2014 WL 1309092 (D. Minn. March 31, 2014)**

In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT's implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT's implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

**Procedural background.** Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Intervenors requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Intervenors and the plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-Intervenor's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in

this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in this case.

The Federal Defendants moved for summary judgment and the State defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal Defendants and the State defendants' motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at \*10) Additionally, plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. *Id.* \*10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are "reasonable." *Id.*

**Constitutional claims.** The Court states that the "heart of plaintiffs' claims is that the DBE Program and MnDOT's implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work." *Id.* at \*11. The Court noted that because DBEs are, by definition, small businesses, plaintiffs contend they "simply cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work. *Id.*

As a result, plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. *Id.* Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non-DBEs in those areas of work are forced to bear the entire burden of "correcting discrimination", while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id.*

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id.* Plaintiffs allege that the DBE Program is facially unconstitutional because it is "fatally prone to overconcentration" where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id.* at 11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is "reasonable" without defining a reasonable increase in cost. *Id.*

Plaintiffs also brought three as-applied challenges based on MnDOT's implementation of the DBE Program. *Id.* at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

**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.*

**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 \*.

**Compelling governmental interest.** The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id.* \*13, quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id.* at \*13. In assessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at \*13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id.*

**Congressional evidence of discrimination: disparity studies and barriers.** Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id.* at \*13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* \*14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as

evidence by the Federal Defendants and find all of the flaws. *Id.* \*14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at \*14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or nonminorities. *Id.* at \*6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* \*6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at \*5.

The Court concluded that neither of the plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id.* at \*14. The Court rejected plaintiffs' argument that because Congress found multiple forms of discrimination against minority- and women-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand*, the Court found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at \*14.

The Court, citing again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at \*14, *quoting, Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and nonminority 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.

**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.*

**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.

**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 *Sherbrooke Turf, Inc.* at 973.

Plaintiffs' expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at \*18. Plaintiffs' expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

**Plaintiffs present no affirmative evidence that discrimination does not exist.** The Court held that plaintiffs' disputes with MnDOT's conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT's implementation of the Federal DBE Program is not narrowly tailored. *Id.* at \*18. First, the Court found that it is insufficient to show that "data was susceptible to multiple interpretations," instead, plaintiffs must "present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts." *Id.* at \*18, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs' expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota's public contracting. *Id.* at \*18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at \*18. The Court found that it would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal. *Id.* at \*18, quoting *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT's compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at \*18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at \*18. Accordingly, the Court granted the State defendants' motion for summary judgment with respect to this claim.

**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.*

**Alleged overconcentration in the traffic control market.** Plaintiffs' final argument was that MnDOT's implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration in the traffic control market and correct for such overconcentration. *Id.* at \*20. MnDOT presented an expert report that reviewed four different industries into which plaintiffs' work falls based on NAICS codes that firms conducting traffic control-type work identify themselves by. *Id.* After conducting a disproportionality comparison, the consultant concluded that there was not statistically significant overconcentration of DBEs in plaintiffs' type of work.

Plaintiffs' expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which plaintiffs believe perform the same type of work as plaintiff. *Id.* at \*20. But, the Court found plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business' self-assessment of what industry group they fall into and what other businesses are similar. *Id.*

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id.* at \*20. This, the Court states, would require the government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id.*

Because plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICS codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. *Id.* at \*20. Therefore, the Court granted the State defendants' motion for summary judgment with respect to this claim.

**III. Claims Under 42 U.S.C. § 1981 and 42 U.S.C. § 2000.** Because the Court concluded that MnDOT's actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id.* at \*21. In addition, because the Court concluded that plaintiffs failed to establish a violation of the Equal Protection Clause, it granted the defendants' motions for summary judgment on the 42 U.S.C. § 2000d claim.

**Holding.** Therefore, the Court granted the Federal Defendants' motion for summary judgment and the States' defendants' motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the plaintiffs.

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

Plaintiffs, white male owners of Geod Corporation ("Geod"), brought this action against the New Jersey Transit Corporation ("NJT") alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT's DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

**New Jersey Transit Program and Disparity Study.** NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, "conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the “three-step process pursuant to USDOT regulations to establish the NJT DBE goal.” *Id.* at 649. First, the consultant determined “the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn.” *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified “the relevant industries in which NJ Transit contracts,” and (3) calculated “the weighted availability measure.” *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical marketplace for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace.” *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchase awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, citing *Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 citing *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

**Applying *Northern Contracting v. Illinois*.** The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at 652 quoting *Northern Contracting*, 473 F.3d at 721. The district court in *Geod* followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id.* at 652, citing *Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id.* at 652-653, quoting *Northern Contracting*, 473 F.3d at 722 and citing also *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 citing *Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id.* at 653 quoting *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and citing *South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT's use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the "examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, *citing* 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT's list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.



The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only "when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal." *Id.* at 655, quoting *Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." *Id.* at 656, quoting *Western States Paving*, 407 F.3d at 997.

**Applying *Western States Paving*.** The district court then analyzed whether the NJT program was narrowly tailored applying *Western States Paving*. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id.* at 656, citing *Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id.* at 656. However, the court found that the plaintiffs' argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id.* at 656. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id.* In addition, plaintiff's expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id.* at 656. The court held this was insufficient to overcome the consultant's determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id.* at 656.

The district court rejected Plaintiffs' argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT's expert identified "prime contracting" as the area in which NJT procurements evidence discrimination. *Id.* at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative,

but it does require serious, good faith consideration of workable race-neutral alternatives. *Id.* at 656, *citing Sherbrook Turf*, 345 F.3d at 972 (*quoting Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id.* at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the “relationship of the numerical goals to the relevant labor market.” *Id.* at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id.* at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id.* at 657, *citing Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id.* at 657, *citing Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id.* at 657, *citing Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id.*

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT’s DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* at 657.

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

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT’s DBE program was unconstitutional and in violation of the United States 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.

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

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County's implementation of the Federal DBE Program and Broward County's issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (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.

**13. *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.

The district court conducted a trial after denying the parties’ Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the “plaintiff”), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations (“TEA-21”), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at \*1 (N.D. Ill. Sept. 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the “maximum feasible portion” of its DBE goal through race-neutral means. *Id.* at \*4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id.* (citing regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]



**Statistical evidence.** To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at \*6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at \*6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at \*7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id.* at \*8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. *Id.* Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id.*

IDOT considered three reports prepared by expert witnesses. *Id.* at \*9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling for relevant variables such as credit worthiness, "that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males." *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses' formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they "were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals." *Id.* Additionally, witnesses identified 20 prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. *Id.* The prime contractors did not respond to IDOT's requests for information concerning their utilization of DBEs. *Id.*

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County’s public construction contracts, and a “non-goals” experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id.* at \*11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id.*

IDOT’s representative testified that the DBE program was administered on a “contract-by-contract basis.” *Id.* She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the “lowest responsible bidder.” IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (e.g., where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id.* at \*12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id.*

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court’s earlier summary judgment order, including:

1. A “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);
3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. “Unbundling” large contracts; and
5. Allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses.

*Id.* (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. *Id.*

The court found that IDOT attempted to achieve the “maximum feasible portion” of its overall DBE goal through race- and gender-neutral measures. *Id.* at \*13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id.*

**Anecdotal evidence.** A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and “unanimously reported that they were rarely invited to bid on such contracts.” *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at \*13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who “frequently are forced to pay higher insurance rates due to racial and gender discrimination.” *Id.* at \*14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they “occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT.” *Id.* A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at \*15.

**Strict scrutiny.** The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id.* at \*16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a “‘strong basis in evidence’ to conclude that remedial action was necessary, before it embarks on an affirmative action program ... If the government makes such a showing, the party challenging the affirmative action plan bears the ‘ultimate burden’ of demonstrating the unconstitutionality of the program.” *Id.* The court held that challenging party’s burden “can only be met by presenting credible evidence to rebut the government’s proffered data.” *Id.* at \*17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show “that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction.” *Id.* at \*16.

The court found that IDOT presented “an abundance” of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at \*17. The plaintiff argued that the study was “erroneous because it failed to limit its DBE availability figures to those firms ... registered and pre-qualified with IDOT.” *Id.* The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT’s calculation of DBE availability and utilization rates was incorrect. *Id.*

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id.* at \*18. Additionally, the court found “that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability.” *Id.* at \*19. The court found that IDOT presented “an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets.” *Id.* at \*21. The court also found that the statistical studies were consistent with the anecdotal evidence. *Id.* The court did find, however, that “there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This ... is [also] supported by the statistical data ... which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability.” *Id.* at \*21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id.* at \*21, n. 32.

The court further found:

*That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: ‘[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced because of industry discrimination.’* *Id.* at \*21, citing *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id.* at \*22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id.* The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT’s fiscal year 2005 goal was a “‘plausible lower-bound estimate’ of DBE participation in the absence of discrimination.” *Id.* The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT’s data. *Id.*

The plaintiff argued that even if accepted at face value, IDOT’s marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id.* The court found first that IDOT’s indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id.* Second, the court found:

[M]ore importantly, plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally-funded highway contracts. This is a fundamental distinction ... [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

*Id.* at \*23. The court distinguished *Builders Ass’n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff’d* 256 F.3d 642 (7th Cir. 2001), noting that the program in that case was not federally-funded. *Id.* at \*23, n. 34.

The court also found that “IDOT has done its best to maximize the portion of its DBE goal” through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at \*24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id.* The small business initiative included: “unbundling” large contracts; allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses; a “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found “[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures.” *Id.* at \*25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id.*, citing *Adarand Constructors, Inc. v. Slater* “*Adarand VII*”, 228 F.3d 1147, 1177 (10th Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT’s DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

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

This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *see* above, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (i.e., the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT’s DBE Program is narrowly tailored to achieve the federal government’s compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT’s implementation of the Federal DBE Program.

The court in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the Federal defendants' Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) ("*Adarand VII*"), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at \*34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith consideration of workable race-neutral alternatives." 2004 WL422704 at \*36, *citing and quoting Sherbrooke Turf*, 345 F.3d at 972, *quoting Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds \$750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the *Sherbrooke Turf* court's assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every 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.

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

This is another case that involved a challenge to the USDOT Regulations that implement TEA-21 (49 CFR Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation ("DOT") from enforcing its DBE Program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct constitutional challenge to racial and gender preferences in federally-funded state highway contracts. This case concerned the constitutionality of the Kansas DOT's implementation of the Federal DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The court granted the federal and state defendants' (USDOT and Kansas DOT) Motions to Dismiss based on lack of standing. The court held the contractor could not show the specific aspects of the DBE Program that it contends are unconstitutional have caused its alleged injuries.

**16. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), *aff'd* 345 F.3d 964 (8th Cir. 2003)**

*Sherbrooke* involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the "federal affirmative action programs," the USDOT implementing regulations, and the Minnesota DOT's participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at \*1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of "random inclusion" of various groups as being within the Program in connection with whether the Federal DBE Program is "narrowly tailored." The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the "potentially invidious effects of providing blanket benefits to minorities" in part, by restricting a state's DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota's DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota's overall DBE contracting goal.



*Sherbrooke*, 2001 WL 1502841 at \*10 (D. Minn.). The court rejected plaintiff's claim that the Minnesota DOT must independently demonstrate how its program comports with *Croson*'s strict scrutiny standard. The court held that the "Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program." *Id.* at \*11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, "relieves the state of any burden to independently carry the strict scrutiny burden." *Id.* at \*11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 CFR Part 26 are implementing a Congressionally-required program and not establishing a local one. As such, the court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. *Id.*

**17. *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.

## **F. Recent Decisions Involving State or Local Government MBE/WBE Programs in Other Jurisdictions**

### **Recent Decisions in Federal Circuit Courts of Appeal**

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

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

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

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

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina’s highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

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

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

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

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

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

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data — reflecting the number of subcontractors that actually bid on Department subcontracts — estimates availability better than “vendor data.” 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id.* The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence,” and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, citing *Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

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

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

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

in the public subcontracting market, raising the specter of racial discrimination.”) The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id.* at 248.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

**Overinclusive.** The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

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

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

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women subcontractors in the general construction industry statewide and in the 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 women-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id.* at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id.*

In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id.*

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

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

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

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

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

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

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

This recent case is instructive in connection with the determination of the groups that may be included in a MBE/WBE-type program, and the standard of analysis utilized to evaluate a local government's non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as "under-inclusive" (i.e., those that exclude persons from a particular racial classification) are subject to a "rational basis" review, not strict scrutiny.

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 CFR § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." *Id.* at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. *Id.*

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of persons from, Spain or Portugal. *Id.* Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. *Id.* at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of "Hispanic" was fatally under-inclusive. *Id.* at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis "allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program." *Id.* at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. *Id.* at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of "Hispanic," finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. *Id.* at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the "federal USDOT definition of Hispanic without at least making an independent assessment of discrimination against Hispanics of Spanish Origin in New York." *Id.* Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. *Id.* at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York's decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. *Id.* at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

### **3. *Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc.*, 460 F.3d 859 (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.

**4. *Viridi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion)**

Although it is an unpublished opinion, *Viridi 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 *Viridi*, 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 Viridi, 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). Viridi 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 Viridi’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 Viridi’s case. *Id.*

In 1989, the Board appointed the Tillman Committee (the “Committee”) to study participation of female- and minority-owned businesses with the District. *Id.* The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id.* Based upon a “general feeling” that minorities were under-represented, the Committee issued the Tillman Report (the “Report”) stating “the Committee’s impression that ‘[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community.’” *Id.* The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id.*

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a “how to” booklet to be made available to any business interested in doing business with the District.

*Id.* The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id.* The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id.*

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the “how to” booklet. *Id.* The Board also implemented the Minority Vendor Involvement Program (the “MVP”) which adopted the participation goals set forth in the Report. *Id.* at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id.* Viridi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id.* Viridi 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, Viridi 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 Viridi that his firm was not selected not based upon his qualifications, but because the “District was only looking for ‘black-owned firms.’” *Id.* Viridi 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, Viridi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Viridi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Viridi 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 Viridi 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 nonminority-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 women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id.* at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the

professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, *inter alia*, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the “1997 Study”). *Id.* at 966. The 1997 Study used geographic and specialization information to calculate MBE/WBE availability. Availability was defined as “the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City’s contracts.” *Id.*

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. *Id.* The statewide market was used because necessary information was unavailable for the Denver MSA. *Id.* at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 41 for African American firms, 40 for Hispanic firms, 14 for Asian and other minorities, and 74 for women-owned firms. *Id.*

The 1997 Study also contained an analysis of whether African Americans, Hispanics or Asian Americans working in the construction industry are less likely to be self-employed than similarly situated whites. *Id.* Using data from the Public Use Microdata Samples (“PUMS”) of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id.* Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id.* at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans and women had lower earnings than white males. *Id.*

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: “How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements ... also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?” Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were “seldom or never” used on non-goals projects. *Id.*

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm's size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. *Id.* at 968-69.

After the 1997 Study was completed, the City enacted the 1998 Ordinance. The 1998 Ordinance reduced the annual goals to 10 percent for both MBEs and WBEs and eliminated a provision which previously allowed MBE/WBEs to count their own work toward project goals. *Id.* at 969.

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects, but their applications were denied even though they met the prequalification requirements. *Id.*

Other MBE/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that they were required to do additional work not part of the subcontracting arrangement; and that they found it difficult to join unions and trade associations. *Id.* There was testimony detailing the difficulties MBE/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. *Id.*

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. *Id.* at 969-70.

**The legal framework applied by the court.** The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver’s evidence showed that there is pervasive discrimination. *Id.* at 970. The court, quoting *Concrete Works II*, stated that “the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination.” *Id.* at 970, quoting *Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver’s initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that “approaching a prima facie case of a constitutional or statutory violation,” not irrefutable or definitive proof of discrimination. *Id.* at 97, quoting *Croson*, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver’s “evidence did not support an inference of prior discrimination and thus a remedial purpose.” *Id.*, quoting *Adarand VII*, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver’s evidence did not suffer from the problem discussed by the court in *Croson*. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a “city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market.” *Id.* at 971, quoting *Croson*, 488 U.S. 503. Thus, the Court held Denver’s burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. *Id.*, citing *Croson*, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. *Id.* at 972.

The court found Denver’s statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver’s evidence on that basis. *Id.*

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id.* at 973. The court rejected the district court’s erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson*. *Id.* The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area.” *Id.*, quoting *Concrete*

*Works II*, 36 F.3d at 1529 (emphasis added). In *Concrete Works II*, the court stated that “we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. *Id.* at 973. Thus, Denver was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden. *Id.*

Additionally, the court had previously concluded that Denver’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination. *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529. Thus, the court held Denver’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id.*

The Court’s rejection of CWC’s arguments and the district court findings.

**Use of marketplace data.** The court held the district court, inter alia, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court’s conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt*. *Id.* at 975. In *Shaw*, a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity’s “interest in remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions.” *Id.*, quoting *Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” *Id.* at 976, quoting *Shaw*, 517 U.S. at 910. The City can satisfy this condition by identifying the discrimination, “‘public or private, with some specificity.’” *Id.* at 976, citing *Shaw*, 517 U.S. at 910, quoting *Croson*, 488 U.S. at 504 (emphasis added). The governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.” *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality’s burden of producing strong evidence. *Id.* at 976.

In *Adarand VII*, the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67 (“[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*” (emphasis added)). Further, the court pointed out in this case it earlier rejected

the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to “the Denver MSA evidence of industry-wide discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529. The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to Denver’s burden of producing strong evidence. *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

Consistent with the court’s mandate in *Concrete Works II*, the City attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.” *Id.* The City can demonstrate that it is a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, quoting *Croson*, 488 U.S. at 492.

The court rejected CWC’s argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.” *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City’s showing that it indirectly participates in industry discrimination. *Id.* at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that “despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial.” *Id.* at 977-78. In *Adarand VII*, the court concluded that this study, among other evidence, “strongly support[ed] an initial showing of discrimination in lending.” *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170, n. 13 (“Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination ... supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded.”). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.



CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court's criticism did not undermine the study's reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in *Adarand VII* it took "judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects." *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra*, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id.* at 978.

The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion." *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. *Id.* at 979-80.

**Variables.** CWC challenged Denver's disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm's size has little effect on its qualifications or its ability to provide construction services and that MBE/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; MBE/WBEs are less capable of expanding because they are smaller and less experienced. *Id.* at 980.

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver's argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that MBE/WBE construction firms are generally smaller and less experienced *because* of industry discrimination. *Id.* at 981. The lending discrimination and business formation studies, according to the court, both strongly supported Denver's argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver's expert testified that discrimination by banks or bonding companies would reduce a firm's revenue and the number of employees it could hire. *Id.*

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for MBE/WBEs and concluded that the resulting disparities, "suggest[ ] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of nonminority male-owned firms." *Id.* at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia*, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver's studies would decrease or disappear if the studies controlled for size and experience to CWC's satisfaction. Consequently, the court held CWC's rebuttal evidence was insufficient to meet its burden of discrediting Denver's disparity studies on the issue of size and experience. *Id.* at 982.

**Specialization.** The district court also faulted Denver's disparity studies because they did not control for firm specialization. The court noted the district court's criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id.* at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found relevant the testimony of the City's expert, that the data he reviewed showed that MBEs were represented "widely across the different [construction] specializations." *Id.* at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver's studies. *Id.* at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver's studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver's argument that firm specialization does not explain the disparities. *Id.* at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id.* at 983.

**Utilization of MBE/WBEs on City projects.** CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC’s argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC’s argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver’s evidence. *Id.* at 984.

Consistent with the court’s mandate in *Concrete Works II*, at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and “reflect[ed] the intended remedial effect on MBE and WBE utilization.” *Id.* at 984, *quoting Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id.* at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id.* at 985.

The court rejected CWC’s argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver’s burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. *Id.* at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver’s position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

**Anecdotal evidence.** The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. *Id.* at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver’s witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. *Id.*

The court held there was no merit to CWC’s argument that the witnesses’ accounts must be verified to provide support for Denver’s burden. The court stated that anecdotal evidence is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions. *Id.*

After considering Denver’s anecdotal evidence, the district court found that the evidence “shows that race, ethnicity and gender affect the construction industry and those who work in it” and that the egregious mistreatment of minority and women employees “had direct financial consequences” on construction firms. *Id.* at 989, *quoting Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court’s findings regarding Denver’s anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, un rebutted support for Denver’s initial burden. *Id.* at 989-90, *citing Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it “brought the cold [statistics] convincingly to life”).

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

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

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

The court stated it had previously concluded in its earlier decisions that Denver’s program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found *Concrete Works* did not challenge the district court’s conclusion with respect to the second prong of *Croson*’s strict scrutiny standard — i.e., that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id.* at 992, *citing Concrete Works II*, 36 F.3d at 1531, n. 24.

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

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

This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. *Id.* The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.

The district court had ruled that the City could not introduce a post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. *Id.* at 350-351. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue. *Id.* at 350-351.

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id.* This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id.* The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (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.

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

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contracts discriminated against any of the groups "favored" by the Program. The court also found that the Program was not "narrowly tailored" to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* (“VMP”), 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.

**8. *Associated Gen. Contractors v. Drabik*, 214 F.3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998)**

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a “set-aside” contract based on the State of Ohio’s MBE program with the award of construction contracts.

The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court concluded the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court said the statute failed the narrow tailoring test, including because there was no evidence that the State had considered race-neutral remedies.

This case involves a suit by the Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio, representing Ohio building contractors to stop the award of a construction contract for the Toledo Correctional Facility to a minority-owned business (“MBE”), in a bidding process from which nonminority-owned firms were statutorily excluded from participating under Ohio’s state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act (“MBEA”) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court’s Order. *Id.* at 733. The Sixth Circuit

Court of Appeals affirmed the Order of the district court, holding unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. *Id.*

Ohio passed the MBEA in 1980. *Id.* at 733. This legislation “set aside” 5 percent, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id.* Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility’s Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id.*

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id.* at 738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id.* at 739.

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

#### **9. *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.

#### **10. *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9th Cir. 1997)**

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term "goals" as opposed to "quotas," the Ninth Circuit rejected such a distinction, holding "[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." The case also is instructive because it found the use of "goals" and the application of "good faith efforts" in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the "plaintiff") submitted the low bid for a construction project for the California Polytechnic State University (the "University"). 125 F.3d 702, 704 (9th Cir. 1994). The University rejected the plaintiff's bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

Importantly, the University did not conduct a disparity study, and instead argued that because "the 'goal requirements' of the scheme '[did] not involve racial or gender quotas, set-asides or preferences,'" the University did not need a disparity study. *Id.* at 705. The plaintiff protested the contract award and sued the University's trustees, and a number of other individuals (collectively the "defendants") alleging the state law was violative of the Equal Protection Clause. *Id.* The district court denied the plaintiff's motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. *Id.* at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. *Id.* at 709. The court held that contrary to the district court's finding, such a difference was not *de minimis*. *Id.*

The defendants 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.

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

*Engineering Contractors Association of South Florida v. Metropolitan Engineering Contractors Association* is a paramount case in the Eleventh Circuit and is instructive to the disparity study. This decision has been cited and applied by the courts in various circuits that have addressed MBE/WBE-type programs or legislation involving local government contracting and procurement.

In *Engineering Contractors Association*, six trade organizations (the "plaintiffs") filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the "County") as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11th Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program ("BBE"), the Hispanic Business Enterprise program ("HBE"), and the Woman Business Enterprise program, ("WBE"), (collectively "MWBE")

programs). *Id.* The plaintiffs challenged the application of the program to County construction contracts. *Id.*

For certain classes of construction contracts valued over \$25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. *Id.* at 901. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County Commission would make the final determination and its decision was appealable to the County Manager. *Id.* The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id.*

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite “strong basis in evidence” to support the race- and ethnicity-conscious measures. *Id.* at 902. The district court applied intermediate scrutiny to the WBE program and found that the “County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference.” *Id.* Therefore, the County had failed to demonstrate a “compelling interest” necessary to support the BBE and HBE programs, and failed to demonstrate an “important interest” necessary to support the WBE program. *Id.* The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id.* The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id.* at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];
2. Whether the district court erred in finding the County lacked a “strong basis in evidence” to justify the existence of the BBE and HBE programs;
3. Whether the district court erred in finding the County lacked a “sufficient probative basis in evidence” to justify the existence of the WBE program; and
4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve. *Id.* at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* at 906. Under this standard, “an affirmative action program must be based upon a ‘compelling government interest’ and must be ‘narrowly tailored’ to achieve that interest.” *Id.* The Eleventh Circuit further noted:

*“In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government’s interest, but rather the adequacy of the evidence of discrimination offered to show that interest.” Id.* (internal citations omitted).

Therefore, strict scrutiny requires a finding of a “‘strong basis in evidence’ to support the conclusion that remedial action is necessary.” *Id.*, citing *Croson*, 488 U.S. at 500). The requisite “‘strong basis in evidence’ cannot rest on ‘an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.’” *Id.* at 907, citing *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) (citing and applying *Croson*). However, the Eleventh Circuit found that a governmental entity can “justify affirmative action by demonstrating ‘gross statistical disparities’ between the proportion of minorities hired ... and the proportion of minorities willing and able to do the work ... Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.” *Id.* (internal citations omitted).

Notwithstanding the “exceedingly persuasive justification” language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id.* at 908. Under this standard, the government must provide “sufficient probative evidence” of discrimination, which is a lesser standard than the “strong basis in evidence” under strict scrutiny. *Id.* at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical “anecdotal” evidence. *Id.* at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially “post-enactment” evidence (i.e., evidence based on data related to years following the initial enactment of the BBE program). *Id.* However, “such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market.” *Id.* at 912. A district court should not “speculate about what the data *might* have shown had the BBE program never been enacted.” *Id.*

**The statistical evidence.** The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County’s statistical evidence (described more fully below) was subject to more than one interpretation. *Id.* at 924. The district court found that the evidence was “insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County’s stated rationale for imposing a gender preference.” *Id.* The district court’s view of the evidence was a permissible one. *Id.*

**County contracting statistics.** The County presented a study comparing three factors for County non-procurement Construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no “consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate ‘share’ ... when the bidder percentages are used as the baseline.” *Id.* at 913. For the WBE statistics, the bidder/awardee statistics were “decidedly mixed” as across the range of County construction contracts. *Id.*

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating “disparity indices” for each program and classification of construction contract. The Eleventh Circuit explained:

*“[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group’s bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group’s contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent.”* *Id.* at 914. “The utility of disparity indices or similar measures ... has been recognized by a number of federal circuit courts.” *Id.*

The Eleventh Circuit found that “[i]n general ... disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination.” *Id.* The Eleventh Circuit noted that “the EEOC’s disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination.” *Id.*, citing 29 CFR § 1607.4D. In addition, no circuit that has “explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination.” *Id.*, citing *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994) (crediting disparity indices ranging from 0% to 3.8%); *Contractors Ass’n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id.* at 914. “The standard deviation figure describes the probability that the measured disparity is the result of mere chance.” *Id.* The Eleventh Circuit had previously recognized “[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance.” *Id.*

The statistics presented by the County indicated “statistically significant underutilization of BBEs in County construction contracting.” *Id.* at 916. The results were “less dramatic” for HBEs and mixed as between favorable and unfavorable for WBEs. *Id.*

The Eleventh Circuit then explained the burden of proof:

*“[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant’s] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently ‘narrowly tailored.’”* *Id.* (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a “neutral explanation” by: “(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced “sufficient evidence to establish a neutral explanation for the disparities.” *Id.*

The plaintiffs alleged that the disparities were “better explained by firm size than by discrimination ... [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts.” *Id.* at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id.* at 917. The Eleventh Circuit found that the plaintiff’s explanation of the disparities was a “plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms.” *Id.*

Additionally, the Eleventh Circuit noted that the County’s own expert admitted that “firm size plays a significant role in determining which firms win contracts.” *Id.* The expert stated:

*The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it.* *Id.*

The Eleventh Circuit then summarized:

*Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms.* *Id.*

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is “a statistical procedure for determining the relationship between a dependent and independent variable, e.g., the dollar value of a contract award and firm size.” *Id.* (internal citations omitted). The purpose of the regression analysis is “to determine whether the relationship between the two variables is statistically meaningful.” *Id.*



The County's regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (i.e., most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite "strong basis in evidence" of discrimination of BBEs and HBEs. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id.*

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. *Id.* However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id.*

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. *Id.* The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this evidence was not "sufficiently probative of discrimination." *Id.*

The County argued that the district court erroneously relied on the disaggregated data (i.e., broken down by contract type) as opposed to the consolidated statistics. *Id.* at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) "the County's own expert testified as to the utility of examining the disaggregated data 'insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another.'" *Id.*

Additionally, the district court noted, and the Eleventh Circuit found that “the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as ‘Simpson’s Paradox,’ which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated.” *Id.* at 919, n. 4 (internal citations omitted). “Under those circumstances,” the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a “strong basis in evidence” of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

**County subcontracting statistics.** The County performed a subcontracting study to measure MBE/WBE participation in the County’s subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), “the study compared the proportion of the designated group that filed a subcontractor’s release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period.” *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor’s release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor’s release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation. *Id.* The County’s argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court’s decision to fail to credit the study erroneous. *Id.*

**Marketplace data statistics.** The County conducted another statistical study “to see what the differences are in the marketplace and what the relationships are in the marketplace.” *Id.* The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a “certificate of competency” with Dade County as of January 1995. *Id.* The selected firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm’s owner, and asked for information on the firm’s total sales and receipts from all sources. *Id.* The County’s expert then studied the data to determine “whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. *Id.* The expert’s hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id.*

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: “[w]hen special qualifications are required to fill particular jobs, comparisons to the

general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.” *Id.*, quoting *Croson*, 488 U.S. at 501, quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id.* Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id.*

**The Wainwright Study.** The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing “the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database” (derived from the decennial census). *Id.* The study “(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners.” *Id.* “The study concluded that blacks, Hispanics, and women are less likely to own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males.” *Id.*

With respect to the first conclusion, Wainwright controlled for “human capital” variables (education, years of labor market experience, marital status, and English proficiency) and “financial capital” variables (interest and dividend income, and home ownership). *Id.* The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id.* The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id.* at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id.*

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id.* The Eleventh Circuit quoted *Croson*, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: “There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities *as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.*” *Id.*, quoting *Croson*, 488 U.S. at 503. Following the Supreme Court in *Croson*, the Eleventh Circuit held “the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason.” *Id.*, quoting *Croson*, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. *Id.* at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id.* at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting

statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed *supra*, which did regress for firm size. *Id.*

**The Brimmer Study.** The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id.* The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau’s Survey of Minority- and Women-Owned Businesses, produced every five years. *Id.* The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id.*

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id.* The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id.* However, the study made no attempt to filter for the Metrorail project and “complete[ly] fail[ed]” to account for firm size. *Id.* Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id.* at 924.

**Anecdotal evidence.** In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBEs, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBEs. *Id.* The County presented three basic forms of anecdotal evidence: “(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms.” *Id.*

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id.* They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than their non-MBE/WBE counterparts. *Id.* They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id.*

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

*Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was “shopped” to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a “letter of unavailability” for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project. *Id.* at 924-25.*

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id.* at 925. The interviewees reported similar instances of perceived discrimination, including: “difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms.” *Id.*

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County’s construction contracting process. *Id.* However, such anecdotal evidence is helpful “only when it [is] combined with and reinforced by sufficiently probative statistical evidence.” *Id.* In her plurality opinion in *Croson*, Justice O’Connor found that “evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government’s determination that broader remedial relief is justified.” *Id.*, quoting *Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that “anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a “constitutionally sufficient evidentiary foundation.” *Id.*

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, i.e., “remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market.” *Id.*

**Narrow tailoring.** “The essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences ... must only be a ‘last resort’ option.” *Id.*, quoting *Hayes v. North Side Law Enforcement Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993) and citing *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) (“[T]he strict scrutiny standard ... forbids the use of even narrowly drawn racial classifications except as a last resort.”).

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) “the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties.” *Id.* at 927, citing *Ensley Branch*, 31 F.3d at 1569. The four factors provide “a useful analytical structure.” *Id.* at 927. The Eleventh Circuit focused only on the first factor in the present case “because that is where the County’s MBE/WBE programs are most problematic.” *Id.*

The Eleventh Circuit flatly reject[ed] the County’s assertion that ‘given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.’ That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, citing *Croson*, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where “there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting”) ... Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment. *Id.* at 927.

The Eleventh Circuit held that the County “clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures.” *Id.* Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an “equally conclusory analysis” in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id.*

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County’s own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County’s own processes and procedures, including: “the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information.” *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were “institutional barriers” to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the “institutional youth” of black- and Hispanic-owned construction firms. *Id.* “It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part.” *Id.*

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O’Connor in *Croson*:

*[T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect ... The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Id., quoting Croson, 488 U.S. at 509-10.*

The Eleventh Circuit found that except for some “half-hearted programs” consisting of “limited technical and financial aid that might benefit BBEs and HBEs,” the County had not “seriously considered” or tried most of the race- and ethnicity-neutral alternatives available. *Id.* at 928. “Most notably ... the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County’s own contracting process.” *Id.*

The Eleventh Circuit found that the County had taken no steps to “inform, educate, discipline, or penalize” discriminatory misconduct by its own employees. *Id.* at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. *Id.* “Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort.” Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. *Id.*

**Substantial relationship.** The Eleventh Circuit held that due to the relaxed “substantial relationship” standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. *Id.* However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. *Id.*

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

## **12. *Contractor’s Association of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586 (3d Cir. 1996)**

The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appealed from the district court’s judgment declaring that the City’s DBE/MBE/WBE program for black construction contractors, violated the Equal Protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors). The Third Circuit affirmed the district court that the Ordinance was not narrowly tailored to serve a compelling state interest. 91 F. 3d 586, 591 (3d Cir. 1996), *affirming*, *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 893 F.Supp. 419 (E.D.Pa.1995).

**The Ordinance.** The City’s Ordinance sought to increase the participation of “disadvantaged business enterprises” (DBEs) in City contracting. *Id.* at 591. DBEs are businesses defined as those at least 51 percent owned by “socially and economically disadvantaged” persons. “Socially and economically disadvantaged” persons are, in turn, defined as “individuals who have ... been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* The Third Circuit found in *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990, 999 (3d Cir.1993) (*Contractors II*), this definition “includes only individuals who are both victims of prejudice based on status and economically deprived.” Businesses majority-owned by racial minorities (minority business enterprises or MBEs) and women are rebuttably presumed to be

DBEs, but businesses that would otherwise qualify as DBEs are rebuttably presumed not to be DBEs if they have received more than \$5 million in City contracts. *Id.* at 591-592.

The Ordinance set participation “goals” for different categories of DBEs: racial minorities (15%), women (10%) and handicapped (2%). *Id.* at 592. These percentage goals were percentages of the total dollar amount spent by the City in each of the three contract categories: vending contracts, construction contracts, and personal and professional service contracts. Dollars received by DBE *subcontractors* in connection with City financed prime contracts are counted towards the goals as well as dollars received by DBE *prime* contractors. *Id.*

Two different strategies were authorized. When there were sufficient DBEs qualified to perform a City contract to ensure competitive bidding, a contract could be let on a sheltered market basis — i.e., only DBEs will be permitted to bid. In other instances, the contract would be let on a non-sheltered basis — i.e., any firm may bid — with the goals requirements being met through subcontracting. *Id.* at 592 The sheltered market strategy saw little use. It was attempted on a trial basis, but there were too few DBEs in any given area of expertise to ensure reasonable prices, and the program was abandoned. *Id.* Evidence submitted by the City indicated that no construction contract was let on a sheltered market basis from 1988 to 1990, and there was no evidence that the City had since pursued that approach. *Id.* Consequently, the Ordinance’s participation goals were achieved almost entirely by requiring that prime contractors subcontract work to DBEs in accordance with the goals. *Id.*

The Court stated that the significance of complying with the goals is determined by a series of presumptions. *Id.* at 593. Where at least one bidding contractor submitted a satisfactory Schedule for Participation, it was presumed that all contractors who did not submit a satisfactory Schedule did not exert good faith efforts to meet the program goals, and the “lowest responsible, responsive contractor” received the contract. *Id.* Where none of the bidders submitted a satisfactory Schedule, it was presumed that all but the bidder who proposed “the highest goals” of DBE participation at a “reasonable price” did not exert good faith efforts, and the contract was awarded to the “lowest, responsible, responsive contractor” who was granted a Waiver and proposed the highest level of DBE participation at a reasonable price. *Id.* Non-complying bidders in either situation must rebut the presumption in order to secure a waiver.

**Procedural History.** This appeal is the third appeal to consider this challenge to the Ordinance. On the first appeal, the Third Circuit affirmed the district court’s ruling that the Contractors had standing to challenge the set-aside program, but reversed the grant of summary judgment in their favor because UMEA had not been afforded a fair opportunity to develop the record. *Id.* at 593 citing, *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991) (*Contractors I*).

On the second appeal, the Third Circuit reviewed a second grant of summary judgment for the Contractors. *Id.*, citing, *Contractors II*, 6 F.3d 990. The Court in that appeal concluded that the Contractors had standing to challenge the program only as it applied to the award of construction contracts, and held that the pre-enactment evidence available to the City Council in 1982 did “not provide a sufficient evidentiary basis” for a conclusion that there had been discrimination against women and minorities in the construction industry. *Id.* citing, 6 F.3d at 1003. The Court further held, however, that evidence of discrimination obtained after 1982 could be considered in determining whether there was a sufficient evidentiary basis for the Ordinance. *Id.*



In the second appeal, 6 F.3d 990 (3d. Cir. 1993), after evaluating both the pre-enactment and post-enactment evidence in the summary judgment record, the Court affirmed the grant of summary judgment insofar as it declared to be unconstitutional those portions of the program requiring set-asides for women and non-black minority contractors. *Id.* at 594. The Court also held that the 2 percent set-aside for the handicapped passed rational basis review and ordered the court to enter summary judgment for the City with respect to that portion of the program. *Id.* In addition, the Court concluded that the portions of the program requiring a set-aside for black contractors could stand only if they met the “strict scrutiny” standard of Equal Protection review and that the record reflected a genuine issue of material fact as to whether they were narrowly tailored to serve a compelling interest of the City as required under that standard. *Id.*

This third appeal followed a nine-day bench trial and a resolution by the district court of the issues thus presented. That trial and this appeal thus concerned only the constitutionality of the Ordinance’s preferences for black contractors. *Id.*

**Trial.** At trial, the City presented a study done in 1992 after the filing of this suit, which was reflected in two pretrial affidavits by the expert study consultant and his trial testimony. *Id.* at 594. The core of his analysis concerning discrimination by the City centered on disparity indices prepared using data from fiscal years 1979–1981. The disparity indices were calculated by dividing the percentage of all City construction dollars received by black construction firms by their percentage representation among all area construction firms, multiplied by 100.

The consultant testified that the disparity index for black construction firms in the Philadelphia metropolitan area for the period studied was about 22.5. According to the consultant, the smaller the resulting figure was, the greater the inference of discrimination, and he believed that 22.5 was a disparity attributable to discrimination. *Id.* at 595. A number of witnesses testified to discrimination in City contracting before the City Council, prior to the enactment of the Ordinance, and the consultant testified that his statistical evidence was corroborated by their testimony. *Id.* at 595.

Based on information provided in an affidavit by a former City employee (John Macklin), the study consultant also concluded that black representation in contractor associations was disproportionately low in 1981 and that between 1979 and 1981 black firms had received no subcontracts on City-financed construction projects. *Id.* at 595. The City also offered evidence concerning two programs instituted by others prior to 1982 which were intended to remedy the effects of discrimination in the construction industry but which, according to the City, had been unsuccessful. *Id.* The first was the Philadelphia Plan, a program initiated in the late 1960s to increase the hiring of minorities on public construction sites.

The second program was a series of programs implemented by the Philadelphia Urban Coalition, a non-profit organization (Urban Coalition programs). These programs were established around 1970, and offered loans, loan guarantees, bonding assistance, training, and various forms of non-financial assistance concerning the management of a construction firm and the procurement of public contracts. *Id.* According to testimony from a former City Council member and others, neither program succeeded in eradicating the effects of discrimination. *Id.*

The City pointed to the waiver and exemption sections of the Ordinance as proof that there was adequate flexibility in its program. The City contended that its 15 percent goal was appropriate. The City maintained that the goal of 15 percent may be required to account for waivers and exemptions allowed by the City, was a flexible goal rather than a rigid quota in light of the waivers and exemptions allowed by the Ordinance, and was justified in light of the discrimination in the construction industry. *Id.* at 595.

The Contractors presented testimony from an expert witness challenging the validity and reliability of the study and its conclusions, including, *inter alia*, the data used, the assumptions underlying the study, and the failure to include federally-funded contracts let through the City Procurement Department. *Id.* at 595. The Contractors relied heavily on the legislative history of the Ordinance, pointing out that it reflected no identification of any specific discrimination against black contractors and no data from which a Council person could find that specific discrimination against black contractors existed or that it was an appropriate remedy for any such discrimination. *Id.* at 595. They pointed as well to the absence of any consideration of race-neutral alternatives by the City Council prior to enacting the Ordinance. *Id.* at 596.

On cross-examination, the Contractors elicited testimony that indicated that the Urban Coalition programs were relatively successful, which the Court stated undermined the contention that race-based preferences were needed. *Id.* The Contractors argued that the 15 percent figure must have been simply picked from the air and had no relationship to any legitimate remedial goal because the City Council had no evidence of identified discrimination before it. *Id.*

At the conclusion of the trial, the district court made findings of fact and conclusions of law. It determined that the record reflected no “strong basis in evidence” for a conclusion that discrimination against black contractors was practiced by the City, nonminority prime contractors, or contractors associations during any relevant period. *Id.* at 596 *citing*, 893 F.Supp. at 447. The court also determined that the Ordinance was “not ‘narrowly tailored’ to even the perceived objective declared by City Council as the reason for the Ordinance.” *Id.* at 596, *citing*, 893 F. Supp. at 441.

**Burden of Persuasion.** The Court held affirmative action programs, when challenged, must be subjected to “strict scrutiny” review. *Id.* at 596. Accordingly, a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a “passive participant;” race-based preferences cannot be justified by reference to past “societal” discrimination in which the municipality played no material role. *Id.* Moreover, the Court found the remedy must be tailored to the discrimination identified. *Id.*

The Court said that a municipality must justify its conclusions regarding discrimination in connection with the award of its construction contracts and the necessity for a remedy of the scope chosen. *Id.* at 597. While this does not mean the municipality must convince a court of the accuracy of its conclusions, the Court stated that it does mean the program cannot be sustained unless there is a strong basis in evidence for those conclusions. *Id.* The party challenging the race-based preferences can succeed by showing either (1) the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) there is no “strong basis in evidence”

for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. *Id.*

The Third Circuit noted it and other courts have concluded that when the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination. *Id.* at 597. Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not “fit” the identified discrimination. *Id.*

Ultimately, however, the Court found that plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred. *Id.* at 597. This means that the plaintiffs bear the burden of persuading the court that the race-based preferences were not intended to serve the identified compelling interest or that there is no strong basis in the evidence as a whole for the conclusions the municipality needed to have reached with respect to the identified discrimination and the necessity of the remedy chosen. *Id.*

The Court explained the significance of the allocation of the burden of persuasion differs depending on the theory of constitutional invalidity that is being considered. If the theory is that the race-based preferences were adopted by the municipality with an intent unrelated to remedying its past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else. *Id.* at 597. As noted in *Contractors II*, the Third Circuit held the burden of persuasion here is analogous to the burden of persuasion in Title VII cases. *Id.* at 598, *citing*, 6 F.3d at 1006. The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important. *Id.*

The Court said the situation is different when the plaintiff’s theory of constitutional invalidity is that, although the municipality may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, when the municipality comes forward with evidence of facts alleged to justify its conclusions, the Court found that the plaintiff has the burden of persuading the court that those facts are not accurate. *Id.* The ultimate issue as to whether a strong basis in evidence exists is an issue of law, however. The burden of persuasion in the traditional sense plays no role in the court’s resolution of that ultimate issue. *Id.*

The Court held the district court’s opinion explicitly demonstrates its recognition that the plaintiffs bore the burden of persuading it that an equal protection violation occurred. *Id.* at 598. The Court found the district court applied the appropriate burdens of production and persuasion, conducted the required evaluation of the evidence, examined the credited record evidence as a whole, and concluded that the “strong basis in evidence” for the City’s position did not exist. *Id.*

**Three forms of discrimination advanced by the City.** The Court pointed out that several distinct forms of racial discrimination were advanced by the City as establishing a pattern of discrimination against minority contractors. The first was discrimination by prime contractors in the awarding of subcontracts. The second was discrimination by contractor associations in admitting members. The third was discrimination by the City in the awarding of prime contracts. The City and UMEA argued that the City may have “passively participated” in the first two forms of discrimination. *Id.* at 599.

**A. The evidence of discrimination by private prime contractors.** One of the City’s theories is that discrimination by prime contractors in the selection of subcontractors existed and may be remedied by the City. The Court noted that as Justice O’Connor observed in *Crosby*: if the city could show that it had essentially become a “passive participant” in a system of racial exclusion practiced by elements of the local construction industry, ... the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity ... has a compelling government interest in assuring that public dollars ... do not serve to finance the evil of private prejudice. *Id.* at 599, *citing*, 488 U.S. at 492.

The Court found the disparity study focused on just one aspect of the Philadelphia construction industry — the award of prime contracts by the City. *Id.* at 600. The City’s expert consultant acknowledged that the only information he had about subcontracting came from an affidavit of one person, John Macklin, supplied to him in the course of his study. As he stated on cross-examination, “I have made no presentation to the Court as to participation by black minorities or blacks in subcontracting.” *Id.* at 600. The only record evidence with respect to black participation in the subcontracting market comes from Mr. Macklin who was a member of the MBEC staff and a proponent of the Ordinance. *Id.* Based on a review of City records, found by the district court to be “cursory,” Mr. Macklin reported that not a single subcontract was awarded to minority subcontractors in connection with City-financed construction contracts during fiscal years 1979 through 1981. The district court did not credit this assertion. *Id.*

Prior to 1982, for solely City-financed projects, the City did not require subcontractors to prequalify, did not keep consolidated records of the subcontractors working on prime contracts let by the City, and did not record whether a particular contractor was an MBE. *Id.* at 600. To prepare a report concerning the participation of minority businesses in public works, Mr. Macklin examined the records at the City’s Procurement Department. The department kept procurement logs, project engineer logs, and contract folders. The subcontractors involved in a project were only listed in the engineer’s log. The court found Mr. Macklin’s testimony concerning his methodology was hesitant and unclear, but it does appear that he examined only 25 to 30 percent of the project engineer logs, and that his only basis for identifying a name in that segment of the logs as an MBE was his personal memory of the information he had received in the course of approximately a year of work with the OMO that certified minority contractors. *Id.* The Court quoted the district court finding as to Macklin’s testimony:

Macklin went to the contract files and looked for contracts in excess of \$30,000.00 that in his view appeared to provide opportunities for subcontracting. (*Id.* at 13.) With that information, Macklin examined some of the project engineer logs for those projects to determine whether minority subcontractors were used by the prime contractors. (*Id.*) Macklin did not look at every available project engineer log. (*Id.*) Rather, he looked at a random 25 to 30 percent of all the project engineer

logs. (*Id.*) As with his review of the Procurement Department log, Macklin determined that a minority subcontractor was used on the project only if he personally recognized the firm to be a minority. (*Id.*) Quite plainly, Macklin was unable to determine whether minorities were used on the remaining 65 to 70 percent of the projects that he did not review. When questioned whether it was possible that minority subcontractors did perform work on some City public works projects during fiscal years 1979 to 1981, and that he just did not see them in the project logs that he looked at, Macklin answered “it is a very good possibility.” 893 F.Supp. at 434.

*Id.* at 600.

The district court found two other portions of the record significant on this point. First, during the trial, the City presented Oscar Gaskins (“Gaskins”), former general counsel to the General and Specialty Contractors Association of Philadelphia (“GASCAP”) and the Philadelphia Urban Coalition, to testify about minority participation in the Philadelphia construction industry during the 1970s and early 1980s. Gaskins testified that, in his opinion, black contractors are still being subjected to racial discrimination in the private construction industry, and in subcontracting within the City limits. However, the Court pointed out, when Gaskins was asked by the district court to identify even one instance where a minority contractor was denied a private contract or subcontract after submitting the lowest bid, Gaskins was unable to do so. *Id.* at 600-601.

Second, the district court noted that since 1979 the City’s “standard requirements warn [would-be prime contractors] that discrimination will be deemed a ‘substantial breach’ of the public works contract which could subject the prime contractor to an investigation by the Commission and, if warranted, fines, penalties, termination of the contract and forfeiture of all money due.” Like the Supreme Court in *Croson*, the Court stated the district court found significant the City’s inability to point to any allegations that this requirement was being violated. *Id.* at 601.

The Court held the district court did not err by declining to accept Mr. Macklin’s conclusion that there were no subcontracts awarded to black contractors in connection with City-financed construction contracts in fiscal years 1979 to 1981. *Id.* at 601. Accepting that refusal, the Court agreed with the district court’s conclusion that the record provides no firm basis for inferring discrimination by prime contractors in the subcontracting market during that period. *Id.*

**B. The evidence of discrimination by contractor associations.** The Court stated that a city may seek to remedy discrimination by local trade associations to prevent its passive participation in a system of private discrimination. Evidence of “extremely low” membership by MBEs, standing by itself, however, is not sufficient to support remedial action; the city must “link [low MBE membership] to the number of local MBEs eligible for membership.” *Id.* at 601.

The City’s expert opined that there was statistically low representation of eligible MBEs in the local trade associations. He testified that, while numerous MBEs were eligible to join these associations, three such associations had only one MBE member, and one had only three MBEs. In concluding that there were many eligible MBEs not in the associations, however, he again relied entirely upon the work of Mr. Macklin. The district court rejected the expert’s conclusions because it found his reliance on Mr. Macklin’s work misplaced. *Id.* at 601. Mr. Macklin formed an opinion that a listed number of MBE and WBE firms were eligible to be members of the plaintiff Associations. *Id.* Because Mr. Macklin did not set forth the criteria for association membership and because the OMO

certification list did not provide any information about the MBEs and WBEs other than their names and the fact that they were such, the Court found the district court was without a basis for evaluating Mr. Macklin's opinions. *Id.*

On the other hand, the district court credited "the uncontroverted testimony of John Smith [a former general manager of the CAEP and member of the MBEC] that no black contractor who has ever applied for membership in the CAEP has been denied." *Id.* at 601 *citing*, 893 F.Supp. at 440. The Court pointed out the district court noted as well that the City had not "identified even a single black contractor who was eligible for membership in any of the plaintiffs' associations, who applied for membership, and was denied." *Id.* at 601, *quoting*, 893 F.Supp. at 441.

The Court held that given the City's failure to present more than the essentially unexplained opinion of Mr. Macklin, the opposing, uncontradicted testimony of Mr. Smith, and the failure of anyone to identify a single victim of the alleged discrimination, it was appropriate for the district court to conclude that a constitutionally sufficient basis was not established in the evidence. *Id.* at 601. The Court found that even if it accepted Mr. Macklin's opinions, however, it could not hold that the Ordinance was justified by that discrimination. *Id.* at 602. Racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination. *Id.* The Court said that this record would not support a finding that this occurred. *Id.*

Contrary to the City's argument, the Court stated nothing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations. *Id.* Prior to 1982, the City let construction contracts on a competitive bid basis. It did not require bidders to be association members, and nothing in the record suggests that it otherwise favored the associations or their members. *Id.*

**C. The evidence of discrimination by the City.** The Court found the record provided substantially more support for the proposition that there was discrimination on the basis of race in the award of prime contracts by the City in the fiscal 1979–1981 period. *Id.* The Court also found the Contractors' critique of that evidence less cogent than did the district court. *Id.*

The centerpiece of the City's evidence was its expert's calculation of disparity indices which gauge the disparity in the award of prime contracts by the City. *Id.* at 602. Following *Contractors II*, the expert calculated a disparity index for black construction firms of 11.4, based on a figure of 114 such firms available to perform City contracts. At trial, he recognized that the 114 figure included black engineering and architecture firms, so he recalculated the index, using only black construction firms (i.e., 57 firms). This produced a disparity index of 22.5. Thus, based on this analysis, black construction firms would have to have received approximately 4.5 times more public works dollars than they did receive in order to have achieved an amount proportionate to their representation among all construction firms. The expert found the disparity sufficiently large to be attributable to discrimination against black contractors. *Id.*

The district court found the study did not provide a strong basis in evidence for an inference of discrimination in the prime contract market. It reached this conclusion primarily for three reasons. The study, in the district court's view, (1) did not take into account whether the black construction firms were qualified and willing to perform City contracts; (2) mixed statistical data from different sources; and (3) did not account for the "neutral" explanation that qualified black firms were too preoccupied with large, federally-assisted projects to perform City projects. *Id.* at 602-3.

The Court said the district court was correct in concluding that a statistical analysis should focus on the minority population capable of performing the relevant work. *Id.* at 603. As *Croson* indicates, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, citing, 488 U.S. at 501. In *Croson* and other cases, the Court pointed out, however, the discussion by the Supreme Court concerning qualifications came in the context of a rejection of an analysis using the percentage of a particular minority in the general population. *Id.*

The issue of qualifications can be approached at different levels of specificity, however, the Court stated, and some consideration of the practicality of various approaches is required. An analysis is not devoid of probative value, the Court concluded, simply because it may theoretically be possible to adopt a more refined approach. *Id.* at 603.

To the extent the district court found fault with the analysis for failing to limit its consideration to those black contractors "willing" to undertake City work, the Court found its criticism more problematic. *Id.* at 603. In the absence of some reason to believe otherwise, the Court said one can normally assume that participants in a market with the ability to undertake gainful work will be "willing" to undertake it. Moreover, past discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. *Id.* at 603.

The Court stated that it seemed a substantial overstatement to assert that the study failed to take into account the qualifications and willingness of black contractors to participate in public works. *Id.* at 603. During the time period in question, fiscal years 1979–1981, those firms seeking to bid on City contracts had to prequalify for *each and every* contract they bid on, and the criteria could be set differently from contract to contract. *Id.* The Court said it would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE. *Id.* The expert chose instead to use as the relevant minority population the black firms listed in the 1982 OMO Directory. The Court found this would appear to be a reasonable choice that, if anything, may have been on the conservative side. *Id.*

When a firm applied to be certified, the OMO required it to detail its bonding experience, prior experience, the size of prior contracts, number of employees, financial integrity, and equipment owned. *Id.* at 603. The OMO visited each firm to substantiate its claims. Although this additional information did not go into the final directory, the OMO was confident that those firms on the list were capable of doing the work required on large scale construction projects. *Id.*

The Contractors point to the small number of black firms that sought to prequalify for City-funded contracts as evidence that black firms were unwilling to work on projects funded solely by the City. *Id.* at 603. During the time period in question, City records showed that only seven black firms sought to prequalify, and only three succeeded in prequalifying. The Court found it inappropriate, however, to conclude that this evidence undermines the inference of discrimination. As the expert indicated in his testimony, the Court noted, if there has been discrimination in City contracting, it is to be expected that black firms may be discouraged from applying, and the low numbers may tend to corroborate the existence of discrimination rather than belie it. The Court stated that in a sense, to weigh this evidence for or against either party required it to presume the conclusion to be proved. *Id.* at 604.

The Court found that while it was true that the study “mixed data,” the weight given that fact by the district court seemed excessive. *Id.* at 604. The study expert used data from only two sources in calculating the disparity index of 22.5. He used data that originated from the City to determine the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of black construction firms. *Id.* He “mixed” this with data from the Bureau of the Census concerning the number of total construction firms in the Philadelphia Standard Metropolitan Statistical Area (PSMSA). The data from the City is not geographically bounded to the same extent that the Census information is. *Id.* Any firm could bid on City work, and any firm could seek certification from the OMO.

Nevertheless, the Court found that due to the burdens of conducting construction at a distant location, the vast majority of the firms were from the Philadelphia region and the Census data offers a reasonable approximation of the total number of firms that might vie for City contracts. *Id.* Although there is a minor mismatch in the geographic scope of the data, given the size of the disparity index calculated by the study, the Court was not persuaded that it was significant. *Id.* at 604.

Considering the use of the OMO Directory and the Census data, the Court found that the index of 22.5 may be a conservative estimate of the actual disparity. *Id.* at 604. While the study used a figure for black firms that took into account qualifications and willingness, it used a figure for total firms that did not. *Id.* If the study under-counted the number of black firms qualified and willing to undertake City construction contracts or over-counted the total number of firms qualified and willing to undertake City construction contracts, the actual disparity would be greater than 22.5. *Id.* Further, while the study limited the index to black firms, the study did not similarly reduce the dollars awarded to minority firms. The study used the figure of \$667,501, which represented the total amount going to all MBEs. If minorities other than blacks received some of that amount, the actual disparity would again be greater. *Id.* at 604.

The Court then considered the district court’s suggestion that the extensive participation of black firms in federally-assisted projects, which were also procured through the City’s Procurement Office, accounted for their low participation in the other construction contracts awarded by the City. *Id.* The Court found the district court was right in suggesting that the availability of substantial amounts of federally funded work and the federal set-aside undoubtedly had an impact on the number of black contractors available to bid on other City contracts. *Id.* at 605.



The extent of that impact, according to the Court, was more difficult to gauge, however. That such an impact existed does not necessarily mean that the study's analysis was without probative force. *Id.* at 605. If, the Court noted for example, one reduced the 57 available black contractors by the 20 to 22 that participated in federally assisted projects in fiscal years 1979–1981 and used 35 as a fair approximation of the black contractors available to bid on the remaining City work, the study's analysis produces a disparity index of 37, which the Court found would be a disparity that still suggests a substantial under-participation of black contractors among the successful bidders on City prime contracts. *Id.*

The court in conclusion stated whether this record provided a strong basis in evidence for an inference of discrimination in the prime contract market “was a close call.” *Id.* at 605. In the final analysis, however, the Court held it was a call that it found unnecessary to make, and thus it chose not to make it. *Id.* Even assuming that the record presents an adequately firm basis for that inference, the Court held the judgment of the district court must be affirmed because the Ordinance was clearly not narrowly tailored to remedy that discrimination. *Id.*

**Narrowly Tailored.** The Court said that strict scrutiny review requires it to examine the “fit” between the identified discrimination and the remedy chosen in an affirmative action plan. *Croson* teaches that there must be a strong basis in evidence not only for a conclusion that there is, or has been, discrimination, but also for a conclusion that the particular remedy chosen is made “necessary” by that discrimination. *Id.* at 605. The Court concluded that issue is shaped by its prior conclusions regarding the absence of a strong basis in evidence reflecting discrimination by prime contractors in selecting subcontractors and by contractor associations in admitting members. *Id.* at 606.

This left as a possible justification for the Ordinance only the assumption that the record provided a strong basis in evidence for believing the City discriminated against black contractors in the award of prime contracts during fiscal years 1979 to 1981. *Id.* at 606. If the remedy reflected in the Ordinance cannot fairly be said to be necessary in light of the assumed discrimination in awarding prime construction projects, the Court said that the Ordinance cannot stand. The Court held, as did the district court, that the Ordinance was not narrowly tailored. *Id.*

**A. Inclusion of preferences in the subcontracting market.** The Court found the primary focus of the City's program was the market for subcontracts to perform work included in prime contracts awarded by the City. *Id.* at 606. While the program included authorization for the award of prime contracts on a “sheltered market” basis, that authorization had been sparsely invoked by the City. Its goal with respect to dollars for black contractors had been pursued primarily through requiring that bidding prime contractors subcontract to black contractors in stipulated percentages. *Id.* The 15 percent participation goal and the system of presumptions, which in practice required non-black contractors to meet the goal on virtually every contract, the Court found resulted in a 15 percent set-aside for black contractors in the subcontracting market. *Id.*

Here, as in *Croson*, the Court stated “[t]o a large extent, the set aside of subcontracting dollars seems to rest on the unsupported assumption that white contractors simply will not hire minority firms.” *Id.* at 606, *citing*, 488 U.S. at 502. Here, as in *Croson*, the Court found there is no firm evidentiary basis for believing that nonminority contractors will not hire black subcontractors. *Id.* Rather, the Court concluded the evidence, to the extent it suggests that racial discrimination had occurred, suggested discrimination by the City's Procurement Department against black contractors who were capable of

bidding on prime City construction contracts. *Id.* To the considerable extent that the program sought to constrain decision making by private contractors and favor black participation in the subcontracting market, the Court held it was ill-suited as a remedy for the discrimination identified. *Id.*

The Court pointed out it did not suggest that an appropriate remedial program for discrimination by a municipality in the award of primary contracts could never include a component that affects the subcontracting market in some way. *Id.* at 606. It held, however, that a program, like Philadelphia's program, which focused almost exclusively on the subcontracting market, was not narrowly tailored to address discrimination by the City in the market for prime contracts. *Id.*

**B. The amount of the set-aside in the prime contract market.** Having decided that the Ordinance is overbroad in its inclusion of subcontracting, the Court considered whether the 15 percent goal was narrowly tailored to address discrimination in prime contracting. *Id.* at 606. The Court found the record supported the district court's findings that the Council's attention at the time of the original enactment and at the time of the subsequent extension was focused solely on the percentage of minorities and women in the general population, and that Council made no effort at either time to determine how the Ordinance might be drafted to remedy particular discrimination — to achieve, for example, the approximate market share for black contractors that would have existed, had the purported discrimination not occurred. *Id.* at 607. While the City Council did not tie the 15 percent participation goal directly to the proportion of minorities in the local population, the Court said the goal was either arbitrarily chosen or, at least, the Council's sole reference point was the minority percentage in the local population. *Id.*

The Court stated that it was clear that the City, in the entire course of this litigation, had been unable to provide an evidentiary basis from which to conclude that a 15 percent set-aside was necessary to remedy discrimination against black contractors in the market for prime contracts. *Id.* at 607. The study data indicated that, at most, only 0.7 percent of the construction firms qualified to perform City-financed prime contracts in the 1979–1981 period were black construction firms. *Id.* at 607. This, the Court found, indicated that the 15 percent figure chosen is an impermissible one. *Id.*

The Court said it was not suggesting that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides. It well may be that some premium could be justified under some circumstances. *Id.* at 608. However, the Court noted that the *only* evidentiary basis in the record that appeared at all relevant to fashioning a remedy for discrimination in the prime contracting market was the 0.7 percent figure. That figure did not provide a strong basis in evidence for concluding that a 15 percent set-aside was necessary to remedy discrimination against black contractors in the prime contract market. *Id.*

**C. Program alternatives that are either race-neutral or less burdensome to nonminority contractors.** In holding that the Richmond plan was not narrowly tailored, the Court pointed out, the Supreme Court in *Croson* considered it significant that race-neutral remedial alternatives were available and that the City had not considered the use of these means to increase minority business participation in City contracting. *Id.* at 608. It noted, in particular, that barriers to entry like capital and bonding requirements could be addressed by a race-neutral program of city financing for small firms and could be expected to lead to greater minority participation. Nevertheless, such alternatives

were not pursued or even considered in connection with the Richmond's efforts to remedy past discrimination. *Id.*

The district court found that the City's procurement practices created significant barriers to entering the market for City-awarded construction contracts. *Id.* at 608. Small contractors, in particular, were deterred by the City's prequalification and bonding requirements from competing in that market. *Id.* Relaxation of those requirements, the district court found, was an available race-neutral alternative that would be likely to lead to greater participation by black contractors. No effort was made by the City, however, to identify barriers to entry in its procurement process and that process was not altered before or in conjunction with the adoption of the Ordinance. *Id.*

The district court also found that the City could have implemented training and financial assistance programs to assist disadvantaged contractors of all races. *Id.* at 608. The record established that certain neutral City programs had achieved substantial success in fulfilling its goals. The district court concluded, however, that the City had not supported the programs and had not considered emulating and/or expanding the programs in conjunction with the adoption of the Ordinance. *Id.*

The Court held the record provided ample support for the finding of the district court that alternatives to race-based preferences were available in 1982, which would have been either race neutral or, at least, less burdensome to nonminority contractors. *Id.* at 609. The Court found the City could have lowered administrative barriers to entry, instituted a training and financial assistance program, and carried forward the OMO's certification of minority contractor qualifications. *Id.* The record likewise provided ample support for the district court's conclusion that the "City Council was not interested in considering race-neutral measures, and it did not do so." *Id.* at 609. To the extent the City failed to consider or adopt these alternatives, the Court held it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors. *Id.*

The Court found it particularly noteworthy that the Ordinance, since its extension, in 1987, for an additional 12 years, had been targeted exclusively toward benefiting only minority and women contractors "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* at 609. The City's failure to consider a race-neutral program designed to encourage investment in and/or credit extension to small contractors or minority contractors, the Court stated, seemed particularly telling in light of the limited classification of victims of discrimination that the Ordinance sought to favor. *Id.*

**Conclusion.** The Court held the remedy provided by the program substantially exceeds the limited justification that the record provided. *Id.* at 609. The program provided race-based preferences for blacks in the market for subcontracts where the Court found there was no strong basis in the evidence for concluding that discrimination occurred. *Id.* at 610. The program authorized a 15 percent set-aside applicable to all prime City contracts for black contractors when, the Court concluded there was no basis in the record for believing that such a set-aside of that magnitude was necessary to remedy discrimination by the City in that market. *Id.* Finally, the Court stated the City's program failed to include race-neutral or less burdensome remedial steps to encourage and facilitate greater participation of black contractors, measures that the record showed to be available. *Id.*

The Court concluded that a city may adopt race-based preferences only when there is a “strong basis in evidence for its conclusion that [the] remedial action was necessary.” *Id.* at 610. Only when such a basis exists is there sufficient assurance that the racial classification is not “merely the product of unthinking stereotypes or a form of racial politics.” *Id.* at 610. That assurance, the Court held was lacking here, and, accordingly, found that the race-based preferences provided by the Ordinance could not stand. *Id.*

**13. *Contractor’s Association of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 996 (3d Cir. 1993)**

An association of construction contractors filed suit challenging, on equal protection grounds, a city of Philadelphia ordinance that established a set-aside program for “disadvantaged business enterprises” owned by minorities, women, and handicapped persons. 6 F.3d. at 993. The United States District Court for the Eastern District of Pennsylvania, [735 F.Supp. 1274 \(E.D. Phila. 1990\)](#), granted summary judgment for the [contractors 739 F.Supp. 227](#), and denied the City’s motion to stay the injunctive relief. Appeal was taken. The Third Circuit Court of Appeals, [945 F.2d 1260 \(3d Cir. 1991\)](#), affirmed in part and vacated in part the district court’s decision. *Id.* On remand, the district court again granted summary judgment for the contractors. The City appealed. The Third Circuit Court of Appeals held that: (1) the contractors association had standing, but only to challenge the portions of the ordinance that applied to construction contracts; (2) the City presented sufficient evidence to withstand summary judgment with respect to the race and gender preferences; and (3) the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection. *Id.*

**Procedural history.** Nine associations of construction contractors challenged on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. *Id.* at 993. The district court granted summary judgment to the Contractors, holding they had standing to bring this lawsuit and invalidating the Ordinance in all respects. [Contractors Association v. City of Philadelphia, 735 F.Supp. 1274 \(E.D.Pa.1990\)](#). In an earlier opinion, the Third Circuit affirmed the district court’s ruling on standing, but vacated summary judgment on the merits because the City had outstanding discovery requests. [Contractors Association v. City of Philadelphia, 945 F.2d 1260 \(3d Cir.1991\)](#). On remand after discovery, the district court again entered summary judgment for the Contractors. The Third Circuit in this case affirmed in part, vacated in part, and reversed in part. 6 F.3d 990, 993.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and women-owned businesses. Phila.Code § 17–500. *Id.* The Ordinance established “goals” for the participation of “disadvantaged business enterprises.” § 17–503. “Disadvantaged business enterprises” (DBEs) were defined as those enterprises at least 51 percent owned by “socially and economically disadvantaged individuals,” defined in turn as: those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* at 994. The Ordinance further provided that racial minorities and women are rebuttably presumed to be socially and economically

disadvantaged individuals, § 17–501(11)(a), but that a business which has received more than \$5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17–501(10). *Id.* at 994.

The Ordinance set goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for women-owned businesses, and 2 percent for businesses owned by handicapped persons. § 17–503(1). *Id.* at 994. The Ordinance applied to all City contracts, which are divided into three types — vending, construction, and personal and professional services. § 17–501(6). The percentage goals related to the total dollar amounts of City contracts and are calculated separately for each category of contracts and each City agency. *Id.* at 994.

In 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 994. After the City moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the merits. The district court granted the Contractors’ motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. *Id.* at 995 *citing*, [735 F.Supp. at 1283 & n. 3](#).

Turning to the merits of the Contractors’ equal protection claim, the district court held that [City of Richmond v. J.A. Croson Co.](#), 488 U.S. 469 (1989), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. *Id.* Under that standard, the Third Circuit held a law will be invalidated if it is not “narrowly tailored” to a “compelling government interest.” *Id.* at 995.

Applying *Croson*, the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a “compelling government interest.” *Id.* at 995, *quoting*, [735 F.Supp. at 1295–98](#). The court also held the Ordinance was not “narrowly tailored,” emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id.* at 995; [735 F.Supp. at 1298–99](#). The court held the Ordinance’s preferences for businesses owned by women and handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id.* at 995 *citing*, [735 F.Supp. at 1299–1309](#).

On appeal, the Third Circuit in 1991 affirmed the district court’s ruling on standing, but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. [945 F.2d 1260 \(3d Cir.1991\)](#). The Court remanded so discovery could be completed and explicitly reserved judgment on the merits. *Id.* at 1268. On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the Philadelphia construction industry against businesses owned by racial minorities, women, and handicapped persons to withstand summary judgment. The City and United Minority Enterprise Associates, Inc. (UMEA), which had intervened filed an appeal. *Id.*

This appeal, the Court said, presented three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. *Id.* at 995.

**Standing.** The Supreme Court has confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are “able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis.” *Id.* at 995. Because the affidavits submitted to the district court established the Contractors were able and ready to bid on construction contracts, but could not do so for failure to meet the DBE percentage requirements, the court held they had standing to challenge the sections of the Ordinance covering construction contracts. *Id.* at 996.

**Standards of equal protection review.** The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons. In analyzing these classifications separately, the Court first considered which standard of equal protection review applies to each classification. *Id.* at 999.

**Race, ethnicity, and gender.** The Court found that choice of the appropriate standard of review turns on the nature of the classification. *Id.* at 999. Because under equal protection analysis classifications based on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *Id.* Accordingly, the Court determined whether the Ordinance contains race- or gender-based classifications. The Ordinance’s classification scheme is spelled out in its definition of “socially and economically disadvantaged.” *Id.* The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition’s economic criteria as in addition to rather than in lieu of race, ethnicity, gender, and handicap. *Id.* Therefore, it applied strict scrutiny to the racial preference under *Croson* and intermediate scrutiny to the gender preference under [\*Mississippi University for Women v. Hogan\*, 458 U.S. 718, 724 \(1982\)](#). *Id.* at 999.

**A. Strict scrutiny.** Under strict scrutiny, a law may only stand if it is “narrowly tailored” to a “compelling government interest.” *Id.* at 999. Under intermediate scrutiny, a law must be “substantially related” to the achievement of “important government objectives.” *Id.*

The Court agreed with the district court that the definition of “socially and economically disadvantaged individuals” included only individuals who are both victims of prejudice based on status and economically deprived. *Id.* at 999. Additionally, the last clause of the definition described economically disadvantaged individuals as those “whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged.” *Id.* This clause, the Court found, demonstrated the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. *Id.* The Court said the plain language of the Ordinance foreclosed the City’s argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage. *Id.* at 1000.

**B. Intermediate scrutiny.** The Court considered the proper standard of review for the Ordinance's gender preference. The Court held a gender-based classification favoring women merited intermediate scrutiny. *Id.* at 1000, *citing*, *Hogan* [458 U.S. at 728](#). The Ordinance, the Court stated, is such a program. *Id.* Several federal courts, the Court noted, have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Id.* at 1001, *citing*, *Coral Constr. Co. v. King County*, [941 F.2d 910, 930 \(9th Cir.1991\)](#), *cert. denied*, [502 U.S. 1033 \(1992\)](#); *Michigan Road Builders Ass'n, Inc. v. Milliken*, [834 F.2d 583, 595 \(6th Cir.1987\)](#), *aff'd mem.*, [489 U.S. 1061\(1989\)](#); *Associated General Contractors of Cal. v. City and County of San Francisco*, [813 F.2d 922, 942 \(9th Cir.1987\)](#); *Main Line Paving Co. v. Board of Educ.*, [725 F.Supp. 1349, 1362 \(E.D.Pa.1989\)](#).

Application of intermediate scrutiny to the Ordinance's gender preference, the Court said, also follows logically from *Croson*, which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. *Id.* For these reasons, the Third Circuit rejected, as did the district court, those cases applying strict scrutiny to gender-based classifications. *Cone Corp. v. Hillsborough County*, [908 F.2d 908 \(11th Cir.\)](#), *cert. denied*, [498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 \(1990\)](#). *Id.* at 1000-1001. The Court agreed with the district court's choice of intermediate scrutiny to review the Ordinance's gender preference. *Id.*

**Handicap.** The district court reviewed the preference for handicapped business owners under the rational basis test. *Id.* at 1000, *citing* [735 F.Supp. at 1307](#). That standard validates the classification if it is "rationally related to a legitimate governmental purpose." *Id.* at 1001, *citing* *Cleburne*, [473 U.S. at 445](#). The Court held the district court properly chose the rational basis standard in reviewing the Ordinance's preference for handicapped persons. *Id.*

**Constitutionality of the ordinance: race and ethnicity.** Because strict scrutiny applies to the Ordinance's racial and ethnic preferences, the Court stated it may only uphold them if they are "narrowly tailored" to a "compelling government interest." *Id.* at 1001-2. The Court noted that in *Croson*, the Supreme Court made clear that combatting racial discrimination is a "compelling government interest." *Id.* at 1002, *quoting*, [488 U.S. at 492, 509](#). It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry." *Id.* at 1002, *quoting*, [488 U.S. at 492](#).

In the Supreme Court's view, the "relevant statistical pool" was not the minority population, but the number of qualified minority contractors. It stressed the city did not know the number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. *Id.* at 1002, *citing* [488 U.S. at 502](#).

Ruling the Philadelphia Ordinance's racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance "possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan," *Id.* at 1002, *quoting*, [735 F.Supp. at 1298](#). As in *Croson*, the district court reasoned, the City relied on national statistics, a comparison between prime contract awards and the percentage of minorities in Philadelphia's population, the Ordinance's declaration it was remedial, and "conclusory" testimony of witnesses regarding discrimination in the Philadelphia construction industry. *Id.* at 1002, *quoting*, [1295-98](#).



In a footnote, the Court pointed out the district court also interpreted *Croson* to require “specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit” enacting the ordinance. [735 F.Supp. at 1295](#). The Court said this reading overlooked the statement in *Croson* that a City can be a “*passive participant*” in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city “has a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice.” *Id.* at 1002, n. 10, *quoting*, [488 U.S. at 492](#).

**Anecdotal evidence of racial discrimination.** The City contended the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. *Id.* at 1002. In certain instances, these contractors lost out despite being low bidders. The Court found this anecdotal evidence significantly outweighed that presented in *Croson*, where the Richmond City Council heard “no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.” *Id.*, *quoting*, [488 U.S. at 480](#).

Although the district court acknowledged the minority contractors’ testimony was relevant under *Croson*, it discounted this evidence because “other evidence of the type deemed impermissible by the Supreme Court ... unsupported general testimony, impermissible statistics and information on the national set-aside program, ... overwhelmingly formed the basis for the enactment of the set-aside ... and therefore taint[ed] the minds of city councilmembers.” *Id.* at 1002, *quoting*, [735 F.Supp. at 1296](#).

The Third Circuit held, however, given *Croson*’s emphasis on statistical evidence, even had the district court credited the City’s anecdotal evidence, the Court did not believe this amount of anecdotal evidence was sufficient to satisfy strict scrutiny. *Id.* at 1003, *quoting*, [Coral Constr., 941 F.2d at 919](#) (“anecdotal evidence ... rarely, if ever, can ... show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”). Although anecdotal evidence alone may, the Court said, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here. *Id.* But because the combination of “anecdotal and statistical evidence is potent,” [Coral Constr., 941 F.2d at 919](#), the Court considered the statistical evidence proffered in support of the Ordinance.

**Statistical evidence of racial discrimination.** There are two categories of statistical evidence here, evidence undisputedly considered by City Council before it enacted the Ordinance in 1982 (the “pre-enactment” evidence), and evidence developed by the City on remand (the “post-enactment” evidence). *Id.* at 1003.

**Pre-Enactment statistical evidence.** The principal pre-enactment statistical evidence appeared in the 1982 Report of the City Council Finance Committee and recited that minority contractors were awarded only 0.09 percent of City contract dollars during the preceding three years, 1979 through 1981, although businesses owned by Blacks and Hispanics accounted for 6.4 percent of all businesses licensed to operate in Philadelphia. The Court found these statistics did not satisfy *Croson* because they did not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts. *Id.* at 1003. Under *Croson*, available



minority-owned businesses comprise the “relevant statistical pool.” *Id.* at 1003. Therefore, the Court held the data in the Finance Committee Report did not provide a sufficient evidentiary basis for the Ordinance.

**Post-Enactment statistical evidence.** The “post-enactment” evidence consists of a study conducted by an economic consultant to demonstrate the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia. The study provided the “relevant statistical pool” needed to satisfy *Croson* — the percentage of minority businesses engaged in the Philadelphia construction industry. *Id.* at 1003. The study also presented data showing that minority subcontractors were underrepresented in the private sector construction market. This data may be relevant, the Court said, if at trial the City can link it to discrimination occurring in the public sector construction market because the Ordinance covers subcontracting. *Id.* at n. 13.

The Court noted that several courts have held post-enactment evidence is admissible in determining whether an Ordinance satisfies *Croson*. *Id.* at 1004. Consideration of post-enactment evidence, the Court found was appropriate here, where the principal relief sought and the only relief granted by the district court, was an injunction. Because injunctions are prospective only, it makes sense the Court said to consider all available evidence before the district court, including the post-enactment evidence, which the district court did. *Id.*

**Sufficiency of the statistical and anecdotal evidence and burden of proof.** In determining whether the statistical evidence was adequate, the Court looked to what it referred to as its critical component — the “disparity index.” The index consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the “population” of Philadelphia area construction firms. This equation yields a percentage figure which is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise. *Id.* at 1005.

The Court noted that other courts considering equal protection challenges to similar ordinances have relied on disparity indices in determining whether *Croson*’s evidentiary burden is satisfied. *Id.* Disparity indices are highly probative evidence of discrimination because they ensure that the “relevant statistical pool” of minority contractors is being considered. *Id.*

**A. Statistical evidence.** The study reported a disparity index for City of Philadelphia construction contracts during the years 1979 through 1981 of 4 out of a possible 100. This index, the Court stated, was significantly worse than that in other cases where ordinances have withstood constitutional attack. *Id.* at 1004, citing, [\*Cone Corp.\*, 908 F.2d at 916 \(10.78 disparity index\)](#); [\*AGC of California\*, 950 F.2d at 1414 \(22.4 disparity index\)](#); [\*Concrete Works\*, 823 F.Supp. at 834](#) (disparity index “significantly less than” 100); see also [\*Stuart\*, 951 F.2d at 451](#) (disparity index of 10 in police promotion program); compare [\*O'Donnell\*, 963 F.2d at 426](#) (striking down ordinance given disparity indices of approximately 100 in two categories). Therefore, the Court found the disparity index probative of discrimination in City contracting in the Philadelphia construction industry prior to enactment of the Ordinance. *Id.*

The Contractors contended the study was methodologically flawed because it considered only prime contractors and because it failed to consider the qualifications of the minority businesses or their interest in performing City contracts. The Contractors maintained the study did not indicate why there was a disparity between available minority contractors and their participation in contracting. The Contractors contended that these objections, without more, entitled them to summary judgment, arguing that under the strict scrutiny standard they do not bear the burden of proof, and therefore need not offer a neutral explanation for the disparity to prevail. *Id.* at 1005.

The Contractors, the Court found, misconceived the allocation of the burden of proof in affirmative action cases. *Id.* at 1005. The Supreme Court has indicated that “[t]he ultimate burden remains with [plaintiffs] to demonstrate the unconstitutionality of an affirmative action program.” *Id.* 1005. Thus, the Court held the Contractors, not the City, bear the burden of proof. *Id.* Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise. *Id.* Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified. *Id.*

The Court, following *Croson*, held where a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. *Id.* at 1006. *Croson*’s reference to an “inference of discriminatory exclusion” based on statistics, as well as its citation to Title VII pattern cases, the Court stated, supports this interpretation. *Id.* The plaintiff bears the burden in such a case. *Id.* The Court noted the Third Circuit has indicated statistical proof of discrimination is handled similarly under Title VII and equal protection principles. *Id.*

The Court found the City’s statistical evidence had created an inference of discrimination which the Contractors would have to rebut at trial either by proving a “neutral explanation” for the disparity, “showing the statistics are flawed, ... demonstrating that the disparities shown by the statistics are not significant or actionable, ... or presenting contrasting statistical data.” *Id.* at 1007. *A fortiori*, this evidence, the Court said is sufficient for the City to withstand summary judgment. The Court stated that the Contractors’ objections to the study were properly presented to the trier of fact. *Id.* Accordingly, the Court found the City’s statistical evidence established a prima facie case of racial discrimination in the award of City of Philadelphia construction contracts. *Id.*

Consistent with strict scrutiny, the Court stated it must examine the data for each minority group contained in the Ordinance. *Id.* The Census data on which the study relied demonstrated that in 1982, the year the Ordinance was enacted, there were construction firms owned in Philadelphia by Blacks, Hispanics, and Asian-Americans, but not Native Americans. *Id.* Therefore, the Court held neither the City nor prime contractors could have discriminated against construction companies owned by Native Americans at the time of the Ordinance, and the Court affirmed summary judgment as to them. *Id.*

The Census Report indicated there were 12 construction firms owned by Hispanic persons, six firms owned by Asian-American persons, three firms owned by persons of Pacific Islands descent, and one other minority-owned firm. *Id.* at 1008. The study calculated Hispanic firms represented 0.15 percent of the available firms and Asian-American, Pacific-Islander, and “other” minorities represented 0.12 percent of the available firms, and that these firms received no City contracts during the years 1979 through 1981. The Court did not believe these numbers were large enough to create a triable issue of discrimination. The mere fact that 0.27 percent of City construction firms — the percentage of all of these groups combined — received no contracts does not rise to the “significant statistical disparity.” *Id.* at 1008.

**B. Anecdotal evidence.** Nor, the Court found, does it appear that there was any anecdotal evidence of discrimination against construction businesses owned by people of Hispanic or Asian-American descent. *Id.* at 1008. The district court found “there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts,” *Id.* at 1008, *quoting*, [735 F.Supp. at 1299](#), and there was no evidence of any witnesses who were members of these groups or who were Hispanic. *Id.*

The Court recognized that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian-American persons did not eliminate the possibility of discrimination against these firms. *Id.* at 1008. The small number itself, the Court said, may reflect barriers to entry caused in part by discrimination. *Id.* But, the Court held, plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. *Id.*

**Conclusion on compelling government interest.** The Court found that nothing in its decision prevented the City from re-enacting a preference for construction firms owned by Hispanic, Asian-American, or Native American persons based on more concrete evidence of discrimination. *Id.* In sum, the Court held, the City adduced enough evidence of racial discrimination against Blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test. *Id.*

**Narrowly Tailored.** The Court then decided whether the Ordinance’s racial preference was “narrowly tailored” to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Id.* at 1008. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective “race-neutral measures,” such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance. *Id.*

The City contended it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. *Id.* It relied on the affidavits of City Council President and former Philadelphia Urban Coalition General Counsel who testified regarding the race-neutral precursors of the Ordinance — the Philadelphia Plan, which set goals for employment of minorities on public construction sites, and the Urban Coalition’s programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. *Id.* The Court found the information in these affidavits sufficiently

established the City’s prior consideration of race-neutral programs to withstand summary judgment. *Id.* at 1009.

Unlike the Richmond Ordinance, the Philadelphia Ordinance provided for several types of waivers of the 15 percent goal. *Id.* at 1009. It exempted individual contracts or classes of contracts from the Ordinance where there were an insufficient number of available minority-owned businesses “to ensure adequate competition and an expectation of reasonable prices on bids or proposals,” and allowed a prime contractor to request a waiver of the 15 percent requirement where the contractor shows he has been unable after “a good faith effort to comply with the goals for DBE participation.” *Id.*

Furthermore, as the district court noted, the Ordinance eliminated from the program successful minority businesses — those who have won \$5 million in city contracts. *Id.* Also unlike the Richmond program, the City’s program was geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs “within the Philadelphia Standard Metropolitan Statistical Area.” *Id.* The Court noted other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored. *Id.*

The Court said a closer question was presented by the Ordinance’s 15 percent goal. The City’s data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. The Court found that the goal need not correspond precisely to the percentage of available contractors. *Id.* *Croson* does not impose this requirement, the Third Circuit concluded, as the Supreme Court stated only that Richmond’s 30 percent goal inappropriately assumed “minorities [would] choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, quoting, [488 U.S. at 507.](#)

The Court pointed out that imposing a 15 percent goal for each contract may reflect the need to account for those contractors who received a waiver because insufficient minority businesses were available, and the contracts exempted from the program. *Id.* Given the strength of the Ordinance’s showing with respect to other *Croson* factors, the Court concluded the City had created a dispute of fact on whether the minority preference in the Ordinance was “narrowly tailored.” *Id.*

**Gender and intermediate scrutiny.** Under the intermediate scrutiny standard, the gender preference is valid if it was “substantially related to an important governmental objective.” *Id.* at 1009.

The City contended the gender preference was aimed at the “important government objective” of remedying economic discrimination against women, and that the 10 percent goal was substantially related to this objective. In assessing this argument, the Court noted that “[i]n the context of women-business enterprise preferences, the two prongs of this intermediate scrutiny test tend to converge into one.” *Id.* at 1009. The Court held it could uphold the construction provisions of this program if the City had established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the 10 percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.* But, the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id.* at 1011.

The Court concluded the evidence offered by the City regarding women-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id.* at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. *Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination *Id.* at 1011.

**Handicap and rational basis.** The Court then addressed the 2 percent preference for businesses owned by handicapped persons. *Id.* at 1011. The district court struck down this preference under the rational basis test, based on the belief according to the Third Circuit, that *Croson* required some evidence of discrimination against business enterprises owned by handicapped persons and therefore that the City could not rely on testimony of discrimination against handicapped individuals. *Id.*, citing [735 F.Supp. at 1308](#). The Court stated that a classification will pass the rational basis test if it is “rationally related to a legitimate government purpose,” *Id.*, citing, [Cleburne, 473 U.S. at 440](#).

The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in [\*Heller v. Doe\*, 509 U.S. 312–43 \(1993\)](#), indicating that “a [statutory] classification” subject to rational basis review “is accorded a strong presumption of validity,” and that “a state ... has no obligation to produce evidence to sustain the rationality of [the] classification.” *Id.* at 1011. Moreover, “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Id.* at 1011.

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Court held the 2 percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id.* at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force. *Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negating every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. *Id.* at 1012. Therefore, the Court reversed the district court’s grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue. *Id.*

**Holding.** The Court vacated the district court’s grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian-American, or Native American persons or women, and remanded the case for further proceedings and a trial in accordance with the opinion.

## Recent District Court Decisions

### **14. *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. March 22, 2016).**

Plaintiff Kossman is a company engaged in the business of providing erosion control services and is majority owned by a white male. 2016 WL 1104363 at \*1. Kossman brought this action as an equal protection challenge to the City of Houston's Minority and Women Owned Business Enterprise ("MWBE") program. *Id.* The MWBE program that is challenged has been in effect since 2013 and sets a 34 percent MWBE goal for construction projects. *Id.* Houston set this goal based on a disparity study issued in 2012. *Id.* The study analyzed the status of minority-owned and women-owned business enterprises in the geographic and product markets of Houston's construction contracts. *Id.*

Kossman alleges that the MWBE program is unconstitutional on the ground that it denies non-MWBEs equal protection of the law, and asserts that it has lost business as a result of the MWBE program because prime contractors are unwilling to subcontract work to a non-MWBE firm like Kossman. *Id.* at \*1. Kossman filed a motion for summary judgment; Houston filed a motion to exclude the testimony of Kossman's expert; and Houston filed a motion for summary judgment. *Id.*

The district court referred these motions to the Magistrate Judge. The Magistrate Judge, on February 17, 2016, issued its Memorandum & Recommendation to the district court in which it found that Houston's motion to exclude Kossman's expert should be granted because the expert articulated no method and had no training in statistics or economics that would allow him to comment on the validity of the disparity study. *Id.* at \*1 The Magistrate Judge also found that the MWBE program was constitutional under strict scrutiny, except with respect to the inclusion of Native American-owned businesses. *Id.* The Magistrate Judge found there was insufficient evidence to establish a need for remedial action for businesses owned by Native Americans, but found there was sufficient evidence to justify remedial action and inclusion of other racial and ethnic minorities and women-owned businesses. *Id.*

After the Magistrate Judge issued its Memorandum & Recommendation, Kossman filed objections, which the district court subsequently in its order adopting Memorandum & Recommendation, decided on March 22, 2016, affirmed and adopted the Memorandum & Recommendation of the magistrate judge and overruled the objections by Kossman. *Id.* at \*2.

#### **District court order adopting Memorandum & Recommendation of Magistrate Judge.**

**Dun & Bradstreet underlying data properly withheld and Kossman's proposed expert properly excluded.** The district court first rejected Kossman's objection that the City of Houston improperly withheld the Dun & Bradstreet data that was utilized in the disparity study. This ruling was in connection with the district court's affirming the decision of the Magistrate Judge granting the motion of Houston to exclude the testimony of Kossman's proposed expert. Kossman had conceded that the Magistrate Judge correctly determined that Kossman's proposed expert articulated no method and relied on untested hypotheses. *Id.* at \*2. Kossman also acknowledged that the expert was unable to produce data to confront the disparity study. *Id.*



Kossman had alleged that Houston withheld the underlying data from Dun & Bradstreet. The court found that under the contractual agreement between Houston and its consultant, the consultant for Houston had a licensing agreement with Dun & Bradstreet that prohibited it from providing the Dun & Bradstreet data to any third-party. *Id.* at \*2. In addition, the court agreed with Houston that Kossman would not be able to offer admissible analysis of the Dun & Bradstreet data, even if it had access to the data. *Id.* As the Magistrate Judge pointed out, the court found Kossman's expert had no training in statistics or economics, and thus would not be qualified to interpret the Dun & Bradstreet data or challenge the disparity study's methods. *Id.* Therefore, the court affirmed the grant of Houston's motion to exclude Kossman's expert.

**Dun & Bradstreet data is reliable and accepted by courts; bidding data rejected as problematic.**

The court rejected Kossman's argument that the disparity study was based on insufficient, unverified information furnished by others, and rejected Kossman's argument that bidding data is a superior measure of determining availability. *Id.* at \*3.

The district court held that because the disparity study consultant did not collect the data, but instead utilized data that Dun & Bradstreet had collected, the consultant could not guarantee the information it relied on in creating the study and recommendations. *Id.* at \*3. The consultant's role was to analyze that data and make recommendations based on that analysis, and it had no reason to doubt the authenticity or accuracy of the Dun & Bradstreet data, nor had Kossman presented any evidence that would call that data into question. *Id.* As Houston pointed out, Dun & Bradstreet data is extremely reliable, is frequently used in disparity studies, and has been consistently accepted by courts throughout the country. *Id.*

Kossman presented no evidence indicating that bidding data is a comparably more accurate indicator of availability than the Dun & Bradstreet data, but rather Kossman relied on pure argument. *Id.* at \*3. The court agreed with the Magistrate Judge that bidding data is inherently problematic because it reflects only those firms actually solicited for bids. *Id.* Therefore, the court found the bidding data would fail to identify those firms that were not solicited for bids due to discrimination. *Id.*

**The anecdotal evidence is valid and reliable.** The district court rejected Kossman's argument that the study improperly relied on anecdotal evidence, in that the evidence was unreliable and unverified. *Id.* at \*3. The district court held that anecdotal evidence is a valid supplement to the statistical study. *Id.* The MWBE program is supported by both statistical and anecdotal evidence, and anecdotal evidence provides a valuable narrative perspective that statistics alone cannot provide. *Id.*

The district court also found that Houston was not required to independently verify the anecdotes. *Id.* at \*3. Kossman, the district court concluded, could have presented contrary evidence, but it did not. *Id.* The district court cited other courts for the proposition that the combination of anecdotal and statistical evidence is potent, and that anecdotal evidence is nothing more than a witness's narrative of an incident told from the witness's perspective and including the witness's perceptions. *Id.* Also, the court held the city was not required to present corroborating evidence, and the plaintiff was free to present its own witness to either refute the incident described by the city's witnesses or to relate their own perceptions on discrimination in the construction industry. *Id.*



**The data relied upon by the study was not stale.** The court rejected Kossman’s argument that the study relied on data that is too old and no longer relevant. *Id.* at \*4. The court found that the data was not stale and that the study used the most current available data at the time of the study, including Census Bureau data (2006-2008) and Federal Reserve data (1993, 1998 and 2003), and the study performed regression analyses on the data. *Id.*

Moreover, Kossman presented no evidence to suggest that Houston’s consultant could have accessed more recent data or that the consultant would have reached different conclusions with more recent data. *Id.*

**The Houston MWBE program is narrowly tailored.** The district court agreed with the Magistrate Judge that the study provided substantial evidence that Houston engaged in race-neutral alternatives, which were insufficient to eliminate disparities, and that despite race-neutral alternatives in place in Houston, adverse disparities for MWBEs were consistently observed. *Id.* at \*4. Therefore, the court found there was strong evidence that a remedial program was necessary to address discrimination against MWBEs. *Id.* Moreover, Houston was not required to exhaust every possible race-neutral alternative before instituting the MWBE program. *Id.*

The district court also found that the MWBE program did not place an undue burden on Kossman or similarly situated companies. *Id.* at \*4. Under the MWBE program, a prime contractor may substitute a small business enterprise like Kossman for an MWBE on a race and gender-neutral basis for up to 4 percent of the value of a contract. *Id.* Kossman did not present evidence that he ever bid on more than 4 percent of a Houston contract. *Id.* In addition, the court stated the fact the MWBE program placed *some* burden on Kossman is insufficient to support the conclusion that the program is not nearly tailored. *Id.* The court concurred with the Magistrate Judge’s observation that the proportional sharing of opportunities is, at the core, the point of a remedial program. *Id.* The district court agreed with the Magistrate Judge’s conclusion that the MWBE program is nearly tailored.

**Native American-owned businesses.** The study found that Native American-owned businesses were utilized at a higher rate in Houston’s construction contracts than would be anticipated based on their rate of availability in the relevant market area. *Id.* at \*4. The court noted this finding would tend to negate the presence of discrimination against Native Americans in Houston’s construction industry. *Id.*

This Houston disparity study consultant stated that the high utilization rate for Native Americans stems largely from the work of two Native American-owned firms. *Id.* The Houston consultant suggested that without these two firms, the utilization rate for Native Americans would decline significantly, yielding a statistically significant disparity ratio. *Id.*

The Magistrate Judge, according to the district court, correctly held and found that there was insufficient evidence to support including Native Americans in the MWBE program. *Id.* The court approved and adopted the Magistrate Judge explanation that the opinion of the disparity study consultant that a significant statistical disparity would exist if two of the contracting Native American-owned businesses were disregarded, is not evidence of the need for remedial action. *Id.* at \*5. The district court found no equal-protection significance to the fact the majority of contracts let to Native American-owned businesses were to only two firms. *Id.* Therefore, the utilization goal for businesses owned by Native Americans is not supported by a strong evidentiary basis. *Id.* at \*5.

The district court agreed with the Magistrate Judge's recommendation that the district court grant summary judgment in favor of Kossman with respect to the utilization goal for Native American-owned business. *Id.* The court found there was limited significance to the Houston consultant's opinion that utilization of Native American-owned businesses would drop to statistically significant levels if two Native American-owned businesses were ignored. *Id.* at \*5.

The court stated the situation presented by the Houston disparity study consultant of a "hypothetical non-existence" of these firms is not evidence and cannot satisfy strict scrutiny. *Id.* at \*5. Therefore, the district court adopted the Magistrate Judge's recommendation with respect to excluding the utilization goal for Native American-owned businesses. *Id.* The court noted that a preference for Native American-owned businesses could become constitutionally valid in the future if there were sufficient evidence of discrimination against Native American-owned businesses in Houston's construction contracts. *Id.* at \*5.

**Conclusion.** The district court held that the Memorandum & Recommendation of the Magistrate Judge is adopted in full; Houston's motion to exclude the Kossman's proposed expert witness is granted; Kossman's motion for summary judgment is granted with respect to excluding the utilization goal for Native American-owned businesses and denied in all other respects; Houston's motion for summary judgment is denied with respect to including the utilization goal for Native American-owned businesses and granted in all other respects as to the MWBE program for other minorities and women-owned firms. *Id.* at \*5.

**Memorandum and Recommendation by Magistrate Judge, dated February 17, 2016, S.D. Texas, Civil Action No. H-14-1203.**

**Kossman's proposed expert excluded and not admissible.** Kossman in its motion for summary judgment solely relied on the testimony of its proposed expert, and submitted no other evidence in support of its motion. The Magistrate Judge (hereinafter "MJ") granted Houston's motion to exclude testimony of Kossman's proposed expert, which the district court adopted and approved, for multiple reasons. The MJ found that his experience does not include designing or conducting statistical studies, and he has no education or training in statistics or economics. *See*, MJ, Memorandum and Recommendation ("M&R") by MJ, dated February 17, 2016, at 31, S.D. Texas, Civil Action No. H-14-1203. The MJ found he was not qualified to collect, organize or interpret numerical data, has no experience extrapolating general conclusions about a subset of the population by sampling it, has demonstrated no knowledge of sampling methods or understanding of the mathematical concepts used in the interpretation of raw data, and thus, is not qualified to challenge the methods and calculations of the disparity study. *Id.*

The MJ found that the proposed expert report is only a theoretical attack on the study with no basis and objective evidence, such as data or testimony of construction firms in the relative market area that support his assumptions regarding available MWBEs or comparative studies that control the factors about which he complained. *Id.* at 31. The MJ stated that the proposed expert is not an economist and thus is not qualified to challenge the disparity study explanation of its economic considerations. *Id.* at 31. The proposed expert failed to provide econometric support for the use of bidder data, which he argued was the better source for determining availability, cited no personal experience for the use of bidder data, and provided no proof that would more accurately reflect

availability of MWBEs absent discriminatory influence. *Id.* Moreover, he acknowledged that no bidder data had been collected for the years covered by the study. *Id.*

The court found that the proposed expert articulated no method at all to do a disparity study, but merely provided untested hypotheses. *Id.* at 33. The proposed expert's criticisms of the study, according to the MJ, were not founded in cited professional social science or econometric standards. *Id.* at 33. The MJ concludes that the proposed expert is not qualified to offer the opinions contained in his report, and that his report is not relevant, not reliable, and, therefore, not admissible. *Id.* at 34.

**Relevant geographic market area.** The MJ found the market area of the disparity analysis was geographically confined to area codes in which the majority of the public contracting construction firms were located. *Id.* at 3-4, 51. The relevant market area, the MJ said, was weighted by industry, and therefore the study limited the relevant market area by geography and industry based on Houston's past years' records from prior construction contracts. *Id.* at 3-4, 51.

**Availability of MWBEs.** The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its public dollars do not finance racial discrimination. *Id.* at 52-53. Here, the study defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. *Id.* at 3-4, 53. Those parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and MWBEs that had been utilized in Houston's construction contracting over the last five and one-half years. *Id.* at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. *Id.* at 6, 53.

Kossman produced no evidence that the availability estimate was inadequate. *Id.* at 53. Plaintiff's criticisms of the availability analysis, including for capacity, the court stated was not supported by any contrary evidence or expert opinion. *Id.* at 53-54. The MJ rejected Plaintiff's proposed expert's suggestion that analysis of bidder data is a better way to identify MWBEs. *Id.* at 54. The MJ noted that Kossman's proposed expert presented no comparative evidence based on bidder data, and the MJ found that bidder data may produce availability statistics that are skewed by active and passive discrimination in the market. *Id.*

In addition to being underinclusive due to discrimination, the MJ said bidder data may be overinclusive due to inaccurate self-evaluation by firms offering bids despite the inability to fulfill the contract. *Id.* at 54. It is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. *Id.* The MJ concluded that the law does not require an individualized approach that measures whether MWBEs are qualified on a contract-by-contract basis. *Id.* at 55.

**Disparity analysis.** The study indicated significant statistical adverse disparities as to businesses owned by African Americans and Asians, which the MJ found provided a *prima facie* case of a strong basis in evidence that justified the Program's utilization goals for businesses owned by African Americans, Asian-Pacific Americans, and subcontinent Asian Americans. *Id.* at 55.

The disparity analysis did not reflect significant statistical disparities as to businesses owned by Hispanic Americans, Native Americans or nonminority women. *Id.* at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id.* at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id.* at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by 50 percent when they no longer benefitted from remedial goals. *Id.* at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the period as a whole. *Id.* at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id.* at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id.*

The MJ rejected Plaintiff's argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that contracted with Houston by industry and those available in the relevant market by industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston's awarding of construction contracts and to reach constitutionally sound results. *Id.*

**Anecdotal evidence.** Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. *Id.* at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. *Id.* at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. *Id.* The court rejected any requirement that the anecdotal evidence be verified and investigated. *Id.* at 59.

**Regression analyses.** Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id.* The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60. Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id.* at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

**Narrow Tailoring factors.** The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston's race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for MWBEs for up to 4 percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to meet contract goals or MWSBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*

The MJ concluded that the 34 percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on nonminorities. *Id.* at 62. The burden on nonminority SBEs, such as Kossman, is lessened by the 4 percent substitution provision. *Id.* at 62. The MJ noted another district court's opinion that the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 62.

**Holding.** The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.

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

In *H.B. Rowe Company v. Tippet, North Carolina Department of Transportation, et al.* (“*Rowe*”), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina “affirmative action” program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

**Background.** In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff’s bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff’s bid was rejected because of plaintiff’s failure to demonstrate “good faith efforts” to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff’s bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff’s good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT’s MWBE Program “largely mirrors” the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT’s MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippet. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

**March 29, 2007 Order of the District Court.** The matter came before the district court initially on several motions, including the defendants’ Motion to Dismiss or for Partial Summary Judgment, defendants’ Motion to Dismiss the Claim for Mootness and plaintiff’s Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants’ Motion to Dismiss or for partial summary judgment; denied defendants’ Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff’s Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff’s claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff’s claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff’s claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff’s claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff’s claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines “minority” as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants’ Motion to Dismiss Claim for Mootness as to plaintiff’s suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff’s pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

**September 28, 2007 Order of the District Court.** On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally, the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

**December 9, 2008 Order of the District Court (589 F.Supp.2d 587).** The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

**North Carolina's MWBE program.** The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, et seq. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.



North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A § 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT "dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime contractor fails to hire the goal amount, it must submit efforts of 'good faith' attempts to do so." 589 F.Supp.2d 587.

**Compelling interest.** The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina's road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program's suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, "based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination." 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

**Narrowly tailored.** The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court's analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to "those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department." § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4th Cir. 2010), discussed above.

**16. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009)**

In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program ("VOP") that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City's work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City's projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

**The VOP.** Under the VOP, the City sets annual bench marks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various "good faith" requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id.* The VOP further imposes obligations on the City with respect to vendor contracts. *Id.* The court found the City must seek where possible and lawful to award a portion of vendor contracts to

VOP-certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

**Analysis and Order of the Court.** The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt “aggressive race-based affirmative action programs” in order to award specific groups publicly-funded contracts. *Id.* at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day’s notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

**Plaintiff’s claims.** The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City “intentionally” treated plaintiffs unfavorably because of their race. *Id.* at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state action. *Id.* Plaintiffs must offer facts and evidence that constitute proof of “racially discriminatory intent or purpose.” *Id.* at 967. Here, the court found that plaintiff failed to allege any single instance showing the City “intentionally” rejected VOP bids based on their race. *Id.*

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a subcontract, or showed any case where their bids were rejected on the basis of race. *Id.* The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id.*

The City rejected the plaintiff's claims of discrimination because the plaintiffs did not establish by evidence that the City "intentionally" rejected their bid due to race or that the City "intentionally" discriminated against these plaintiffs. *Id.* at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a "discriminatory motive." *Id.* at 968. The court concluded that plaintiffs had failed to show that the City's actions were "racially motivated." *Id.*

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul*, 2009 WL 777932 (8th Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

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

This case considered the validity of the City of Augusta's local minority DBE program. The district court enjoined the City from favoring any contract bid on the basis of racial classification and based its decision principally upon the outdated and insufficient data proffered by the City in support of its program. 2007 WL 926153 at \*9-10.

The City of Augusta enacted a local DBE program based upon the results of a disparity study completed in 1994. The disparity study examined the disparity in socioeconomic status among races, compared black-owned businesses in Augusta with those in other regions and those owned by other racial groups, examined "Georgia's racist history" in contracting and procurement, and examined certain data related to Augusta's contracting and procurement. *Id.* at \*1-4. The plaintiff contractors and subcontractors challenged the constitutionality of the DBE program and sought to extend a temporary injunction enjoining the City's implementation of racial preferences in public bidding and procurement.

The City defended the DBE program arguing that it did not utilize racial classifications because it only required vendors to make a "good faith effort" to ensure DBE participation. *Id.* at \*6. The court rejected this argument noting that bidders were required to submit a "Proposed DBE Participation" form and that bids containing DBE participation were treated more favorably than those bids without DBE participation. The court stated: "Because a person's business can qualify for the favorable treatment based on that person's race, while a similarly situated person of another race would not qualify, the program contains a racial classification." *Id.*

The court noted that the DBE program harmed subcontractors in two ways: first, because prime contractors will discriminate between DBE and non-DBE subcontractors and a bid with a DBE subcontractor would be treated more favorably; and second, because the City would favor a bid containing DBE participation over an equal or even superior bid containing no DBE participation. *Id.*

The court applied the strict scrutiny standard set forth in *Croson* and *Engineering Contractors Association* to determine whether the City had a compelling interest for its program and whether the program was narrowly tailored to that end. The court noted that pursuant to *Croson*, the City would have a compelling interest in assuring that tax dollars would not perpetuate private prejudice. But, the court found (*citing to Croson*), that a state or local government must identify that discrimination, "public or

private, with some specificity before they may use race-conscious relief.” The court cited the Eleventh Circuit’s position that “‘gross statistical disparities’ between the proportion of minorities hired by the public employer and the proportion of minorities willing and able to work” may justify an affirmative action program. *Id.* at \*7. The court also stated that anecdotal evidence is relevant to the analysis.

The court determined that while the City’s disparity study showed some statistical disparities buttressed by anecdotal evidence, the study suffered from multiple issues. *Id.* at \*7-8. Specifically, the court found that those portions of the study examining discrimination outside the area of subcontracting (e.g., socioeconomic status of racial groups in the Augusta area) were irrelevant for purposes of showing a compelling interest. The court also cited the failure of the study to differentiate between different minority races as well as the improper aggregation of race- and gender-based discrimination referred to as Simpson’s Paradox.

The court assumed for purposes of its analysis that the City could show a compelling interest but concluded that the program was not narrowly tailored and thus could not satisfy strict scrutiny. The court found that it need look no further beyond the fact of the thirteen-year duration of the program absent further investigation, and the absence of a sunset or expiration provision, to conclude that the DBE program was not narrowly tailored. *Id.* at \*8. Noting that affirmative action is permitted only sparingly, the court found: “[i]t would be impossible for Augusta to argue that, 13 years after last studying the issue, racial discrimination is so rampant in the Augusta contracting industry that the City must affirmatively act to avoid being complicit.” *Id.* The court held in conclusion, that the plaintiffs were “substantially likely to succeed in proving that, when the City requests bids with minority participation and in fact favors bids with such, the plaintiffs will suffer racial discrimination in violation of the Equal Protection Clause.” *Id.* at \*9.

In a subsequent Order dated September 5, 2007, the court denied the City’s motion to continue plaintiff’s Motion for Summary Judgment, denied the City’s Rule 12(b)(6) motion to dismiss, and stayed the action for 30 days pending mediation between the parties. Importantly, in this Order, the court reiterated that the female- and locally-owned business components of the program (challenged in plaintiff’s Motion for Summary Judgment) would be subject to intermediate scrutiny and rational basis scrutiny, respectively. The court also reiterated its rejection of the City’s challenge to the plaintiffs’ standing. The court noted that under *Adarand*, preventing a contractor from competing on an equal footing satisfies the particularized injury prong of standing. And showing that the contractor will sometime in the future bid on a City contract “that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors” satisfies the second requirement that the particularized injury be actual or imminent. Accordingly, the court concluded that the plaintiffs have standing to pursue this action.

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

The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court's finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). See discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the “plaintiffs”) brought suit against Engineering Contractors Association (the “County”), the former County Manager, and various current County Commissioners (the “Commissioners”) in their official and personal capacities (collectively the “defendants”), seeking to enjoin the same “participation goals” in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit's decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise (“CSBE”) program for construction contracts, “but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services.” *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively “MBE/WBE”). *Id.* The MBE/WBE programs applied to A&E contracts in excess of \$25,000. *Id.* at 1312. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313. However, the district court found “the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994.” *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the “County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services.” The final report further stated “Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures.” *Id.* at 1315. The district court also found that the Commissioners were informed that “there was even less evidence to support [the MBE/WBE]

programs as applied to architects and engineers then there was in contract construction.” *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts: (1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

*Id.* The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present “a strong basis of evidence” indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the “gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective.” *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present “sufficient probative evidence” of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a “last resort.” *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal’s report, most of which consisted of “post-enactment” evidence. *Id.* Dr. Carvajal’s analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by info USA, and a list of firms registered for technical certification with the County’s Department of Public Works to compile a list of the “universe” of firms competing in the market. *Id.* For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*



Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses “in order to determine the effect a firm owner’s gender or race had on certain dependent variables.” *Id.* Dr. Carvajal used the firm’s annual volume of business as a dependent variable and determined the disparities were due in each case to the firm’s gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms.” *Id.* Dr. Carvajal’s results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the “gross statistical disparities” in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he “did not find sufficient evidence of discrimination against blacks.” *Id.*

The court held that Dr. Carvajal’s study constituted neither a “strong basis in evidence” of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute “sufficient probative evidence” necessary to justify the gender-conscious measures. *Id.* The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated, “[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace.” *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it “unreliable and inaccurate” for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the “Tenth Circuit’s decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari.” *Id.* at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County’s A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, “nearly all” of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal’s study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition “that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* (internal citations omitted). The court held that “[t]his is not one of those rare cases.” The district court concluded that the statistical evidence was “unreliable and fail[ed] to establish the existence of discrimination,” and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal’s report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to “identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished ... it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone.” *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.* The court held that the County’s failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, “not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry,” leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id.* The court found this even “more problematic” because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences “must be limited in time.” *Id.* at 1332, citing *Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that “the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination.” *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity- and gender-conscious measures of the MBE/WBE programs if their actions violated “clearly established statutory or constitutional rights of which a reasonable person would have known ... Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity- and gender-conscious measures] gave them ‘fair warning’ that their actions were unconstitutional. “ *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they “had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs ... were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*].” *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law was “clearly established” and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs \$100 each in nominal damages and reasonable attorneys’ fees and costs, for which it held the County and the Commissioners jointly and severally liable.

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

This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a “race-conscious” program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious “preferences” in order to increase the numeric representation of “MBEs” in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity (“OSD”) to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute’s purpose. The statute provided that each State agency is “encouraged” to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were “precatory.” The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, “if true,” constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as “simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.” *Florida A.G.C. Council*, 303 F.Supp.2d at 1315, *quoting Eng’g Contractors Ass’n*, 122 F.3d at 928, *quoting Croson*, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is “permissive.” The court, however, held that “there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute ‘induces an employer to hire with an eye toward meeting ... [a] numerical target.’ *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting a MBE utilization plan. If the State agency deviated from the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all

solicitations and contract awards of the agency as deemed necessary until such time as the agency met its utilization plan. The court held that based on these factors, although alleged to be “permissive,” the statute textually was not.

Therefore, the court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.

**20. *The Builders Ass’n of Greater Chicago v. The City of Chicago*, 298 F. Supp.2d 725 (N.D. Ill. 2003)**

This case is instructive because of the court’s focus and analysis on whether the City of Chicago’s MBE/WBE program was narrowly tailored. The basis of the court’s holding that the program was not narrowly tailored is instructive for any program considered because of the reasons provided as to why the program did not pass muster.

The plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago’s construction Minority- and Women-Owned Business (“MWBE”) Program. The court held that the City of Chicago’s MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The court held that it was not narrowly tailored for several reasons, including because there was no “meaningful individualized review” of MBE/WBEs; it had no termination date nor did it have any means for determining a termination; the “graduation” revenue amount for firms to graduate out of the program was very high, \$27,500,000, and in fact very few firms graduated; there was no net worth threshold; and, waivers were rarely or never granted on construction contracts. The court found that the City program was a “rigid numerical quota,” not related to the number of available, willing and able firms. Formulistic percentages, the court held, could not survive the strict scrutiny.

The court held that the goals plan did not address issues raised as to discrimination regarding market access and credit. The court found that a goals program does not directly impact prime contractor’s selection of subcontractors on non-goals private projects. The court found that a set-aside or goals program does not directly impact difficulties in accessing credit, and does not address discriminatory loan denials or higher interest rates. The court found the City has not sought to attack discrimination by primes directly, “but it could.” 298 F.2d 725. “To monitor possible discriminatory conduct it could maintain its certification list and require those contracting with the City to consider unsolicited bids, to maintain bidding records, and to justify rejection of any certified firm submitting the lowest bid. It could also require firms seeking City work to post private jobs above a certain minimum on a website or otherwise provide public notice ...” *Id.*

The court concluded that other race-neutral means were available to impact credit, high interest rates, and other potential marketplace discrimination. The court pointed to race-neutral means including linked deposits, with the City banking at institutions making loans to startup and smaller firms. Other race-neutral programs referenced included quick pay and contract downsizing; restricting self-performance by prime contractors; a direct loan program; waiver of bonds on contracts under \$100,000; a bank participation loan program; a 2 percent local business preference; outreach programs and technical assistance and workshops; and seminars presented to new construction firms.

The court held that race and ethnicity do matter, but that racial and ethnic classifications are highly suspect, can be used only as a last resort, and cannot be made by some mechanical formulation. Therefore, the court concluded the City's MWBE Program could not stand in its present guise. The court held that the present program was not narrowly tailored to remedy past discrimination and the discrimination demonstrated to now exist.

The court entered an injunction, but delayed the effective date for six months from the date of its Order, December 29, 2003. The court held that the City had a "compelling interest in not having its construction projects slip back to near monopoly domination by white male firms." The court ruled a brief continuation of the program for six months was appropriate "as the City rethinks the many tools of redress it has available." Subsequently, the court declared unconstitutional the City's MWBE Program with respect to construction contracts and permanently enjoined the City from enforcing the Program. 2004 WL 757697 (N.D. Ill 2004).

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

This case is instructive because the court found the Executive Order of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. ("AUC") sued the City of Baltimore challenging its ordinance providing for minority and women-owned business enterprise ("MWBE") participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35 percent of all City contracting dollars to MBE/WBEs. The court found this goal of 35 percent participation was aspirational only and the Executive Order contained no enforcement mechanism or penalties for noncompliance. The Executive Order also specified many "noncoercive" outreach measures to be taken by the City agencies relating to increasing participation of MBE/WBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC did not have any of its individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a "case or

controversy” in connection with a facial attack. The court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the court on October 22, 2003 dismissing the case with prejudice.

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

Plaintiffs, nonminority 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 nonminority 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 nonminority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

**Compelling state interest.** The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment’s Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id.* The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a “passive participant” in a system of racial exclusion practiced by private businesses. *Id.* at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

The district court stated that a “mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice.” *Id.* Rather, the court held that the “benchmark for judging the adequacy of a state’s factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state’s conclusion that remedial action was necessary.” *Id.* The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was “a passive participant” in private industry’s discriminatory practices. *Id.* at 1240, *citing* to *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest “is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts.” *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act’s bid preference “is not based on past discrimination,” rather, it is based on a desire to “encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenors’ evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenors did not identify “a single qualified, minority-owned bidder who was excluded from a state contract.” *Id.* The district court, thus, held that broad allegations of “systematic” exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the “State’s admission here that the State’s governmental interest was not in remedying past discrimination in the state competitive bidding process, but in ‘encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.’” *Id.* at 1242.



The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio's statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

**Narrow tailoring.** The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 citing *Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral

alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, “and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act.” *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the “goal” of 10 percent of the state's contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to “graduate” from preference eligibility. *Id.* The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act's duration was not tied in any way to the eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the “questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable.” *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act's minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of “numerical proportionality” between the MBE Act’s aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act’s 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id.* at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is “not necessarily an absolute cap” on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, citing *Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer “substantial evidence” that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act’s bid preference provisions prevented nonminority 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.

**23. *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000)**

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.

**24. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), *aff'd per curiam* 218 F.3d 1267 (11th Cir. 2000)**

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, *citing Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11th Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods “to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data.” *Id.*, citing *Eng’g Contractors Ass’n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, citing *Eng’g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County’s pre-1994 disparity study (the “Brimmer-Marshall Study”) and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a “passive participant” in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are “exacerbating a pattern of prior discrimination that can be identified with specificity.” *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a “strong basis in evidence” of discrimination to justify the County’s racial and ethnic preferences. *Id.*

The court next considered the County’s post-1994 disparity study. *Id.* at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id.* The court explained:

*Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period. Id.*

The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id.* Additionally, the court found that the County's standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County's anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that "[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone." *Id.*, quoting *Eng'g Contractors Ass'n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. "The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a 'last resort.'" *Id.* at 1380, citing *Eng'g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit's four-part test and concluded that the County's M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. "If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem." *Id.*, quoting *Eng'g Contractors Ass'n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity .... *Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County's argument that its program was permissible because it set "goals" as opposed to "quotas," because the program in *Engineering Contractors Association* also utilized "goals" and was struck down. *Id.*

Per the M/FBE program's gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present "sufficient probative evidence" of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

## **25. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999)**

The district court in this case pointed out that it had struck down Ohio's MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District*, 31 F.Supp.2d 571 (N.D. Ohio 1998). *Id.* at 741.

The state defendants appealed this court's decision to the United States court of Appeals for the Sixth Circuit. *Id.* Thereafter, the Supreme Court of Ohio held in the case of *Ritchey Produce, Co., Inc. v. The State of Ohio, Department of Administrative*, 704 N.E. 2d 874 (1999), that the Ohio statute, which provided race-based preferences in the state's purchase of nonconstruction-related goods and services, was constitutional. *Id.* at 744.

While this court's decision related to construction contracts and the Ohio Supreme Court's decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id.* at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court's decision in *Ritchey Produce*. The district court took the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a "blatantly unconstitutional program of race-based benefits. *Id.* at 745.

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited to *F. Buddie Contracting v. Cuyahoga Community College*, 31 F. Supp.2d 571 (N.D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court's holding in *Ritchey Produce*, 707 N.E. 2d 871 (Ohio 1999), which held that the State of Ohio's MBE program as applied to the state's purchase of non-construction-related goods and services was constitutional. The court found the evidence to be insufficient to justify the Ohio MBE program. The court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

**Strict Scrutiny.** The district court held that the Supreme Court of Ohio decision in *Ritchey Produce* was wrongly decided for the following reasons:

1. Ohio's MBE program of race-based preferences in the award of state contracts was unconstitutional because it is unlimited in duration. *Id.* at 745.
2. A program of race-based benefits can not be supported by evidence of discrimination which is over 20 years old. *Id.*
3. The state Supreme Court found that there was a severe numerical imbalance in the amount of business the State did with minority-owned enterprises, based on its uncritical acceptance of essentially "worthless calculations contained in a twenty-one year-old report, which miscalculated the percentage of minority-owned businesses in Ohio and misrepresented data on the percentage of state purchase contracts they had received, all of which was easily detectable by examining the data cited by the authors of the report." *Id.* at 745.
4. The state Supreme Court failed to recognize that the incorrectly calculated percentage of minority-owned businesses in Ohio (6.7%) bears no relationship to the 15 percent set-aside goal of the Ohio Act. *Id.*
5. The state Supreme Court applied an incorrect rule of law when it announced that Ohio's program must be upheld unless it is clearly unconstitutional beyond a reasonable doubt, whereas according to the district court in this case, the Supreme Court of the United States has said that all racial class classifications are highly suspect and must be subjected to strict judicial scrutiny. *Id.*
6. The evidence of past discrimination that the Ohio General Assembly had in 1980 did not provide a firm basis in evidence for a race-based remedy. *Id.*

Thus, the district court determined the evidence could not support a compelling state-interest for race-based preferences for the state of Ohio MBE Act, in part based on the fact evidence of past discrimination was stale and twenty years old, and the statistical analysis was insufficient because the state did not know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts. *Id.* at 763-771. The statistical evidence was fatally flawed because the relevant universe of minority 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 nonminority 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 nonminority 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 nonminority 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.

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

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation's ("FDOT") program of "setting aside" certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a nonminority 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 MBE/WBE/DBE Programs**

**1. *Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016), cert. denied, 2017 WL 1375832 (Oct. 16, 2017), affirming on other grounds, *Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.*, 107 F.Supp. 3d 183 (D.D.C. 2015)**

In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at \*1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id.*\*1. Businesses owned by “socially and economically disadvantaged” individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons “who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.” *Id.*, quoting 15 U.S.C. § 627(a)(5).

The Section 8(a) statute is race-neutral. The court rejected Rothe's allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id.*\*1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA's *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id.*\*2, citing 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id* at \*2. The court stated the statute “readily survives” the rational basis scrutiny standards. *Id* \*2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id*.

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id* \*2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id* \*2.

The court found that the definition of the term “socially disadvantaged” does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id* \*3. On its face, the court stated the term envisions a individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id*. The court said that the statute definition of the term “social disadvantaged” does not provide for preferential treatment based on an applicant’s race, but rather on an individual applicant’s experience of discrimination. *Id* \*3.

The court distinguished cases involving situations in which disadvantaged nonminority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered “socially disadvantaged.” *Id* \*3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id*.

The court pointed out that the SBA’s implementation of the statute’s definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id* \*4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA’s implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id* \*4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id* \*5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner’s experience of discrimination. *Id* \*6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id*.

The court noted that the Supreme Court and this court's discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id* \*8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id.* at \*7.

**The SBA statute does not trigger strict scrutiny.** The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id* \*10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id* \*9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id.* The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id.*

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id* \*10. Instead, the court considered whether the statute is supported by a rational basis. *Id.* The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id* \*10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id.* Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id* \*11. The statutory scheme, the court said, is rationally related to that end. *Id.*

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* \*11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

**Other issues.** The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* \*11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id* \*11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id.*

**Dissenting Opinion.** There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id*\*12. The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)’s contract preference by virtue of their race. *Id*\*13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe’s right to equal protection of the laws. *Id*\*16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id*\*22.

## **2. *Rothe Development Corp. v. U.S. Department of Defense, et al.*, 545 F.3d 1023 (Fed. Cir. 2008)**

Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense (“DOD”) to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the “Price Evaluation Adjustment Program” or “PEA”).

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the “analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization.” 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004)). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, “the evidence must be proven to have been before Congress prior to enactment of the racial classification.” The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the

data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe*, 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals (“SDBs”). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was “stale,” that the plaintiff (*Rothe*) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

**2007 Order of the District Court (499 F.Supp.2d 775).** In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff *Rothe* did not qualify as an SDB because it was owned by a Caucasian female. Although *Rothe* was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the “lowest” bidder and was awarded the contract. *Id.* *Rothe* claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 782-83. The district court’s decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government’s burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was

cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id.* at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court's strict scrutiny analysis. First, Rothe's claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, Rothe must introduce "credible, particularized" evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, Rothe may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and "they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting." *Id.* at 838-39. The court found that the data used in these six disparity studies is not "stale" for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with Rothe's argument that all the data were stale (data in the studies from 1997 through 2002), "because this data was the most current data available at the time that these studies were performed." *Id.* The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a "bright-line rule for determining staleness." *Id.*



The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are “stale.” *Id.* at n.86. The court also stated that it “accepts the reasoning of the *Appendix*, which the court found stated that for the most part “the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities.” *Id.* at 839, *quoting* 61 *Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the *Appendix*, the Benchmark Study, and the Urban Institute Report were “stale,” and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the *Appendix* to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the *Appendix*, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with “concrete, particularized” evidence to the contrary. *Id.* at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government’s involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the

case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id.*, quoting *Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;
2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and
3. Over- and under-inclusiveness.

*Id.* The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

**November 4, 2008 decision by the Federal Circuit Court of Appeals.** On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a "strong basis in evidence" upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

**Strict scrutiny framework.** The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is “beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature’s decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

**Compelling interest — strong basis in evidence.** The Federal Circuit pointed out that the statistical and anecdotal evidence relied upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, citing to *Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

**Six state and local disparity studies.** The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson*’s emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson*’s evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

**Staleness.** The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress “should be able to rely on the most recently available data so long as that data is reasonably up-to-date.” 545 F.3d at 1039. The Federal Circuit affirmed the district court’s conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id.*

**Before Congress.** The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it “must be proven to have been before Congress prior to enactment of the racial classification.” 545 F.3d at 1039, quoting *Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id.* at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD “which Congress was emphatically not required to make.” *Id.* at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the “government need not incriminate itself with a formal finding of discrimination prior to using a race-conscious remedy.” 545 F.3d at 1040, footnote 11 *quoting Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

**Methodology.** The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, “[a] disparity ratio less than 0.80” — i.e., a finding that a given minority group received less than 80 percent of the expected amount — “indicates a relevant degree of disparity,” and “might support an inference of discrimination.” 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and citing *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a “crucial question” in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by Rothe, that the six studies misapplied this “touchstone” of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because “the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists.” 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id.*

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id.* However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or “relative capacity,” of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 quoting *Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id.* at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id.* at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing to Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id.* at 1044-1045.

The court stated, to “be clear,” that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id.* at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id.* The court recognized that a minority-owned firm’s capacity and qualifications may themselves be affected by discrimination. *Id.* The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id.*

**Geographic coverage.** The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, “we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest.” 545 F.3d at 1046. The court stated in particular, the Appendix relied on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

**Anecdotal evidence.** The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, citing *Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in *Concrete Works* noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, *quoting Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and “should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no ‘precise mathematical formula’ to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 545 F.3d at 1049, *quoting W.H. Scott Constr. Co.*, 199 F.3d at 218 n. 11.

**Narrowly tailoring.** The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination.” 545 F.3d at 1049-1050.

**3. *Rothe Development, Inc. v. U.S. Department of Defense and Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. June 5, 2015), affirmed on other grounds, 2016 WL 471909 (D.C. Cir. September 9, 2016).**

Plaintiff Rothe Development, Inc. is a small business that filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) (collectively, “Defendants”) challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. *See DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic’s* court disagreed with the

plaintiff's facial attack and held the Section 8(a) Program as facially constitutional. *See DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (*See also* discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff *Rothe* relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic's* holding in the context of this case. 2015 WL 3536271 at \*1. Both the plaintiff *Rothe* and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other's expert witnesses. The court concludes that Defendants' experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff *Rothe's* motion to exclude Defendants' expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff's experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants' motions to exclude plaintiff's expert testimony.

In addition, the court in *Rothe* agrees with the court's reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff's motion for summary judgment and grants Defendants' cross-motion for summary judgment.

*DynaLantic Corp. v. Department of Defense.* The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. *See* 2015 WL 3536271 at \*4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at \*5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id.* at \*5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated nonminority 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 nonminority 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 percent of contract actions, 93.0 percent of dollars awarded, and in which 92.2 percent of non-8(a) minority-owned SDBs are registered. *Id.* Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe’s contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at \*10. The court found convincing the expert’s response to Rothe’s critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert’s reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, citing *DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, citing *DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants’ additional expert’s testimony as admissible in connection with that expert’s review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id.* at \*11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business

enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at \*12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id.* The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

**Plaintiff's expert's testimony rejected.** The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at \*13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred methodology for conducting disparity studies "appears to be well outside of the mainstream in this particular field." *Id.* at \*14. The expert's methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

**The Section 8(a) Program is constitutional on its face.** The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. *Id.* at \*15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at \*17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at \*17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government's initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action — specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business

formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at \*17, citing *DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated nonminority counterparts. *Id.* at \*17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at \*17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at \*18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to 2 to 5 percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; citing *DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at \*18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at \*18, citing *DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at \*18. The court concurred with the *DynaLantic* court's conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at \*18, citing *DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe's argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id.* at \*19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at \*19. The court pointed out that any person may present credible evidence challenging an individual's status as socially or economically disadvantaged. *Id.* The court said that Rothe's argument is incorrect because it is based on the

misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the “narrowness” of the narrow-tailoring mandate relates to the relationship between the government’s interest and the remedy it prescribes. *Id.*

**Conclusion.** The court concluded that plaintiff’s facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government’s racial classification, the purported need for remedial action is supported by strong and un rebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at \*20.

Plaintiff Rothe appealed the decision of the district court to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals affirmed the decision of the district court on other grounds. See 836 F.3d. 57, 2016 WL 4719049 (D.C. Cir. September 9, 2016).

**4. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C. Aug. 15, 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014)**

Plaintiff, the DynaLantic Corporation (“DynaLantic”), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense (“DoD”), the Department of the Navy, and the Small Business Administration (“SBA”) challenging the constitutionality of Section 8(a) of the Small Business Act (the “Section 8(a) program”), on its face and as applied: namely, the SBA’s determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at \*1, \*37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id.* at \*1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD’s use of the program, which is reserved for “socially and economically disadvantaged individuals,” constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id.* at \*1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic’s specific industry, defined as the military simulation and training industry. *Id.*

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

**The Section 8(a) Program.** The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. “Socially disadvantaged” individuals are persons who have been “subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities.” 13 CFR § 124.103(a); *see*

*also* 15 U.S.C. § 637(a)(5). “Economically disadvantaged” individuals are those socially disadvantaged individuals “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.” 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.*, 2012WL 3356813 at \*2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian-Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id.* at \*2 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than \$250,000 upon entering the program, and a showing that the individual’s income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at \*3; *see* 13 CFR § 124.104(c)(2).

Congress has established an “aspirational goal” for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of 5 percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at \*3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id.* Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id.* DoD has established a goal of awarding approximately 2 percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at \*3. The Section 8(a) program allows the SBA, “whenever it determines such action is necessary and appropriate,” to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a “sole source” basis (i.e., reserved to one firm) or on a “competitive” basis (i.e., between two or more Section 8(a) firms). *DynaLantic*, at \*3-4; 13 CFR 124.501(b).

**Plaintiff’s business and the simulation and training industry.** *DynaLantic* performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic* at \*5.

**Compelling interest.** The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *DynaLantic*, at \*9. First, the government must “articulate a legislative goal that is properly considered a compelling government interest.” *Id. quoting Sherbrooke Turf v. Minn. DOT*, 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, “the government must demonstrate ‘a strong basis in evidence’ supporting its conclusion that race-based remedial action was necessary to further that interest.” *DynaLantic*, at \*9, *quoting Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to DynaLantic to present “credible, particularized evidence” to rebut the government’s “initial showing of a compelling interest.” *DynaLantic*, at \*10 quoting *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at \*10, citing *Rothe Dev. Corp. v. U.S. Dep’t of Def.* (“*Rothe III*”), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a “passive participant.” *DynaLantic*, at \*11. The Court rejected *DynaLantic*’s argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at \*11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at \*11, citing *Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at \*11 quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1995), and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of “discriminatory barriers” to “fair competition between minority and nonminority 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 nonminority 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 nonminority-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 nonminority 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 nonminority may qualify as socially and economically disadvantaged. *DynaLantic*, at \*44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at \*45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at \*46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than 5 percent of contract dollars, are facially constitutional. *DynaLantic*, at \*46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to 2 to 5 percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at \*47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at \*48. The Court concluded that the government is not required to eliminate the burden on nonminorities 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 nonminority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

**Conclusion.** The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at \*51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

**Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court.** A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the sum of \$1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

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

*DynaLantic Corp.* involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id.* Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement, but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

## APPENDIX C.

### Contract Data Collection

Keen Independent compiled data about ADOT and local agency contracts and the firms used as prime contractors and subcontractors on those contracts. Keen Independent sought sources of data that consistently included information about prime contractors and subcontractors on both federally (FHWA, FAA and FTA) and state-funded contracts, regardless of firm ownership or DBE status. The study team compiled data on USDOT-funded and state-funded construction, engineering and other transportation-related contracts. Data collection encompasses contracts awarded by local agencies receiving FHWA, FAA, FTA or state funds through the Local Public Agency Program.

Appendix C describes the study team's utilization data collection processes in six parts:

- A. ADOT contract and agreement data;
- B. Local Public Agency (LPA) Program contract data;
- C. ADOT bid and proposal data;
- D. Characteristics of utilized firms and bidders;
- E. ADOT review; and
- F. Data limitations.

#### A. ADOT Contract Data

Keen Independent collected data on transportation-related construction and engineering contracts that ADOT awarded during the October 1, 2013 through September 31, 2018 study period.

ADOT Business Engagement and Compliance Office databases were the primary sources of prime and subcontract information for FHWA-, FAA-, FTA-funded and state-funded construction and engineering contracts. These sources identified dollars going to prime contractors and subcontractors for each project.

**B2GNow.** ADOT Business Engagement and Compliance Office (BECO) uses B2GNow to manage and track awarded contracts. ADOT BECO provided access to B2GNow to the study team to download FHWA-, FAA-, FTA-funded and state-funded construction and engineering prime contracts and subcontracts awarded from October 1, 2013 through September 31, 2018.

Fields in the B2GNow database include:

- Contract number;
- Contract title;
- Contract value;
- Goal;
- Work description;
- Start date;
- Vendor name;
- Vendor address;
- Vendor type (prime/subcontractor);
- County;
- District;
- Federal fund indicator (FHWA, FAA, FTA); and
- State indicator.

**List of FAST contracts.** ADOT BECO supplied an export from its Field Office Automation System (FAST) contract system to provide a list of FHWA-funded and state-funded construction prime contracts and subcontracts within the study period. The study team were able to identify the following information, when available:

- Contract number;
- Contract title;
- Contract award date;
- Total contract amount;
- Type of work;
- Federal fund indicator;
- Prime name;
- Subcontractor name;
- Subcontractor work; and
- Vendor address.

**ADOT's Engineering Consultant Section (ECS).** ADOT administers consulting work through consultant contracts and “task orders.” Keen Independent was provided different electronic spreadsheets for consulting and other contracts that had activity (awards, amendments or task orders) during the October 2013 through September 2018 study period.

The electronic spreadsheets included information for FHWA-funded and state-funded engineering prime contracts and some subcontractor information within the study period. The Keen Independent study team compiled missing subcontractor information directly from ADOT BECO offices. In addition, Keen Independent compared the ECS contract data with the B2GNow contract data and worked with ADOT BECO to obtain any further clarification.

The study team was able to identify the following information, when available:

- Contract number;
- Prime name;
- Subconsultant name;
- Contract description;
- Work type;
- Notice to proceed date;
- Firm budget;
- Original budget;
- Total payments;
- Subconsultant budget;
- Subconsultant skill type;
- Consultant firm address;
- Description of work/ skill type; and
- DBE goal.

**ADOT Procurement Section projects.** The study team collected information on transportation-related Procurement contracts. ADOT's Procurement Section uses purchase orders for supplies and other procurements as well as certain contracts for consulting and maintenance services. Keen Independent identified prime and subcontractors from a Contracts Database provided by ADOT's Procurement Section. Procurement provided a spreadsheet that had activity (cumulative contract and amount paid) during the October 2013 through September 2018 study period.

Contracts in this list also included ADOT's Multimodal Planning Division (MPD) contracts, MPD projects and, when applicable, indicated federal funding sources and amounts. Keen Independent reviewed these data to develop a refined list of contracts.

## **B. Local Public Agency (LPA) Program Contract Data**

Under its Stewardship Agreement with FHWA, ADOT administers FHWA funding that goes to local agencies throughout the State. ADOT established the Local Public Agency (LPA) Section to administer these local agency contracts. Sometimes ADOT awards those contracts on behalf of the local agencies. In other instances, cities, counties, regional transportation agencies, other local agencies and tribal entities award transportation contracts and ADOT reimburses the local agencies using FHWA or state funds.<sup>1</sup>

When FHWA funds are involved, FHWA requires local agencies to comply with federal requirements including implementation of the Federal DBE Program.

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<sup>1</sup> Sometimes LPA funds go to reimburse local agencies for work performed with their own forces. Such work is not included in the study.



ADOT funds some of the local agency projects solely using state funds. In addition to any federal requirements, Arizona state law governs local government public works contracting.

**B2GNow.** ADOT BECO provided access to B2GNow to the study team to download LPA prime contracts and subcontracts awarded from October 1, 2013 through September 31, 2018. The study team was able to identify the following information, when available:

- Contract number;
- Contract title;
- Contract value;
- Goal;
- Assigned department (LPA);
- Work description;
- Start date;
- Vendor name;
- Vendor address; and
- Vendor type (prime/subcontractor).

### **C. ADOT Bid and Proposal Data**

To complete case studies of ADOT's contracting processes, Keen Independent analyzed firms bidding and proposing on a sample of ADOT construction contracts and engineering-related agreements.

ADOT provided bidder information for construction contracts from June 2016 through April 2019. The data consisted of 517 distinct project numbers with 1,857 submissions.

### **D. Characteristics of Utilized Firms and Bidders**

For each firm identified as working on an ADOT or local agency contract, Keen Independent attempted to collect business characteristics including the race, ethnicity and gender of the business owner. Keen Independent also collected information about bidders and proposers (including those not receiving work).

Keen Independent compiled company information from multiple sources. ADOT provided contact and other information on businesses that they utilized as prime contractors and subcontractors. The study team obtained additional information about utilized firms from Dun & Bradstreet and other sources.

Collecting data on the race, ethnicity and gender ownership of utilized firms was key to building the database on firm characteristics. Sources of information to determine whether firms were owned by minorities or women (including race/ethnicity) and whether MBE/WBEs were DBE-certified, included:

- Study team availability survey with firm owners and managers;
- Additional Keen Independent telephone interviews with firm owners and managers;
- Information from the 2019 AZ UTRACS database;
- ADOT data on firms certified as DBEs in the past (whether or not they were currently certified);
- Small Business Administration Dynamic Small Business Database, which pertains to businesses registered in the federal System for Award Management (SAM);
- Other review of firm information (i.e., information about ownership on firm websites);
- Information from Dun & Bradstreet; and
- ADOT staff review.

Keen Independent also determined which MBE/WBEs receiving ADOT contracts and subcontracts should be counted as “potential DBEs” in the utilization analysis. Potential DBEs are minority- and women-owned firms that are not certified as DBEs but appear that they could be. Keen Independent used information from the availability analysis to perform this assessment if a company completed an availability survey (see Chapter 5). For utilized firms that did not complete an availability survey, Keen Independent counted a firm as a potential DBE if Dun & Bradstreet’s revenue information for the firm indicated that it was below the revenue limits for DBE certification and the firm had not graduated from the DBE program or had their certification application denied.

## **E. ADOT Review**

ADOT reviewed Keen Independent contract data during several stages of the study process. The study team met with ADOT staff multiple times to review data collection, information the study team gathered, sample data for specific contracts and preliminary results.

Keen Independent reviewed and incorporated ADOT feedback throughout the study process.

## **F. Data Limitations**

Two limitations concerning contract data collection are worth noting.

- ADOT maintains comprehensive records about its prime contracts and most areas of subcontracting for its larger construction contracts. Even so, ADOT commitment and payment data for truckers, suppliers and certain other subcontract disciplines may not be complete.
- In some instances, like Procurement and ECS contracts, subcontractors are not known at the time the contract is awarded. This means that data are not always complete in the contract databases.

## **APPENDIX D.**

### **General Approach to Availability Analysis**

The study team used an approach similar to a “custom census” to compile data on MBEs, WBEs and majority-owned firms available for ADOT contracts and developed dollar-weighted estimates of MBE/WBE availability based on analysis of individual ADOT transportation-related construction and engineering prime contracts and subcontracts. Appendix D further explains the availability methodology and results in five parts:

- A. General approach to collecting availability information;
- B. Development of the survey instrument;
- C. Execution of availability surveys;
- D. Additional considerations related to measuring availability; and
- E. Availability survey instrument.

#### **A. General Approach to Collecting Availability Information**

Keen Independent collected information from firms about their availability for ADOT and local government contracts through telephone and online surveys.

**Listings.** Firms contacted in the transportation-related availability surveys came from two sources:

- Company representatives who had previously identified themselves to ADOT as interested in learning about future work by being prequalified for certain types of work or being on bidding lists.
- Businesses that Dun & Bradstreet (D&B) identified in certain study-related subindustries in Arizona (D&B Hoovers’ business establishment database).

The availability analysis focused on companies in Arizona performing types of work most relevant to transportation-related construction and engineering contracts. As such, Keen Independent did not include all of the listings in the bidder/vendor lists or D&B database in the availability surveys, as described below.

The following four sources of vendor information were combined to create the interested vendors list.

- **AZUTRACS Vendors List** — ADOT provided Keen Independent with a list of all firms with accounts in their AZUTRACS system. Firms interested in doing work for ADOT must have an active account on AZUTRACS to bid on projects.
- **Electronic Contract Management System (“eCMS”) Prequalified Firms List** — ADOT’s Engineering Consultants Section supplied a list of firms that are prequalified to do engineering work for ADOT.
- **Procurement Bidders List** — ADOT’s Procurement Section supplied a list of bidders with their list of contracts in the study period. Firms in this list had bid on one or more of the projects in the contract database.
- **AZUTRACS Bidders and Proposers List** — AZUTRACS also tracks bidders and proposers on projects they advertise. ADOT supplied Keen Independent with a list of all bidders and proposers on contracts awarded in the project study period.

Keen Independent attempted to exclude any listings for government agencies or not-for-profit organizations. (Not all were excluded on the list, but after survey respondents indicated that the organization was not a business those organizations were then excluded.)

**Dun & Bradstreet Hoovers database.** There might be other firms available for ADOT work that do not appear on ADOT lists. Therefore, Keen Independent supplemented the firms on the ADOT lists by acquiring Dun & Bradstreet data for firms in Arizona doing business in relevant subindustries.

Dun & Bradstreet Hoovers Analytics maintains the largest commercially available database of U.S. businesses. The study team used D&B listings to supplement the companies identified in ADOT’s databases of bidders, vendors and prequalified firms.

Keen Independent determined the types of work involved in ADOT contract elements by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. D&B classifies types of work by 8-digit work specialization codes.<sup>1</sup> Figure D-1 identifies the work specialization codes the study team determined were the most related to the study transportation-related contract dollars.

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<sup>1</sup> D&B has developed 8-digit industry codes to provide more precise definitions of firm specializations than the 4-digit SIC codes or the NAICS codes that the federal government has prepared.

Keen Independent obtained a list of firms from the D&B Hoovers database within relevant work codes that had locations within Arizona. D&B provided phone numbers for these businesses.

**Total listings.** Keen Independent attempted to consolidate information when a firm had multiple listings across these data sources. After consolidation, the data sources provided 13,449 unique listings for transportation-related firms.

Keen Independent did not draw a sample of those firms for the availability analysis; rather, the study team attempted to contact each business identified through telephone surveys and other methods. Some courts have referred to similar approaches to gathering availability data as a “custom census.”

**Telephone surveys.** Keen Independent retained Customer Research International (CRI) to conduct telephone surveys with listed businesses. After receiving the list described above, CRI used the following steps to complete telephone surveys with business establishments:

- Firms were contacted by telephone. Up to six phone calls were made at different times of day and different days of the week to attempt to reach each company.
- Interviewers indicated that the calls to transportation-related firms were made on behalf of the Arizona Department of Transportation to firms providing construction, engineering, planning and other services related to transportation contracts.
- Some firms indicated in the phone calls that they did not work in the transportation contracting industry or had no interest in ADOT work, so no further survey was necessary. (Such surveys were treated as complete at that point.)

**Other avenues to complete a survey.** Even if a company was not able to complete a survey on the telephone, business owners could request a fax or fillable PDF version of the survey, and business owners could also complete the survey online via a link provided by CRI. Additionally, ADOT posted PDFs of the survey on the disparity study website, and any business owner could respond to the survey, regardless of whether they were on the initial business list.

Figure D-1.

D&amp;B 8-digit codes for transportation-related availability list source

Construction	
<b>General road construction and widening</b>	
16110000	Highway and street construction
16110201	Airport runway construction
16110207	Gravel or dirt road construction
16119900	Highway and street construction, nec
16119901	General contractor, highway and street construction
16119902	Highway and street maintenance
<b>Bridge work</b>	
16220000	Bridge, tunnel, and elevated highway construction
16229900	Bridge, tunnel, and elevated highway, nec
16229901	Bridge construction
16229902	Highway construction, elevated
16229903	Tunnel construction
<b>Electrical work</b>	
17310000	Electrical work including lighting and signals
17319903	General electrical contractor
17319904	Lighting contractor
<b>Steel work</b>	
17910000	Structural steel erection
17919900	Structural steel erection, nec
17919905	Iron work, structural
<b>Trucking and hauling</b>	
42120000	Trucking and hauling
42120200	Liquid transfer services
42120201	Liquid haulage, local
42120202	Petroleum haulage, local
42129904	Drying, local: without storage
42129905	Dump truck haulage
42129908	Heavy machinery transport, local
42129909	Light haulage and cartage, local
42129912	Steel hauling, local
42130000	Trucking, except local
42139902	Building materials transport
42139904	Heavy hauling, nec
42139905	Heavy machinery transport
<b>Striping or pavement marking</b>	
16119903	Highway reflector installation
17210303	Striping or pavement marking
<b>Wrecking and demolition</b>	
17950000	Wrecking and demolition work
17959901	Concrete breaking for streets and highways
17959902	Demolition, buildings and other structures
<b>Landscaping and related work</b>	
07820200	Landscaping and related work
07820207	Sodding contractor
07820210	Turf installation services, except artificial
07829903	Landscape contractors
07830101	Planting services, ornamental bush
07830102	Planting services, ornamental tree
<b>Installation of guardrails, fencing or signs</b>	
16110100	Guardrail, signs or fencing
16110101	Guardrail construction, highways
16110102	Highway and street sign installation
17999912	Fence construction
17999929	Sign installation and maintenance
<b>Concrete pumping</b>	
17719901	Concrete pumping
<b>Concrete cutting</b>	
17719902	Concrete cutting
<b>Portland cement concrete paving</b>	
16110202	Concrete construction, roads, highways, sidewalks, etc.
<b>Concrete flatwork (sidewalk, curb and gutter)</b>	
16110206	Sidewalk construction
17710200	Concrete flatwork (sidewalk, curb and gutter)
17710201	Curb construction
17710202	Sidewalk contractor
<b>Drilling and foundations</b>	
17410100	Foundation and retaining wall construction
17719904	Foundation and footing contractor
17990901	Boring for building construction
17999906	Core drilling and cutting
17999908	Diamond drilling and sawing
<b>Asphalt paving</b>	
16110200	Surfacing and paving
16110204	Asphalt paving
17710301	Blacktop (asphalt) work
<b>Pavement milling</b>	
16110205	Resurfacing contractor
<b>Structural concrete work</b>	
17919902	Concrete reinforcement, placing of
17919907	Precast concrete structural framing or panels, placing
<b>Painting for road or bridge projects</b>	
17210302	Painting for road or bridge projects
<b>Temporary traffic control</b>	
73899921	Temporary traffic control
<b>Construction remediation and cleanup</b>	
17990503	Construction site cleanup
17990800	Construction remediation and cleanup
17990801	Asbestos removal and encapsulation
49590102	Sweeping service: road, airport, parking lot, etc.
49590300	Toxic or hazardous waste cleanup
49590301	Oil spill cleanup
49590302	Environmental cleanup services
<b>Excavation, site prep, grading and drainage</b>	
16110203	Grading
16290105	Drainage system construction
16290400	Land preparation construction
16290401	Land leveling
16290402	Land reclamation
16290403	Rock removal
16290404	Timber removal
16299901	Blasting contractor, except building demolition
16299902	Earthmoving contractor
16299903	Land clearing contractor
16299904	Pile driving contractor
16299906	Trenching contractor
17940000	Excavation work
17949901	Excavation and grading, building construction
17990900	Building site preparation
<b>Underground utilities</b>	
16230000	Water, sewer and utility lines
16230300	Water and sewer line construction
16230302	Sewer line construction
16230303	Water main construction
16239902	Manhole construction
16239903	Pipe laying construction
16239904	Pipeline construction
16239906	Underground utilities contractor

Figure D-1.

D&amp;B 8-digit codes for transportation-related availability list source (cont.)

Professional services, other services and goods	
<b>Architecture and engineering</b>	
87110000	Engineering services
87110400	Construction and civil engineering
87110402	Civil engineering
87110404	Structural engineering
87119903	Consulting engineer
87119904	Design engineering
87119909	Professional engineer
87139901	Photogrammetric engineering
<b>Soils and materials testing</b>	
07119906	Soil testing services
73890200	Inspection and testing services
87340000	Testing laboratories
87349909	Soil analysis
89990700	Earth science services
89990701	Geological consultant
89990702	Geophysical consultant
<b>Construction management</b>	
15429902	Design and erection, combined: non-residential
87419902	Construction management
87420402	Construction project management consultant
<b>Transportation planning</b>	
87420410	Transportation planning
87480204	Traffic consultant
<b>Environmental consulting</b>	
87310302	Environmental research
87330201	Archeological expeditions
87489905	Environmental consulting
<b>Surveying and mapping</b>	
73890800	Mapmaking services
73890801	Mapmaking or drafting, including aerial
73890802	Photogrammetric mapping
87130000	Surveying services
87139900	Surveying services, nec
87139902	Surveying technicians
<b>Transit services</b>	
41110000	Local transportation services
41110100	Bus transportation
41110101	Bus line operations
41110102	Commuter bus operation
41119900	Local and suburban transit, nec
41310000	Intercity and rural bus transportation
41319900	Intercity and rural bus transportation, nec
41319901	Intercity bus line
41319902	Intercity highway transport, special service
<b>Aggregate materials supply</b>	
14420000	Construction sand and gravel
14420200	Gravel and pebble mining
14420201	Gravel mining
50329901	Aggregate materials supply
50329905	Gravel
50329908	Stone, crushed or broken
52110506	Sand and gravel
<b>Asphalt, concrete or other paving materials</b>	
29110501	Asphalt or asphaltic materials, made in refineries
29110505	Road materials, bituminous
29110506	Road oils
29110507	Tar or residuum
29510000	Asphalt paving mixtures and blocks
29510200	Paving mixtures
29510201	Asphalt/Asphaltic pvng mixtures (not from ref.)
29510202	Coal tar paving materials (not from refineries)
29510203	Concrete, asphaltic (not from refineries)
29510204	Concrete, bituminous
29510206	Road materials, bituminous (not from ref.)
29520000	Asphalt felts and coatings
32419903	Portland cement
32710000	Concrete block and brick
32720000	Concrete products, nec
32720711	Piling, prefabricated concrete
32729903	Paving materials, prefabricated concrete
32730000	Ready-Mixed concrete
32810600	Curbing, paving and walkway stone
50320100	Paving materials
50320101	Asphalt mixture
50320102	Paving mixtures
50320504	Asphalt, concrete or other paving materials
50329904	Cement
52110502	Cement
<b>Petroleum and fuel</b>	
51710000	Petroleum bulk stations and terminals
51720000	Petroleum product wholesalers, except bulk stations
51720200	Engine fuels and oils
51720202	Diesel fuel
51720203	Gasoline
51720205	Service station supplies, petroleum
51729900	Petroleum products
59830000	Fuel oil dealers
59890000	Fuel dealers, nec

## B. Development of the Survey Instrument

Keen Independent developed the survey instrument and obtained ADOT staff review before performing the surveys. The final survey instrument is presented at the end of this appendix.

The availability survey included fourteen sections. The study team did not know the race, ethnicity or gender of the business owner when calling a business establishment. Obtaining that information was a key component of the survey. Areas of survey questions included:

- **Identification of purpose.** The surveys began by identifying ADOT as the survey sponsor and describing the purpose of the study (i.e., “compiling a list of companies interested in working on road and highway, transit or aviation projects”).
- **Verification of correct business name.** CRI confirmed that the business reached was in fact the business sought out.
- **Contact information.** CRI collected complete contact information for the establishment and the individual who completed the survey.
- **Verification of work related to transportation.** The interviewer asked whether the organization does work or provides materials related to construction, maintenance or design on transportation-related projects.
- **Verification of for-profit business status.** The survey then asked whether the organization was a for-profit business as opposed to a government or not-for-profit entity. Interviewers continued the survey with businesses that responded “yes” to that question.
- **Identification of main lines of business.** Businesses then chose from a list of work types that their firm performed in categories of construction-related work, engineering-related work and supply activities. In addition to choosing all areas that the firms did work, the study team asked businesses to briefly describe their main line of business as an open-ended question.
- **Sole location or multiple locations.** The interviewer asked business owners or managers if their businesses had other locations and whether their establishments were affiliates or subsidiaries of other firms. (Keen Independent combined responses from multiple locations into a single record for multi-establishment firms.)
- **Past bids or work with government agencies and private sector organizations.** The survey then asked about bids and work on past government and private sector contracts. The questions were asked in connection with both prime contracts and subcontracts.
- **Qualifications and interest in future transportation work.** The interviewer asked about businesses’ qualifications and interest in future work with ADOT and other government agencies in connection with both prime contracts and subcontracts.



- **Geographic areas.** Interviewees were asked whether they could do work in three geographic areas in Arizona: central Arizona (such as in the Maricopa-Pinal County area), southern Arizona (such as the Tucson, Yuma or Wilcox areas) and northern Arizona (the rest of the state, other than the areas already mentioned).
- **Largest contracts.** The study team asked businesses to identify the value of the largest transportation-related contract or subcontract on which they had bid on or had been awarded in Arizona during the past six years.
- **Ownership.** Businesses were asked if at least 51 percent of the firm was owned and controlled by women and/or minorities. If businesses indicated that they were minority-owned, they were also asked about the race and ethnicity of owners. The study team reviewed reported ownership against other available data sources such as DBE directories.
- **Business background.** The study team asked businesses to identify the approximate year in which they were established. The interviewer asked several questions about the size of businesses in terms of their revenues and number of employees. For businesses with multiple locations, this section also asked about their revenues and number of employees across all locations.
- **Potential barriers in the marketplace.** Establishments were asked a series of questions concerning general insights about the marketplace and ADOT contracting practices including obtaining loans, bonding and insurance. The survey also included an open-ended question which asked for respondents' thoughts about barriers to starting a business or achieving success in Arizona. In addition, the survey included a question asking whether interviewees would be willing to participate in a follow-up survey about marketplace conditions.

### C. Execution of Availability Surveys

Keen Independent held planning and training sessions with CRI as part of the launch of the availability surveys. CRI began conducting full availability surveys for transportation construction and engineering-related firms in July of 2019 and completed the surveys in early September.

To minimize non-response, CRI made at least six attempts at different times of day and on different days of the week to reach each business establishment. CRI identified and attempted to interview an available company representative such as the owner, manager or other key official who could provide accurate and detailed responses to the questions included in the survey.

**Establishments that the study team successfully contacted.** Figures D-2 and D-3 presents the dispositions of the businesses the study team attempted to contact for availability surveys.

Note that the following analysis is based on business counts after Keen Independent removed duplicate listings (beginning with a list of 13,449 unique businesses).

**Non-working or wrong phone numbers.** Some of the business listings that the study team attempted to contact were:

- Non-working phone numbers (1,973); or
- Wrong numbers for the desired businesses (138).

Some non-working phone and wrong numbers reflected business establishments that closed, were sold or changed their names. Those phone numbers could also have changed between the time that a source listed them and the time that the study team attempted to contact them.

**Figure D-2.**  
Disposition of  
attempts to survey  
business  
establishments

Note:

Study team made at least  
six attempts to complete  
an interview with each  
establishment.

Source:

Keen Independent from  
2019 Availability Surveys.

	Number of firms	Percent of business listings
<b>Beginning list (unique businesses)</b>	<b>13,449</b>	
Less non-working phone numbers	1,973	
Less wrong number	138	
<b>Firms with working phone numbers</b>	<b>11,338</b>	<b>100 %</b>
Less no answer	5,687	
Less could not reach responsible staff member	347	
Less could not continue in English or Spanish	82	
Less unreturned fax/email	351	
Less said they already completed the survey but didn't	12	
<b>Firms successfully contacted</b>	<b>4,859</b>	<b>43 %</b>

**Working phone numbers.** As shown in Figure D-2, there were 11,338 businesses with working phone numbers that the study team attempted to contact. For various reasons, the study team was unable to contact some of those businesses:

- **No answer.** Some businesses could not be reached after at least six attempts at different times of the day and on different days of the week (5,687 establishments).
- **Could not reach responsible staff member.** For a small number of businesses (347), a responsible staff person could not be reached to complete the survey after repeated attempts.
- **Could not complete the survey in English or Spanish.** Businesses with language barriers during an initial call were re-contacted by a Spanish-speaking CRI interviewer, as appropriate. The interviewee was asked if there was anyone available to perform the survey in English. If not, CRI completed a shortened version of the survey with the interviewee. If it appeared that the firm performed transportation related work, Keen Independent contacted the company and asked if they would like to complete an email or faxed questionnaire (in English), which was then sent. This approach appeared to eliminate some of the potential language barriers to participating in the availability surveys. Language barriers presented a difficulty in conducting the survey for 82 companies, about 0.7 percent of the businesses with working phone numbers.

- **Unreturned fax or email surveys.** The study team sent email invitations to those who requested a link to the online survey or requested to do the survey via fax or email. There were 351 businesses that requested such surveys but did not return them. After sending the survey via fax or email, the study team later followed up with each of these firms to remind them to complete the survey.
- **Respondent indicated that they had already completed an online survey.** There were 12 respondents who said that they had already completed an online survey that were not found within the online survey responses.

After taking those unsuccessful attempts into account, the study team was able to successfully contact 4,859 businesses, or 43 percent of those with working phone numbers. This response rate was less than the 2015 study, but there is no indication that this affected the relative number of MBE/WBEs compared with the total number of respondents. (This issue is addressed later in this appendix.)

**Establishments included in the availability database.** Figure D-4 presents the disposition of the 4,859 businesses the study team successfully contacted and how that number resulted in the 996 businesses the study team included in the availability database.

Figure D-3.  
Disposition of  
successfully contacted  
businesses

Source:  
Keen Independent from  
2019 Availability Surveys.

	Number of firms
<b>Firms successfully contacted</b>	<b>4,859</b>
Less business not interested	2,270
Less no longer in business	323
Less don't do related work	781
<b>Firms that completed interviews about business characteristics</b>	<b>1,485</b>
Less not a for-profit business	326
Less firms with no location in the study area	163
<b>Firms included in availability database</b>	<b>996</b>

**Establishments not interested in discussing availability for ADOT work.** Of the 4,859 businesses that the study team successfully contacted, 2,270 were not interested in discussing their availability for ADOT work, or reported they were not qualified to work with ADOT as a prime contractor or subcontractor. In Keen Independent's experience, those types of responses are often firms that do not perform relevant types of work. Another 323 respondents indicated that their companies were no longer in business, and 781 firms were found to not perform work related to ADOT contracts.

**Businesses included in the availability database.** Many firms responding to availability surveys were not included in the final availability database because they indicated that they were not a for-profit business or did not have a location within the study area.

- Of the completed surveys, 326 indicated that they were not a for-profit business (including non-profits or government agencies). Surveys ended when respondents reported that their establishments were not for-profit businesses.
- There were 163 firms surveyed that did not have a location within the study area (Keen Independent attempted to find an Arizona location for each of these firms but was unsuccessful).

After those final screening steps, the survey effort produced a database of 996 businesses potentially available for ADOT transportation contracting work.

**Coding responses from multi-location businesses.** There were multiple responses from some firms. Responses from different locations of the same business were combined into a single, summary data record after reviewing the multiple responses. Each unique business was only counted once in the tables above.

#### **D. Additional Considerations Related to Measuring Availability**

The study team made several additional considerations related to its approach to measuring availability, particularly as they related to ADOT's implementation of the Federal DBE program.

**Did not survey all businesses available for any type of ADOT work.** The purpose of the availability surveys was to provide precise, unbiased estimates of the percentage of MBE/WBEs potentially available for ADOT transportation-related work. The research appropriately focused on firms in subindustries related to transportation contracting in the relevant geographic area for ADOT contracts. Subindustries that comprised a very small portion of ADOT highway-related work were not included and firms solely located outside Arizona were not added to the survey list.

Also, not all firms on the list of businesses in the state completed surveys, even after repeated attempts to contact them. For all of the above reasons, the availability analysis did not provide a comprehensive listing of every business that could be available for all types of ADOT contracts and should not be used in that way.

There were some firms receiving ADOT work that did not complete an availability survey. Further research indicated that some were out of business by the time that the survey was conducted or might have been no longer interested in ADOT work. Keen Independent's analysis of MBE/WBE and majority-owned firms receiving ADOT work found that MBE/WBEs were about as likely to have completed an availability survey as majority-owned firms, which provides confidence in survey results regarding the *relative* availability of minority- and women-owned firms.

Federal courts have approved similar approaches to measuring availability that Keen Independent used in this study. The United States Department of Transportation's (USDOT's) "Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program" also recommends a similar approach to measuring availability for agencies implementing the Federal DBE Program.<sup>2</sup>

**Not using a "headcount" based solely on ADOT lists.** USDOT guidance for determining MBE/WBE availability recommends dividing the number of businesses in an agency's DBE 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 MBE/WBEs for an agency's prime contracts and subcontracts.

Keen Independent used ADOT lists that included firms that expressed interest in ADOT work, but included other firms potentially available for ADOT contracts as well. This helps capture firms that might have been discouraged from pursuing ADOT work and would not appear on ADOT lists.

Keen Independent's approach to measuring availability used in this study also incorporates several layers of refinement to a simple head count approach. For example, the surveys provide data on businesses' qualifications, size of contracts they bid on and interest in ADOT work, which allowed the study team to take a more refined approach to measuring availability.

**Using D&B lists.** Keen Independent supplemented business lists obtained from ADOT with Dun & Bradstreet business listings for Arizona. Note that D&B does not require firms to pay a fee to be included in its listings — it is completely free to listed firms. 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 Arizona due to the following reasons:

- There can be a lag between formation of a new business and inclusion in D&B listings, meaning that the newest businesses may be underrepresented in the sample frame.
- 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 women-owned, which again suggests that MBE/WBEs might be underrepresented in the final availability database.<sup>3</sup>
- Some businesses providing transportation construction or engineering-related work might not be classified as such in the D&B data.

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<sup>2</sup> Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program. Retrieved from <http://www.osdbu.dot.gov/dbeprogram/tips.cfm>

<sup>3</sup> Michael McManus. 2016. Minority Business Ownership: Data from the 2012 Survey of Business Owners. U.S. Small Business Administration. <https://www.sba.gov/sites/default/files/advocacy/Minority-Owned-Businesses-in-the-US.pdf> (accessed November 20, 2019).

Because Keen Independent used several ADOT data sources of business listings for the availability analysis as well as D&B lists, the final survey list captures some firms not included in the D&B data. (The study team estimates that about one-third of the completed surveys were firms not among the businesses on the list purchases from D&B, although they could still be in the D&B data under a different line of work.)

**Selection of specific subindustries.** Keen Independent identified specific subindustries when compiling business listings from Dun & Bradstreet. D&B provides highly specialized, 8-digit codes to assist in selecting firms within specific specializations. There are limitations when choosing specific D&B work specialization codes to define sets of establishments to be surveyed, which leave some businesses off the contact list. However, Keen Independent's use of additional ADOT data (AZUTRACS Vendors List, eCMS Prequalified Firms List, etc.) for Arizona businesses mitigates this potential concern.

**Large number of companies reporting that they do not perform highway-related work or were not interested in discussing ADOT work.** Many firms contacted in the availability surveys indicated that they did not perform related work or were otherwise not interested in ADOT work. The number of responses fitting these categories reflects the fact that Keen Independent was necessarily broad when developing its initial lists.

For example, Dun & Bradstreet does not have a subindustry code that identifies the subset of electrical firms or trucking firms that perform highway-related work. Therefore, Keen Independent acquired a general list of electrical firms (code 17310000) and local trucking firms (code 42120000), and through surveys identified which firms would perform highway or other transportation work. Most did not. Most of the construction and engineering contracting firms indicating that they were not interested in discussing ADOT work were in electrical, plumbing, trucking, nonresidential construction and engineering services.

There were a few companies that had actually performed ADOT contracts that responded in the availability survey that they were not interested in discussing their availability for ADOT work or did not perform relevant work. There was no indication that MBE/WBEs were underrepresented in the final availability database due to these types of responses.

**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;
- Differences in success reaching potential interviewees;
- Calling from outside Arizona; and
- Language barriers.

**Research sponsorship.** Interviewers introduced themselves by identifying ADOT as the survey sponsor because businesses may be less likely to answer somewhat sensitive business questions if the interviewer was unable to identify the sponsor.

**Differences in success reaching potential interviewees.** There might be differences in the success reaching firms in different types of work. However, Keen Independent concludes that any such differences did not lead to lower estimates of MBE/WBE availability than if the study team had been able to successfully reach all firms.

Businesses in highly mobile fields, such as trucking, are more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering firms). That assertion suggests that response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to determine overall MBE/WBE availability would lead to estimates that were biased in favor of businesses that could be easily contacted by email or telephone.

However, work specialization as a potential source of non-response bias in the availability analysis is minimized because the availability analysis examines businesses within particular work fields before determining an MBE/WBE availability figure. In other words, the potential for trucking firms to be less likely to complete a survey is less important because the number of MBE/WBE trucking firms is compared with the number of total trucking firms when calculating availability for trucking work.

Keen Independent examined whether minority- and women-owned firms were more difficult to reach in the telephone survey and found no indication that interviewers were less likely to complete telephone surveys with MBE/WBEs than majority-owned firms. The study team examined response rates based on MBE/WBE versus non-MBE/WBE business ownership data that Dun & Bradstreet had for firms in the list purchased from this source. Comparing MBE/WBE representation on the initial list from Dun & Bradstreet with MBE/WBE representation on the list of firms (from the D&B Hoovers source) that were successfully contacted, MBE/WBE transportation contracting firms were just slightly more likely to be successfully contacted than majority-owned firms. Based on D&B identification of ownership, MBE/WBE firms were 9.00 percent of the initial list and 9.58 percent of successfully surveyed firms. (Note that D&B records under-identify MBE/WBEs.)

Therefore, there is no indication that there were differences in response rates that materially affected the estimates of MBE/WBE availability in this study.

**Calling from outside Arizona.** It might have been obvious to people in Arizona that the phone calls were placed from outside the state and the interviewers were not from Arizona. This might have reduced the overall response rate. However, there was no indication that minority- and women-owned firms were less likely to respond to the calls than white male-owned businesses.

**Potential language barriers.** Because of the methods explained previously in this appendix, any language barriers were minimal. Study results do not appear to have been affected by conducting the principal portions of the availability survey in English.

**Response reliability.** Business owners and managers were asked questions that may be difficult to answer, including questions about revenues and employment.

Keen Independent explored the reliability of survey responses in a number of ways. For example:

- Keen Independent reviewed data from the availability surveys in light of information from other sources. This includes data on the race/ethnicity and gender of the owners of DBE-certified businesses which was compared with survey responses concerning business ownership.
- Keen Independent compared survey responses about the largest contracts that businesses won during the past six years with actual ADOT contract data.

A copy of the survey instrument for construction follows.



## E. Availability Survey Instrument

### ARIZONA DEPARTMENT OF TRANSPORTATION FAX/EMAIL SURVEY

If you have any questions, please contact:

**Tina Samartinean**  
**Contract Compliance and Training Officer**  
**Arizona Department of Transportation**  
**602-712-7415**  
**FSamartinean@azdot.gov**

You may also visit the study website at <http://www.azdot.gov/DBEDisparityStudy> to learn more.

Z5. What is the name of your business?

\_\_\_\_\_

Z8. Address of business (if multiple offices, choose an Arizona location if possible):

Street Address: \_\_\_\_\_

City (Required): \_\_\_\_\_

State (Required): \_\_\_\_\_

ZIP: \_\_\_\_\_

A1. Does your firm do any work related to road and highway, transit or aviation projects? This includes any construction, engineering and design, trucking, materials supply and other services related to highways, roads, bridges, transit systems, airports and related projects.

- 01=Yes
- 02=No
- 98=Don't know

A2. Is your firm a for-profit business (as opposed to a non-profit organization, a foundation or a government office)?

- 01=Yes
- 02=No
- 98=Don't know

A4. What would you say is the main line of business of your company?

---

A5. Is the address of your business, as provided earlier, the sole location for your business, or do you have offices in other locations?

- 01=Sole location
- 02=Have other locations
- 98=Don't know

A6. Is your company a subsidiary or affiliate of another firm?

- 01=Independent **[SKIP TO B1]**
- 02=Subsidiary or affiliate of another firm
- 98=Don't know **[SKIP TO B1]**

A7. What is the name of your parent company?

---

B1. Which of the following types of work does your firm perform related to construction?  
Select all that apply.

- 01 = General road construction and widening
- 02 = Bridge work
- 03 = Electrical work including lighting and signals
- 04 = Structural steel work
- 05 = Excavation, site prep, grading and drainage
- 06 = Wrecking and demolition
- 07 = Landscaping and related work
- 08 = Installation of guardrails, fencing or signs (traffic or highway signs)
- 09 = Asphalt paving
- 10 = Portland cement concrete paving
- 11 = Concrete flatwork, including sidewalk, curb and gutter
- 12 = Drilling and foundations
- 13 = Concrete pumping
- 14 = Concrete cutting
- 15 = Pavement milling
- 16 = Structural concrete work
- 17 = Painting for road or bridge projects
- 18 = Striping or pavement marking
- 19 = Temporary traffic control
- 20 = Trucking and hauling
- 21 = Underground utilities
- 22 = Construction remediation and clean-up
- 32 = Construction management
- 88=Other (Please specify) \_\_\_\_\_
- \_\_\_\_\_
- 98=Don't know

C1. During the past six years, has your company bid on or been awarded work on a public sector project?

- 01=Yes
- 02=No **[SKIP TO C3]**
- 98=Don't know **[SKIP TO C3]**

C2. For those bids or awards, which of the following describes your role? Please select all that apply.

- 01=Prime contractor
- 02=Subcontractor
- 03=Trucker or hauler
- 04= Supplier or manufacturer
- 98=Don't know

C3. Is your company qualified and interested in working with public sector agencies as a prime contractor?

- 01=Yes
- 02=No
- 98=Don't know

C4. Is your company qualified and interested in working with public sector agencies as a subcontractor?

- 01=Yes
- 02=No
- 98=Don't know

The next questions pertain to the geographical areas where your company can perform work or serve customers.

D1. Can your company do work in Central Arizona, such as in the Maricopa/Pinal County area?

- 01=Yes
- 02=No
- 98=Don't know

D2. Can your company do work in Southern Arizona, such as the Tucson, Yuma or Wilcox areas?

- 01=Yes
- 02=No
- 98=Don't know

D3. We are referring to the rest of the state as Northern Arizona. Can your company do work in Northern Arizona?

- 01=Yes
- 02=No
- 98=Don't know

The next question is about the firm's contract history.

E1. In rough dollar terms, in the past six years what was the largest contract or subcontract your company was awarded, bid on, or submitted quotes for in Arizona (public or private)?

- 01=\$100,000 or less
- 02=More than \$100,000 up to \$500,000
- 03=More than \$500,000 to \$1 million
- 04=More than \$1 million to \$2 million
- 05=More than \$2 million to \$5 million
- 06=More than \$5 million to \$10 million
- 07=More than \$10 million to \$20 million
- 08=More than \$20 million to \$100 million
- 09=More than \$100 million or more
- 97=None
- 98=Don't know

The next questions are about the ownership of the business.

F1. 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 your firm a woman-owned business?

- 01=Yes
- 02=No
- 98=Don't know

F2. A business is defined as minority-owned if more than half—that is, 51 percent or more—of the ownership and control is African American, Asian American, Hispanic American, Native American or another minority group. By this definition, is your firm a minority-owned business?

- 01=Yes
- 02=No **[SKIP TO G1]**
- 98=Don't know **[SKIP TO G1]**

F3. Would you say that the minority group ownership is mostly African American, Asian-Pacific American, Hispanic American, Native American, or Subcontinent Asian American?

- 01 = African American
- 02 = Asian-Pacific American
- 03 = Hispanic American or Portuguese American
- 04 = Native American
- 05 = Subcontinent Asian American
- 88 = Other (Please specify) \_\_\_\_\_
- 98 = Don't know

The next questions are about the background of the business.

G1. About what year was your firm established?

\_\_\_\_\_

The next set of questions pertains to annual averages for your company for the past three years (or just years in business if formed after 2016).

G3. About how many employees did you have working out of just your location, on average, over the past three years? (This includes employees who work at that location and those who work from that location.)

\_\_\_\_\_

G5. Think about the annual gross revenue of your company, considering just your location. Please estimate the annual average for the past three years.

- 01=Less than \$1 million
- 02=\$1 million to \$5 million
- 03=\$5.1 million to \$7.5 million
- 04=\$7.6 million to \$11 million
- 05=\$11.1 million to \$15 million
- 06=\$15.1 million to \$20.5 million
- 07=\$20.6 million to 24 million
- 08=\$24.1 million to \$27.5 million
- 09=\$27.6 million to \$36.5 million
- 10=\$36.6 million to \$38.5 million
- 11=More than \$38.5 million
- 98=Don't know

G6. **[SKIP IF YOUR FIRM DOES NOT HAVE OTHER LOCATIONS]**

About how many employees did you have, on average, for all of your locations over the past three years?

(Number of employees at all locations should not be fewer than at "just your location.")

\_\_\_\_\_

G7. **[SKIP IF YOUR FIRM DOES NOT HAVE OTHER LOCATIONS]**

Think about the annual gross revenue of your company, for all your locations. Please estimate the annual average for the past three years.

(Revenue at all locations should not be less than at just your location.)

- 01=Less than \$1 million
- 02=\$1 million to \$5 million
- 03=\$5.1 million to \$7.5 million
- 04=\$7.6 million to \$11 million
- 05=\$11.1 million to \$15 million
- 06=\$15.1 million to \$20.5 million
- 07=\$20.6 million to 24 million
- 08=\$24.1 million to \$27.5 million
- 09=\$27.6 million to \$36.5 million
- 10=\$36.6 million to \$38.5 million
- 11=More than \$38.5 million
- 98=Don't know

Finally, we're interested in whether your company has experienced barriers or difficulties associated with business start-up or expansion in your industry, or with obtaining work. Think about your experiences in the past six years as you answer these questions.

H1A. Has your company experienced any difficulties in obtaining lines of credit or loans?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1B. Has your company obtained or tried to obtain a bond for a project or contract?

- 01=Yes
- 02=No [SKIP TO H1D]
- 97=Does not apply [SKIP TO H1D]
- 98=Don't know [SKIP TO H1D]

H1C. Has your company had any difficulties obtaining bonds needed for a project or contract?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1D. Have you had any difficulty in being prequalified for work?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1E. Have any insurance requirements on projects presented a barrier to bidding?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1F. Has the large size of projects presented a barrier to bidding?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1G. Has your company experienced any difficulties learning about bid opportunities with ADOT?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1H. Has your company experienced any difficulties learning about bid opportunities with cities, counties and other local agencies in Arizona?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1I. Has your company experienced any difficulties learning about bid opportunities in the private sector in Arizona?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1J. Has your company experienced any difficulties learning about subcontracting opportunities in Arizona?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know



H1K. Has your company experienced any difficulties obtaining final approval on your work from inspectors or prime contractors?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1L. Has your company experienced any difficulties receiving payment from ADOT in a timely manner?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1M. Has your company experienced any difficulties receiving payment from prime contractors in a timely manner?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1N. Has your company experienced any difficulties receiving payment from other customers in a timely manner?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H2. Do any other barriers come to mind about starting and expanding a business or achieving success in your industry in Arizona?

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- 97=Nothing/None/No comments
- 98=Don't know

H3. Would you be willing to participate in a follow-up interview about any of these issues?

- 01=Yes
- 02=No
- 97=(Does not apply)
- 98=(Don't know)

Just a few last questions:

I1. What is your name?

---

I2. What is your position at the firm?

- |                |                             |
|----------------|-----------------------------|
| • 01=Owner     | • 07=Vice President         |
| • 02=Principal | • 08=Sales manager          |
| • 03=CEO       | • 09=Office manager         |
| • 04=President | • 10=Assistant to Owner/CEO |
| • 05=Manager   | • 88=Other (Please specify) |
| • 06=CFO       | <hr/>                       |

14. What mailing address should ADOT use to get any materials to you?

Street Address: \_\_\_\_\_

City: \_\_\_\_\_

State: \_\_\_\_\_

ZIP: \_\_\_\_\_

15. What fax number should they use to fax any materials to you?

\_\_\_\_\_

15\_PHONE. What phone number should they use to contact you?

\_\_\_\_\_

16. What e-mail address should they use to get any materials to you?

\_\_\_\_\_

Thank you for your time. This is very helpful for ADOT.

If you have any questions, please contact:

**Tina Samartinean**  
**Contract Compliance and Training Officer**  
**Arizona Department of Transportation**  
**602-712-7415**  
**FSamartinean@azdot.gov**

## APPENDIX E.

### Entry and Advancement in the Arizona Construction and Engineering Industries

Federal courts have found that Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses and of barriers to entry.”<sup>1</sup> Congress found that discrimination had impeded the formation of qualified minority-owned businesses. In the marketplace appendices (Appendix E through Appendix I), Keen Independent examines whether some of the barriers to business formation that Congress found for minority- and women-owned businesses also appear to occur in Arizona.

Potential barriers to business formation include barriers associated with entry and advancement in the study industries. Appendix E examines recent data on education, employment, and workplace advancement that may ultimately influence business formation within the Arizona study industries.<sup>2, 3</sup>

#### Introduction

Keen Independent examined whether there were barriers to the formation of minority- and women-owned businesses in Arizona. Business ownership often results from an individual entering an industry as an employee and then advancing within that industry. Within the entry and advancement process, there may be some barriers that limit opportunities for minorities and women. Figure E-1 presents a model of entry and advancement in the study industries. Note that Keen Independent considers the entire state of Arizona to represent the Arizona marketplace. Any discussion of the Arizona marketplace or Arizona study industries in the following analysis includes firms and individuals located in the state.

Appendix E uses 2013–2017 American Community Survey (ACS) data to analyze education, employment and workplace advancement — all factors that may influence whether individuals start construction or engineering businesses. Keen Independent studied barriers to entry into the study industries separately because entrance requirements and opportunities for advancement differ for those industries.

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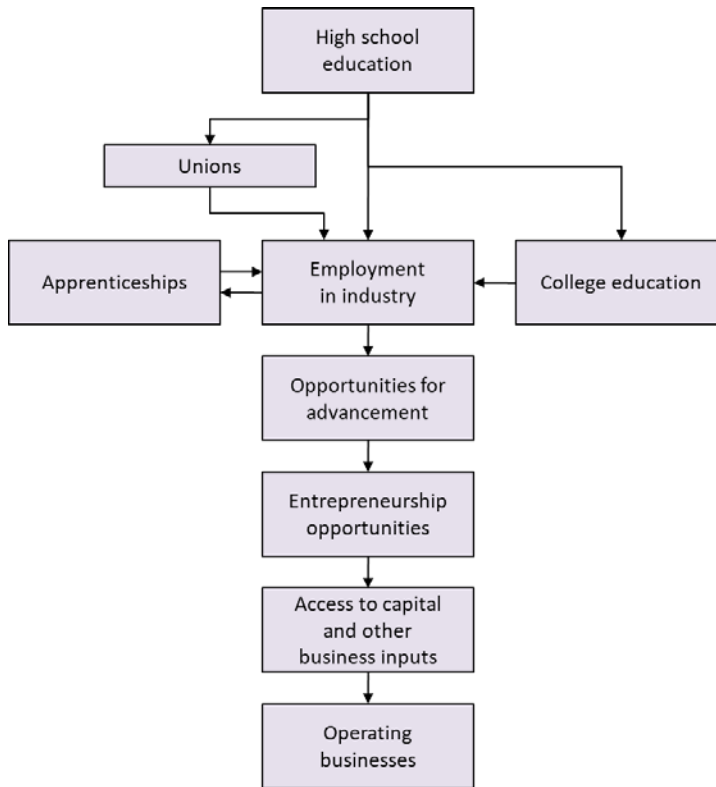
<sup>1</sup> *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), citing *Adarand Constructors, Inc. v. Slater*, 228 F.3d (10th Cir. 2000); *Western States Paving Co., Inc. v. Washington State DOT*, 345 F.3d 964 (8th Cir. 2003).

<sup>2</sup> In Appendix E and other appendices that present information about local marketplace conditions, information for “engineering” refers to architectural, engineering and related services. Each reference to “engineering” work pertains to those types of services.

<sup>3</sup> Several other report appendices analyze other quantitative aspects of conditions in the Arizona marketplace. Appendix F explores business ownership. Appendix G presents an examination of access to capital. Appendix H considers the success of businesses. Appendix I presents the data sources that Keen Independent used in those appendices.

Figure E-1.  
Model for studying entry  
into the construction and  
engineering industries in  
Arizona

Source:  
Keen Independent Research.



**Minority workers and business owners in Arizona.** Keen Independent began the analysis by examining the representation of people of color and women among business owners and workers in Arizona. Figure E-2 shows the demographic distribution of business owners in the study industries, business owners in other industries (excluding the study industries) and the labor force, based on 2013–2017 ACS data. (Demographics of the workforce in each individual study industry are presented separately later in Appendix E.) Analysis for Arizona in 2013–2017 indicated the following:

- African Americans accounted for 1 percent of business owners in the study industries and 3 percent of business owners in all other industries, while accounting for about 5 percent of all workers.
- Asian Americans accounted 4 percent of all workers and business owners in non-study industries, and less than 1 percent of business owners in study industries.
- Hispanic Americans accounted for 36 percent of business owners in the study industries, 24 percent of business owners in other industries and 30 percent of the entire workforce.
- Native Americans or other minorities accounted for approximately 4 percent of the workforce compared with 1 percent of business owners in the study industries and 2 percent of business owners in all other industries.
- Non-Hispanic whites accounted for about 61 percent of business owners in the study industries and 68 percent of business owners in other industries, higher than their representation in the workforce (57%).

Figure E-2.

Demographic distribution of business owners and the workforce in Arizona, 2013–2017

Arizona	Workforce in all industries	Business owners in study industries	Business owners in all other industries
<b>Race/ethnicity</b>			
African American	4.9 %	1.2 % **	2.6 % **
Asian American	4.1	0.7 **	3.8
Hispanic American	30.1	35.9 **	23.7 **
Native American or other minority	3.9	1.3 **	2.0
Non-Hispanic white	57.0	60.9 **	67.9 **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>			
Female	46.3 %	7.8 % **	43.4 % **
Male	53.7	92.2 **	56.6 **
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>	<b>100.0 %</b>

Note: \*\* Denotes that the difference in proportions between business owners in the specified industries and the workforce in all industries for the given race/ethnicity/gender group is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2013–2017 ACS Public Use Microdata Sample (PUMS). The 2013–2017 raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Keen Independent analyzed whether differences between business ownership and the representation of people of color and women in the workforce were statistically significant (noted with asterisks in Figure E-2). This analysis showed:

- Relatively fewer African American business owners in both study industries and all other industries when compared with representation in the statewide workforce.
- Relatively fewer Asian American and Native American or other minority business owners in the construction and engineering industries (combined) than what would be expected based on representation in the overall workforce.
- Relatively more Hispanic American business owners in the study industries compared to representation in the workforce.

Non-Hispanic white business owners were also a larger percentage of business owners in all other industries than what would be expected based on their portion of the overall workforce.

**Female workers and business owners in Arizona.** Figure E-2 also examines the percentage of Arizona business owners and workers who are women. In 2013–2017, women accounted for about 8 percent of business owners in the study industries, significantly less than representation among business owners in other industries (43%) and in the overall workforce (46%).

**General academic research on conditions in the Arizona labor market.** Academic research has investigated race- and gender-based discrimination and its effect on opportunities for women and minorities in Arizona. Because of Arizona’s unique immigration trends and regulations, recent research has focused on the role of Hispanic Americans and foreign-born immigrants in the workforce.

According to 2013–2017 ACS data, over 18 percent of the Arizona labor force was foreign born, with the majority (63%) being Hispanic Americans. In the Arizona construction industry, almost 27 percent of the labor force was foreign born. Again, the vast majority of Arizona foreign-born construction workers (89%) were Hispanic Americans.

In addition to documented foreign-born workers, undocumented immigrants constitute a significant portion of the Arizona workforce. Among Arizona industries, the construction industry has one of the largest shares of workers that are undocumented immigrants.<sup>4</sup> Note that ACS calculations included in this appendix likely undercount Hispanic Americans in the workforce due to undocumented immigration.

## **Construction Industry**

Keen Independent examined how education, training, employment and advancement may affect the number of businesses that people of color and women owned in the Arizona construction industry in 2013–2017.

**Education.** Formal education beyond high school is not a prerequisite for most construction jobs,<sup>5</sup> and the construction industry often attracts individuals who have relatively less formal education than in other industries.<sup>6</sup> Based on 2013–2017 ACS data, 35 percent of construction workers in Arizona were high school graduates without post-secondary education and 25 percent had not graduated high school. Only 11 percent of construction workers had a four-year college degree or more, less than what is found for all other industries combined (30%).

**Race/ethnicity.** Due to the educational requirements of entry-level jobs and the limited education beyond high school for many minority groups in the state, one would expect a relatively high representation of those groups in the Arizona construction industry, especially in entry-level positions.

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<sup>4</sup> In 2015, the American Immigration Council found that 2 percent of workers in the construction industry are undocumented immigrants. American Immigration Council. (2017, October 4). Immigrants in Arizona. Retrieved from <https://www.americanimmigrationcouncil.org/research/immigrants-in-arizona>

<sup>5</sup> Bureau of Labor Statistics, U.S. Department of Labor. (2018, January 30). Construction and extraction occupations. *Occupational Outlook Handbook*. Retrieved from <https://www.bls.gov/ooh/construction-and-extraction/home.htm>

<sup>6</sup> CPWR - The Center for Construction Research and Training. (2013). Educational attainment and internet usage in construction and other industries. In *The construction chart book: The U.S. construction industry and its workers* (5th ed.). Retrieved from <https://www.cpwrr.com/sites/default/files/publications/5th%20Edition%20Chart%20Book%20Final.pdf>;

CPWR - The Center for Construction Research and Training. (2007). Educational attainment and internet usage in construction and other industries. In *The construction chart book: The U.S. construction industry and its workers* (3rd ed.). Retrieved from [https://www.cpwrr.com/sites/default/files/research/CB3\\_FINAL.pdf](https://www.cpwrr.com/sites/default/files/research/CB3_FINAL.pdf)

- Hispanic Americans represented a large population of workers without post-secondary education. In 2013–2017, only 14 percent of all Hispanic American workers age 25 and older who worked in Arizona held at least a four-year college degree, far below the figure for non-Hispanic whites 25 and older (40%).
- The percentage of Native American or other minorities (18%) and African American (30%) workers in Arizona with a four-year college degree was also substantially lower than that of nonminorities in 2013–2017.

However, 58 percent of Asian American workers age 25 and older in Arizona had at least a four-year college degree in 2013–2017. One might expect representation of Asian Americans in the Arizona construction industry to be lower than in other industries given this level of education.

**Gender.** Based on 2013–2017 data, 34 percent of female workers and 31 percent of male workers age 25 and older had at least a four-year college degree. This might be one factor behind lower representation of women among construction workers.

Among people with a college degree, women have been less likely to enroll in construction-related degree programs. Nationally, women have low levels of enrollment in Construction Management programs, and this may be due to (a) the prevailing notion that construction is an industry dominated by males and is unkind to females and families, and (b) secondary school career counselors’ lack of discussion of women’s career opportunities in the construction fields, and female students’ consequent lack of knowledge of these professions.<sup>7</sup>

**Apprenticeship and training.** Training in the construction industry is largely on-the-job and through trade schools and apprenticeship programs. Entry-level jobs for workers out of high school are often for laborers, helpers or apprentices. More skilled positions in the construction industry may require additional training through a technical or trade school, or through an apprenticeship or other training program. Apprenticeship programs can be developed by employers, trade associations, trade unions or other groups.

Workers can enter apprenticeship programs from high school or trade school. Apprenticeships have traditionally been three- to five-year programs that combine on-the-job training with classroom instruction.<sup>8</sup> In response to limited construction employment opportunities during the Great Recession, apprenticeship programs limited the number of new apprenticeships<sup>9</sup> as well as access to knowing when and where apprenticeships occur.<sup>10</sup> Apprenticeship programs often refer to an “out-of-work list” when contacting apprentices; those who have been on the list the longest are given preference.

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<sup>7</sup> Sewalk, S., & Nietfeld, K. (2013). Barriers preventing women from enrolling in construction management programs. *International Journal of Construction Education and Research*, 9(4), 239-255. doi:10.1080/15578771.2013.764362

<sup>8</sup> Bureau of Labor Statistics, U.S. Department of Labor. (2013). Apprenticeship: Earn while you learn. Retrieved from <https://www.bls.gov/careeroutlook/2013/summer/art01.pdf>

<sup>9</sup> Kelly, M., Pisciotto, M., Wilkinson, L., & Williams, L. S. (2015). When working hard is not enough for female and racial/ethnic minority apprentices in the highway trades. *Sociological Forum*, 30(2), 415-438. doi:10.1111/socf.12169

<sup>10</sup> Graves, F. G., et al. *Women in construction: Still breaking ground* (Rep.). Retrieved from National Women’s Law Center website: [https://www.nwlc.org/sites/default/files/pdfs/final\\_nwlc\\_womeninconstruction\\_report.pdf](https://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf)



Furthermore, some research indicates that apprentices are often hired and laid off several times throughout the duration of their apprenticeship program. Apprentices were more successful if they were able to maintain steady employment, either by remaining with one company and moving to various work sites, or by finding work quickly after being laid off. Apprentices identified mentoring from senior coworkers, such as journey workers, foremen or supervisors, and being assigned tasks that furthered their training as important to their success.<sup>11</sup>

**Employment.** With educational attainment for minorities, women and other workers as context, Keen Independent examined employment in the Arizona construction industry. Figure E-3 presents data from 2013–2017 to compare the demographic composition of the construction industry with the total workforce in Arizona.

**Race/ethnicity.** Based on 2013–2017 ACS data, people of color were 50 percent of those working in the Arizona construction industry. Examination of the Arizona construction industry workforce in 2013–2017 shows that:

- About 43 percent were Hispanic Americans;
- About 4 percent were Native Americans and other minorities;
- About 2 percent were African Americans; and
- Asian Americans made up about 1 percent.

In Arizona, Hispanic Americans were a significantly larger percentage of workers in construction (43%) than in other industries (29%). Native Americans and other minorities were also a relatively larger portion of the construction workforce. In contrast, African Americans (2%) and Asian Americans (1%) accounted for a smaller percentage of workers in the construction industry than in other industries (5% and 4%, respectively). Figure E-3 presents these results.

The average educational attainment of African American workers is consistent with requirements for construction jobs, so education does not explain the relatively low number of African Americans employed in the Arizona construction industry. Historically, race discrimination by construction unions has contributed to the low employment of African Americans in construction trades.<sup>12</sup> The role of unions is discussed more thoroughly later in Appendix E (including research that suggests discrimination has been reduced in unions).

Asian Americans made up 1 percent of the construction workforce and 4 percent of all other workers in Arizona in 2013–2017. The fact that Asian Americans were more likely than other groups to have a college education may explain part of that difference.

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<sup>11</sup> *Ibid.*

<sup>12</sup> Feagin, J. R., & Imani, N. (1994). Racial barriers to African American entrepreneurship: An exploratory study. *Social Problems*, 41(4), 562-584. doi:10.1525/sp.1994.41.4.03x0272l; Waldinger, R., & Bailey, T. (1991). The continuing significance of race: Racial conflict and racial discrimination in construction. *Politics & Society*, 19(3), 291-323. doi:10.1177/003232929101900302; United Steelworkers v. Weber, 443 U.S. 193 (5th Cir. 1979).

**Gender.** There are large differences between the representation of women in construction and in all industries. For 2013–2017, women represented 10 percent of all construction workers and 49 percent of workers in all other industries in Arizona.

Figure E-3.

Demographics of workers in construction and all other industries in Arizona, 2013–2017

Arizona	Constuction	All other industries
<b>Race/ethnicity</b>		
African American	1.8 % **	5.2 %
Asian American	1.0 **	4.3
Hispanic American	43.3 **	29.1
Native American or other minority	4.3 *	3.8
<b>Total minority</b>	<b>50.3 %</b>	<b>42.4 %</b>
Non-Hispanic white	49.7 **	57.6
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>		
Female	10.1 % **	49.0 %
Male	89.9 **	51.0
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>

Note: \*, \*\* Denotes that the difference in proportions between workers in the construction industry and all other industries for the given Census/ACS year is statistically significant at the 90% and 95% confidence level, respectively. "All other industries" includes all industries other than the construction industry.

Source: Keen Independent Research from 2013–2017 ACS Public Use Microdata samples. The 2013–2017 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Foreign-born workers.** A substantial portion of Arizona construction workers are foreign-born and the vast majority (89%) are Hispanic. Based on ACS data:

- In 2007, 34 percent of the Arizona construction workforce was foreign-born.
- In the 2008 to 2012 time period, foreign-born workers were 24 percent of the Arizona construction workforce.<sup>13</sup>
- In the 2013 to 2017 time period, foreign-born workers were 27 percent of the Arizona construction workforce.<sup>14</sup>

<sup>13</sup> The ACS may not fully reflect undocumented workers due to undercounting. The Department of Homeland Security estimates the undercount is about 5 percent.

<sup>14</sup> The ACS may not fully reflect undocumented workers due to undercounting. The Department of Homeland Security estimates the undercount is about 10 percent. December 2018. "Population Estimates: Illegal population residing in the United States, January 2015." Retrieved from: [https://www.dhs.gov/sites/default/files/publications/18\\_1214\\_PLCY\\_pops-est-report.pdf](https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf)

The change in composition of the foreign-born construction workforce since 2007 may be a result of several factors, including:

- Changes in state laws concerning employer verification in 2007 with the passage of the Legal Arizona Workers Act (LAWA), which mandated the use of E-Verify for Arizona employers;<sup>15</sup>
- Additional state laws enacted in 2010 with the passage of the Support Our Law Enforcement and Safe Neighborhoods Act (SB1070) regarding immigration enforcement;<sup>16, 17</sup> and
- The Great Recession.

Recent research indicates that the passage of LAWA resulted in a decrease in the population of foreign-born workers and Hispanic non-citizens in Arizona when compared to similar states that did not enact such legislation (comparable states in the research were chosen based on pre-LAWA population and employment trends).<sup>18</sup> Similar research suggests that one result of this legislation was a doubling of the historic self-employment rate among non-citizen Hispanic males with a high school education or less because entering into independent contractor agreements avoids the E-Verify process while wage and salary employment does not.<sup>19</sup> This research also estimates the effects of the legislation separately from the effects of the recession by comparing the average difference in foreign-born workers between Arizona and comparable states before and after the enactment of LAWA. Results suggest that both events led to a decrease in the foreign-born Arizona workforce. Additionally, Arizona's construction employment specifically decreased beginning in 2006 and continued falling more steeply than neighboring states following the passage of LAWA.<sup>20</sup>

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<sup>15</sup> In the 2011 case *Chamber of Commerce v. Whiting*, the U.S. Supreme Court upheld the legality of LAWA, ruling that it did not preempt federal legislation. LAWA includes a provision allowing the State of Arizona to suspend or revoke business licenses of firms that hire undocumented immigrants.

<sup>16</sup> Hoekstra M. and Orozco-Aleman, S. May 2017. "Illegal Immigration, State Law, and Deterrence" *American Economic Journal: Economic Policy* 9(2): 228-252.

<sup>17</sup> In the 2012 case *Arizona v. United States* the U.S. Supreme Court struck down three provisions included in SB1070, ruling that these provisions preempted federal immigration regulations. Struck down were (1) a provision requiring legal immigrants to carry registration documents at all times; (2) a provision allowing state police to arrest any person suspected of being an undocumented immigrant; and (3) the criminalization of undocumented immigrants searching for or having a job in Arizona. However, Arizona state police are allowed to investigate the immigration status of an individual that is stopped, detained or arrested given reasonable suspicion that the individual is an undocumented immigrant.

<sup>18</sup> Bohn, S., M. Lofstrum and S. Raphael. May 2014. "Did the 2007 Legal Arizona Workers Act Reduce the State's Unauthorized Immigrant Population?" *Review of Economics and Statistics* 96.2: 258-269.

<sup>19</sup> Lofstrum, M., S. Bohn and S. Raphael. March 2011. "Lessons from the 2007 Legal Arizona Workers Act." Public Policy Institute of California.

<sup>20</sup> Nowrasteh, Alex. March 2016. "The Aftermath of Arizona's Immigration Laws." Cato Institute.

**Academic research concerning any effect of race- and gender-based discrimination in construction labor markets.**

There is substantial academic literature that has examined whether race- or gender-based discrimination affects opportunities for people of color and women to enter construction trades in the United States. Many studies indicate that race- and gender-based discrimination affect opportunities for minorities and women in the construction industry. For example, literature concerning women in construction trades has identified substantial barriers to entry and advancement due to gender discrimination and sexual harassment.<sup>21</sup> One recent study found that when African American women in construction advance into leadership roles, they often find that others unduly challenge their authority. Study participants also reported incidents of harassment, bullying, and the assumption that they are inferior to their male peers; these instances are believed to hinder African American females' career development and overall success in the construction industry.<sup>22</sup> In another study, white men were found to be the least likely to report challenges related to being assigned low-skill or repetitive tasks that did not enable them to learn new skills. Women and people of color felt that they were disproportionately performing low-skill tasks that negatively impacted the quality of their training experience.<sup>23</sup>

Additionally, women encounter practical issues such as difficulty in accessing personal protective equipment that fits them properly (they frequently find such employer-provided equipment to be too large). This sometimes poses a safety hazard, and even more often hinders female workers' productivity, which can impact their relationships with supervisors as well as their opportunities for growth in the industry.<sup>24</sup>

Research suggests that race and gender inequalities in a workplace are often evidenced through the acceptance of the "good old boys' club" culture.<sup>25</sup> There may also be an attachment to the idea that "working hard" will bring success. However, the quantitative and qualitative evidence indicates that "hard work" alone does not ensure success for women and people of color.<sup>26</sup> In 2014, the National Women's Law Center found low representation of women, and especially women of color, in construction jobs and apprenticeships. Women experience many barriers to success in this career path, including explicit gender discrimination and harassment.<sup>27</sup>

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<sup>21</sup> Denissen, A. M., & Saguy, A. C. (2013). Gendered homophobia and the contradictions of workplace discrimination for women in the building trades. *Gender & Society*, 28(3), 381-403. doi:10.1177/0891243213510781; Ericksen, J. A., & Schulteiss, D. E. (2009). Women pursuing careers in trades and construction. *Journal of Career Development*, 36(1), 68-89. doi:10.1177/0894845309340797

<sup>22</sup> Hunte, R. (2016). Black women and race and gender tensions in the trades. *Peace Review*, 28(4), 436-443. doi:10.1080/10402659.2016.1237087

<sup>23</sup> Kelly, M., et al. (2015). When working hard is not enough for female and racial/ethnic minority apprentices in the highway trades. *Sociological Forum*, 30(2), 415-438. doi:10.1111/socf.12169

<sup>24</sup> Onyebeke, L. C., et al. (2016). Access to properly fitting personal protective equipment for female construction workers. *American Journal of Industrial Medicine*, 59(11), 1032-1040. doi:10.1002/ajim.22624

<sup>25</sup> Kelly, Maura, et al. (2015). When working hard is not enough for female and racial/ethnic minority apprentices in highway trades. *Eastern Sociological Society*, 30(2): 415-438.

<sup>26</sup> *Ibid.*

<sup>27</sup> Jackson, Sarah. (2019, Nov. 29). 'Not the boys' club anymore': Eight women take a swing at the construction industry. NBC News. Retrieved from <https://www.nbcnews.com/news/us-news/not-boys-club-anymore-eight-women-take-swing-construction-industry-n1091376>; Graves, F. G., et al. *Women in construction: Still breaking ground* (Rep.). Retrieved from National Women's Law Center website: [https://www.nwlc.org/sites/default/files/pdfs/final\\_nwlc\\_womeninconstruction\\_report.pdf](https://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf)

The temporary nature of construction work results in uncertain job prospects, and the relatively high turnover of laborers presents a disincentive for construction firms to invest in training. Some researchers have concluded that constant turnover has lent itself to informal recruitment practices and nepotism, compelling laborers to tap social networks for training and work. They credit the importance of social networks with the high degree of ethnic segmentation in the construction industry.<sup>28</sup> Unable to integrate themselves into traditionally white social networks, African Americans and other minorities faced long-standing historical barriers to entering the industry.<sup>29</sup>

**Importance of unions to entry in the construction industry.** Labor researchers characterize construction as a historically volatile industry that is sensitive to business cycles, making the presence of labor unions important for stability and job security within the industry.<sup>30</sup> According to the Bureau of Labor Statistics, in 2018 union membership among people employed in construction occupations was 17 percent.<sup>31</sup> National union membership within all occupations during 2018 was less than 11 percent.<sup>32</sup> The difference in union membership rates demonstrates the importance of unions within the construction industry. In Arizona, union membership for all occupations during 2018 was about 5 percent,<sup>33</sup> although it is unclear what percentage of these workers worked in the construction industry.

Construction unions aim to provide a reliable source of labor for employers and preserve job opportunities for workers by formalizing the recruitment process, coordinating training and apprenticeships, enforcing standards of work, and mitigating wage competition. The unionized sector of construction would seemingly be the best road for African Americans and other underrepresented groups into the industry.

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<sup>28</sup> Waldinger, R., & Bailey, T. (1991). The continuing significance of race: Racial conflict and racial discrimination in construction. *Politics & Society*, 19(3), 291-323. doi:10.1177/003232929101900302

<sup>29</sup> Feagin, J. R., & Imani, N. (1994). Racial barriers to African American entrepreneurship: An exploratory study. *Social Problems*, 41(4), 562-584. doi:10.1525/sp.1994.41.4.03x0272l

<sup>30</sup> Applebaum, H. A. (1999). *Construction workers, U.S.A.* Westport, CT: Greenwood Press.

<sup>31</sup> Bureau of Labor Statistics, U.S. Department of Labor. (2019, January 18). *Union affiliation of employed wage and salary workers by occupation and industry* [Press release]. Retrieved from <https://www.bls.gov/news.release/union2.t03.htm>

<sup>32</sup> Bureau of Labor Statistics, U.S. Department of Labor. (2019, January 18). *Union Members Summary* [Press release]. Retrieved from <https://www.bls.gov/news.release/union2.nr0.htm>

<sup>33</sup> Bureau of Labor Statistics, U.S. Department of Labor. (2019, March 20). *Union Members in Arizona —2018* [Press release]. Retrieved from [https://www.bls.gov/regions/west/news-release/unionmembership\\_arizona.htm](https://www.bls.gov/regions/west/news-release/unionmembership_arizona.htm)

However, some researchers have identified racial discrimination by trade unions that has historically prevented minorities from obtaining employment in skilled trades.<sup>34</sup> Some researchers have argued that union discrimination has taken place in a variety of forms, including the following examples:

- Unions have used admissions criteria that adversely affect minorities. In the 1970s, federal courts ruled that standardized testing requirements for unions unfairly disadvantaged minority applicants who had less exposure to testing. In addition, the policies that required new union members to have relatives who were already in the union perpetuated the effects of past discrimination.<sup>35</sup>
- Of those minority individuals who are admitted to unions, a disproportionately low number are admitted into union-coordinated apprenticeship programs. Apprenticeship programs are an important means of producing skilled construction laborers, and the reported exclusion of African Americans from those programs has severely limited their access to skilled occupations in the construction industry.<sup>36</sup>
- Although formal training and apprenticeship programs exist within unions, most training of union members takes place informally through social networking. Nepotism characterizes the unionized sector of construction as it does the non-unionized sector, and that practice favors a white-dominated status quo.<sup>37</sup>
- Traditionally, unions have been successful in resisting policies designed to increase African American participation in training programs. The political strength of unions in resisting affirmative action in construction has hindered the advancement of African Americans in the industry.<sup>38</sup>
- Discriminatory practices in employee referral procedures, including apportioning work based on seniority, have precluded minority union members from having the same access to construction work as their white counterparts.<sup>39</sup>

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<sup>34</sup> U.S. Department of Justice. (1996). Proposed reforms to affirmative action in federal procurement (61 FR 26042). *Federal register*, 101(61), 26042-63. Office of the Federal Register, National Archives and Records Administration.

<sup>35</sup> *Ibid.*; U.S. v. Iron Workers Local 86, 443 F.2d 544 (9th Cir. 1971); Sims v. Sheet Metal Workers International Association, 489 F. 2d 1023 (6th Cir. 1973); U.S. v. International Association of Bridge, Structural and Ornamental Iron Workers, 438 F.2d 679 (7th Cir. 1971).

<sup>36</sup> Applebaum, H. A. (1999). *Construction workers*, U.S.A. Westport, CT: Greenwood Press.

<sup>37</sup> *Ibid.* A high percentage of skilled workers reported having a father or relative in the same trade. However, the author suggests this may not be indicative of current trends.

<sup>38</sup> Waldinger, R., & Bailey, T. (1991). The continuing significance of race: Racial conflict and racial discrimination in construction. *Politics & Society*, 19(3), 291-323. doi:10.1177/003232929101900302

<sup>39</sup> U.S. Department of Justice. (1996). Proposed reforms to affirmative action in federal procurement (61 FR 26042). *Federal register*, 101(61), 26042-63. Office of the Federal Register, National Archives and Records Administration.

- According to testimony from African American union members, even when unions implement meritocratic mechanisms of apportioning employment to laborers, white workers are often allowed to circumvent procedures and receive preference for construction jobs.<sup>40</sup>

More recent research suggests that the relationship between minorities and unions has been changing. As a result, historical observations may not be indicative of current dynamics in construction unions. Recent studies focusing on the role of unions in apprenticeship programs have compared minority and female participation and graduation rates for apprenticeships in joint programs (that unions and employers organize together) with rates in employer-only programs.

Many of those studies conclude that the impact of union involvement is generally positive or neutral for minorities and women, compared to non-Hispanic white males, as summarized below.

- Glover and Bilginsoy analyzed apprenticeship programs in the U.S. construction industry during 1996 through 2003. Their dataset covered about 65 percent of apprenticeships during that time. The authors found that joint programs had “much higher enrollments and participation of women and ethnic/racial minorities” and exhibited “markedly better performance for all groups on rates of attrition and completion” compared to employer-run programs.<sup>41</sup>
- In a similar analysis focusing on female apprentices, Bilginsoy and Berik found that women were most likely to work in highly skilled construction professions as a result of enrollment in joint programs as opposed to employer-run programs. Moreover, the effect of union involvement in apprenticeship training was higher for African American women than for white women.<sup>42</sup>
- Additional research on the presence of African Americans and Hispanic Americans in apprenticeship programs found that African Americans were 8 percent more likely to be enrolled in a joint program than in an employer-run program. However, Hispanic Americans were less likely to be in a joint program than in an employer-run program.<sup>43</sup> Those data suggest that Hispanic Americans may be more likely than African Americans to enter the construction industry without the support of a union.

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<sup>40</sup> Feagin, J. R., & Imani, N. (1994). Racial barriers to African American entrepreneurship: An exploratory study. *Social Problems*, 41(4), 562-584. doi:10.1525/sp.1994.41.4.03x0272l

<sup>41</sup> Glover, R. W., & Bilginsoy, C. (2005). Registered apprenticeship training in the U.S. construction industry. *Education + Training*, 47(4/5), 337-349. doi:10.1108/00400910510601913

<sup>42</sup> Berik, G., & Bilginsoy, C. (2006). Still a wedge in the door: Women training for the construction trades in the USA. *International Journal of Manpower*, 27(4), 321-341. doi:10.1108/01437720610679197

<sup>43</sup> Bilginsoy, C. (2005). How unions affect minority representation in building trades apprenticeship programs. *Journal of Labor Research*, 26(3), 451-463. doi:10.1007/s12122-005-1014-4

Recent union membership data support those findings as well. For example, 2018 Current Population Survey (CPS) asked participants, “Are you a member of a labor union or of an employee association similar to a union?” CPS data showed that union membership was highest among African Americans (13%), and non-Hispanic whites (10%). Hispanic American workers (9%) and Asian American workers (8%) had relatively lower rates of union membership.<sup>44</sup> Recent research utilizing ACS data puts African American union membership in the construction industry at over 17 percent.<sup>45</sup>

According to some research, union apprenticeships appear to have drawn more African Americans into the construction trades in some markets,<sup>46</sup> and studies have found a high percentage of minority construction apprentices. In 2010 in New York City, for example, approximately 69 percent of first-year local construction apprentices were African American, Hispanic American, Asian American, or members of other minority groups. In addition, 11 percent of local New York City construction apprentices were women. It should be noted that, though the Building and Construction Trades Council of Greater New York set a goal that women represent 10 percent of local apprentices; the City did not establish a goal for minority participation.<sup>47</sup> However, this increase in apprenticeships may not necessarily be indicative of improved future prospects for minority workers. A study in Oregon found that, though minority men’s participation in construction apprenticeships was roughly proportional to their representation in the state’s workforce, their representation in skilled trades apprenticeships was lower than might be expected.<sup>48</sup>

Although union membership and union program participation vary based on race and ethnicity, there is no clear picture from the research about the causes of those differences and their effects on construction industry employment. Research is especially limited concerning the impact of unions on African American employment. It is unclear from past studies whether unions presently help or hinder equal opportunity in construction and whether effects in Arizona are different from other parts of the country. In addition, the current research indicates that the effects of unions on entry into the construction industry may be different for different minority groups. Some unions are actively trying to provide a more inclusive environment for racial minorities and women through “insourcing” and active recruitment into apprenticeship programs.<sup>49, 50</sup>

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<sup>44</sup> Bureau of Labor Statistics, U.S. Department of Labor. (2019, January 18). *Union Members Summary* [Press release]. Retrieved from <https://www.bls.gov/news.release/union2.nr0.htm>

<sup>45</sup> Bucknor, C. (2016). *Black Workers, Unions, and Inequality*. Washington D.C.: Center for Economic and Policy Research.

<sup>46</sup> Mishel, L. (2017). *Diversity in the New York City union and nonunion construction sectors* (Rep.). Retrieved from Economic Policy Institute website: <http://www.epi.org/publication/diversity-in-the-nyc-construction-union-and-nonunion-sectors/>

<sup>47</sup> Figueroa, M., Grabelsky, J., & Lamare, J. R. (2013). Community workforce agreements: A tool to grow the union market and to expand access to lifetime careers in the unionized building trades. *Labor Studies Journal*, 38(1), 7-31. doi:10.1177/0160449x13490408

<sup>48</sup> Berik, G., Bilginsoy, C., & Williams, L. S. (2011). Gender and racial training gaps in Oregon apprenticeship programs. *Labor Studies Journal*, 36(2), 221-244. doi:10.1177/0160449x10396377

<sup>49</sup> Judd, R. (2016, November 30). Seattle’s building boom is good news for a new generation of workers. *The Seattle Times, Pacific NW Magazine*. Retrieved from <https://www.seattletimes.com/pacific-nw-magazine/seattles-building-boom-is-good-news-for-a-new-generation-of-workers/>

<sup>50</sup> For example, Boston’s “Building Pathways” apprenticeship program is designed to recruit workers from low-income underserved communities. <https://buildingpathwaysboston.org/>



**Advancement.** To research opportunities for advancement in the Arizona construction industry, Keen Independent examined the representation of people of color and women in construction occupations (defined by the U.S. Bureau of Labor Statistics<sup>51</sup>). Appendix I provides full descriptions of construction trades with large enough sample sizes in the 2013–2017 ACS for analysis.

**Racial/ethnic composition of construction occupations.** Figure E-4 presents the race/ethnicity of workers in select construction-related occupations in Arizona, including lower-skill occupations (e.g., construction laborers), higher-skill construction trades (e.g., electricians), and supervisory roles. The trades correspond to types of construction labor often involved in transportation contracting. Figure E-4 presents those data for 2013–2017.

Based on 2013–2017 ACS data, there are large differences in the racial and ethnic makeup of workers in various trades related to construction in Arizona. Overall, people of color comprised 50 percent of construction workers in 2013–2017, as shown in Figure E-4. Most minorities working in the state construction industry in 2013–2017 were Hispanic Americans. When compared with the representation of Hispanic Americans among all construction workers (43%), the representation of Hispanic Americans was substantially greater in occupations including:

- Plasterers (97%);
- Drywallers (81%);
- Cement masons (76%);
- Brickmasons (74%); and
- Roofers (73%).

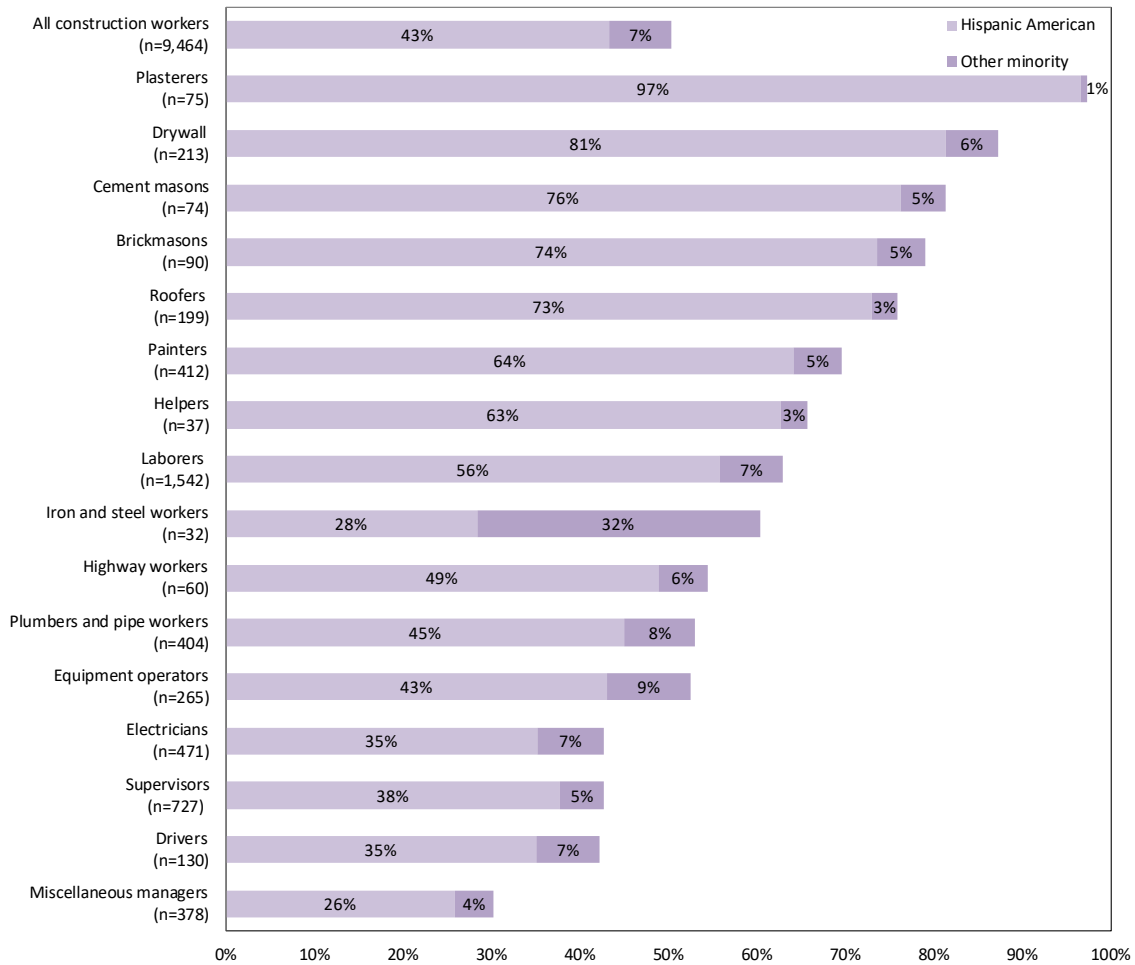
However, among first-line supervisors in the Arizona construction industry, only 38 percent were Hispanic Americans and 5 percent were other minorities.

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<sup>51</sup> Bureau of Labor Statistics, U.S. Department of Labor. (2001). Standard occupational classification major groups. Retrieved from [http://www.bls.gov/soc/major\\_groups.htm](http://www.bls.gov/soc/major_groups.htm)

Figure E-4.

Minorities as a percentage of selected construction occupations in Arizona, 2013–2017



Note: Other minority includes African Americans, Asian American and Native Americans or other minorities.

Source: Keen Independent Research from 2013–2017 ACS Public Use Microdata samples. The 2013–2017 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

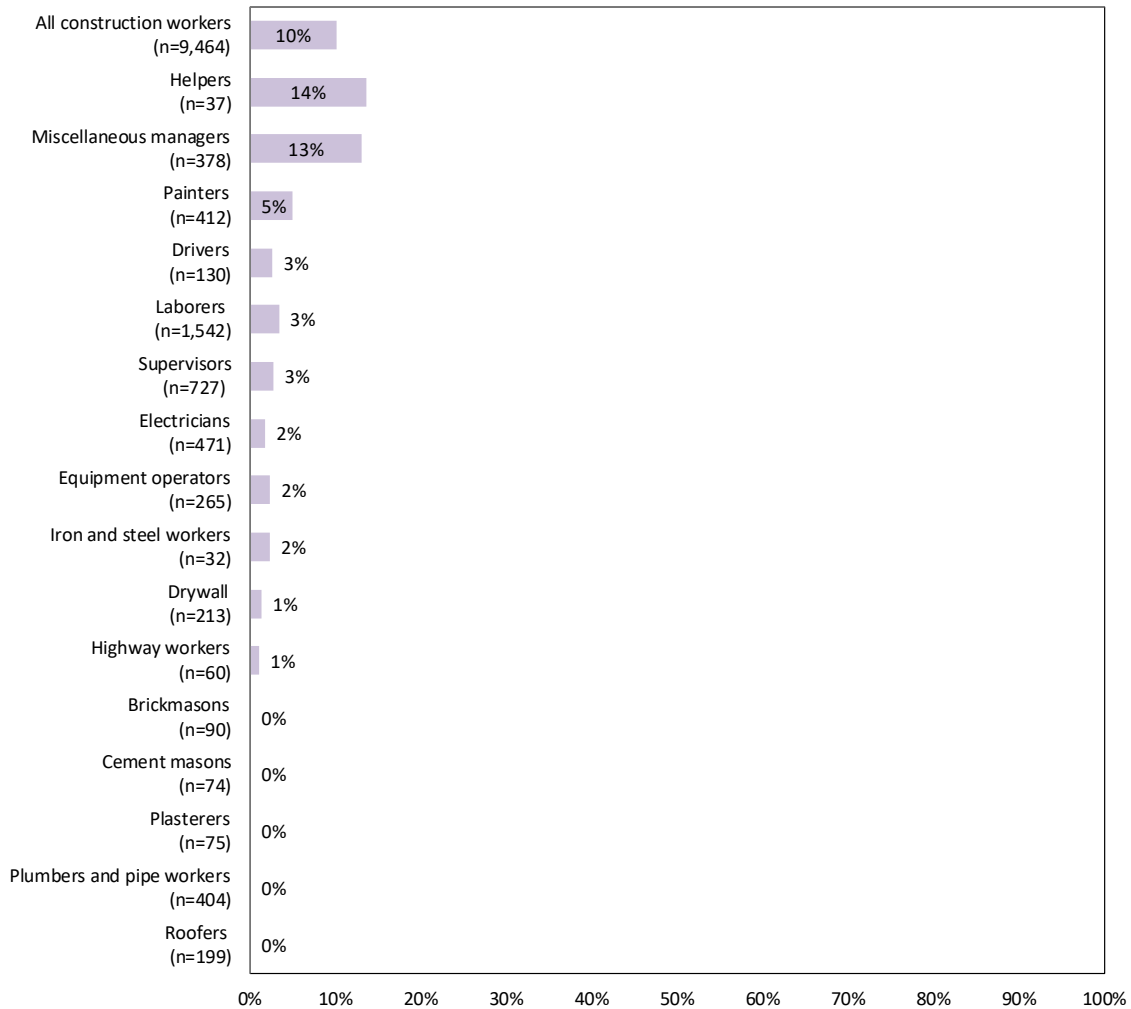
**Gender composition of construction occupations.** Keen Independent also analyzed the proportion of women in construction-related occupations. Figure E-5 summarizes the representation of women in select construction-related occupations for 2013–2017. (Overall, women made up only 10 percent of workers in the industry in 2013–2017, which includes office workers in the industry.)

In 2013–2017, women accounted for no more than 3 percent of the workers in most of the largest construction trades. There were no women among the 842 workers in the ACS sample data for people working as brickmasons, cement masons, plasterers, plumbers and pipe workers, or roofers.

As shown in Figures E-5, women comprised just 3 percent of first-line supervisors in 2013–2017.

Figure E-5.

Women as a percentage of construction workers in selected occupations in Arizona, 2013–2017



Source: Keen Independent Research from 2013–2017 ACS Public Use Microdata samples.  
The 2013–2017 ACS raw data extract was obtained through the IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa/>.

**Percentage of minorities as managers.** To further assess advancement opportunities in the Arizona construction industry, Keen Independent examined the proportion of construction workers who reported being managers. Figure E-6 presents the percentage of construction employees who reported working as managers in 2013–2017 for Arizona by racial/ethnic and gender group.

In 2013–2017, more than 11 percent of non-Hispanic whites in the Arizona construction industry were managers. Relatively fewer African Americans (5%), Hispanic Americans (2%) and Native Americans or other minorities (4%) in the industry worked as managers, statistically significant differences from the rate for non-Hispanic whites.

**Percentage of women as managers.** In the Arizona construction industry in 2013–2017, there was a statistically significant difference in the percentage of female and male workers who were managers (see Figure E-6). About 5 percent of female construction workers were managers, less than the 7 percent of male construction workers were managers in 2013–2017.

National research suggests that this is not due to managerial competency differences between males and females. One study found that women construction managers were rated similarly to their male counterparts in terms of various managerial capabilities and performed better than male managers in terms of sensitivity, customer focus, and authority and presence.<sup>52</sup>

Figure E-6.  
Percentage of construction workers who worked as a manager in 2013–2017 in Arizona

Arizona	2013-2017
<b>Race/ethnicity</b>	
African American	5.1 % **
Asian American	7.1
Hispanic American	2.2 **
Native American or other minority	3.7 **
Non-Hispanic white	11.4
<b>Gender</b>	
Female	4.9 % **
Male	7.2
<b>All individuals</b>	<b>7.0</b>

Note: \*\* Denote that the difference in proportions between the minority and non-Hispanic white groups (or between females and males) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2013–2017 ACS Public Use Microdata samples. The 2013–2017 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

<sup>52</sup> Arditi, D., & Balci, G. (2009). Managerial competencies of female and male construction managers. *Journal of Construction Engineering and Management*, 135(11), 1275-1278. doi:10.1061/(asce)co.1943-7862.0000100

## Engineering Industry

Keen Independent also examined how education and employment may influence the number of workers, and therefore potential minority and female entrepreneurs, in the Arizona engineering industry.

**Education.** Unlike the construction industry, lack of relevant education may preclude workers' entry into the engineering industry. Many occupations require at least a four-year college degree and some require licensure. According to the 2013–2017 ACS, 63 percent of individuals working in the Arizona engineering industry had at least a four-year college degree and 9 percent had an associate's degree. About 79 percent of civil engineers age 25 years and older had at least a four-year college degree.

Therefore, any barriers to college education can restrict employment opportunities, advancement opportunities, and, consequently, business ownership in the engineering industry. Any disparities in business ownership rates in engineering-related work may in part reflect the lack of higher education for particular racial, ethnic and gender groups.<sup>53</sup> Keen Independent explores this issue below.

**Race/ethnicity.** Figure E-7 presents the percentage of workers age 25 and older with at least a four-year college degree in Arizona.

In Arizona, about 40 percent of all nonminority workers age 25 and older had at least a four-year degree in 2013–2017. This percentage was 58 percent for Asian Americans. For individuals 25 years and older in other racial/ethnic groups, the data for Arizona indicated the following percentage with at least a four-year college degree:

- 30 percent for African Americans;
- 18 percent for Native Americans or other minorities; and
- 14 percent for Hispanic Americans.

The level of education necessary to work in the engineering industry may affect employment opportunities for groups for which college education lags that of non-Hispanic whites.

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<sup>53</sup> Dickson, P. H., Solomon, G. T., & Weaver, K. M. (2008). Entrepreneurial selection and success: Does education matter? *Journal of Small Business and Enterprise Development*, 15(2), 239-258. doi:10.1108/14626000810871655; Feagin, J. R., & Imani, N. (1994). Racial barriers to African American entrepreneurship: An exploratory study. *Social Problems*, 41(4), 562-584. doi:10.1525/sp.1994.41.4.03x0272l; Macionis, J. J. (2018). *Sociology* (16th ed.). Harlow, England: Pearson.

Figure E-7.  
Percentage of all workers 25 and older with at least a  
four-year college degree in Arizona, 2013–2017

Arizona	2013-2017
<b>Race/ethnicity</b>	
African American	29.5 % **
Asian American	57.7 **
Hispanic American	14.3 **
Native American or other minority	18.1 **
Non-Hispanic white	40.0
<b>Gender</b>	
Female	33.9 % **
Male	30.9
<b>All individuals</b>	<b>32.2</b>

Note: \*\* Denotes that the difference in proportions between the minority and non-Hispanic white groups (or females and males) for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2013–2017 ACS Public Use Microdata samples. The 2013–2017 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Employment.** Figure E-8 compares the demographic composition of workers in the Arizona engineering industry to that of workers in all other industries who are 25 years or older and have a college degree.

**Race/ethnicity.** In 2013–2017, about 24 percent of workers in the Arizona engineering industry were people of color.

- Almost 14 percent were Hispanic Americans;
- About 5 percent were Asian Americans;
- 2 percent were Native Americans or other minorities; and
- Approximately 2 percent were African Americans.

The representation of African Americans and Asian Americans with a college degree in the Arizona engineering industry is lower than in other industries. These differences are statistically significant, as shown in Figure E-8.

**Gender.** Compared to representation among workers 25 and older with a college degree in all other industries, fewer women work in the engineering industry. In 2013–2017, women represented about 23 percent of engineering-related workers in Arizona and 49 percent of workers with a four-year college degree in all other industries.

Figure E-8.

Demographic distribution of engineering workers and workers age 25 and older with a four-year college degree in all other industries in Arizona, 2013–2017

Arizona	Engineering	All other industries
<b>Race/ethnicity</b>		
African American	2.2 % **	4.4 %
Asian American	5.2 **	7.7
Hispanic American	13.8	12.5
Native American or other minority	2.3	2.1
<b>Total minority</b>	<b>23.5 %</b>	<b>26.6 %</b>
Non-Hispanic white	76.5 **	73.4
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>		
Female	22.5 % **	48.9 %
Male	77.5 **	51.1
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>

Note: \*\* Denotes that the difference in proportions between workers in the engineering industry and workers in all other industries for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2013–2017 ACS Public Use Microdata samples. The 2013–2017 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Civil engineers.** Keen Independent also examined the representation of people of color and women among civil engineers in Arizona in 2013–2017 (see Figure E-9). Overall, the percentage of civil engineers who were minorities (23%) was less than the percentage of all Arizona workers with college degrees in other industries who were people of color (27%). There were statistically significant differences for African Americans and Hispanic Americans. Unlike the Arizona engineering industry as a whole, representation of Asian Americans among civil engineers was higher than among all people with a four-year college degree.

Only 18 percent of civil engineers in Arizona were women in 2013–2017, substantially less than the percentage of workers with college degrees in other industries who were women (49%).

Figure E-9.

Demographic distribution of civil engineers and all other workers age 25 and older with a four-year college degree in Arizona, 2013–2017

Arizona	Civil engineering	All other industries
<b>Race/ethnicity</b>		
African American	1.6 % **	4.3 %
Asian American	8.7 **	7.6
Hispanic American	9.6	12.5
Native American or other minority	3.0	2.1
<b>Total minority</b>	<b>22.8 %</b>	<b>26.6 %</b>
Non-Hispanic white	77.2 **	73.4
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>
<b>Gender</b>		
Female	18.0 % **	48.6 %
Male	82.0 **	51.4
<b>Total</b>	<b>100.0 %</b>	<b>100.0 %</b>

Note: \*\* Denotes that the difference in proportions between workers in civil engineering and workers in all other industries for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2013–2017 ACS Public Use Microdata samples. The 2013–2017 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



**Academic research concerning female and minority participation in science, technology, engineering and mathematics (STEM) fields.** Many studies have examined the factors that contribute to low minority and female participation in the STEM fields.<sup>54</sup> Some factors that may play a role include isolation within work environments,<sup>55</sup> negative bias toward females in the engineering fields,<sup>56</sup> the perception that STEM fields are non-communal,<sup>57</sup> low anticipated power in male-dominated domains such as the STEM fields,<sup>58</sup> and inadequate secondary-school preparation for college-level STEM courses.<sup>59</sup>

Researchers have also found that some minority groups, including African Americans, Hispanic Americans and Native Americans, continue to have disproportionately low representation among recipients of science and engineering bachelor's degrees and science and engineering doctorate degrees. The study found that those same groups were disproportionately underrepresented among employees in science and engineering occupations.<sup>60</sup>

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<sup>54</sup> See, for example, Rice, D. (2017). Diversity in STEM? Challenges influencing the experiences of African American female engineers. In J. Ballenger, B. Polnick, & B. J. Irby (Eds.), *Women of color in STEM: Navigating the workforce* (pp. 157-180). Charlotte, NC: Information Age Publishing; Moss-Racusin, C. A., Dovidio, J. F., Brescoll, V. L., & Graham, M. J. (2012). Science faculty's subtle gender biases favor male students. *Proceedings of the National Academy of Sciences*, 109(41), 16474-16479. doi:10.1073/pnas.1211286109

<sup>55</sup> Rice, D. (2017). Diversity in STEM? Challenges influencing the experiences of African American female engineers. In J. Ballenger, B. Polnick, & B. J. Irby (Eds.), *Women of color in STEM: Navigating the workforce* (pp. 157-180). Charlotte, NC: Information Age Publishing; Strayhorn, T. L. (2015). Factors influencing black males' preparation for college and success in STEM majors: A mixed methods study. *Western Journal of Black Studies*, 39(1), 45-63. Retrieved from [http://link.galegroup.com.ezp3.lib.umn.edu/apps/doc/A419267248/EAIM?u=umn\\_wilson&sid=EAIM&xid=dd369039](http://link.galegroup.com.ezp3.lib.umn.edu/apps/doc/A419267248/EAIM?u=umn_wilson&sid=EAIM&xid=dd369039); Wagner, S. H. (2017). Perceptions of support for diversity and turnover intentions of managers with solo-minority status. *Journal of Organizational Psychology*, 17(5), 28-36. Retrieved from [http://www.na-businesspress.com/JOP/WagnerSH\\_17\\_5\\_.pdf](http://www.na-businesspress.com/JOP/WagnerSH_17_5_.pdf)

<sup>56</sup> Banchevsky, S., Westfall, J., Park, B., & Judd, C. M. (2016). But you don't look like a scientist! Women scientists with feminine appearance are deemed less likely to be scientists. *Sex Roles*, 75(3/4), 95-109. doi:10.1007/s11199-016-0586-1; Moss-Racusin, C. A., Dovidio, J. F., Brescoll, V. L., & Graham, M. J. (2012). Science faculty's subtle gender biases favor male students. *Proceedings of the National Academy of Sciences*, 109(41), 16474-16479. doi:10.1073/pnas.1211286109; Reuben, E., Sapienza, P., & Zingales, L. (2014). How stereotypes impair women's careers in science. *Proceedings of the National Academy of Sciences*, 111(12), 4403-4408. doi:10.1073/pnas.1314788111

<sup>57</sup> Stout, J. G., Grunberg, V. A., & Ito, T. A. (2016). Gender roles and stereotypes about science careers help explain women and men's science pursuits. *Sex Roles*, 75(9/10), 490-499. doi:10.1007/s11199-016-0647-5

<sup>58</sup> Chen, J. M., & Moons, W. G. (2014). They won't listen to me: Anticipated power and women's disinterest in male-dominated domains. *Group Processes & Intergroup Relations*, 18(1), 116-128. doi:10.1177/1368430214550340

<sup>59</sup> Strayhorn, T. L. (2015). Factors influencing black males' preparation for college and success in STEM majors: A mixed methods study. *Western Journal of Black Studies*, 39(1), 45-63. Retrieved from [http://link.galegroup.com.ezp3.lib.umn.edu/apps/doc/A419267248/EAIM?u=umn\\_wilson&sid=EAIM&xid=dd369039](http://link.galegroup.com.ezp3.lib.umn.edu/apps/doc/A419267248/EAIM?u=umn_wilson&sid=EAIM&xid=dd369039)

<sup>60</sup> National Center for Science and Engineering Statistics. (2017, January 31). NCSES publishes latest Women, Minorities, and Persons with Disabilities in Science and Engineering report. *National Science Foundation: Where Discoveries Begin*. Retrieved from [https://www.nsf.gov/news/news\\_summ.jsp?cntn\\_id=190946](https://www.nsf.gov/news/news_summ.jsp?cntn_id=190946)

## Summary

Keen Independent's analyses suggest that there are barriers to entry for certain minority groups and for women in the construction and engineering industries in Arizona, as summarized below.

- Fewer African Americans, Asian Americans and women worked in the Arizona construction industry than what might be expected based on representation in the overall workforce.
- Fewer African Americans, Asian Americans and women worked in the Arizona engineering industry than what might be expected based on analyses of workers 25 and older with a four-year college degree.
- There were fewer African American, Hispanic American and female civil engineers in Arizona than what might be expected from representation among all people 25 and older who have a four-year college degree.

Any barriers to entry in the study industries might affect the relative number of minority and female business owners in these industries in Arizona.

Keen Independent also examined advancement in the Arizona construction industry.

- Representation of minorities was much lower in certain construction trades than others.
- Most construction trades are nearly all male workers.
- Compared to non-Hispanic whites working in the construction industry, African Americans, Hispanic Americans and Native Americans were less likely to be managers. Relatively fewer women than men working in the construction industry were managers.

Any barriers to advancement in the Arizona construction industry may also affect the number of business owners among those groups.

Appendix F, which follows, examines rates of business ownership among individuals working in the Arizona construction and engineering industries.

## APPENDIX F.

### Business Ownership in the Arizona Construction and Engineering Industries

Approximately one in five construction workers in the Arizona marketplace was a self-employed business owner in 2013–2017. About one in seven people working in the Arizona engineering industry was a self-employed business owner. Focusing on these study industries, Keen Independent examined business ownership for different racial, ethnic and gender groups in Arizona using Public Use Microdata Samples (PUMS) from the 2013–2017 American Community Survey (ACS). (Appendix F uses “self-employment” and “business ownership” interchangeably.)

As discussed in Appendix E, Keen Independent considers the entire state of Arizona to represent the Arizona marketplace. Any discussion of the Arizona marketplace or Arizona industries in the following analysis also includes firms and individuals located in the entire state.

#### Business Ownership Rates

Many studies have explored differences between minority and nonminority business ownership at the national level.<sup>1</sup> Although self-employment rates have increased for minorities and women over time, several studies indicate that race, ethnicity and gender continue to affect opportunities for business ownership. The extent to which such individual characteristics may limit business ownership opportunities differs across industries and regions.<sup>2</sup>

**Construction industry.** Keen Independent classified workers as self-employed if they reported that they worked in their own unincorporated or incorporated business. In 2013–2017, 21 percent of workers in the Arizona construction industry were self-employed, compared with about 10 percent of all workers in the state.

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<sup>1</sup> See, for example, Bates, T., and Robb, A.M. (2016). Impacts of Owner Race and Geographic Context on Access to Small-Business Financing. *Economic Development Quarterly*, 30(2), 159–170.; Blanchflower, D. (2008). Minority Self Employment in the United States and the Impact of Affirmative Action Programs. *NBER Working Paper Series*, (13972).; Fairlie, R. W. and Robb, A. M. (2007). Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances and Business Human Capital. *Journal of Labor Economics*, 25(2), 289–323.; Fairlie, R. W. and Robb, A. M. (2006). Race, Families and Business Success: A Comparison of African-American-, Asian-, and White-Owned Businesses. *Russell Sage Foundation*.; Chatterji, A. K., Chay, K. Y., and Fairlie, R. W. (2013). The Impact of City Contracting Set-Asides on Black Self-Employment and Employment.

<sup>2</sup> Lofstrom, M., Bates, T., and Parker, S. C. (2014). Why are Some People More Likely to Become Small-Businesses Owners than Others: Entrepreneurship Entry and Industry-Specific Barriers. *Journal of Business Venturing*, (29), 232–251.

Figure F-1 shows that there are racial and gender differences in the percentage of workers who were self-employed in the Arizona construction industry.

- About 15 percent of African American workers in the construction industry in 2013 through 2017 were self-employed, less than the rate for non-Hispanic whites (25%). This difference was statistically significant.
- Only 7 percent of Native Americans or other minorities in the construction industry were self-employed, substantially less than the rate for non-Hispanic whites (statistically significant difference).
- The self-employment rate among women in the construction industry (15%) was lower than the rate among men in the industry (22%). This difference was statistically significant.

Figure F-1.  
Percentage of workers in the Arizona construction industry  
who were self-employed, 2013–2017

Demographic group	2013–2017
<b>Race/ethnicity</b>	
African American	14.5 % **
Asian American	12.9
Hispanic American	18.5
Native American or other minority	7.1 **
Non-Hispanic white	24.9
<b>Gender</b>	
Female	15.3 % **
Male	21.7
<b>All individuals</b>	<b>21.1 %</b>

Note: \*\* Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at 95% confidence level.

Source: Keen Independent Research from 2013–2017 ACS Public Use Microdata samples. The 2013–2017 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Engineering industry.** Figure F-2 presents the percentage of workers in the Arizona engineering industry who were self-employed. These results are also from ACS data for the state for 2013–2017. Due to small sample sizes, people of color other than Hispanic Americans were grouped as “Other minority” in Figure F-2.

There were some racial and gender differences in business ownership rates in the engineering industry in Arizona.

- About 5 percent of minority workers other than Hispanic Americans were self-employed, substantially less than the rate for non-Hispanic whites (16%). This difference was statistically significant.
- The self-employment rate for women in the engineering industry (9%) was also substantially less than the rate among men (16%), a statistically significant difference.

Figure F-2.

Percentage of workers in the engineering industry who were self-employed in Arizona, 2013–2017

Demographic group	2013–2017
<b>Race/ethnicity</b>	
Hispanic American	12.7 %
Other minority	4.9 **
Non-Hispanic white	15.9
<b>Gender</b>	
Female	8.7 % **
Male	16.1
<b>All individuals</b>	14.4 %

Note: \*\* Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 95% confidence level.

Due to small sample size, "other minority" includes African Americans, Asian Americans and Native Americans or other minorities.

Source: Keen Independent Research from 2013–2017 ACS Public Use Microdata samples. The 2013–2017 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Potential causes of differences in business ownership rates.** Nationally, researchers have examined whether racial and gender differences in business ownership rates persist after considering personal characteristics such as education and age. Several studies have found that disparities in business ownership still exist even after accounting for such factors.

- **Financial capital.** Some studies have concluded that access to financial capital is a strong determinant of business ownership. Researchers have consistently found correlation between startup capital and business formation, expansion and survival.<sup>3</sup> Additionally, studies suggest that housing appreciation has a positive effect on small business formation and employment.<sup>4</sup> However, unexplained racial and ethnic differences in financial capital remain after statistically controlling for those factors.<sup>5</sup> Recent studies have found that minorities (particularly African Americans and Hispanic Americans) experience greater barriers to accessing credit and face further credit constraints at business startup and throughout business ownership than non-Hispanic whites.<sup>6</sup> Access to capital is discussed in more detail in Appendix G.
- **Education.** Education has a positive effect on the probability of business ownership in most industries. Recent research confirms a significant relationship between education and ability to obtain startup capital.<sup>7</sup> However, results of multiple studies indicate that minorities are still less likely to own a business than nonminorities with similar levels of education.<sup>8</sup>

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<sup>3</sup> See Lofstrom, M. and Chunbei, W. (2006). Hispanic Self-Employment: A Dynamic Analysis of Business Ownership, *Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor)*; Fairlie, R. W., and Robb, A.M. (2006). Race, Families and Business Success: A Comparison of African American-, Asian-, and White-Owned Businesses. *Russell Sage Foundation*; Chatterji, A. K., et al. (2013). The Impact of City Contracting Set-Asides on Black Self-Employment and Employment.

<sup>4</sup> Fairlie, R. W., and Krashinsky, H. A. (2012). Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited.

<sup>5</sup> Lofstrom, M., and Chunbei, W. (2006). Hispanic Self-Employment: A Dynamic Analysis of Business Ownership. *Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor)*; Fairlie, R. W., Robb, A. M., and United States Minority Business Development Agency. (2010). Disparities in Capital Access between Minority and Non-minority-owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs.

<sup>6</sup> Lee, A., Mitchell, B., & Lederer, A. (2019). *Disinvestment, Discouragement and Inequity in Small Business Lending* (Rep.). Washington, D.C.: National Community Reinvestment Coalition.; Robb, A. M. (2012). Access to Capital among Young Firms, Minority-owned Firms, Women-owned Firms and High-Tech Firms. *Small Business Administration*; Chatterji, A. K., et al. (2013). The Impact of City Contracting Set-Asides on Black Self-Employment and Employment.

<sup>7</sup> Robb, A. M., Fairlie, R. W. and Robinson, D. T. (2009). "Capital Injections among New Black and White Business Ventures: Evidence from the Kauffman Firm Survey." *Federal Reserve Bank of Cleveland*.

<sup>8</sup> See Fairlie, R. W. and Meyer, B. D. (1996). Ethnic and Racial Self-Employment Differences and Possible Explanations. *The Journal of Human Resources*, 31(4), 757–793; Butler, J. S., and Herring, C. (1991). Ethnicity and Entrepreneurship in America: Toward an Explanation of Racial and Ethnic Group Variations in Self-Employment. *Sociological Perspectives*. 79–94.

- **Experience.** Both prior self-employment and managerial experience are important indicators of re-entering or entering business ownership, respectively.<sup>9</sup> However, unexplained differences in self-employment between minorities and nonminorities still exist after accounting for business experience.<sup>10</sup>
- **Intergenerational links.** Intergenerational links affect one's likelihood of self-employment.<sup>11</sup> In fact, having an entrepreneurial parent can increase the likelihood of their offspring choosing to be self-employed by up to 200 percent.<sup>12</sup> One study found that experience working for a self-employed family member increases the likelihood of business ownership for minorities.<sup>13</sup>

## Business Ownership Regression Analysis

As discussed above, race, ethnicity and gender can affect opportunities for business ownership, even when accounting for personal characteristics such as education, age and familial status.

To further examine business ownership for the Arizona construction and engineering industries, Keen Independent developed multivariate regression models. Those models estimate the effect of race, ethnicity and gender on the probability of business ownership while statistically controlling for certain personal and family characteristics of the worker.

An extensive body of literature examines whether race- and gender-neutral personal factors such as access to financial capital, education, age and family characteristics (e.g., marital status) help explain differences in business ownership. That subject has also been examined in other disparity studies that have been upheld in court.<sup>14</sup> For example, prior studies in Minnesota and Illinois have used econometric analyses to investigate whether disparities in business ownership for minorities and women working in the construction and engineering industries persist after statistically controlling

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<sup>9</sup> Kim, P., Aldrich, H., and Keister, H. (2006). Access (Not) Denied: The Impact of Financial, Human, and Cultural Capital on Entrepreneurial Entry in the United States. *Small Business Economics*, 27(1), 5–22; Georgellis, Y., Sessions, J. G., and Tsitsianis, N. (2005). Windfalls, wealth, and the transition to self-employment. *Small Business Economics*, 25(5), 407–428.

<sup>10</sup> Fairlie, R., and Meyer, B. (2000). Trends in Self-Employment among White and Black Men during the Twentieth Century. *The Journal of Human Resources*, 35(4), 643–669. doi:10.2307/146366

<sup>11</sup> Andersson, L., and Hammarstedt, M. (2010). Intergenerational transmissions in immigrant self-employment: Evidence from three generations. *Small Business Economics*, 34(3), 261–276.

<sup>12</sup> Lindquist, M. J., Sol, J., and Van Praag, M. (2015). Why Do Entrepreneurial Parents Have Entrepreneurial Children? *Journal of labor economics*, (2). 269–296.

<sup>13</sup> Fairlie, R. W., and Robb, A.M. (2006). Race, Families and Business Success: A Comparison of African American-, Asian-, and White-Owned Businesses. *Russell Sage Foundation*; Fairlie, R. W., and Robb, A. M. (2007). Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances and Business Human Capital. *Journal of Labor Economics*, 25(2), 289–323.

<sup>14</sup> National Economic Research Associates, Inc. (2012). The State of Minority- and Women-Owned Business Enterprise in Construction: Evidence from Houston. Prepared for the City of Houston.; Mason Tillman Associates (2011) Illinois Department of Transportation/Illinois Tollway Disadvantaged Business Enterprises Disparity Study (Vols. 1–2). Prepared for the Illinois Department of Transportation.; Mason Tillman Associates (2011); National Economic Research Associates, Inc. (1997) Disadvantaged Business Enterprise Availability Study. Prepared for the City of Denver.

for race- and gender-neutral personal characteristics.<sup>15, 16</sup> Those studies developed probit econometric models using PUMS data from the 2000 Census, and have been among the materials that agencies have submitted to courts in subsequent litigation concerning the implementation of the Federal DBE Program.

Keen Independent used similar probit regression models to predict business ownership from multiple independent or “explanatory” variables, such as:

- Personal characteristics that are potentially linked to the likelihood of business ownership — age, age-squared, marital status, disability, number of children in the household, number of elderly people in the household and English-speaking ability;
- Educational attainment;
- Measures and indicators related to personal financial resources and constraints — home ownership, home value, monthly mortgage payment, dividend and interest income, and additional household income from a spouse or unmarried partner; and
- Race, ethnicity and gender.<sup>17</sup>

Keen Independent developed probit regression models using PUMS data from the 2013–2017 ACS. The models were separated by industry and included the following number of observations:

- For the Arizona construction industry 8,196 observations were included; and
- For the Arizona engineering industry 1,309 observations were included.

**Arizona construction industry in 2013–2017.** Figure F-3 presents the coefficients for the probit model for individuals working in the Arizona construction industry in 2013–2017.

Several neutral factors were statistically significant in predicting the probability of business ownership:

- Being older was associated with a higher probability of business ownership;
- Having more children was associated with a higher probability of business ownership;
- Higher home values were associated with a higher probability of business ownership;
- Greater interest and dividend income were associated with a higher probability of business ownership; and
- Having an advanced degree was associated with a lower probability of business ownership.

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<sup>15</sup> National Economic Research Associates, Inc. (2000). Disadvantaged Business Enterprise Availability Study. Prepared for the Minnesota Department of Transportation.

<sup>16</sup> National Economic Research Associates, Inc. (2004). Disadvantaged Business Enterprise Availability Study. Prepared for the Illinois Department of Transportation.

<sup>17</sup> Probit models estimate the effects of multiple independent or “predictor” variables in terms of a single, dichotomous dependent or “outcome” variable — in this case, business ownership. The dependent variable is binary, coded as “1” for individuals in a particular industry who are self-employed and “0” for individuals who are not self-employed. The model enables estimation of the probability that workers in each sample are self-employed, based on their individual characteristics. Keen Independent excluded observations where the Census Bureau had imputed values for the dependent variable (business ownership).



After statistically controlling for certain factors other than race, ethnicity and gender, there were lower rates of ownership (statistically significant differences) for the following groups of workers:

- African Americans;
- Asian Americans;
- Native Americans or other minorities; and
- White females.

Members of these groups working in the industry were less likely to own construction businesses than similarly situated non-Hispanic whites and men.

Hispanic Americans working in the construction industry were about as likely as non-Hispanic whites to own businesses after controlling for other factors. Figure F-3 provides detailed results of this regression model.

**Figure F-3.**  
Construction industry business ownership model in Arizona, 2013–2017

Note:

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

Source:

Keen Independent Research from 2013–2017 ACS Public Use Microdata samples. The 2013–2017 ACS raw data extract was obtained through the IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.1030 **
Age	0.0327 **
Age-squared	-0.0001
Married	0.0121
Disabled	0.0164
Number of children in household	0.0573 **
Number of people over 65 in household	-0.0236
Owns home	-0.0785
Home value (\$0,000s)	0.0005 **
Monthly mortgage payment (\$0,000s)	0.0238
Interest and dividend income (\$0,000s)	0.0033 **
Income of spouse or partner (\$0,000s)	0.0003
Speaks English well	0.0606
Less than high school education	-0.0125
Some college	0.0233
Four-year degree	-0.0108
Advanced degree	-0.3290 **
African American	-0.3800 **
Asian American	-0.3670 *
Hispanic American	-0.0618
Native American or other minority	-0.6560 **
White female	-0.3480 **

Probit regression modeling allows for further analysis of the disparities identified in business ownership rates for African Americans, Asian Americans, Native Americans or other minorities, and white women. Keen Independent modeled business ownership rates for these groups as if they had the same probability of business ownership as similarly situated non-Hispanic white males.

1. Keen Independent performed a probit regression analysis predicting business ownership using only non-Hispanic white male construction workers in the dataset.<sup>18</sup>
2. After obtaining the results from the non-Hispanic white male regression model, the study team used coefficients from that model along with the mean personal, financial and educational characteristics of African Americans, Asian Americans, Native Americans or other minorities, and non-Hispanic white women working in the Arizona construction industry (i.e., indicators of educational attainment as well as indicators of financial resources and constraints) to estimate the probability of business ownership of each group if they were treated the same as non-Hispanic white men. Similar simulation approaches have been used in other disparity studies that courts have reviewed.

Figure F-4 presents the simulated business ownership rate (i.e., “benchmark” rate) for African Americans, Asian Americans, Native American or other minorities and non-Hispanic white women, and compares it to the actual, observed mean probabilities of business ownership for that group. The disparity index was calculated by taking the actual business ownership rate for each group, dividing it by that group’s benchmark rate, and then multiplying the result by 100. The disparity index expresses the presence of an ownership disparity, or lack thereof, in terms of what would be expected based on the simulated business ownership rates of similarly situated non-Hispanic white male construction workers. Note that the “actual” self-employment rates are derived from the dataset used for these regression analyses and do not always exactly match results from the entire 2013–2017 data.

**Figure F-4.**  
Comparison of actual business ownership rates to simulated rates for construction workers in Arizona, 2013–2017

Demographic group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
African American	12.1 %	19.9 %	61
Asian American	14.1	21.7	65
Native American or other minority	7.0	19.4	36
Non-Hispanic white female	18.7	26.9	69

**Note:** As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-1.

Disparity index calculated as actual/benchmark rate, multiplied by 100.

**Source:** Keen Independent Research from 2013–2017 ACS Public Use Microdata samples. The 2013–2017 ACS raw data extract was obtained through the IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa/>.

<sup>18</sup> That version of the model excluded the race, ethnicity and gender indicator variables, because the value of all those variables would be the same (i.e., 0).

Results from these analyses show lower actual self-employment rates for African Americans, Asian Americans, Native Americans or other minorities and non-Hispanic white women when compared with simulated ownership rates for these groups.

- **African Americans.** The actual business ownership rate for African Americans was 12.1 percent, which is less than the benchmark rate of 19.9 percent. Dividing 12.1 percent by 19.9 percent (and then multiplying by 100) gives a disparity index of 61, indicating that African Americans owned construction businesses at 61 percent of the rate that would be expected based on simulated ownership rates of non-Hispanic white males. Because the disparity index was less than 80, it indicates a “substantial” disparity (Appendix B has a discussion of the use of “substantial disparity” in court cases).
- **Asian Americans.** In the Arizona construction industry, Asian Americans had an actual business ownership rate of 14.1 percent, less than the benchmark rate of 21.7 percent. With a disparity index of 65, Asian Americans in the industry had business ownership rates significantly less than the rate that would be expected based on simulated ownership rates of non-Hispanic white males. Because the disparity index was less than 80, the disparity was substantial.
- **Native American or other minorities.** Among Native Americans or other minorities in the construction industry, the actual business ownership rate was 7 percent. This is less than the benchmark rate of 19.4 percent. With a disparity index of 36, Native Americans or other minorities working in the construction industry owned businesses well below the rate that would be expected based on simulated ownership rates of non-Hispanic white male construction workers. This disparity was substantial.
- **Women.** The actual ownership rate for non-Hispanic white women in the construction industry was 18.7 percent, which is less than the benchmark rate of 26.9 percent. Non-Hispanic white women owned businesses at about two-thirds of the rate that would be expected based on simulated ownership rates of non-Hispanic white male construction workers. This disparity was substantial (disparity index of 69).

**Arizona engineering industry in 2013 through 2017.** Using the same data source as for the construction industry (2013–2017 ACS data), Keen Independent developed a business ownership regression model for people working in the Arizona engineering industry. Once again, due to small sample sizes, people of color other than Hispanic Americans were grouped as “Other minority.”

Figure F-5 presents the coefficients for that probit model. After controlling for certain other personal and family characteristics, business ownership rates in the engineering industry were lower for:

- People of color (other than Hispanic Americans); and
- Women.

These differences were statistically significant. There was no statistically significant difference in business ownership rates for Hispanic Americans working in the Arizona engineering industry. Figure F-5 shows these results.

Figure F-5.  
Engineering industry business  
ownership model in Arizona,  
2013–2017

Note:

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

Due to small sample size, "other minority" includes African Americans, Asian Americans and Native Americans or other minorities.

Source:

Keen Independent Research from 2013–2017 ACS Public Use Microdata samples. The 2013–2017 ACS raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-7.9510 **
Age	0.0524 *
Age-squared	-0.0003
Married	-0.0525
Disabled	0.8350 **
Number of children in household	0.0622
Number of people over 65 in household	0.3250 **
Owns home	-0.3170
Home value (\$0,000s)	0.0007 **
Monthly mortgage payment (\$0,000s)	0.0038
Interest and dividend income (\$0,000s)	0.0025
Income of spouse or partner (\$0,000s)	0.0016 *
Speaks English well	4.8900 **
Less than high school education	0.5310
Some college	0.1780
Four-year degree	0.2680
Advanced degree	-0.0550
Hispanic American	0.1980
Other minority	-0.5790 **
White female	-0.2630 **

Using the same approach as for the construction industry, Keen Independent simulated business ownership rates for people working in the Arizona engineering industry (see Figure F-6).

- The actual business ownership rate for people of color (other than Hispanic Americans) was 4.9 percent, less than the 13.4 percent benchmark rate for the group. The disparity index was 37, indicating a substantial disparity.
- Non-Hispanic white women had an actual business ownership rate of 10.6 percent compared to a benchmark rate of 15.8 percent (a substantial disparity).

Figure F-6.

Comparison of actual business ownership rates to simulated rates for engineering workers in Arizona, 2013–2017

Demographic group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Other minority	4.9 %	13.4 %	37
Non-Hispanic white female	10.6	15.8	67

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-2.

Disparity index calculated as actual/benchmark rate, multiplied by 100.

Due to small sample size, "other minority" includes African Americans, Asian Americans and Native Americans or other minorities.

Source: Keen Independent Research from 2013–2017 ACS Public Use Microdata samples. The 2013–2017 raw data extract was obtained through the IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa/>.

### Summary of Business Ownership in Arizona

Keen Independent examined whether there were differences in business ownership rates for workers in the Arizona construction and engineering industries related to race, ethnicity or gender.

- There were disparities in business ownership rates for people of color (other than Hispanic Americans) and women working in the construction industry in 2013–2017. After statistically controlling for factors including education, age, family status and homeownership, statistically significant disparities in business ownership rates were found for each of these groups. Disparities were substantial.
- Fewer people of color (other than Hispanic Americans) and women working in the engineering industry were business owners when compared with nonminorities and men. After controlling for education, age and other personal characteristics, there were statistically significant disparities in business ownership rates for these groups. The disparities were substantial.

The disparities in business ownership rates result in fewer minority- and women-owned companies in the Arizona construction and engineering industries relative nonminority male-owned firms.

## APPENDIX G.

### Access to Capital for Business Formation and Success

Access to capital is key factor researchers examine when studying business formation and success. If race- or gender-based discrimination exists in capital markets, people of color and women may have difficulty acquiring the capital necessary to start, operate or expand businesses.<sup>1,2</sup> Researchers have also found that the amount of start-up capital can affect long-term business success and, on average, minority- and women-owned businesses appear to have less start-up capital than non-Hispanic white-owned businesses and male-owned businesses.<sup>3</sup> For example:

- In 2012, 25 percent of white-owned businesses that responded to a national U.S. Census Bureau survey indicated that they had start-up capital of \$25,000 or more.<sup>4</sup>
- Only 12 percent of African American-owned businesses indicated a comparable amount of start-up capital, and disparities in start-up capital were identified for every other minority group except Asian Americans.
- Fifteen percent of female-owned businesses reported start-up capital of \$25,000 or more compared with 27 percent of male-owned businesses (not including businesses that were equally owned by men and women).

Race- or gender-based discrimination affecting availability of start-up capital can have long-term consequences, as can discrimination in access to business loans after businesses have already been formed.<sup>5</sup> Therefore, any discrimination in the traditional means of obtaining start-up capital (e.g., access to credit markets, the ability to obtain a business loan, and having equity in a home and the ability to borrow against that equity) could also have long-term impacts on business ownership and success. Lack of access to credit, housing market discrimination and discrimination in mortgage lending that occurred decades ago could have lasting effects for current or potential business owners.

Appendix G presents information about start-up capital and business credit markets. It also provides information on homeownership and mortgage lending because home equity is often an important source of capital to start and expand businesses.

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<sup>1</sup> Fairlie, R. W., and Robb, A. (2010). *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs*. U.S. Department of Commerce.

<sup>2</sup> Fairlie, R. W., and Robb, A. (2010). *Race and Entrepreneurial Success: Black-, Asian-, and White-Owned Businesses in the United States*. Cambridge, MA: MIT Press.

<sup>3</sup> *Ibid.*

<sup>4</sup> United States Census Bureau. (2012). *2012 Survey of Business Owners*. [Data file]. Retrieved from [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO\\_2007\\_00CSCB16&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2007_00CSCB16&prodType=table).

<sup>5</sup> Fairlie, R. W., and Robb, A. (2010). *Race and Entrepreneurial Success: Black-, Asian-, and White-Owned Businesses in the United States*. Cambridge, MA: MIT Press.

## Start-Up Capital

The study team analyzed financing patterns, with a focus on sources of start-up capital, to explore any differences in access to capital for people of color and women.

**Sources of start-up capital.** The most common sources of capital used to start or acquire a business according to the U.S. Census Bureau are:

- Personal/family savings of owner(s);
- Personal/family assets other than savings of owner(s);
- Personal/family home equity loan;
- Personal credit card(s) carrying balances;
- Business credit card(s) carrying balances;
- Business loan from federal, state or local government;
- Government-guaranteed business loan from a bank or financial institution;
- Business loan from a bank or financial institution;
- Business loan/investment from family/friends;
- Investment by venture capitalist(s); and
- Grants.

Personal and/or family savings of the potential owner are the main sources of capital used to start or acquire a business among all groups surveyed according to the U.S. Census Bureau's 2016 Annual Survey of Entrepreneurs (ASE).<sup>6</sup> National patterns identified in the 2016 ASE include the following:

- Among employer businesses (those with paid employees other than the owner), female-owned firms were somewhat more likely than male-owned businesses to report using personal and/or family savings for start-up capital (67% and 65%, respectively).
- Asian American-owned employer businesses were most likely to use personal/family savings as a source of start-up capital (73%), followed by Native Hawaiian and other Pacific Islander-owned employer businesses (72%), Hispanic American-owned employer businesses (72%), African American-owned employer businesses (70%) and American Indian- and Alaska Native-owned employer businesses (68%).
- Non-Hispanic white-owned employer businesses were the least likely to use the personal/family savings of the owners for start-up capital (64%).

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<sup>6</sup> The Annual Survey of Entrepreneurs provides economic and demographic data of all businesses with employees with receipts of \$1,000 or more by ethnicity, race and gender. This differs from the U.S. Census Bureau's Survey of Business Owners which collects data on employer businesses and non-employer businesses with receipts of \$1,000 or more. ASE data from 2016 are the most recent data available.

Some national differences regarding the use of credit cards as a source of start-up capital were also identified by the 2016 ASE. The following results pertain to employer businesses:

- Female-owned businesses (11%) were more likely to use personal credit cards as a source of start-up capital compared with male-owned businesses (9%).
- About 15 percent of African American-, American Indian- and Alaska Native-owned businesses used personal credit cards as a source of start-up capital, followed by Native Hawaiian and other Pacific Islander- (14%) and Hispanic American-owned firms (12%).
- Nine percent of Asian American- and non-Hispanic white-owned businesses reported using personal credit cards as a source of start-up capital.

Because credit card financing for debt is a more expensive source of debt-financing compared with business loans through financial institutions,<sup>7</sup> women- and minority-owned businesses are negatively affected by their higher use of personal credit cards as a source of start-up capital.

**Trends in wealth-holding.** Since personal and/or family savings were the most common source of start-up capital used to start or acquire a business, the study team examined data on wealth-holding to further explore effects on people of color and women.

In 2016, white households had, on average, the highest income and net worth levels, far surpassing the income and net worth levels of African American and Hispanic American households.<sup>8</sup> White households were less likely to have zero or negative net worth and had more assets than African American and Hispanic American households.<sup>9</sup> White households also had greater mean net housing wealth than African American and Hispanic American households.<sup>10</sup> Figure G-1 provides household financial data by race/ethnicity for 2016.

All minority groups except for Asian Americans had relatively lower levels of household wealth compared to non-Hispanic whites. Given the heavy dependence upon personal and/or family savings of the owner as the main source of start-up capital, lower levels of wealth among people of color may result in greater difficulty acquiring the capital necessary to start, operate or expand businesses.

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<sup>7</sup> Robb, A. (2018). *Financing Patterns and Credit Market Experiences: A Comparison by Race and Ethnicity for U.S. Employer Firms* (Report No. SBAHQ-16-M-0175). Retrieved from U.S. Small Business Administration, Office of Advocacy website: [https://www.sba.gov/sites/default/files/Financing\\_Patterns\\_and\\_Credit\\_Market\\_Experiences\\_report.pdf](https://www.sba.gov/sites/default/files/Financing_Patterns_and_Credit_Market_Experiences_report.pdf)

<sup>8</sup> Dettling, L. J., Hsu, J. W., Jacobs, L., Moore, K. B., Thompson, J. P., and Llanes, E. (2017). *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*. Retrieved from Board of Governors of the Federal Reserve System website: <https://doi.org/10.17016/2380-7172.2083>

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*



Figure G-1.

U.S. Household financial data by race/ethnicity for 2016 (thousands of dollars or percent)

	White	African American	Hispanic American	Other minority
<b>Income</b>				
Median	\$ 61,200	\$ 35,400	\$ 38,500	\$ 50,600
Mean	123,400	54,000	57,300	86,900
<b>Net worth</b>				
Median	\$ 171,000	\$ 17,600	\$ 20,700	\$ 64,800
Mean	933,700	138,200	191,200	457,800
Percent of families with zero or negative net worth	9 %	19 %	13 %	14 %
<b>Assets (percent of families with...)</b>				
Primary residence	73 %	45 %	46 %	54 %
Retirement accounts	60	34	30	48
Business equity	15	7	6	13
<b>Wealth from housing (for homeowners)</b>				
Percent of assets in housing	32 %	37 %	39 %	35 %
Mean net housing wealth	\$ 215,800	\$ 94,400	\$ 129,800	\$ 220,700

Note: "Other minority" includes Asian Americans, Native Americans and individuals of multiple races.

Source: Dettling, L. J., Hsu, J. W., Jacobs, L., Moore, K. B., Thompson, J. P., & Llanes, E. (2017). *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*. Retrieved from Board of Governors of the Federal Reserve System website: <https://doi.org/10.17016/2380-7172.2083>.

## Business Credit

In addition to personal and/or family savings, businesses also rely on banks for start-up and expansion capital.<sup>11</sup> The study team analyzed data on business loans to identify any differences in business lending to minority-, female- and white male-owned companies.

**Successful acquisition of business loans.** Data for employer businesses that secured business loans from a bank or financial institution are found in the 2016 ASE.<sup>12</sup> In Arizona, 11.4 percent of businesses reported securing a business loan from a bank or financial institution. Although data by race, ethnicity or gender are not available for individual states, nationally, minority-owned businesses (13%) were less likely than non-Hispanic white-owned firms (18%) to report securing a business loan from a bank or financial institution.

<sup>11</sup> Robb, A. and Robinson, D. T. (2017). Testing for Racial Bias in Business Credit Scores. *Small Business Economics*, 50(3), 429-443.

<sup>12</sup> United States Census Bureau. (2016). 2016 Annual Survey of Entrepreneurs. [Data file]. Retrieved from <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>

As shown in Figure G-2, women-owned businesses were less likely than male-owned businesses to obtain business loans from a bank or financial institution.

Figure G-2

U.S. employer businesses that secured business loans from a bank or financial institution in 2016 by race, ethnicity and gender

Demographic group	Percent of respondents
<b>Race</b>	
African American	12.6 %
American Indian and Alaska Native	15.1
Asian American	14.5
Native Hawaiian and other Pacific Islander	14.0
White	17.2
<b>Ethnicity</b>	
Hispanic American	10.7 %
Non-Hispanic	17.2
<b>Gender</b>	
Female	14.3 %
Male	16.6
<b>All individuals</b>	16.5 %

Source: U.S. Census Bureau Annual Survey of Entrepreneurs, 2016.

Greater reluctance to apply for a business loan might be one of the reasons why people of color and women who own business are less likely to secure loans. The 2016 ASE collected data on whether a business needed additional financing and why the owner chose not to apply. One of the top reasons for not applying was because the firm owner(s) believed they would not be approved by a lender. In Arizona, 1.6 percent of all firms reported not applying for additional financing because the owner believed they would not be approved by a lender. Nationally, 1.7 percent of firms reported not applying for financing for the same reason.

Although results by race, ethnicity and gender are not available for Arizona, Figure G-3 presents national results. Nationally, business owners of color were more likely to believe that they would not be approved by a lender. African American-owned firms were by far the most likely group to avoid additional financing due to fear that they would not be approved.

Female-owned firms (2.2%) were more likely to believe that they would not be approved by a lender when compared with male-owned firms (1.5%).

Figure G-3.

U.S. employer businesses that avoided additional financing in 2016 because they did not think the business would be approved by lender

Demographic group	Percent of respondents
<b>Race</b>	
African American	6.2 %
American Indian and Alaska Native	3.9
Asian American	2.0
Native Hawaiian and other Pacific Islander	1.9
White	1.6
<b>Ethnicity</b>	
Hispanic American	3.2 %
Non-Hispanic	1.6
<b>Gender</b>	
Female	2.2 %
Male	1.6
<b>All individuals</b>	1.7 %

Source: U.S. Census Bureau Annual Survey of Entrepreneurs, 2016.

Lack of access to capital can affect business profitability according to the 2016 ASE. Business owners of color were far more likely than non-Hispanic whites and men to cite access to capital as negatively affecting the profitability of their company. Figure G-4 provides results by race, ethnicity and gender of the business owner (data for employer firms).

Figure G-4.

U.S. employer businesses that cited access to financial capital as negatively impacting the profitability of their business in 2016

Demographic group	Percent of respondents
<b>Race</b>	
African American	22.3 %
American Indian and Alaska Native	17.0
Asian American	13.3
Native Hawaiian and other Pacific Islander	19.6
White	8.9
<b>Ethnicity</b>	
Hispanic American	15.1 %
Non-Hispanic	9.3
<b>Gender</b>	
Female	10.0 %
Male	9.6
<b>All individuals</b>	9.5 %

Source: U.S. Census Bureau Annual Survey of Entrepreneurs, 2016.

In sum, minority- and female-owned employer businesses were less likely to secure business loans from a bank or financial institution, more likely to not apply for additional financing because firm owners believed that they would not be approved and more likely to cite access to financial capital as having a negative impact on profitability. These less than favorable indicators of credit market conditions demonstrate great difficulty, on average, for people of color and women to acquire the capital necessary to start, operate or expand businesses.

The ASE data related to business lending are consistent with the findings of other research. For example, a study conducted by the National Community Reinvestment Coalition in 2019 found more significant barriers to accessing capital through the traditional banking market for African American and Hispanic American small business owners. Further research found that African American and Hispanic American applicants for small business loans are asked to provide more documentation and are given less information about the loans than their white counterparts.<sup>13</sup>

<sup>13</sup> Lee, A., Mitchell, B., & Lederer, A. (2019). *Disinvestment, Discouragement and Inequity in Small Business Lending* (Rep.). Washington, D.C.: National Community Reinvestment Coalition.

Overall trends in small business lending is also important when considering credit-market conditions. Small business lending was slow to recover from the Great Recession.<sup>14</sup> Among large banks, lending disproportionately went to large businesses, with bank lending to small businesses decreased by nearly \$100 billion from 2008 to 2016.<sup>15</sup> The decrease in small business lending coupled with greater barriers for people of color and women, may have perpetuated an environment where minorities and women have more difficulty acquiring the capital necessary to start, operate or expand businesses.

**2003 Survey of Small Business Finances (SSBF).** Conducted by the U.S. Federal Reserve Board of Governors, the 2003 SSBF remains one of the most comprehensive sources of information to compare lending to minority- and nonminority-owned small businesses. Unlike previous surveys, the 2003 SSBF is unique in that it provides data on firm-level measurement of characteristics such as race, ethnicity, gender and ownership concentration. The 2003 SSBF surveyed 4,240 representative firms that were operating at the end of 2003.<sup>16</sup>

The SSBF collected information on businesses and business owners including:

- Information on firm and owner characteristics;
- An inventory of small businesses' use of financial services and of their financial service suppliers;
- Income and balance sheet information;
- Demographic characteristics for up to three individual owners;
- Information on the use of nonstandard work arrangements; and
- Details on the use of credit and debit card processing.

The SSBF records the geographic location of businesses by Census Division, not by city, county or state. The Mountain Central Division (or "Mountain region") includes Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming. The Mountain region is the level of geographic detail most specific to Arizona, and 2003 is the most recent information available from the SSBF as the survey was discontinued after that year.

The SSBF collected information about access to capital for businesses including loan denial rates, businesses that did not apply for a loan due to fear of denial, loan values and interest rates. Results from the 2003 SSBF indicate disparities for some minorities and females within these categories. These results are largely consistent with analysis of 2016 ASE data.

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<sup>14</sup> Cole, R. (2018). *How Did Bank Lending to Small Business in the United States Fare After the Financial Crisis?* (Report No. SBAHQ-15-M-0144). Retrieved from U.S. Small Business Administration, Office of Advocacy website: <https://www.sba.gov/sites/default/files/439-How-Did-Bank-Lending-to-Small-Business-Fare.pdf>

<sup>15</sup> *Ibid.*

<sup>16</sup> The Federal Reserve Board. (2003). *2003 Survey of Small Business Finances*. [Data file]. Retrieved from <https://www.federalreserve.gov/pubs/oss/oss3/ssbf03/ssbf03home.html#ssbf03dat>

**Loan denial rates.** The 2003 SSBF included information about loan denials. Within the Mountain region, the loan denial rate for small businesses owned by people of color and women (13%) was higher than that for nonminority male-owned businesses (10%). Because of small sample size in Mountain region, results are not presented by specific racial or ethnic group.

Nationally, SSBF data indicated that the loan denial rate for African American-owned businesses (51%) was considerably higher than the rate for white male-owned firms (8%). This difference was statistically significant. This disparity persisted after statistically controlling for race- and gender-neutral factors including various firm characteristics, the firm's credit and financial health, and business owner characteristics.

Although businesses owned by Asian Americans (12%), Hispanic Americans (16%), Native Americans (22%) and non-Hispanic white females (11%) also had higher loan denial rates when compared with business owned by non-Hispanic white males, these differences were not statistically significant and did not persist after controlling for various race- and gender-neutral factors.

**Applying for loans.** The 2003 SSBF also included a question that gauged whether a business owner did not apply for a loan due to fear of loan denial. Among Mountain region businesses that reported needing loans, minority- and women-owned businesses (29%) were more likely than non-Hispanic white male-owned firms (16%) to report that they did not apply for those loans because of fear of loan denial. This difference was statistically significant. As with loan denial rates, responses for individual race/ethnicity and gender groups were not available within the Mountain region due to small sample size.

Nationwide, businesses owned by African Americans (47%), Hispanic Americans (29%), Native Americans (30%) and non-Hispanic white females (22%) were more likely to forgo applying for business loans due to fear of loan denial when compared with non-Hispanic white male business owners (14%). These differences were statistically significant.

After statistically controlling for various race- and gender-neutral factors for the firm and firm owner, African American- and female-owned businesses were more likely to forgo applying for a loan due to fear of denial. These results were statistically significant.

**Loan values.** Data regarding loan values for businesses that received loans were also included in the 2003 SSBF. Among firms that received loans in the Mountain region, minority- and women-owned firms had lower average loan amounts (\$98,000) when compared with white male-owned firms (\$231,000). This pattern was seen nationally as well. Disparities within the Mountain region and nationwide were statistically significant.

**Interest rates.** According to national 2003 SSBF data, minority- and female-owned businesses were issued loans with a higher interest rate, on average, than majority-owned businesses (7.5% and 6.4%, respectively). This difference was statistically significant.

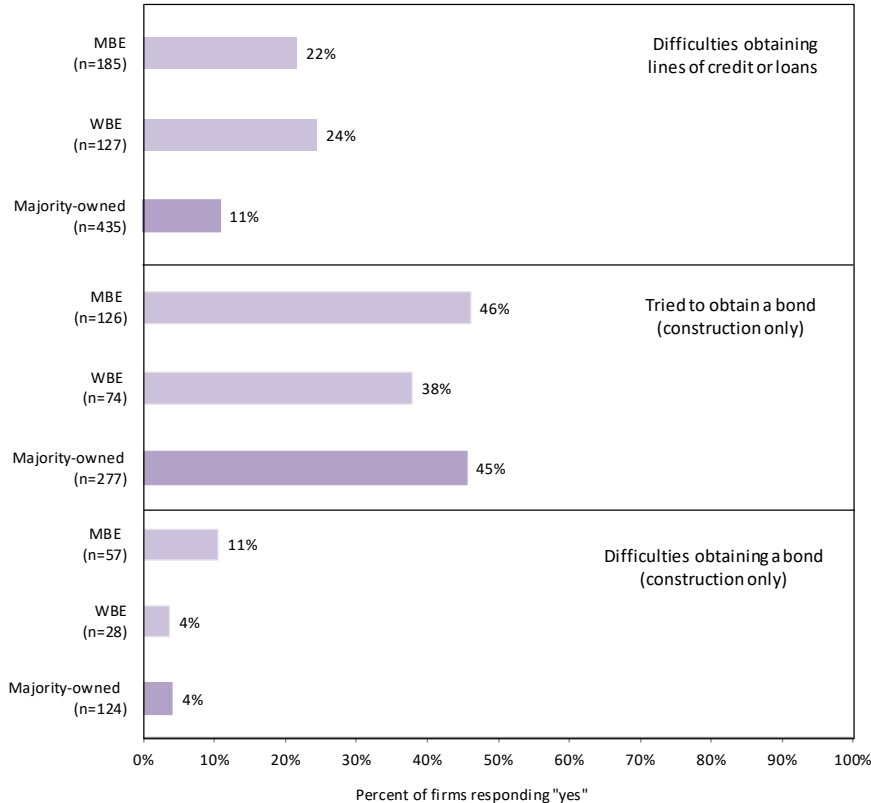
After accounting for various race- and gender-neutral factors, statistically significant disparities persisted for African American- and Hispanic American-owned firms. African American-owned businesses received loans with interest rates approximately 2 percentage points higher than non-Hispanic white male-owned businesses, and businesses owned by Hispanic Americans received loans

with interest rates approximately 1 percentage point higher than majority-owned businesses. Data for the Mountain region also suggest higher interest rates for minority and female business owners.

**Results from the Keen Independent 2019 availability interviews with firms in the Arizona study industries.** At the close of the 2019 availability interviews in the Disparity Study, the study team asked questions regarding potential barriers or difficulties firms might have experienced in the Arizona marketplace. The series of questions was introduced with the following statement: “Finally, we’re interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences in the past six years as you answer these questions.” Respondents were then asked about specific potential barriers or difficulties. Responses to questions about access to capital were combined for all industries; responses to questions about bonding are only for construction firms.

Figure G-5 presents results for questions related to access to capital and bonding. The first question was, “Has your company experienced any difficulties in obtaining lines of credit or loans?” As shown in Figure G-5, 22 percent of minority-owned firms and 24 percent of white women-owned companies reported difficulties obtaining lines of credit or loans. Only 11 percent of majority-owned businesses reported similar difficulties (“majority-owned business” in Figure G-5 are firms not owned by people of color or women).

**Figure G-5.**  
Responses to availability interview questions concerning loans and bonding,  
Arizona MBE, WBE and majority-owned firms



Source: Keen Independent Research from 2019 availability survey.

To research whether bonding presented a barrier to businesses, Keen Independent asked firms completing availability interviews:

- “Has your company obtained or tried to obtain a bond for a project or contract?”
- [and if so] “Has your company had any difficulties obtaining bonds needed for a project or contract?”

Among construction firms receiving or attempting to receive a bond, there was little difference in the percentage of WBEs and majority-owned firms reporting difficulties receiving a bond (both about 4%). However, minority-owned firms were three times more likely to report difficulties receiving bonds (11%) compared with majority-owned businesses.

## Homeownership and Mortgage Lending

The study team also analyzed homeownership and the mortgage lending market to explore differences across race/ethnicity and gender that may lead to disparities in access to capital.

**Homeownership.** There is a strong positive correlation between the likelihood of starting a new business and the potential entrepreneur’s home equity.<sup>17</sup> Wealth created through homeownership can be an important source of capital to start or expand a business.<sup>18</sup> Research has shown:

- Homeownership is a tool for building wealth;<sup>19</sup>
- More personal wealth provides additional options for financing because higher wealth enables both self-financing and wealth leveraging via borrowing from the equity in one’s home;<sup>20</sup>
- Business owners tend to use home equity to finance business investments, confirming that home equity is an efficient means of business financing;<sup>21</sup>
- Wealth inequality results in less homeownership among women and minorities; and
- The United States has a history of restrictive real estate covenants and property laws that affect the ownership rights of minorities and women.<sup>22</sup>

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<sup>17</sup> Corradin, S., and Popov, A. (2015). House Prices, Home Equity Borrowing, and Entrepreneurship. *The Review of Financial Studies*, 28(8), 2399–2428.

<sup>18</sup> The housing and mortgage crisis beginning in late 2006 has substantially impacted the ability of small businesses to secure loans through home equity. Later in Appendix G, Keen Independent discusses the consequences of the housing and mortgage crisis on small businesses and MBE/WBEs.

<sup>19</sup> McCabe, B. J. (2018). Why Buy a Home? Race, Ethnicity, and Homeownership Preferences in the United States. *Sociology of Race and Ethnicity*, 4(4), 452–472.

<sup>20</sup> Bates, T., Bradford, W., and Jackson, W. E. (2018). Are Minority-Owned Businesses Underserved by Financial Markets? Evidence from the private-equity industry. *Small Business Economics*, 50(3), 445–461.

<sup>21</sup> Corradin, S., and Popov, A. (2015). House Prices, Home Equity Borrowing, and Entrepreneurship. *The Review of Financial Studies*, 28(8), 2399–2428.

<sup>22</sup> Baradaran, M. (2017). *The Color of Money: Black banks and the racial wealth gap*. London: The Belknap Press of Harvard University Press.

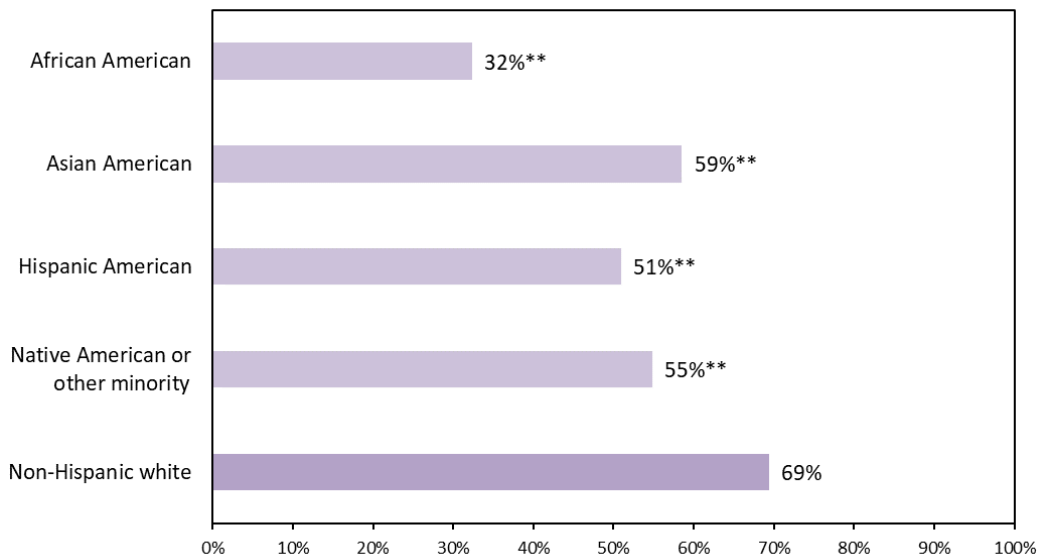


Therefore, barriers to homeownership and creation of home equity for people of color and women can affect business opportunities. Similarly, barriers to accessing home equity through home mortgages can also affect available capital for new or expanding businesses. The study team analyzed homeownership rates, home values and the home mortgage market in Arizona from 2013–2017.

**Homeownership rates.** The study team used 2013–2017 American Community Survey (ACS) data to examine homeownership rates in Arizona. As shown in Figure G-6, homeownership rates for minority groups are lower non-Hispanic whites (statistically significant differences).

Figure G-6.

Percentage of Arizona households that are homeowners, 2013-2017



Note: \*\* Denotes that the difference in proportions between the minority group and non-Hispanic whites for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2013-2017 ACS Public Use Microdata sample. The 2013-2017 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Lower rates of homeownership may reflect lower incomes and wealth for target groups. That relationship may be self-reinforcing, as low wealth puts individuals at a disadvantage in becoming homeowners, which has historically been a path to building wealth. For example, the probability of homeownership is considerably lower for African Americans than it is for comparable non-Hispanic whites throughout the United States.<sup>23</sup>

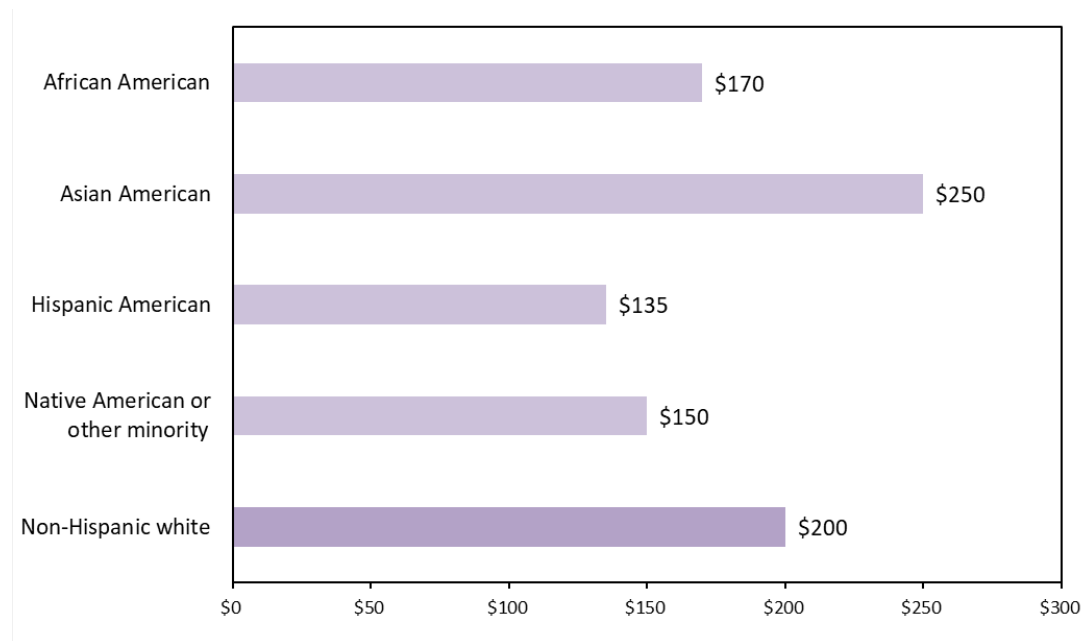
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<sup>23</sup> Board of Governors of the Federal Reserve System. (2017). Residential Mortgage Lending in 2016: Evidence from the Home Mortgage Disclosure Act. *Federal Reserve Bulletin*, 103(6).

**Home values.** Research has shown that increases in home equity encourage business ownership.<sup>24</sup> Using 2013 through 2017 ACS data, the study team compared median home values by target group. Figure G-7 presents median home values by group in Arizona from 2013 to 2017.

African Americans (\$170,000), Hispanic Americans (\$135,000) and Native Americans or other minorities (\$150,000) in Arizona had lower median home values than non-Hispanic whites (\$200,000). On average, Asian Americans (\$250,000) owned homes of greater value than non-Hispanic whites.

Figure G-7.  
Median home values in Arizona, 2013-2017, thousands



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

Source: Keen Independent Research from 2013–2017 ACS Public Use Microdata sample. The 2013-2017 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Mortgage lending.** Minorities may be denied opportunities to own homes, to purchase more expensive homes or to access equity in their homes if they are discriminated against when applying for home mortgages. For example, Bank of America paid \$335 million to settle allegations that its Countrywide Financial unit discriminated against African American and Hispanic American borrowers between 2004 and 2008. The case was brought to the Securities and Exchange Commission after finding evidence of “statistically significant disparities by race and ethnicity” among Countrywide Financial customers.<sup>25</sup>

<sup>24</sup> Harding, J., and Rosenthal, S.S. (2017). Homeownership, Housing Capital Gains and Self-Employment. *Journal of Urban Economics*, 99, 120-135.

<sup>25</sup> Savage, C. (2011, December 21). \$335 Million Settlement on Countrywide Lending Bias. *The New York Times*. Retrieved March 1, 2018, from <http://www.nytimes.com/2011/12/22/business/us-settlement-reported-on-countrywide-lending.html>

The study team explored market conditions for mortgage lending in Arizona. The best available source of information concerning mortgage lending is Home Mortgage Disclosure Act (HMDA) data, which contain information on mortgage loan applications that financial institutions, savings banks, credit unions and some mortgage companies receive.<sup>26</sup> Those data include information about the location, dollar amount and types of loans made, as well as race/ethnicity, income and credit characteristics of all loan applicants. The data are available for home purchases, loan refinances and home improvement loans.

The study team examined HMDA statistics provided by the Federal Financial Institutions Examination Council (FFIEC) for 2007, 2013 and 2017. There were 8,610 lending institutions included in the 2007 data.<sup>27</sup> In 2013, this number fell to 7,190 institutions<sup>28</sup> and by 2017 there were only 5,852 lenders included in the data.<sup>29</sup>

**Mortgage denials.** The study team examined mortgage denial rates on conventional loan applications made by high-income households. Conventional loans are loans that are not insured by a government program. High-income applicants are those households with 120 percent or more of the U.S. Department of Housing and Urban Development (HUD) area median family income.<sup>30</sup> Loan denial rates are calculated as the percentage of mortgage loan applications that were denied, excluding applications that the potential borrowers terminated and applications that were closed due to incompleteness.<sup>31</sup>

Figure G-8 presents loan denial results for high-income households in Arizona in 2007, 2013 and 2017. African American, Asian American, Hispanic American and Native American high-income applicants faced higher loan denial rates compared with non-Hispanic white applicants in all years (2007, 2013 and 2017). In 2017, 13 percent of African American high-income applicants and 20 percent of Native American high-income applicants were denied loans, compared with 7 percent of non-Hispanic white high-income applicants.

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<sup>26</sup> Depository institutions were required to report 2017 HMDA data if they had assets of more than \$44 million on the preceding December 31 (\$42 million for 2013), had a home or branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Non-depository mortgage companies were required to report HMDA if they are for-profit institutions, had home purchase loan originations (including refinancing) either a.) exceeding 10 percent of all loan obligations originations in the past year or b.) exceeding \$25 million, had a home or branch office located in an MSA (or receive applications for, purchase or originated five or more home purchase loans mortgages in an MSA), and either had more than \$10 million in assets or made at least 100 home purchase or refinance loans in the preceding calendar year.

<sup>27</sup> Avery, R., Brevoort, K., and Canner, G. (2008). The 2007 HMDA Data. *Federal Reserve Bulletin*.

<sup>28</sup> Bhutta, N., Ringo, D. R. (2015). The 2013 Home Mortgage Disclosure Act Data. *Federal Reserve Bulletin*.

<sup>29</sup> Consumer Financial Protection Bureau. (2018). FFIEC Announces Availability of 2017 Data on Mortgage Lending. Retrieved from <https://www.consumerfinance.gov/about-us/newsroom/ffiec-announces-availability-2017-data-mortgage-lending/>

<sup>30</sup> Median family income for the Phoenix-Mesa-Glendale, AZ MSA was about \$62,000 in 2013 and \$66,000 in 2017. Likewise, median family income for the non-metro portion of Arizona was about \$49,000 in 2013 and \$47,000 in 2017. Source: FFIEC Census and FFIEC estimated MSA/MD median family income for the 2013 and 2017 CRA/HMDA reports.

<sup>31</sup> For this analysis, loan applications are considered to be applications for which a specific property was identified, thus excluding preapproval requests.

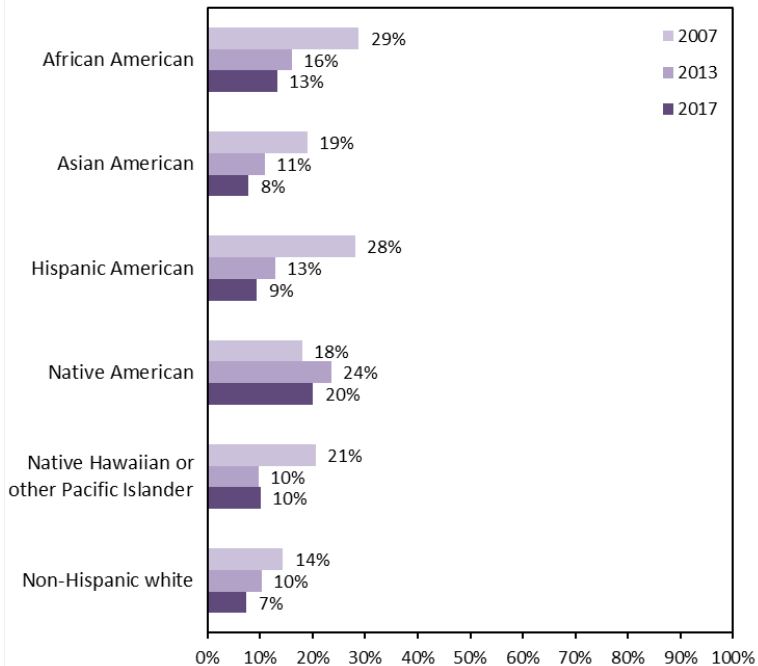
**Figure G-8.**  
Denial rates of conventional  
purchase loans to  
high-income households in  
Arizona, 2007, 2013 and 2017

Note:

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

Source:

FFIEC HMDA data 2007, 2013 and 2017.



**Subprime lending.** Loan denial is one of several ways minorities might be discriminated against in the home mortgage market. Mortgage lending discrimination can also occur through higher fees and interest rates. Subprime lending provides a unique example of such types of discrimination through fees associated with various loan types.

Until recent years, one of the fastest growing segments of the home mortgage industry was subprime lending. From 1994 through 2003, subprime mortgage activity grew by 25 percent per year and accounted for \$330 billion of U.S. mortgages in 2003, up from \$35 billion a decade earlier. In 2006, subprime loans represented about one-fifth of all mortgages in the United States.<sup>32</sup>

With higher interest rates than prime loans, subprime loans were historically marketed to customers with blemished or limited credit histories who would not typically qualify for prime loans. Over time, subprime loans also became available to homeowners who did not want to make a down payment, did not want to provide proof of income and assets, or wanted to purchase a home with a cost above that for which they would qualify from a prime lender.<sup>33</sup> Because of higher interest rates and additional costs, subprime loans affected homeowners' ability to grow home equity and increased their risks of foreclosure. Fair-lending enforcement mechanisms have historically tended to overlook disparate impact and treatment and shielded some lenders with discriminating practices from investigations.<sup>34</sup>

<sup>32</sup> Avery, B., Brevoort, K. P., and Canner, G. B. (2007). The 2006 HMDA Data. *Federal Reserve Bulletin*, A73–A109.

<sup>33</sup> Gerardi, S., and Willen, P. (2008). *Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure* (Working Paper No. 07–15). Boston, MA: Federal Reserve Bank of Boston. Retrieved from Federal Reserve Bank of Boston website: <https://www.bostonfed.org/publications/research-department-working-paper/2007/subprime-outcomes-risky-mortgages-homeownership-experiences-and-foreclosures.aspx>

<sup>34</sup> Ross, S. L., and Yinger, J. (2002). *The Color of Credit: Mortgage Discrimination, Research Methodology, and Fair-Lending Enforcement*. Cambridge, MA: MIT Press.

Although there is no standard definition of a subprime loan, there are several commonly used approaches to examining rates of subprime lending. The study team used a “rate-spread method” — in which subprime loans are identified as those loans with substantially above-average interest rates — to measure rates of subprime lending in 2007, 2013 and 2017.<sup>35</sup> Because lending patterns and borrower motivations differ depending on the type of loan being sought, the study team separately considered home purchase loans and refinance loans.

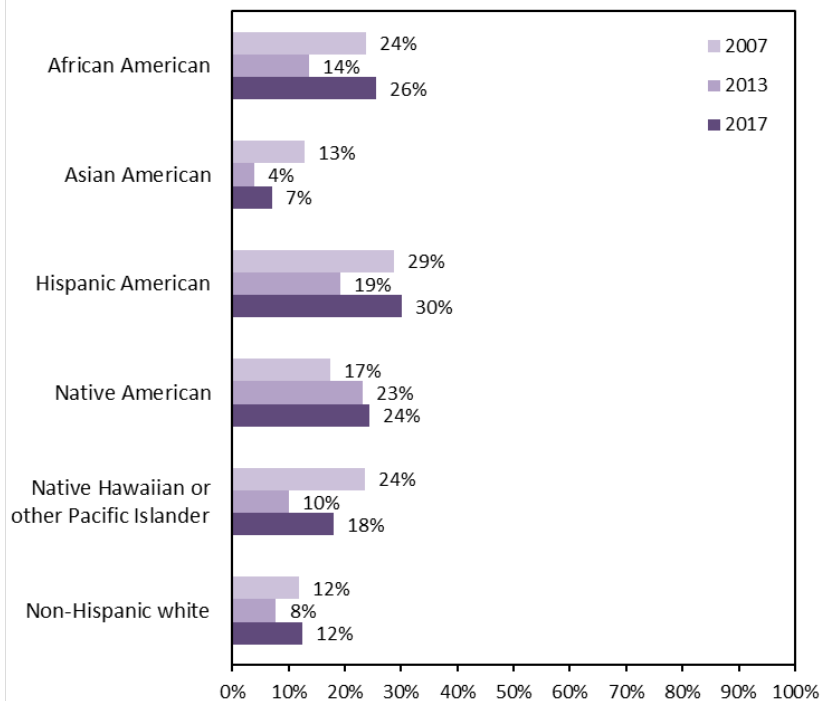
Figure G-9 shows the percent of conventional home purchase loans that were subprime in Arizona, based on 2007, 2013 and 2017 HMDA data. A higher percentage of borrows receiving subprime loans may be the result of predatory lending.

- African American, Hispanic American, Native American and Native Hawaiian or other Pacific Islander borrowers were more likely to receive subprime home purchase loans than non-Hispanic whites in each of these years.
- Asian American borrowers were no more likely to receive subprime home purchase loans than white non-Hispanic borrowers.

**Figure G-9.**  
Percent of conventional home purchase loans in Arizona that were subprime, 2007, 2013 and 2017

**Note:**  
Subprime rates are calculated as the percentage of originated loans that were subprime.

**Source:**  
FFIEC HMDA data 2007, 2013 and 2017.



<sup>35</sup> Prior to October 2009, first lien loans were identified as subprime if they had an annual percentage rate (APR) that was 3.0 percentage points or greater than the federal treasury security rate of like maturity. As of October 2009, rate spreads in HMDA data were calculated as the difference between APR and Average Prime Offer Rate, with subprime loans defined as 1.5 percentage points of rate spread or more. The study team identified subprime loans according to those measures in the corresponding time periods.

Figure G-10 examines the percentage of conventional home refinance loans that were subprime in Arizona in 2007, 2013 and 2017. There was high usage of subprime refinance loans in 2007, with people of color much more likely to receive such loans than non-Hispanic white borrowers.

By 2013, use of subprime refinance loans was rare for any racial or ethnic group.

**Figure G-10.**

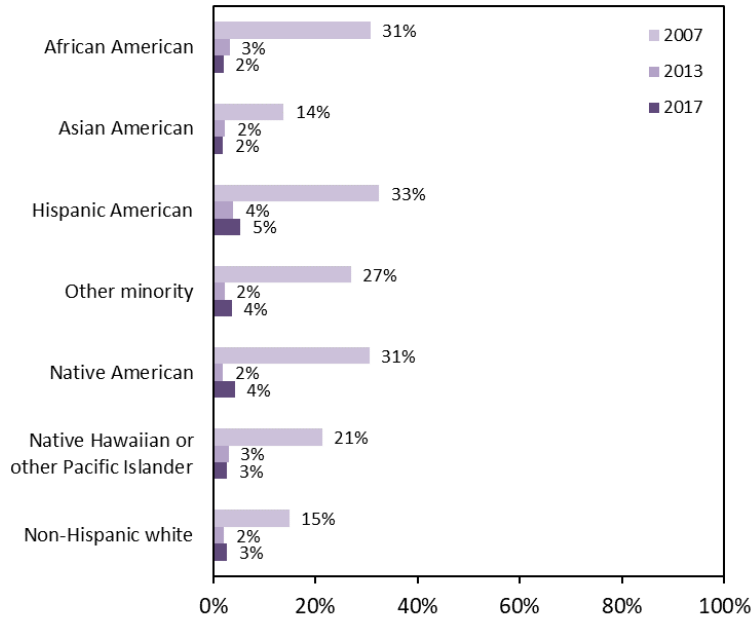
**Percent of conventional refinance loans in Arizona that were subprime, 2007, 2013 and 2017**

**Note:**

Subprime rates are calculated as the percentage of originated loans that were subprime.

**Source:**

FFIEC HMDA data 2007, 2013 and 2017.



**Additional research.** Studies across the country have examined barriers to homeownership for people of color. For example:

- A study that analyzed more than two million home sale transactions over the course of 18 years in four major metropolitan areas — Chicago, Baltimore/Maryland, Los Angeles and San Francisco — showed that African American and Hispanic American buyers pay more for the price of their house than their white counterparts in almost every purchase scenario.<sup>36</sup>
- Researchers found that between 1999 and 2011, socioeconomic and demographic factors could only partially explain the gap in homeownership that existed between white and African Americans homeowners, and that discrimination in the mortgage process was a likely explanation.<sup>37</sup>

<sup>36</sup> Bayer, C., Casey, M., Ferreira, F., and McMillan F. (2017). Racial and Ethnic Price Differentials in the Housing Market. *Journal of Urban Economics*, 102, 91–105.

<sup>37</sup> Fuller, C. (2015). *Race and Homeownership: How Much of the Differences are Explainable by Economics Alone?* Retrieved from Zillow Research website: <https://www.zillow.com/research/racial-homeownership-differences-10155/>

- Results of a mystery-shopping field study conducted at several national banks in a major metropolitan U.S. city showed that minority loan applicants were provided less comprehensive information about financing options, required to provide more information to apply for a loan and received less encouragement and assistance compared to white potential loan applicants.<sup>38</sup>
- An analysis of U.S. Survey of Consumer Finance data shows that African American borrowers on average pay about 29 basis points more in interest on mortgage loans than comparable white borrowers.<sup>39</sup>

Some evidence suggests that lenders sought out and offered subprime loans to individuals who often would not be able to pay off the loan, a form of “predatory lending.”<sup>40</sup> Furthermore, some research has found that many recipients of subprime loans could have qualified for prime loans.<sup>41</sup> Previous studies of subprime lending suggest that predatory lenders have disproportionately targeted minorities.<sup>42</sup> A 2018 study, for example, examined subprime mortgage loans in seven metropolitan areas across the country. The study found that African American borrowers were 103 percent more likely and Hispanic American borrowers were 78 percent more likely than white borrowers to receive a high-cost loan for home purchases. Disparities were found for both low- and high-risk borrowers, regardless of age.<sup>43</sup>

A 2007 study released from the Federal Reserve Bank of Boston found that “homeownerships that begin with a subprime purchase mortgage end up in foreclosure almost 20 percent of the time, or more than six times as often as experiences that begin with prime purchase mortgages.”<sup>44</sup>

**Implications of the mortgage lending crisis.** The ramifications of the mortgage lending crisis not only continue to substantially impact the ability of homeowners to secure capital through home mortgages to start or expand small businesses but have also created a nationwide retreat in dynamism in nearly every measurable respect.<sup>45</sup> (Dynamism consists of the rate and scale at which the process of reallocating the economy’s resources across firms and industries according to their most productive use occurs.)

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<sup>38</sup> Bone, S. A., Christensen, G. L., and Williams, J. D. (2014). Rejected, Shackled, and Alone: The Impact of Systemic Restricted Choice on Minority Consumers' Construction of Self. *Journal of Consumer Research*, 41(2), 451–474.

<sup>39</sup> Cheng, P., Lin, Z., and Liu, Y. (2015). Racial Discrepancy in Mortgage Interest Rates. *Journal of Real Estate Finance and Economics*, 51(1), 101–120.

<sup>40</sup> For example Hull, N.R. (2017). Crossing the Line: Prime, subprime, and predatory lending. *Maine Law Review*, 61(1); Morgan, D. P. (2007). *Defining and Detecting Predatory Lending* (No. 273). Staff report, Federal Reserve Bank of New York.

<sup>41</sup> Faber, J. W. (2013). Racial Dynamics of Subprime Mortgage Lending at the Peak. *Housing Policy Debate*, 23(2), 328-349.

<sup>42</sup> *Ibid*; Been, V., Ellen, I., and Madar, J. (2009). The High Cost of Segregation: Exploring racial disparities in high-cost lending. *Fordham Urb. LJ*, 36, 361.

<sup>43</sup> Bayer, P., Ferreira, F., and Ross, S. (2018). What Drives Racial and Ethnic Differences in High-Cost Mortgages? The Role of High-Risk Lenders. *Review of Financial Studies*, 31(1), 175-205.

<sup>44</sup> Gerardi, K., Shapiro, A. H., and Willen, P. (2007). Subprime Outcomes: Risky mortgages, homeownership experiences, and foreclosures. Federal Reserve Bank of Boston Working Paper 07-15.

<sup>45</sup> Economic Innovation Group. (2017). *Dynamism in Retreat: Consequences for Regions, Markets, and Workers*. Retrieved from the Economic Innovation Group website: <http://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf>

- On July 19, 2017, Karen Kerrigan, President and CEO of the Small Business and Entrepreneurship (SBE) Council, testified before the U.S. House of Representatives Committee on Small Business that there has been a continuing dearth of entrepreneurial activity and substantial decline over the past ten years due to the financial crises, Great Recession and a weak economic recovery that continues to negatively influence the American psyche.<sup>46</sup>
- According to research conducted by economists for the U.S. Federal Reserve System, loan origination activity remains well below pre-crisis levels.<sup>47</sup>
- Startup rates have dropped for years, but the effects of the Great Recession were so detrimental that firm deaths exceeded births for the first time in more than 40 years.<sup>48</sup>
- Despite a progressive decline in new business formation, 117,300 more firms opened than closed on average each year from 1977 to 2007; however, firm deaths have outpaced firm births on average since 2008.<sup>49</sup>
- Small firms suffer more during financial crises due to dependence on bank capital to fund growth.<sup>50</sup>
- Major surveys identify access to credit as a problem and top growth concern for small firms during the recovery, including surveys conducted by the National Federation of Independent Businesses (NFIB) and the Federal Reserve.<sup>51</sup>
- Commercial and residential real estate — which represent two-thirds of the assets of small business owners and are frequently used as collateral for loans — were hit hard during the financial crisis, making small business borrowers less creditworthy today.<sup>52</sup>

The mortgage-lending crisis and the Great Recession have lasting effects as they limited opportunities for homeowners with little home equity to obtain business capital through home mortgages. Furthermore, the historically higher rates of default and foreclosure for homeowners with subprime loans impacted the ability of those individuals to access to capital. Those consequences disproportionate impact people of color.

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<sup>46</sup> *Reversing the Entrepreneurship Decline: Hearing before the Committee on Small Business*, House of Representatives, 115th Cong. Page 3 (2017) (testimony of Ms. Karen Kerrigan).

<sup>47</sup> Dore, T., and Mach, T. (2018). *Recent Trends in Small Business Lending and the Community Reinvestment Act*. Retrieved from the Board of Governors of the Federal Reserve System website: <https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-small-business-lending-and-the-community-reinvestment-act-20180102.htm>

<sup>48</sup> Economic Innovation Group. (2017). *Dynamism in Retreat: Consequences for Regions, Markets, and Workers*. Retrieved from the Economic Innovation Group website: <http://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf>

<sup>49</sup> *Ibid.*

<sup>50</sup> Mills, K.G., and McCarthy, B. (2016). *The State of Small Business Lending: Innovation and Technology and the Implications for Regulation* (Working Paper 17-042). Cambridge, MA. Retrieved from Harvard Business School website: [http://www.hbs.edu/faculty/Publication%20Files/17-042\\_30393d52-3c61-41cb-a78a-cbbe3e040e55.pdf](http://www.hbs.edu/faculty/Publication%20Files/17-042_30393d52-3c61-41cb-a78a-cbbe3e040e55.pdf)

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*



**Redlining.** Historically, redlining referred to mortgage lending discrimination against geographic areas based on racial or ethnic characteristics of a neighborhood.<sup>53</sup> Presently, the concept of redlining includes an examination of the availability of and access to credit in predominantly minority neighborhoods, and the credit terms offered within a lender's assessment area.<sup>54</sup>

The practice of reverse redlining consists of extending high-cost credit. This discriminatory practice involves charging minority borrowers higher mortgage fee costs compared to white borrowers and was the subject of multiple lawsuits brought by the U.S. Department of Justice from the late 1990s through the early 2000s.<sup>55</sup> As a result of reverse redlining, some researchers argue that mortgage discrimination has shifted from being an access to credit issue to being a discretionary pricing issue.<sup>56</sup>

As evidenced by settlements in recent court cases, the practice of redlining continues against minority mortgage applicants. For example:

- In 2015, New York Attorney General Eric Schneiderman settled with Evans Bank for \$825,000 after learning that Evans Bank erased African American neighborhoods from maps used to determine mortgage lending.<sup>57</sup>
- In 2015, the U.S. Department of Housing and Urban Development reached a \$200 million settlement with Associated Bank for denying mortgage loans to African American and Hispanic American applicants in Chicago and Milwaukee.<sup>58</sup>
- In November 2016, Hudson City Savings Bank was subject to a record redlining settlement due to disparities suffered by African American and Hispanic American loan applicants.<sup>59</sup> According to the Consumer Financial Protection Bureau (CFPB) and the Department of Justice (DOJ), Hudson City Savings Bank avoided locating branches and loan officers, and using mortgage brokers in majority African American and Hispanic communities.<sup>60</sup> Hudson City Savings Bank also excluded majority-African American and Hispanic communities from its marketing strategy and credit assessment areas.<sup>61</sup>

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<sup>53</sup> Burnison, T. R., and Boccia, B. (2017). Redlining Everything Old Is New Again. *ABA Banking Journal*, 109(2).

<sup>54</sup> *Ibid.*

<sup>55</sup> Brescia, R. H. (2009). Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis. *Albany Government Law Review*, 2 (1), 164-216.

<sup>56</sup> *Ibid.*

<sup>57</sup> Mock, B. (2015, September 28). Redlining is Alive and Well-and Evolving. *City Lab*. Retrieved from <https://www.citylab.com/equity/2015/09/redlining-is-alive-and-welland-evolving/407497/>

<sup>58</sup> *Ibid.*

<sup>59</sup> Burnison, T. R., and Boccia, B. (2017). Redlining Everything Old Is New Again. *ABA Banking Journal*, 109(2).

<sup>60</sup> Consumer Financial Protection Bureau. (2015, September 24). *CFPB and DOJ Order Hudson City Savings Bank to Pay \$27 Million to Increase Mortgage Credit Access in Communities Illegally Redlined* [Press release]. Retrieved from <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-order-hudson-city-savings-bank-to-pay-27-million-to-increase-mortgage-credit-access-in-communities-illegally-redlined/>

<sup>61</sup> *Ibid.*

- In a different 2016 redlining legal action, the CFPB and DOJ ordered BancorpSouth Bank to pay millions to harmed minorities for illegally denying them access to credit in minority neighborhoods and denying African Americans applicants certain mortgage loans and over charging them, among other things.<sup>62</sup>
- In a reverse redlining case tried in federal court in 2016, a federal jury found that Emigrant Savings Bank and Emigrant Mortgage Company violated the Fair Housing Act, Equal Credit Opportunity Act, and New York City Human Rights Law by aggressively promoting toxic mortgages to African American and Hispanic American applicants with poor credit.<sup>63</sup>
- In 2017, the DOJ filed a lawsuit against KleinBank for redlining minority neighborhoods in Minnesota. According to the DOJ, KleinBank structured its residential mortgage lending business in a manner that excluded the credit needs of minority neighborhoods.<sup>64</sup>

**Steering by real estate agents.** The illegal act of steering can be defined as actions by real estate agents that differentially direct customers to certain neighborhoods and away from others based on race or ethnicity.<sup>65</sup> Mortgage loan originators can also engage in steering. Prior to the mortgage loan crisis, mortgage loan originators engaged in steering to generate higher profits for themselves<sup>66</sup> by directing minority loan applicants to less desirable and toxic loan instruments. Such steering can affect minority borrowers' perception of the availability of mortgage loans.

Additionally, explicit steering can drive racially/ethnically housing prices and result in segregation.<sup>67</sup>

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<sup>62</sup> Dodd-Ramirez, D., and Ficklin, P. (2016, June 29). Redlining: CFPB and DOJ action requires BancorpSouth Bank to pay millions to harmed consumers [Web log post]. Retrieved from <https://www.consumerfinance.gov/about-us/blog/redlining-cfpb-and-doj-action-requires-bancorpsouth-bank-pay-millions-harmed-consumers/>

<sup>63</sup> Lane, B. (2016, June 30). Groundbreaking ruling? Federal jury finds Emigrant Bank liable for predatory lending. *Housingwire*. Retrieved from <https://www.housingwire.com/articles/37419-groundbreaking-ruling-federal-jury-finds-emigrant-bank-liable-for-predatory-lending>

<sup>64</sup> Department of Justice, Office of Public Affairs. (2017, January 13). *Justice Department Sues KleinBank for Redlining Minority Neighborhoods in Minnesota* [Press release]. Retrieved from <https://www.justice.gov/opa/pr/justice-department-sues-kleinbank-redlining-minority-neighborhoods-minnesota>

<sup>65</sup> Galster, G., and Godfrey, E. (2005) By Words and Deeds: Racial Steering by Real Estate Agents in the U.S. in 2000. *Journal of the American Planning Association*, 71(3), 251-268.

<sup>66</sup> Consumer Financial Protection Bureau. (2013, January 18). *CFPB Issuing Rules to Prevent Loan Originators from Steering Consumers into Risky Mortgages* [Press release]. Retrieved from <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-rules-to-prevent-loan-originators-from-steering-consumers-into-risky-mortgages/>

<sup>67</sup> Besbris, M., and Faber, J.W. (2017). Investigating the Relationship Between Real Estate Agents, Segregation, and House Prices: Steering and Upselling in New York State. *Sociological Forum*, 32(4).

Although it is difficult to pursue cases involving steering; however, several steering cases have been prosecuted by federal and state agencies over the past decade:

- In 2011, the U.S. Department of Justice (DOJ) reached a \$335 million settlement with Countrywide Financial Corporation for steering thousands of African American and Hispanic American borrowers into subprime mortgages when white borrowers with comparable credit received prime loans.<sup>68</sup>
- In 2012, the DOJ reached a \$184 million settlement with Wells Fargo for steering African American and Hispanic American borrowers into subprime mortgages and charging higher fees and rates than white borrowers with comparable credit profiles.<sup>69</sup>
- In 2015, M&T Bank agreed to pay \$485,000 to plaintiffs in a settlement for a case involving racial discrimination and steering.<sup>70</sup>
- In 2015, the City of Oakland, California sued Wells Fargo & Co for steering minorities into costly mortgage loans that supposedly led to foreclosures, abandoned properties and blight.<sup>71</sup> The City of Philadelphia filed a lawsuit with similar allegations against Wells Fargo & Co in 2017.<sup>72</sup>
- In 2017, the U.S. Attorney settled a federal civil rights lawsuit against JP Morgan Chase Bank for \$53 million for steering and discrimination based on race and national origin after it was discovered that African Americans and Hispanic Americans paid higher mortgage loan rates compared with whites with comparable credit profiles.<sup>73</sup>

**Gender discrimination in mortgage lending.** Historically, lending practices overtly discriminated against women by requiring information on marital and childbearing status. The Equal Credit Opportunity Act in 1973 suspended such discriminatory lending practices. However, certain barriers affecting women have persisted after 1973 in mortgage lending markets.

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<sup>68</sup> Department of Justice, Office of Public Affairs. (2011, December 21). *Justice Department Reaches \$335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation* [Press release]. Retrieved from <https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination>

<sup>69</sup> Department of Justice, Office of Public Affairs. (2012, July 12). *Justice Department Reaches Settlement with Wells Fargo Resulting in More Than \$175 Million in Relief for Homeowners to Resolve Fair Lending Claims* [Press release]. Retrieved from <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief>

<sup>70</sup> Stempel, J. (2015, August 31). M&T Bank settles lawsuit claiming New York City lending bias. *Reuters*. Retrieved from <https://www.reuters.com/article/us-usa-guns-dicks-sporting/walmart-joins-dicks-sporting-goods-in-raising-age-to-buy-guns-idUSKCN1GC1R1>

<sup>71</sup> Aubin, D. (2015, September 22). Oakland lawsuit accuses Wells Fargo of mortgage discrimination. *Reuters*. Retrieved from <https://www.reuters.com/article/us-wellsfargo-discrimination/oakland-lawsuit-accuses-wells-fargo-of-mortgage-discrimination-idUSKCN0RM28L20150922>

<sup>72</sup> City of Philadelphia, Office of the Mayor. (2015, May 15). *City Files Lawsuit Against Wells Fargo* [Press release]. Retrieved from <https://beta.phila.gov/press-releases/mayor/city-files-lawsuit-against-wells-fargo/>

<sup>73</sup> Department of Justice, U.S. Attorney's Office, Southern District of New York. (2017, January 20). *Manhattan U.S. Attorney Settles Lending Discrimination Suit Against JPMorgan Chase For \$53 Million* [Press release]. Retrieved from <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-settles-lending-discrimination-suit-against-jpmorgan-chase-53>

Recent studies and lawsuits indicate unequal access to mortgage loans for women. For example, a 2013 study by the Woodstock Institute found that women within the six-county Chicago area were far less likely to be approved for mortgage loans than men, and even male-female joint applications were less likely to be originated if the female applicant was listed first. This disparity persisted for mortgage refinancing.<sup>74</sup>

Research has confirmed that on average, women are better than men at paying their mortgages; however, women on average pay more for mortgages relative to their risk, and women of color pay the most.<sup>75</sup> Although disparities in mortgage interest rates are prevalent between African American and white borrowers, African American women are the most likely to experience this type of mortgage loan discrimination.<sup>76</sup>

Recent lawsuits and studies suggest that gender-based lending discrimination continues:

- In 2017, Bellco Credit Union settled a lawsuit for alleged discrimination against women on maternity leave.<sup>77</sup>
- In 2014 the U.S. Department of Housing & Urban Development (HUD) settled a lawsuit against Mountain America Credit Union over allegations of discrimination against prospective borrowers on maternity leave.<sup>78</sup>
- In 2011, HUD engaged in litigation against a company that revoked a pregnant woman's mortgage insurance once the company learned that the woman was on leave from work.<sup>79</sup>
- In 2010, Dr. Budde, an oncologist from Washington State, was initially granted a mortgage loan and later denied once her lender learned she was on maternity leave.<sup>80</sup>

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<sup>74</sup> Woodstock Institute. (2014). *Unequal Opportunity: Disparate Mortgage Origination Patterns for Women in the Chicago Area*. Retrieved from <https://www.woodstockinst.org/advocacy/comment-letters/new-research-finds-disparities-in-mortgage-lending-to-women/>

<sup>75</sup> Goodman, L., Zhu, J., and Bai, B. (2016). *Women are Better than Men at Paying Their Mortgages*. Urban Institute. Retrieved from the Urban Institute website: <https://www.urban.org/sites/default/files/publication/84206/2000930-Women-Are-Better-Than-Men-At-Paying-Their-Mortgages.pdf>

<sup>76</sup> Cheng, P., Lin, Z., and Liu, Y. (2015). Racial Discrepancy in Mortgage Interest Rates. *Journal of Real Estate Finance and Economics*, 51(1), 101-120.

<sup>77</sup> Strozniak, P. (2017, October 17). Bellco CU Settles Alleged Discriminatory Housing Lawsuit. *Credit Union Times*. Retrieved from <https://www.cutimes.com/2017/10/17/bellco-cu-settles-alleged-discriminatory-housing-l>

<sup>78</sup> National Mortgage Professional Magazine. (2014, June 25). HUD Hits Mountain America Credit Union With \$25,000 Fine. *National Mortgage Professional Magazine*. Retrieved from <https://nationalmortgageprofessional.com/news/41558/hud-hits-mountain-america-credit-union-25000-fine>

<sup>79</sup> Hanson, K. (2016). Disparate Impact Discrimination in Residential Lending and Mortgage Servicing Based on Sex: Insidious Evil. *Florida Coastal Law Review*, 17(3), 421-447.

<sup>80</sup> Siegel Bernard, T. (2010, July 19). Need a Mortgage? Don't Get Pregnant. *New York Times*. Retrieved from <http://www.nytimes.com/2010/07/20/your-money/mortgages/20mortgage.html>

## Summary

There is evidence that people of color and women continue to face disadvantages in accessing capital that is necessary to start, operate and expand businesses. Capital is required to start companies, so barriers to accessing capital can affect the number of minorities and women who are able to start businesses. In addition, minorities and women start business with less capital (based on national data). Several studies have demonstrated that lower start-up capital adversely affects prospects for those businesses.

Key results included the following:

- Nationally, minority- and woman- owned employer businesses are more likely to use personal credit cards as a source of start-up capital, which is a more expensive form of debt than business loans from financial institutions.
- Personal and/or family savings of the owner was the main source of capital for startups amount many U.S. businesses, but African American and Hispanic American households had significantly lower amounts of wealth than whites.
- Among employer firms across the country, female- and minority-owned companies were less likely to secure business loans from a bank or financial institution as a source of start-up capital.
- Nationally, female- and minority-owned firms were more likely to not apply for additional financing because firm owners believed that they would not be approved by a lender. These firms were also more likely to indicate that access to financial capital negatively impacted firm profitability.
- Availability survey results for Arizona businesses for 2019 indicate that minority- and woman-owned businesses are twice as likely to report difficulties obtaining lines of credit or loans than majority-owned firms. MBEs were also more likely to report difficulties obtaining bonding. (These results are specific to construction, engineering and other firms available for ADOT and local agency transportation contracts.)
- Home equity is an important source of funds for business start-up and growth. Fewer people of color in Arizona own homes compared with nonminorities. African Americans, Hispanic Americans and Native American or other minorities who own homes tend to have lower home values.
- High-income African American, Asian American, Hispanic American and Native American households applying for conventional home mortgages in Arizona were more likely than high-income non-Hispanic whites to have their applications denied. For some minority groups, the 2017 rates of mortgage loan denial to high-income households was twice that for nonminorities. This may indicate discrimination in mortgage lending and may affect access to capital to start and expand businesses.

- In the 2000s in Arizona, subprime loans accounted for a large share of the conventional home purchase and refinance loans issued to minority groups when compared to loans issued to non-Hispanic whites. This may be evidence of predatory lending practices affecting people of color in the state.

Any discrimination against minority groups in the home purchase and home mortgage markets can negatively affect the formation of firms by minorities in Arizona and the success and growth of those companies.

## **APPENDIX H.**

### **Success of Businesses in Construction and Engineering Industries in Arizona**

The study team examined the success of minority- and women-owned business enterprises (MBE/WBEs) in construction and engineering industries for the United States and in Arizona. The study team assessed whether business outcomes for MBE/WBEs differ from those of non-Hispanic white male-owned businesses (i.e., majority-owned businesses).

The study team examined outcomes for MBE/WBEs and majority-owned businesses in terms of:

- Business closures, expansions and contractions;
- Business receipts and earnings;
- Bid capacity; and
- Potential barriers to starting or expanding businesses.

#### **Business Closures, Expansions and Contractions**

The most current comprehensive data that compares rates of business closures, expansions and contractions for minority- and majority-owned firms comes from Small Business Administration (SBA) analyses for 2002 through 2006. Keen Independent's 2015 ADOT Disparity Study analyzed these data and reported results for Arizona and the United States. This information is not repeated here.

#### **Business Receipts and Earnings**

Annual business receipts and earnings for business owners are also indicators of the success of businesses. The study team examined:

- Business receipts data from the U.S. Census Bureau 2012 Survey of Business Owners (SBO);
- Business earnings data for business owners from the 2013–2017 American Community Survey (ACS); and
- Annual revenue data for firms in the study industries located in Arizona that the study team collected as part of availability surveys.

Each of these data sources updates previous analyses in the 2015 ADOT Disparity Study.

**Business receipts.** The study team examined receipts for businesses using data from the 2012 SBO, conducted by the U.S. Census Bureau. The study team also analyzed receipts for businesses in individual industries. The SBO reports business receipts separately for employer businesses (with paid employees other than owner and family members) and all businesses.<sup>1</sup>

**Receipts for all businesses.** Figure H-1 presents 2012 mean annual receipts for employer and non-employer businesses by race, ethnicity and gender. Racial categories are not available by both race and ethnicity. As such, the racial categories shown may include Hispanic Americans.

The SBO data for businesses across all industries in Arizona indicate that average receipts for minority- and women-owned businesses were much lower than that for non-Hispanic-owned, white-owned or male-owned businesses, with some disparities larger than others. Using the SBO groupings of minority-owned businesses:

- Average receipts of both African American and American Indian and Alaska Native-owned businesses (\$68,000) were about 17 percent that of white-owned businesses (\$412,000).
- Average receipts of Asian American-owned businesses (\$277,000) were about two-thirds that of white-owned businesses.
- Hispanic-owned businesses (\$106,000) exhibited revenues that were approximately 25 percent of the average of non-Hispanic-owned businesses (\$430,000).
- Average receipts for female-owned businesses (\$139,000) were about one-fourth of the average for male-owned businesses (\$545,000).

Disparities in business receipts for minority- and women-owned businesses compared to non-Hispanic white- and male-owned businesses in Arizona are similar to those seen in the U.S. as a whole. A 2007 SBA study identified differences similar to those presented in Figure H-1 when examining businesses in all industries across the U.S.<sup>2</sup>

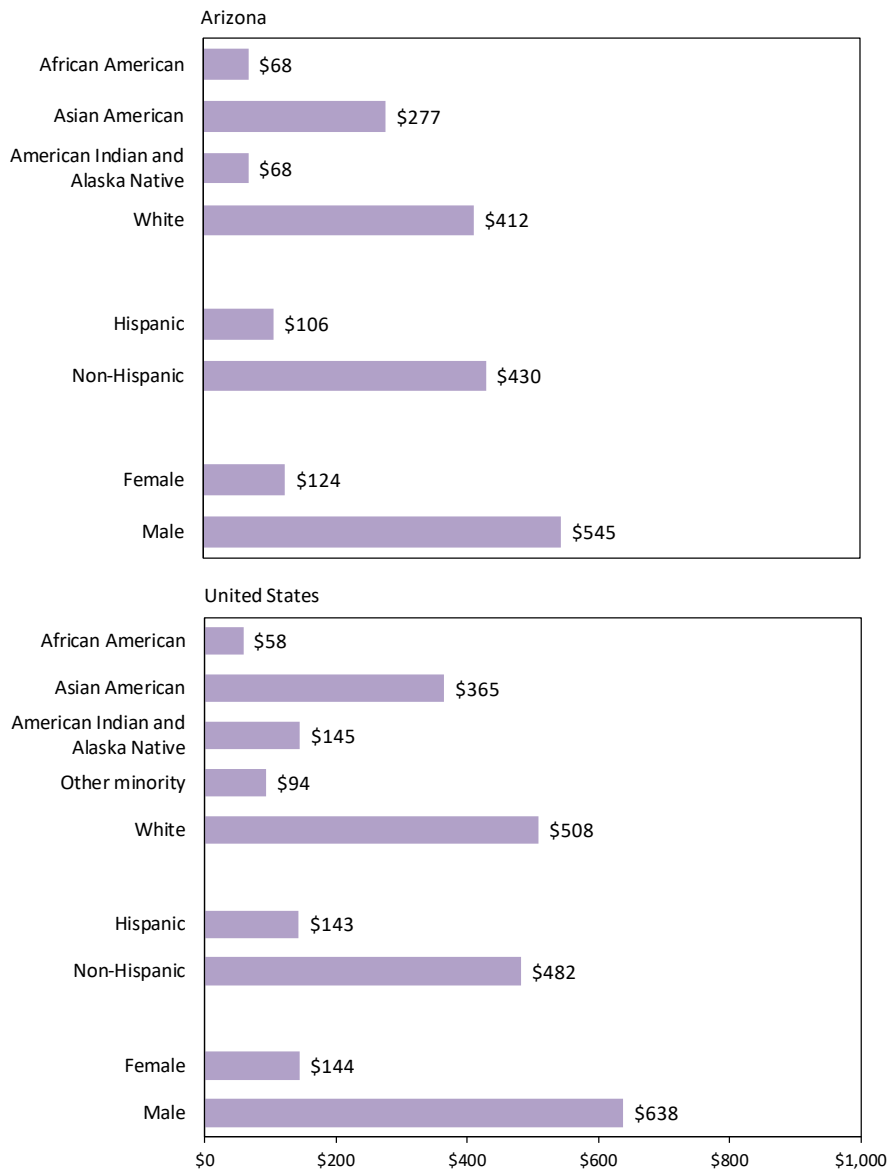
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<sup>1</sup> We use “all businesses” to denote SBO data used in this analysis. Data include incorporated and unincorporated businesses, but not publicly-traded companies or other businesses not classifiable by race/ethnicity and gender.

<sup>2</sup> Lowrey, Y. (2007). *Minorities in Business: A Demographic Review of Minority Business Ownership*. Office of Economic Research, Office of Advocacy, U.S. Small Business Administration.



**Figure H-1.**  
**Mean annual receipts (thousands) for all businesses, by race/ethnicity and gender of owners, 2012**



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

As sample sizes are not reported, statistical significance of these results cannot be determined.

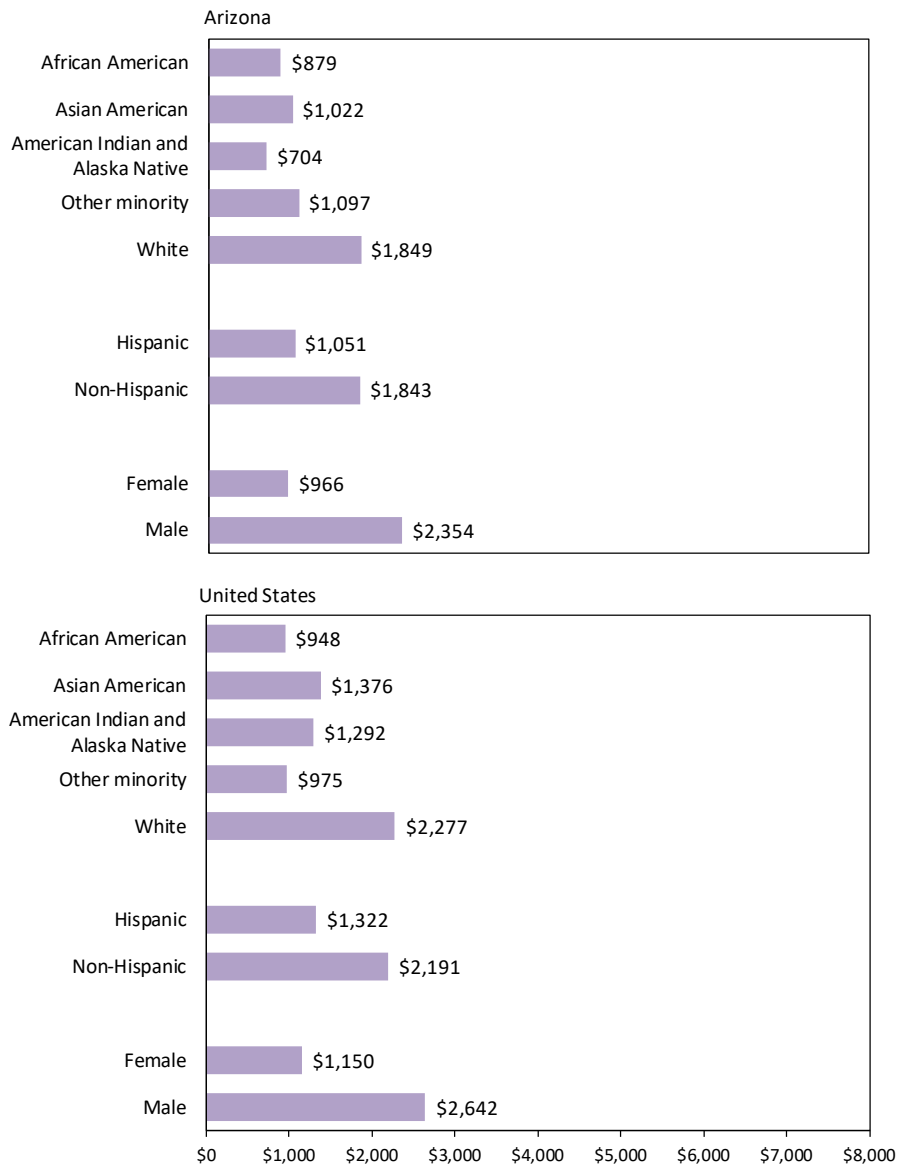
**Source:** 2012 Survey of Business Owners, part of the U.S. Census Bureau's 2012 Economic Census.

Figure H-2 presents average annual receipts in 2012 for only employer businesses in Arizona and in the United States. (Employer businesses are those with paid employees.) Most minority- and women-owned businesses had lower average business receipts than white- and male-owned employer businesses in Arizona:

- Average receipts for white-owned businesses (\$1.8 million) were more than two times that of the average for African American-owned businesses (\$879,000).
- Average receipts of Asian American-owned businesses (\$1 million) were about 56 percent of the average of white-owned businesses.
- Average receipts of American Indian and Alaska Native-owned businesses (\$704,000) were about 39 percent that of the average of white-owned businesses.
- Receipts for other minority-owned businesses (\$1.1 million) were about than 61 percent that of white-owned businesses on average.
- Hispanic American-owned businesses had average receipts (\$1.1 million) were about 61 percent that of non-Hispanic-owned businesses (\$1.8 million).
- Average receipts for women-owned businesses (\$966,000) were 40 percent that of the average male-owned business (\$2.4 million).

Figure H-2.

Mean annual receipts (thousands) for employer businesses, by race/ethnicity and gender of owners, 2012



Note: Includes only employer businesses.

Does not include publicly traded companies or other businesses not classifiable by race/ethnicity and gender.

As sample sizes are not reported, statistical significance of these results cannot be determined.

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

**Receipts by industry.** The study team also analyzed SBO receipts data separately for businesses in the relevant study industries. Figure H-3 and H-4 present mean annual receipts in 2012 for all (i.e., employer and non-employer businesses combined) businesses in the relevant study industries and for just employer businesses by racial, ethnic and gender group. Results are presented for Arizona and for the nation as a whole.

In Arizona, when considering all industries together, average 2012 receipts for minority- and female-owned businesses were lower than the average for non-Hispanic, white- and male-owned businesses.

This pattern persisted when analyzing industry-specific data in Arizona. For the construction industry and the professional, scientific and technical services industry, minority- and women-owned firms earned less, on average, than non-Hispanic, white- and male-owned businesses. The only exception was that Asian American-owned professional, scientific and technical services companies had higher average gross receipts in 2012 than white-owned businesses in that industry.

Figure H-3 provides these results.

Figure H-3.

Mean annual receipts (thousands) for all firms in the study industries, by race/ethnicity and gender of owners, 2012

Demographic group	All industries together	Construction	Professional, scientific and technical services
<b>Arizona</b>			
<b>Race</b>			
African American	\$ 68	\$ 35	\$ 68
Asian American	277	N/A	238
American Indian and Alaska Native	68	130	56
Other minority	98	115	55
White	412	551	187
<b>Ethnicity</b>			
Hispanic	\$ 106	\$ 109	\$ 78
Non-Hispanic	430	618	195
<b>Gender</b>			
Female	\$ 124	\$ 478	\$ 85
Male	545	465	247
<b>United States</b>			
<b>Race</b>			
African American	\$ 58	\$ 81	\$ 76
Asian American	186	172	147
American Indian and Alaska Native	145	239	125
Other minority	94	86	105
White	508	455	235
<b>Ethnicity</b>			
Hispanic	\$ 143	\$ 117	\$ 121
Non-Hispanic	482	467	235
<b>Gender</b>			
Female	\$ 144	\$ 350	\$ 104
Male	638	415	301

Note: Does not include publicly traded companies or other businesses not classifiable by race/ethnicity and gender.

As sample sizes are not reported, statistical significance of these results cannot be determined.

“N/A” indicates that estimates were suppressed by the SBO because publication standards were not met.

Source: 2012 Survey of Business Owners, part of the U.S. Census Bureau’s 2012 Economic Census.

Figure H-4 presents the same results for firms with employees. For Arizona, minority- and women-owned firms earned less than nonminority and male-owned companies.

Figure H-4.

Mean annual receipts (thousands) for employer firms in the relevant study industries, by race/ethnicity and gender of owners, 2012

Demographic group	All industries together	Construction	Professional, scientific and technical services
<b>Arizona</b>			
<b>Race</b>			
African American	\$ 879	\$ 307	\$ 597
Asian American	1,022	N/A	933
American Indian and Alaska Native	704	1,098	364
Other minority	1,097	980	380
White	1,849	1,873	780
<b>Ethnicity</b>			
Hispanic	\$ 1,051	\$ 888	\$ 478
Non-Hispanic	1,843	1,943	802
<b>Gender</b>			
Female	\$ 966	\$ 1,864	\$ 453
Male	2,354	2,184	994
<b>United States</b>			
<b>Race</b>			
African American	\$ 948	\$ 1,096	\$ 816
Asian American	1,376	1,572	1,080
American Indian and Alaska Native	1,292	1,499	939
Other minority	975	839	1,139
White	2,277	1,730	983
<b>Ethnicity</b>			
Hispanic	\$ 1,322	\$ 1,005	\$ 865
Non-Hispanic	2,191	1,749	999
<b>Gender</b>			
Female	\$ 1,150	\$ 1,561	\$ 620
Male	2,642	1,842	1,167

Note: Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender.

As sample sizes are not reported, statistical significance of these results cannot be determined.

"N/A" indicates that estimates were suppressed by the SBO because publication standards were not met.

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

**Business earnings.** In order to assess the business earnings of people of color and women who are self-employed, the study team examined earnings of business owners using Public Use Microdata Series (PUMS) data from the 2013–2017 American Community Survey (ACS). The study team analyzed earnings of incorporated and unincorporated business owners age 16 and older who reported positive business earnings.

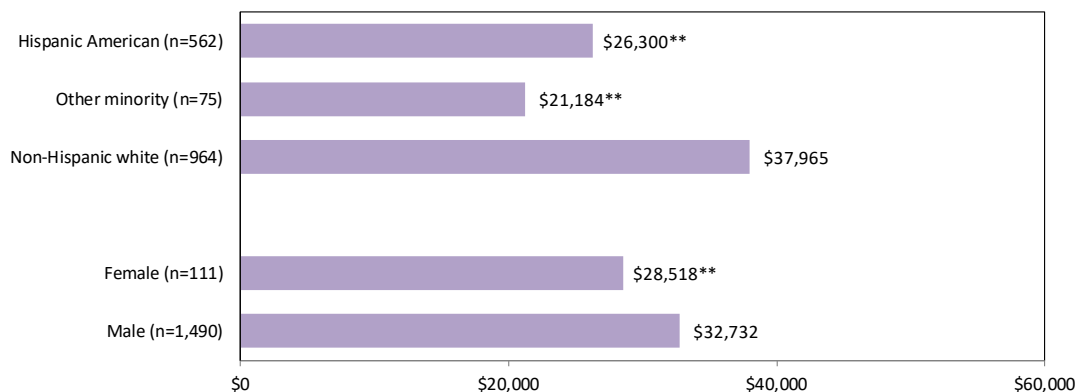
**Business owner earnings, 2013–2017.** The 2013–2017 ACS compiles data on business owner earnings by asking respondents throughout the year to report total pre-tax business earnings accrued during the 12 months immediately preceding the month of the survey. Accordingly, earnings corresponding to the 2013–2017 ACS timeframe consist of 60 reference periods spanning 2012–2017.<sup>3</sup> All dollar amounts are presented in 2017 dollars.

Figure H-5 shows earnings in 2013 through 2017 for business owners in Arizona for both study industries combined. The study team analyzed earnings for racial and ethnic groups as well as females. There was a large enough sample of Hispanic American business owners in the ACS data to report results for that group. Due to small sample sizes, results for African Americans, Asian Americans, Native Americans and other minorities were combined into an “other minority” category.

- On average, Hispanic American business owners (\$26,300) and other minority business owners (\$21,184) earned substantially less in 2013–2017 than non-Hispanic white business owners (\$37,965). These differences were statistically significant.
- Female business owners (\$28,518) earned less on average than male business owners (\$32,732), a statistically significant difference.

**Figure H-5.**

**Mean annual business owner earnings among both Arizona study industries, 2013 through 2017**



**Note:** \*\* Denotes statistically significant differences between groups at the 95% confidence level.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2017 dollars.

Due to small sample sizes, African Americans, Asian Americans, Native Americans and other minorities were combined into an “other minority” category.

**Source:** Keen Independent Research from 2013–2017 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

<sup>3</sup> For example, if a business owner completed the survey on January 2012, the figures for the previous 12 months would reference January 2011 to December 2011. Similarly, a business owner completing the survey in March 2015 would reference amounts between March 2014 and February 2015.

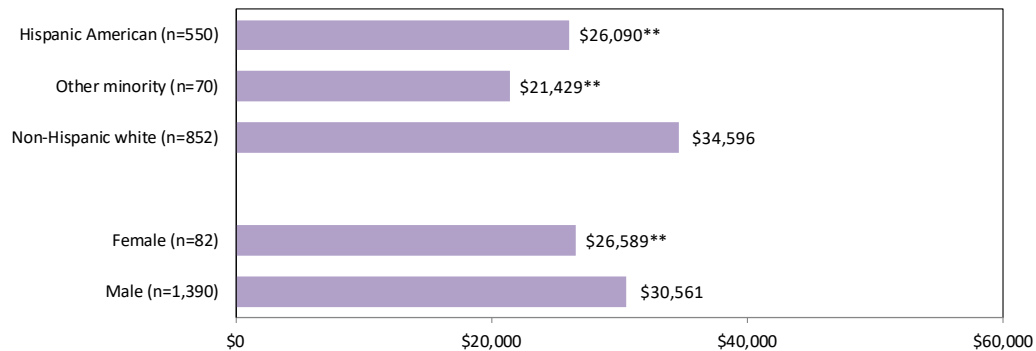
**Construction business owner earnings, 2013–2017.** The ACS construction business owner earnings data also correspond to the 2013–2017 timeframe.

Figure H-6 shows earnings in 2013 through 2017 for business owners by race, ethnicity and gender in the Arizona construction industry.

- On average, Hispanic American (\$26,090) and other minority (\$21,429) construction business owners in Arizona earned less in 2013–2017 than non-Hispanic white construction business owners (\$34,596), statistically significant differences.
- Average earnings for female construction business owners (\$26,589) were substantially less than those of male construction business owners (\$30,561) in Arizona. This difference is also statistically significant.

**Figure H-6.**

**Mean annual business owner earnings in the Arizona construction industry, 2013 through 2017**



**Note:** \*\* Denotes statistically significant differences between groups at the 95% confidence level.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2017 dollars

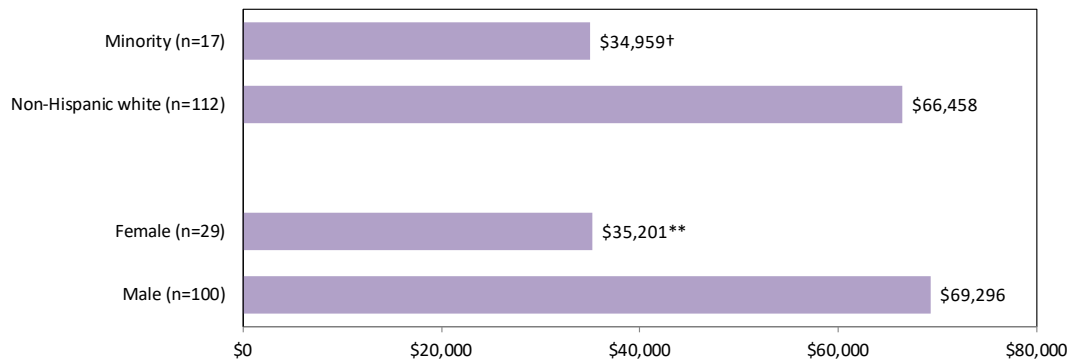
**Source:** Keen Independent Research from 2013–2017 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Engineering business owner earnings, 2013–2017.** As with earnings data for the construction industry, Keen Independent analyzed earnings for engineering business owners reported in the 2013–2017 ACS data. Due to small sample sizes, all business owners of color were combined in the results for minority-owned engineering companies. Results are displayed in Figure H-7.

- On average, business owners of color in Arizona (\$34,959) earned less in 2013–2017 than non-Hispanic white business owners (\$66,458) in the engineering industry. Because of low sample size, statistical significance could not be determined.
- Female engineering business owners (\$35,201) earned less on average than male engineering business owners (\$69,296) in Arizona, a statistically significant difference.

Figure H-7.

Mean annual business owner earnings in the Arizona engineering industry, 2013 through 2017



Note: \*\* Denotes statistically significant differences between groups at the 95% confidence level.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2017 dollars.

† Denotes that the sample size did not reach the minimum required (25 per group) to qualify for significance testing. Therefore, a significance test was not conducted between minority and non-Hispanic white business owners.

Source: Keen Independent Research from 2013–2017 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Regression analyses of business earnings.** Differences in business earnings among different racial/ethnic and gender groups may be at least partially attributable to race- and gender-neutral factors such as age, marital status and educational attainment. The study team created statistical models through “regression analysis” to examine whether there were differences in business earnings between minorities and non-Hispanic whites and between women and men after controlling for certain race- and gender-neutral factors. Data came from the ACS for Arizona for 2013–2017.

The study team applied an ordinary least squares regression model to the data that was very similar to models reviewed by courts after other disparity studies.<sup>4</sup> The dependent variable in the model was the natural logarithm of business earnings. Business owners that reported zero or negative business earnings were excluded, as were observations for which the U.S. Census Bureau had imputed values of business earnings. Along with variables for the race/ethnicity and gender of business owners, the model also included available measures from the data considered likely to affect earnings potential, including age, age-squared, marital status, ability to speak English well, disability condition and educational attainment.

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<sup>4</sup> For example, National Economic Research Associates, Inc. 2012. *The State of Minority- and Women-Owned Business Enterprise in Construction: Evidence from Houston*. Prepared for the City of Houston; BBC Research & Consulting. 2012. *Availability and Disparity Study*. Prepared for the California Department of Transportation.



The study team developed models for business owner earnings in 2013 through 2017 for Arizona in the following industries:

- A model for business owner earnings in the construction industry that included 1,472 observations; and
- A model for business owner earnings in the engineering industry that included 129 observations.

**Construction industry regression results, 2013 through 2017.** Figure H-8 illustrates the results of the regression model for 2013 through 2017 earnings in the Arizona construction industry. The model indicated that some race- and gender-neutral factors were significant in predicting earnings of business owners in the construction industry in Arizona.

Older business owners had greater business earnings, however this effect reversed for the oldest business owners. Married business owners and business owners with a four-year degree tended to have higher business earnings. Disabled construction business owners tended to have significantly lower business earnings.

After statistically controlling for such race- and gender-neutral factors, the model indicated lower earnings for business owners of color other than Hispanic Americans. This difference was statistically significant. There were no statistically significant differences for Hispanic American or white female construction business owners after controlling for other factors.

**Figure H-8.**  
Arizona construction business owner earnings model, 2013–2017

Note:

\*, \*\* Denote statistical significance at the 90% and 95% confidence level, respectively.

Source:

Keen Independent Research from 2013–2017 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	8.308 **
Age	0.067 **
Age-squared	-0.001 **
Married	0.323 **
Speaks English well	0.058
Disabled	-0.350 **
Less than high school	-0.116
Some college	0.080
Four-year degree	0.263 *
Advanced degree	-0.076
Hispanic American	-0.115
Other minority	-0.351 *
White female	-0.138

**Engineering industry regression results, 2013 through 2017.** Figure H-9 presents the results of the regression model of business owner earnings specific to the Arizona engineering industry for 2013 through 2017. Speaking English well was excluded in the model, as nearly all business owners in the industry reported speaking English well. Similar to the construction industry, older engineering business owners had greater business earnings, however this effect reversed for the oldest business owners.

After accounting for race- and gender-neutral factors, the model indicated that minority and white female engineering business owners had lower earnings. These effects were statistically significant.

**Figure H-9.**  
Arizona engineering business owner earnings model, 2013–2017

Note:

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

Source:

Keen Independent Research from 2013–2017 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center:  
<http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	6.481 **
Age	0.200 **
Age-squared	-0.002 **
Married	-0.051
Disabled	-0.563
Less than high school	-1.131
Some college	0.107
Four-year degree	0.152
Advanced degree	-0.035
Minority	-0.826 **
White female	-1.064 **

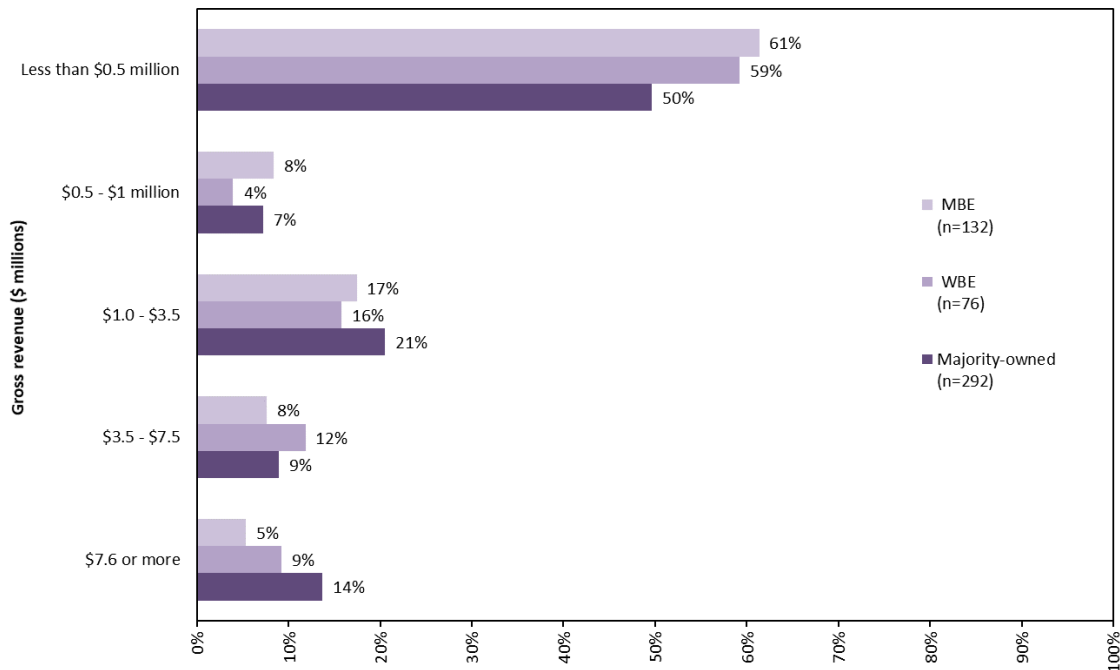
**Gross revenue of firms from availability surveys.** As discussed previously, total revenue is a key measure of the economic success of businesses. In the availability surveys that Keen Independent conducted (discussed in Appendix D), firm owners and managers were asked to identify the size range of their average annual gross revenue in the previous three years (from 2016 through 2018). Only firms with locations in Arizona were included in the availability surveys. Results pertain to firms indicating qualifications and interest in ADOT and/or local agency transportation-related contracts.

**Construction.** Figure H-10 presents the reported annual revenue for minority-owned firms (MBEs), white women-owned businesses (WBEs) and majority-owned businesses from the Arizona availability surveys. Majority-owned construction firms were more likely to report higher average annual revenues relative to minority- and women-owned construction firms in Arizona.

- About 69 percent of MBEs reported average revenue of less than \$1 million per year compared to 63 percent of WBEs and 57 percent of majority-owned firms.
- Relatively few MBEs and WBEs (5% and 9%, respectively) reported average revenue of more than \$7.6 million per year compared with 14 percent of majority-owned businesses.

**Figure H-10.**

Average annual gross revenue of company over previous three years, Arizona construction industry



**Note:** “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

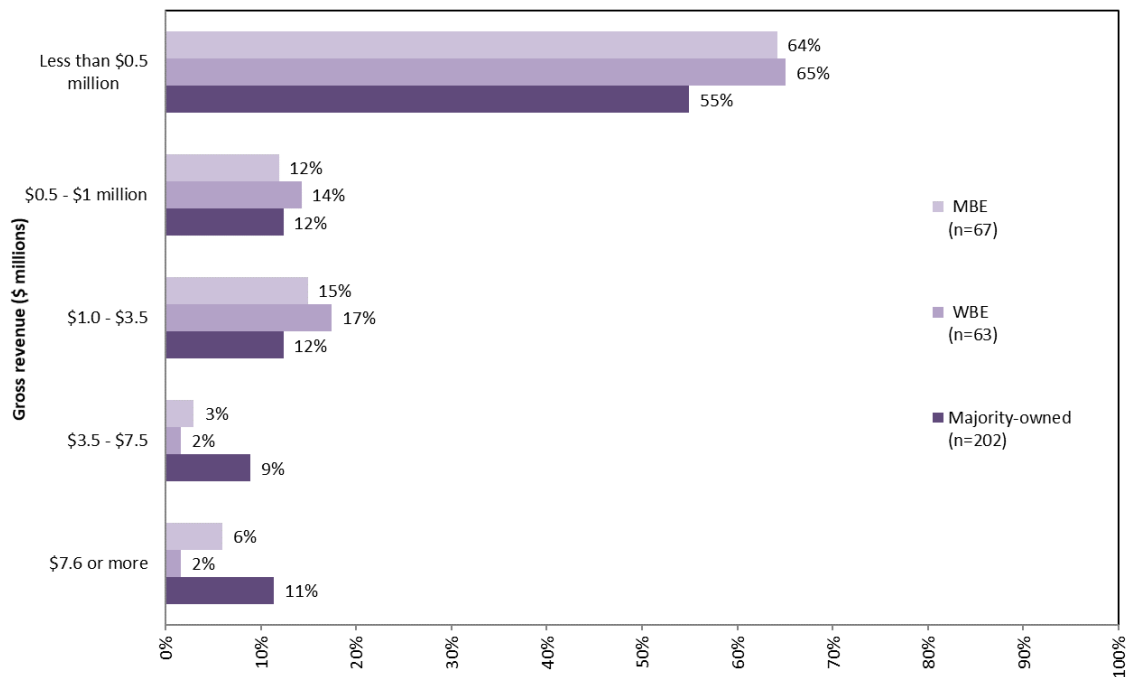
**Source:** Keen Independent Research from 2019 availability surveys.

**Engineering.** Figure H-11 presents the reported annual revenue for MBEs, WBEs and majority-owned engineering businesses in Arizona. MBEs and WBEs were more likely to report lower annual revenues compared to majority-owned businesses.

- A higher percentage of MBEs (76%) and WBEs (79%) than majority-owned engineering businesses (67%) reported average revenue of less than \$1 million per year.
- Relatively few MBE firms (6%) and WBE firms (2%) reported average revenue of more than \$7.6 million per year compared with majority-owned businesses (11%).

**Figure H-11.**

Average annual gross revenue of company over previous three years, Arizona engineering industry



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2019 availability surveys.

## Relative Bid Capacity

Some legal cases regarding race- and gender-conscious contracting programs have considered the importance of the “relative capacity” of businesses included in an availability analysis.<sup>5</sup>

Keen Independent directly measured bid capacity in its availability analysis.<sup>6</sup>

Through this analysis, Keen Independent was able to distinguish firms based on the largest contracts or subcontracts they had performed or bid on (i.e., “bid capacity” as used in this study). Although additional measures of capacity might be theoretically possible, the bid capacity concept can be articulated and quantified for individual firms for specific time periods.

**Data.** The availability analysis produced a database of construction and engineering businesses for which bid capacity could be examined.

“Relative bid capacity” for a business is measured as the largest contract or subcontract that the business performed or reported that they had bid on within the five years preceding when Keen Independent interviewed it.

**Results.** As shown in Figure H-12, relatively few firms reported performing or bidding on contracts of \$20 million or more. Most companies indicated that their largest contract was less than \$1 million. For example, in construction, 75 percent of MBEs, 73 percent of WBEs and 70 percent of majority-owned firms in the construction industry indicated that the largest contract they had bid on or been awarded was less than \$1 million. Majority-owned construction firms were only slightly more likely to report bidding on contracts of \$1 million or more.

Among engineering firms, women-owned firms were the most likely (94%) to report that the largest contract they had bid on or been awarded was less than \$1 million. Most majority-owned firms in the industry reported a bid capacity of less than \$100,000.

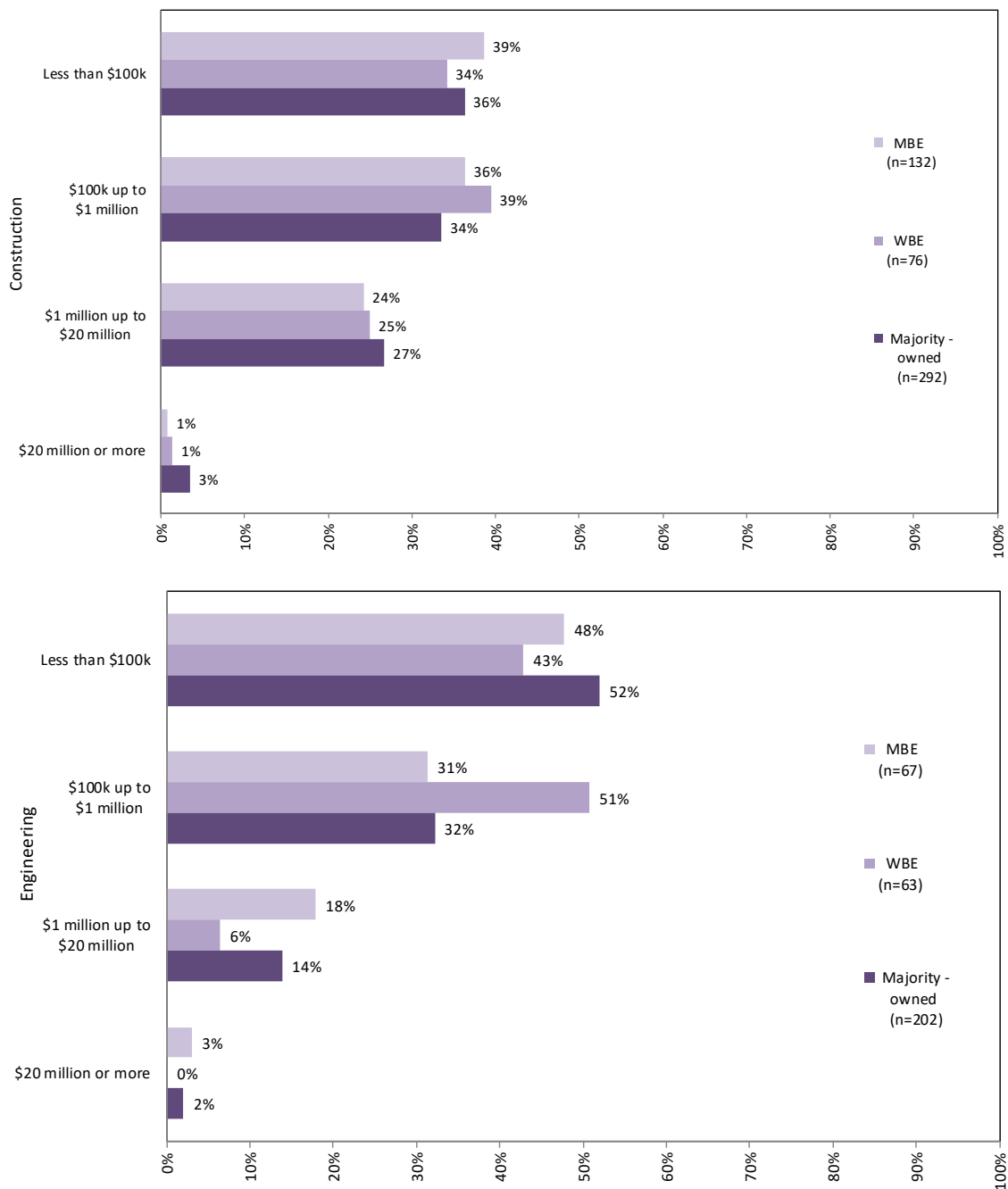
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<sup>5</sup> For example, see the decision of the United States Court of appeals for the Federal Circuit in *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

<sup>6</sup> See Appendix D for details about the availability interview process.

Figure H-12.

Largest contract bid on or awarded (bid capacity) by industry for construction and engineering firms in Arizona



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2019 availability surveys.

**Above median bid capacity.** Keen Independent further explored bid capacity on a subindustry level. Subindustries such as general road construction and widening tend to involve relatively large projects. Other subindustries, such as temporary traffic control, typically involve smaller contracts. Figure H-13 reports the median relative bid capacity among Arizona businesses in 30 subindustries. Results categorized companies according to their primary line of business.

Figure H-13.

Median relative capacity of Arizona businesses by subindustry

Subindustry	Median bid capacity
<b>Construction industry</b>	
General road construction and widening	\$3.6 million to \$7.5 million
Asphalt paving	\$3.6 million to \$7.5 million
Structural concrete work	\$3.6 million to \$7.5 million
Portland cement concrete paving	\$3.6 million to \$7.5 million
Underground utilities	\$3.6 million to \$7.5 million
Wrecking and demolition	\$3.5 million
Structural steel work	\$1.1 million to \$3.5 million
Concrete flatwork, including sidewalk, curb and gutter	\$1.1 million to \$3.5 million
Striping or pavement marking	\$1 million
Bridge work	\$0.6 million to \$1 million
Electrical work including lighting and signals	\$0.6 million to \$1 million
Excavation, site prep, grading and drainage	\$0.6 million to \$1 million
Landscaping and related work	\$0.6 million to \$1 million
Installation of guardrails, fencing or signs (traffic or highway signs)	\$0.6 million to \$1 million
Drilling and foundations	\$0.6 million to \$1 million
Concrete pumping	\$0.6 million to \$1 million
Concrete cutting	\$0.6 million to \$1 million
Painting for road or bridge projects	\$0.6 million to \$1 million
Construction remediation and clean-up	\$0.5 million
Temporary traffic control	Less than \$0.5 million
Trucking and hauling	Less than \$0.5 million
Pavement milling	N/A
Other - construction	\$1.1 million to \$3.5 million
<b>Engineering</b>	
Architecture and Engineering	\$0.6 million to \$1 million
Transportation planning	\$0.6 million to \$1 million
Environmental consulting	\$0.6 million to \$1 million
Construction management	\$0.5 million
Soils and materials testing	Less than \$0.5 million
Surveying and mapping	Less than \$0.5 million
Other - engineering	Less than \$0.5 million

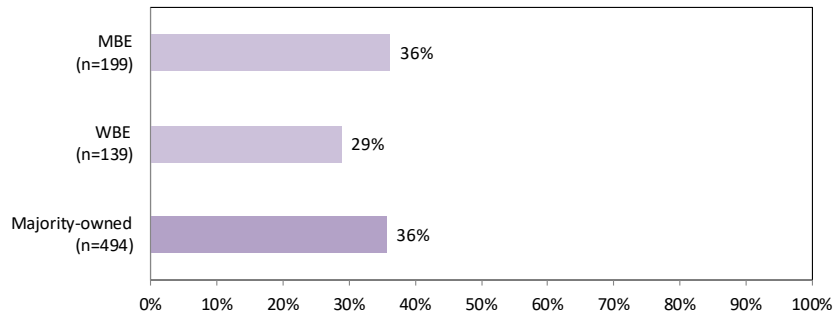
Source: Keen Independent Research from 2019 availability surveys.

**Comparison of above median bid capacity for MBEs, WBEs and majority-owned firms.** Based on the median bid capacity figures identified in Figure H-14, Keen Independent classified firms into “above median bid capacity,” “at median bid capacity” and “below median bid capacity” for their subindustry. About 36 percent of MBEs and majority-owned firms had above median bid capacity for their subindustry compared with 29 percent of WBEs.

In sum, there was no difference in bid capacity between businesses owned by people of color compared with nonminorities after controlling for business specialization. There was a difference in bid capacity for white women-owned companies, however.

**Figure H-14.**  
Percent of firms above median bid capacity for their subindustry, Arizona, 2019

Source:  
Keen Independent Research  
from 2019 availability surveys.



Keen Independent further explored the apparent disparity in bid capacity for white women-owned firms y also statistically controlling for length of time in business. Results in the study team’s probit regression model, indicated no statistically significant effect from being a female-owned firm.

### Availability Interview Results Concerning Potential Barriers

As part of the availability surveys conducted with Arizona businesses, Keen Independent asked firm owners and managers if they had experienced barriers or difficulties associated with starting or expanding a business or with obtaining work. Survey responses pertaining to access to capital were presented in Appendix G. Appendix D explains the survey process and provides the survey questions.

Results for interview questions are discussed within the context of the relevant study industry; some questions were industry-specific and not asked of all available businesses. The analysis is grouped into three sets for each study industry: barriers related to project requirements, barriers to learning about bid opportunities, and barriers related to receipt of payment.

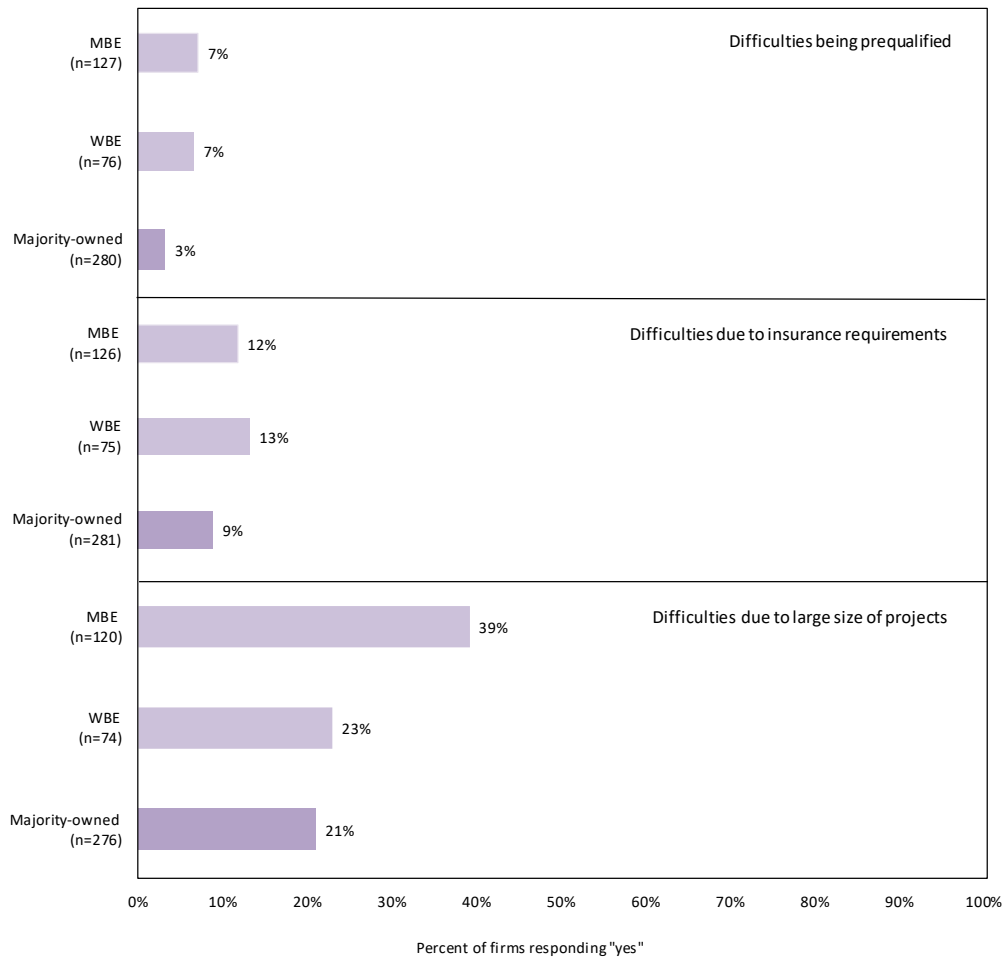
**Construction.** In the availability survey, construction firms were asked about being prequalified for work, insurance requirements and whether project size was a barrier to bidding. Figure H-15 shows results for minority-owned firms (MBEs), white women-owned businesses (WBEs) and majority-owned businesses.

- Seven percent of MBEs and WBEs reported difficulties being prequalified for work compared with 3 percent of majority-owned firms.
- A somewhat larger percentage of MBEs (12%) and WBEs (13%) than majority-owned firms (9%) reported that insurance requirements on contracts were a barrier to bidding.
- MBEs (39%) and were considerably more likely than WBEs (23%) and majority-owned construction firms (21%) to indicate that large contract size presented a barrier to bidding.



Figure H-15.

Responses to availability interview questions concerning insurance, prequalification and size of projects, Arizona MBE, WBE and majority-owned construction firms



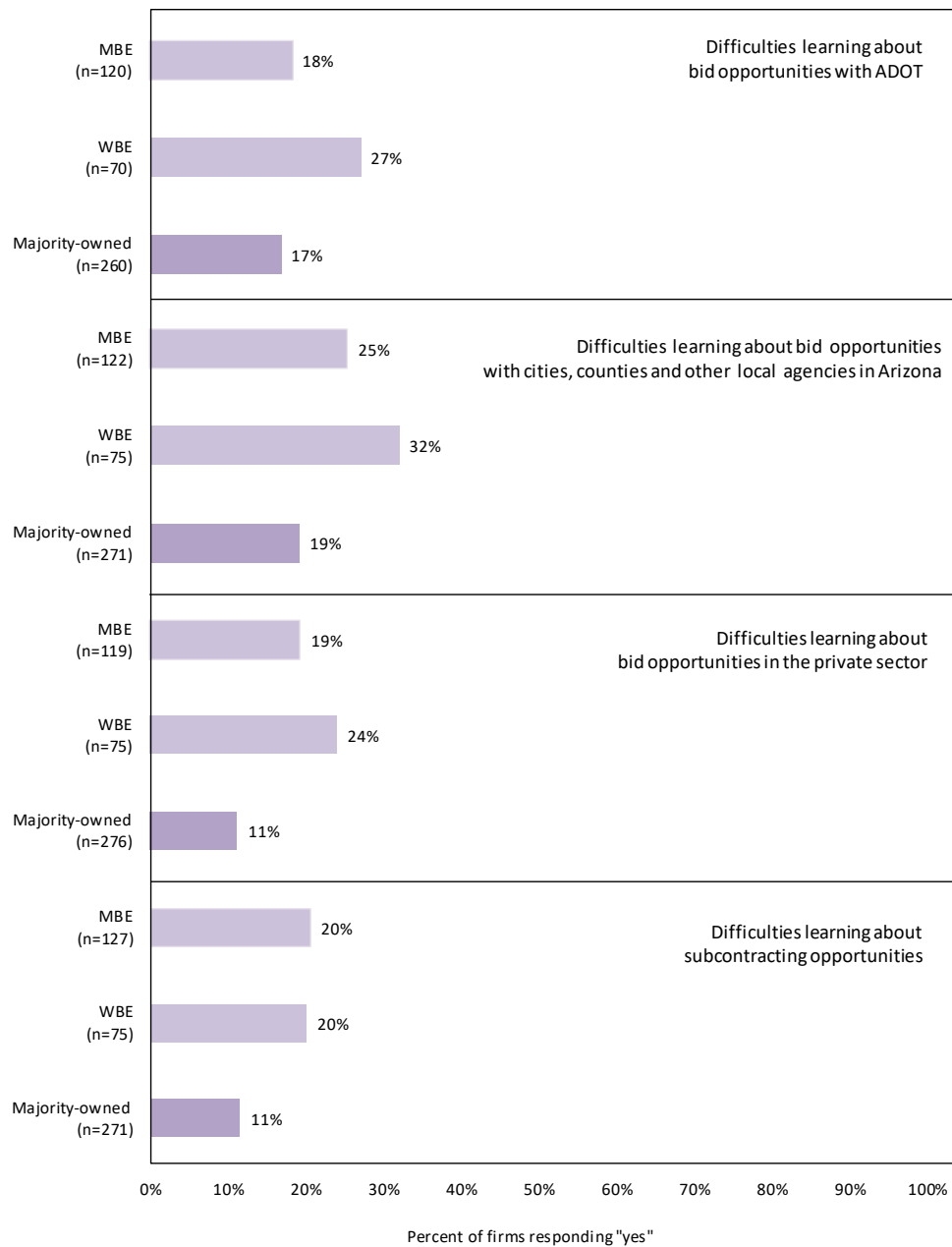
Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2019 availability surveys.

The survey also asked construction firms about any difficulties learning about bid opportunities.

- In general, relatively more WBEs than majority-owned firms indicated difficulties learning about public and private sector bid opportunities and learning about subcontracting opportunities in Arizona, as shown in Figure H-16. Between 20 and 32 percent of WBE construction firms reported such difficulties compared with 11 to 19 percent of majority-owned construction firms, depending on the question.
- MBEs were also relatively more likely to report difficulties learning about work than majority-owned firms. However, a smaller proportion of MBEs than of WBEs reported such difficulties.

Figure H-16.  
Responses to availability interview questions concerning learning about work,  
Arizona MBE, WBE and majority-owned construction firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

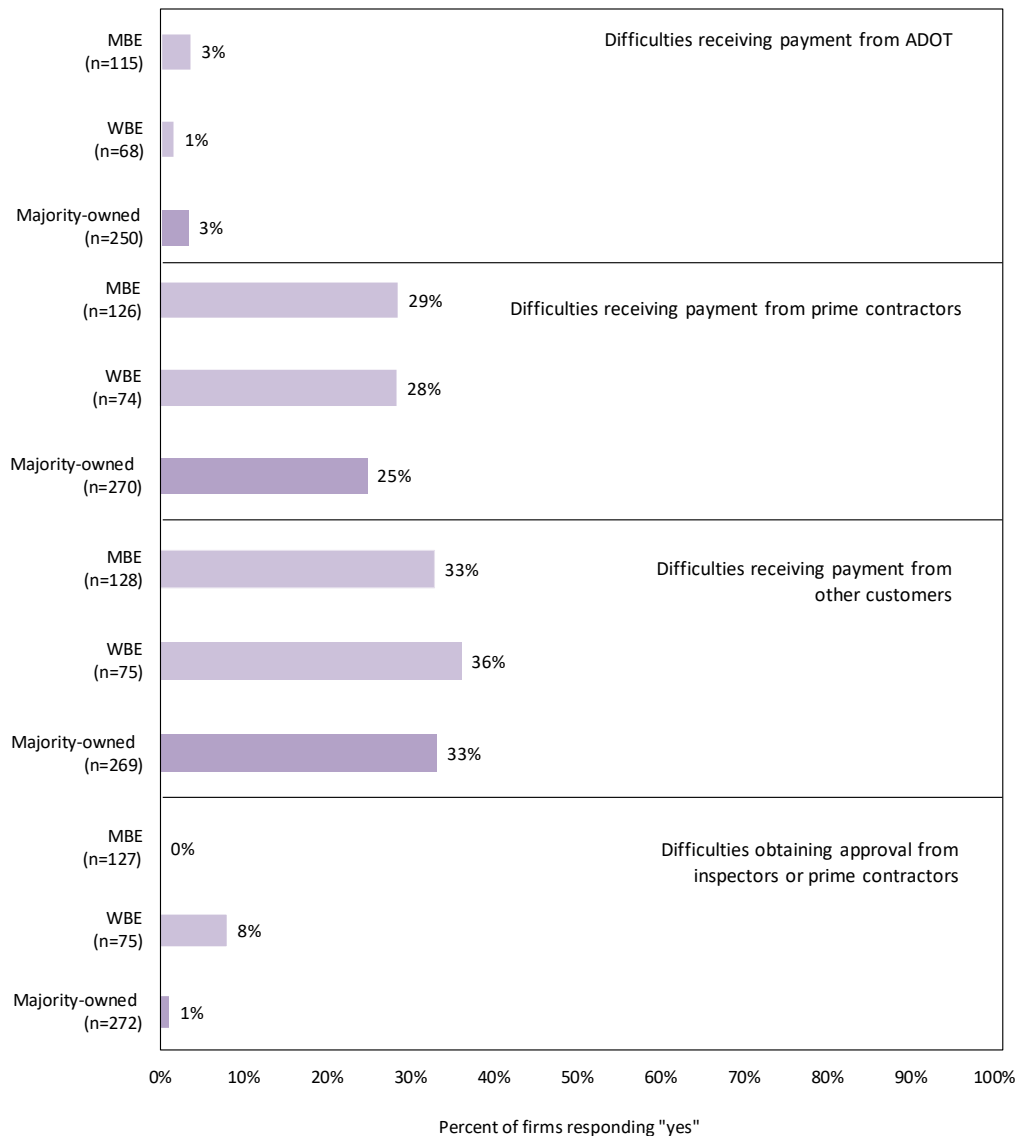
Source: Keen Independent Research from 2019 availability surveys.

Figure H-17 examines the proportion of firms reporting difficulty receiving payments.

- Very few firms reported difficulties receiving payment from ADOT (directly), but more than one-quarter of MBEs and WBEs and 25 percent of majority-owned firms reported difficulties receiving payment from prime contractors.
- About one-third of respondents reported difficulty being paid by other customers.
- WBEs more frequently reported difficulties obtaining work approvals.

Figure H-17.

Responses to availability interview questions concerning receipt of payments and approval of work, Arizona MBE, WBE and majority-owned construction firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

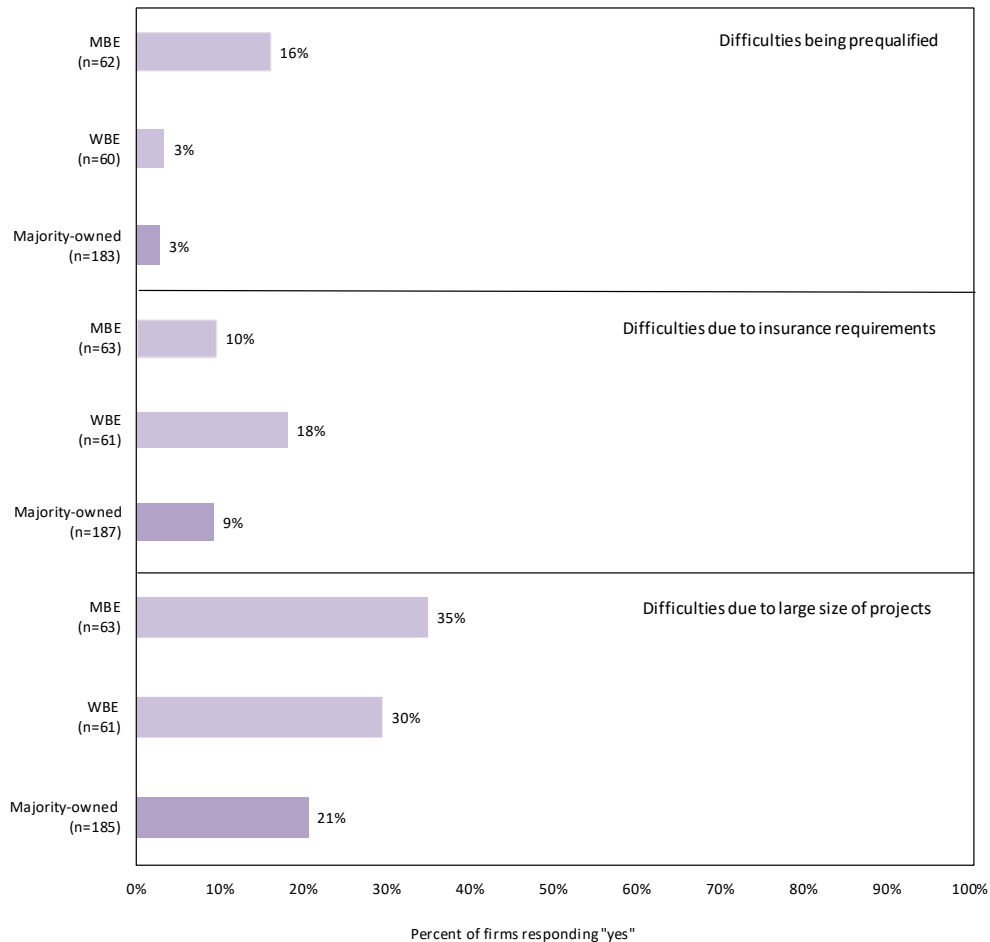
Source: Keen Independent Research from 2019 availability surveys.

**Engineering.** The study team asked similar questions about marketplace barriers as part of the availability surveys with engineering and related professional services firms. Responses are presented in Figure H-18.

- MBEs were more likely than other firms to report difficulties being prequalified.
- About twice as many WBEs (18%) as MBEs (10%) and majority-owned firms (9%) reported barriers due to insurance requirements
- MBEs (35%) and WBEs (30%) were more likely to report large project size as a barrier compared with majority-owned firms (21%).

**Figure H-18.**

Responses to availability interview questions concerning prequalification, insurance and size of projects, Arizona MBE, WBE and majority-owned professional services firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

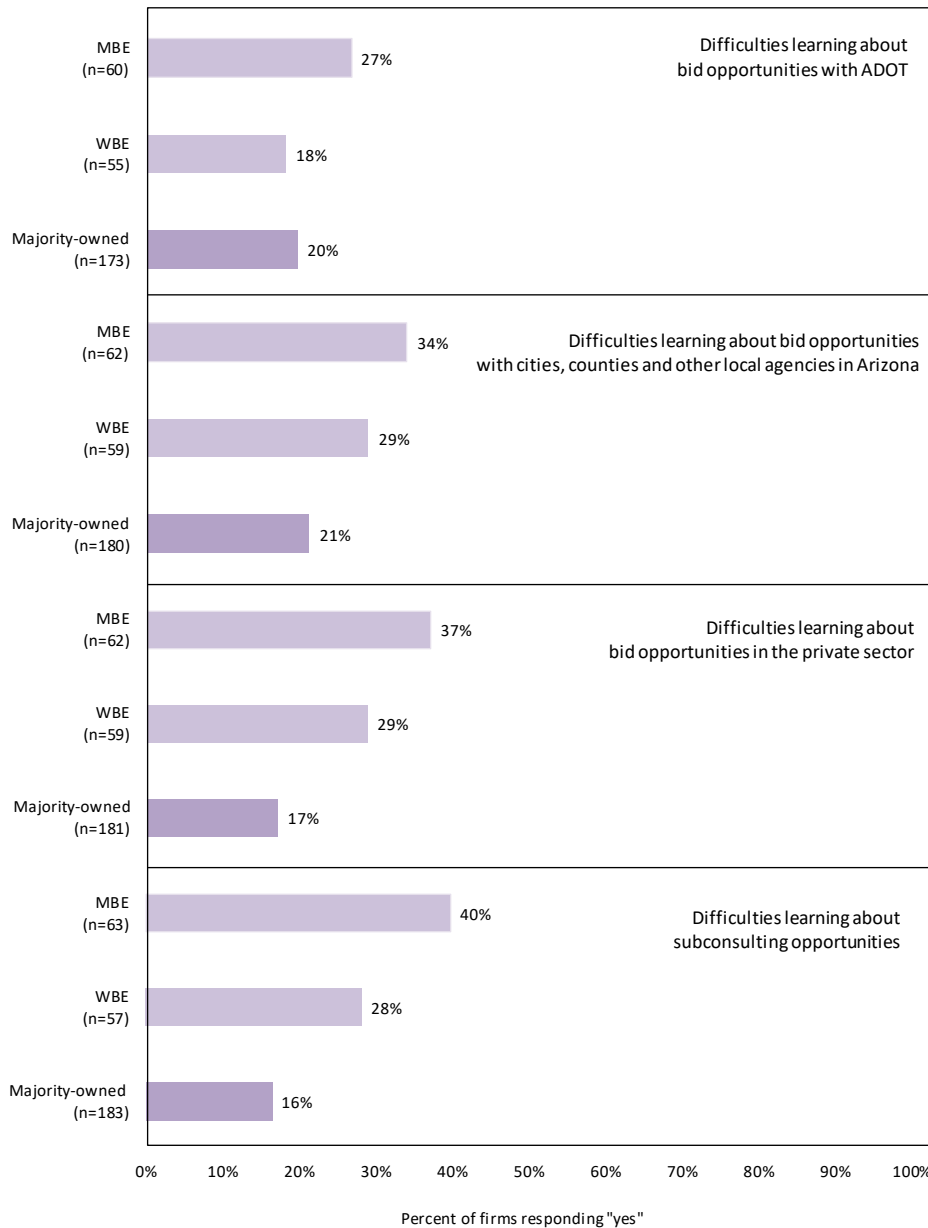
Source: Keen Independent Research from 2019 availability surveys.

Many MBE and WBE engineering firms reported difficulties learning about bid opportunities. Among MBEs, 27 percent reported difficulties learning about ADOT opportunities, more than the 20 percent of majority-owned firms indicating such difficulties.

Compared with majority-owned firms, more MBEs and WBEs reported difficulties learning of opportunities with other public agencies and in the private sector, as well as related to subconsulting.

Figure H-19.

Responses to availability interview questions concerning learning about work, Arizona MBE, WBE and majority-owned engineering firms



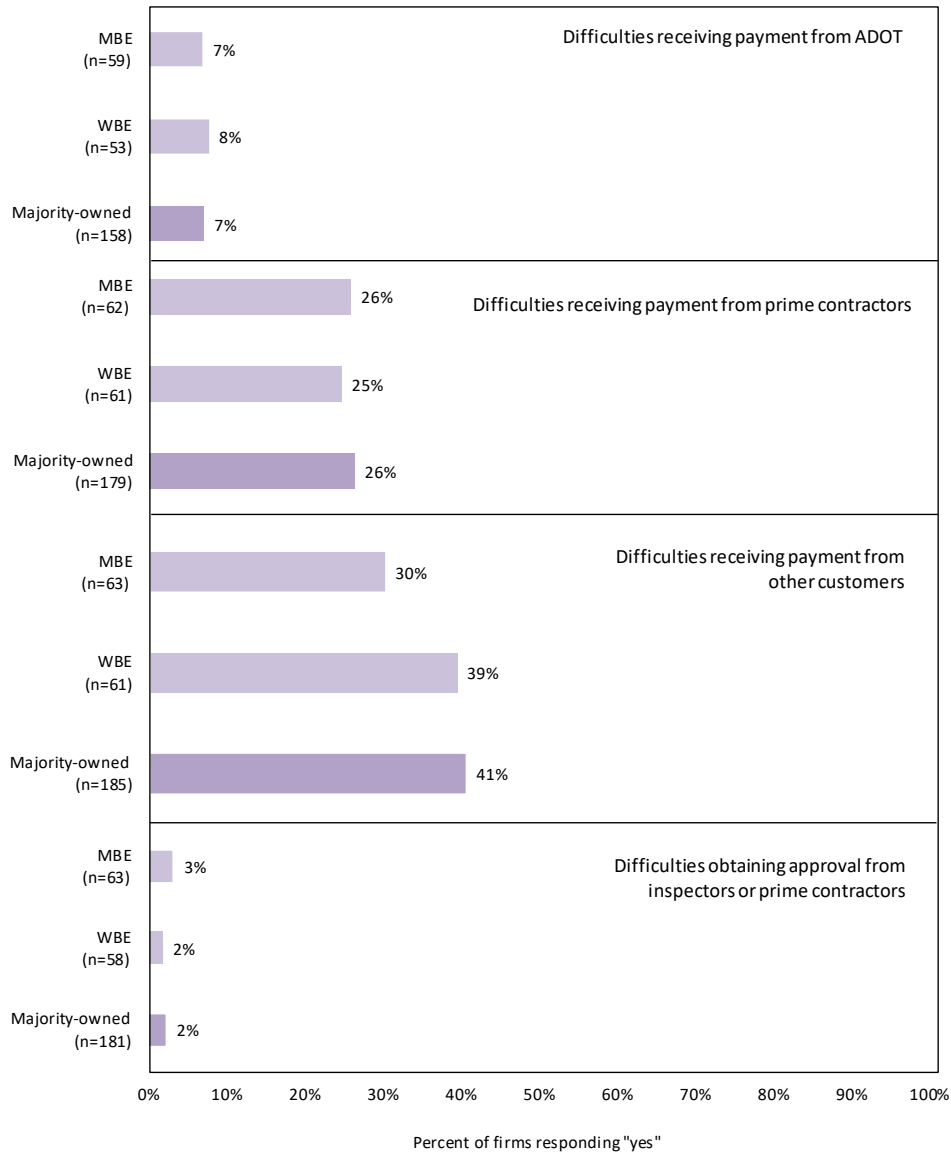
Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2019 availability surveys.

Engineering firms also answered questions about difficulties receiving payment (see Figure H-20). Few firms indicated difficulties receiving payment directly from ADOT, but many engineering firms reported difficulties receiving payment from prime contractors and other customers. Few companies indicated difficulties being approved by inspectors and prime contractors.

Figure H-20.

Responses to availability interview questions concerning receipt of payments and approval of work, Arizona MBE, WBE and majority-owned engineering firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2019 availability surveys.

## Summary

Keen Independent's examination of outcomes regarding business success and analysis of availability survey questions about marketplace barriers suggest that there is not a level playing field for minority- and women-owned construction and engineering businesses in Arizona.

**Disparities in measures of business success.** The study team examined several different data sources to analyze business receipts and earnings for minority-, female- and majority-owned businesses.

- Analysis of 2012 SBO data indicated that, in Arizona, average receipts for minority- and women-owned businesses were lower compared to those of nonminority- and male-owned businesses. Results were consistent across the construction and engineering industries.
- Data from 2013–2017 ACS indicated that, in the Arizona construction and engineering industries:
  - Business owners of color earned less than nonminority business owners; and
  - Female business owners earned less than male business owners.
- Regression analyses using U.S. Census Bureau data for business owner earnings indicated that there were statistically significant effects of race and gender on business earnings. After statistically controlling for certain gender-neutral factors, minority business owners who were not Hispanic had lower business earnings in the construction industry. Within the engineering industry, being a person of color and being female were associated with lower business earnings after controlling for certain neutral factors.
- Data from availability surveys conducted for this study showed that in the Arizona transportation contracting industries, minority- and women-owned firms that were qualified and interested in work with ADOT or local agencies were more likely to be low-revenue firms when compared to majority-owned firms. These results are consistent with other data sources showing lower average revenue for MBEs and WBEs.

Keen Independent examined whether the largest contracts or subcontracts that minority- and women-owned firms had bid were smaller than the “bid capacity” found for majority-owned firms. There was no evidence that MBEs and WBEs have lower bid capacity than other firms after controlling for subindustry of the firm and length of time in business.

**Disparities regarding barriers in the Arizona transportation contracting marketplace.** Answers to questions concerning marketplace barriers in the availability survey indicated large differences in the proportion of minority- and majority-owned construction firms reporting that they experienced difficulties in the Arizona marketplace regarding:

- Large project sizes; and
- Learning about bid opportunities in the private sector and subcontracting opportunities with prime contractors.

There were large differences in the share of white women-owned and majority-owned construction firms that identified difficulties concerning:

- Learning about bid opportunities with ADOT and with cities, counties and other local agencies in Arizona;
- Learning about bid opportunities in private sector, and subcontracting opportunities with prime contractors; and
- Obtaining approval from inspectors or prime contractors.

Among engineering firms responding to the availability survey, minority-owned firms were far more likely than majority-owned companies to report difficulties related to:

- Being prequalified for work;
- Large project sizes; and
- Learning about bid opportunities with ADOT, with local governments, in the private sector and with prime contractors.

White women-owned engineering companies were far more likely than majority-owned firms to report difficulties related to:

- Insurance requirements on projects;
- Large project sizes; and
- Learning about bid opportunities with local governments, in the private sector and with prime contractors.

Across minority-, women- and majority-owned construction and engineering firms responding to the availability survey, relatively few businesses reported difficulties being paid when working directly with ADOT, but many indicated difficulties being paid by other customers and when working as a subcontractor.



## **APPENDIX I.**

### **Description of Data Sources for Marketplace Analyses**

To perform the marketplace analyses presented in Appendices E through H, the study team used data from a range of sources, including:

- The 2013–2017 five-year American Community Survey (ACS), conducted by the U.S. Census Bureau;
- Federal Reserve Board’s 2003 Survey of Small Business Finances (SSBF);
- The 2012 Survey of Business Owners (SBO), conducted by the U.S. Census Bureau;
- The 2016 Annual Survey of Entrepreneurs (ASE), conducted by the U.S. Census Bureau; and
- Home Mortgage Disclosure Act (HMDA) data provided by the Federal Financial Institutions Examination Council (FFIEC).

The following sections provide further detail on each data source, including how the study team used it in its marketplace analyses. (See Appendix D for a description of the availability survey.)

#### **U.S. Census Bureau American Community Survey PUMS Data**

Focusing on the construction and engineering industries, the study team used PUMS data to analyze:

- Demographic characteristics;
- Measures of financial resources; and
- Self-employment (business ownership).

PUMS data offer several features ideal for the analyses reported in this study, including historical cross-sectional data, stratified national and local samples, and large sample sizes that enable many estimates to be made with a high level of statistical confidence, even for subsets of the population (e.g., racial/ethnic and occupational groups).

The study team obtained selected Census and ACS data from the Minnesota Population Center’s Integrated Public Use Microdata Series (IPUMS). The IPUMS program provides online access to customized, accurate datasets.<sup>1</sup> For the analyses contained in this report, the study team used the 2013–2017 five-year ACS sample.

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<sup>1</sup> Ruggles, S., Flood, S., Goeken, R., Grover, J., Meyer, E., Pacas, J., and Sobek, M., IPUMS USA: Version 9.0 [dataset]. Minneapolis, MN: IPUMS, 2019. <https://doi.org/10.18128/D010.V9.0>

**2013–2017 ACS.** The study team examined ACS data obtained through IPUMS. The U.S. Census Bureau conducts the ACS which uses monthly samples to produce annually updated data for the same small areas as the 2000 Census long form.<sup>2</sup> Since 2005, the Census has conducted monthly surveys based on a random sample of housing units in every county in the U.S. Currently, these surveys cover roughly 1 percent of the population per year. The 2013–2017 ACS five-year estimates represent average characteristics over the five-year period of time and correspond to roughly 5 percent of the population. For Arizona, the 2013–2017 ACS dataset includes 336,984 observations which — according to person-level weights — represent about 6.8 million individuals.

**Categorizing individual race/ethnicity.** To define race/ethnicity, the study team used the IPUMS race/ethnicity variables — RACED and HISPAN — to categorize individuals into seven groups:

- African American;
- Asian-Pacific American;
- Subcontinent Asian American;
- Hispanic American;
- Native American;
- Other minority (unspecified); and
- Non-Hispanic white.

The study team created the race definitions using a rank ordering methodology similar to that used in the 2000 Census data dictionary. An individual was considered “non-Hispanic white” if they did not report Hispanic ethnicity and indicated being white only — not in combination with any other race group. Using the rank ordering methodology, an individual who identified multiple races or ethnicities was placed in the reported category with the highest ranking in the study team’s ordering. African American is first, followed by Native American, Asian-Pacific American, and then Subcontinent Asian American. For example, if an individual identified herself as “Korean,” she was placed in the Asian-Pacific American category. If the individual identified herself as “Korean” in combination with “Black,” the individual was considered African American.

- The Asian-Pacific category included the following race groups: Burmese, Cambodian, Chamorro, Chinese, Fijian, Filipino, Guamanian, Hmong, Indonesian, Japanese, Korean, Laotian, Malaysian, Mongolian, Samoan, Taiwanese, Thai, Tongan and Vietnamese. This category also included other Polynesian, Melanesian and Micronesian races, as well as individuals identified as Pacific Islanders.

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<sup>2</sup> U.S. Census Bureau. *Design and Methodology: American Community Survey*. Washington D.C.: U.S. Government Printing, 2009. Available at [https://www.census.gov/content/dam/Census/library/publications/2010/acs/acs\\_design\\_methodology.pdf](https://www.census.gov/content/dam/Census/library/publications/2010/acs/acs_design_methodology.pdf)

- The Subcontinent Asian American category included: Asian Indian (Hindu), Bangladeshi, Bhutanese, Nepalis, Pakistani and Sri Lankan. Individuals who identified themselves as “Asian,” but who were not clearly categorized as Subcontinent Asian, were placed in the Asian-Pacific American group.
- American Indian, Alaska Native, Native Hawaiian and Latin American Indian groups were considered Native American.
- If an individual was identified with any of the above groups and an “other race” group, the individual was categorized into the known category. Individuals identified as “other race,” “Hispanic and other race” or “white and other race” were categorized as “other minority.”

For some analyses — those in which sample sizes were small — the study team combined minority groups.

**Education variables.** The study team used the variable indicating respondents’ highest level of educational attainment (EDUCD) to classify individuals into four categories: less than high school, high school diploma (or equivalent), some college or associate degree, and bachelor’s degree or higher.<sup>3</sup>

**Home ownership and home value.** Rates of home ownership were analyzed using the RELATED variable to identify heads of household and the OWNERSHPD variable to define tenure. Heads of households living in dwellings owned free and clear, and dwellings owned with a mortgage or loan (OWNERSHPD codes 12 or 13) were considered homeowners. Median home values are estimated using the VALUEH variable, which reports the value of housing units in contemporary dollars. In the 2013–2017 ACS, home value is a continuous variable (rounded to the nearest \$1,000) and median estimation is straightforward.

**Definition of workers.** Analyses involving worker class, industry and occupation include workers 16 years of age or older who are employed within the industry or occupation in question. Analyses involving all workers regardless of industry, occupation or class include both employed persons and those who are unemployed but seeking work.

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<sup>3</sup> In the 1940–1980 samples, respondents were classified according to the highest year of school completed (HIGRADE). In the years after 1980, that method was used only for individuals who did not complete high school, and all high school graduates were categorized based on the highest degree earned (EDUC99). The EDUCD variable merges two different schemes for measuring educational attainment by assigning to each degree the typical number of years it takes to earn it.

**Business ownership.** The study team used the Census-detailed “class of worker” variable (CLASSWKD) to determine self-employment. The variable classifies individuals into one of eight categories, shown in Figure I-1. The study team counted individuals who reported being self-employed — either for an incorporated or a non-incorporated business — as business owners.

Figure I-1.  
Class of worker variable  
code in the 2013–2017  
ACS

Source:  
Keen Independent Research from  
the IPUMS program:  
<http://usa.ipums.org/usa/>.

Description	2013–2017 ACS CLASSWKRD codes
N/A	0
Self-employed, not incorporated	13
Self-employed, incorporated	14
Wage/salary, private	22
Wage/salary at nonprofit	23
Federal government employee	25
State government employee	27
Local government employee	28
Unpaid family worker	29

**Business earnings.** The study team used the Census “business earnings” variable (INCBUS00) to analyze business income by race/ethnicity and gender. The study team included business owners age 16 and over with positive earnings in the analyses.

**Study industries.** The marketplace analyses focus on two industries: construction and engineering. The study team used the IND variable to identify individuals as working in one of these industries. That variable includes several hundred industry and sub-industry categories. Figure I-2 identifies the IND codes used to define each study area.

Figure I-2.  
2013–2017 Census industry codes used for construction and engineering

Study industry	2013–2017 ACS IND codes	Description
Construction	0770	Construction industry
Engineering	7290,	Architectural, engineering and related services

Source: Keen Independent Research from the IPUMS program: <http://usa.ipums.org/usa/>.

**Industry occupations.** The study team also examined workers by occupation within the construction industry using the PUMS variable OCC. Figure I-3 summarizes the 2013–2017 ACS OCC codes used in the study team’s analyses.

Figure I-3.

2013–2017 ACS occupation codes used to examine workers in construction

2013–2017 ACS occupational title and code	Job description
<b>Construction managers</b> 2013-17 Code: 20, 220	Plan, direct, coordinate or budget, usually through subordinate supervisory personnel, activities concerned with the construction and maintenance of structures, facilities and systems. Participate in the conceptual development of a construction project and oversee its organization, scheduling and implementation. Include specialized construction fields, such as carpentry or plumbing. Include general superintendents, project managers and constructors who manage, coordinate and supervise the construction process.
<b>Miscellaneous managers</b> 2013-17 Code: 430	All managers not listed separately.
<b>First-line supervisors of construction trades and extraction workers</b> 2013-17 Code: 6200	Directly supervise and coordinate the activities of construction or extraction workers.
<b>Brickmasons, blockmasons and stonemasons</b> 2013-17 Code: 6220	Lay and bind building materials, such as brick, structural tile, concrete block, cinder block, glass block and terra-cotta block, construct or repair walls, partitions, arches, sewers and other structures. Build stone structures, such as piers, walls and abutments and lay walks, curbstones, or special types of masonry for vats, tanks, and floors.
<b>Cement masons, concrete finishers and terrazzo workers</b> 2013-17 Code: 6250	Smooth and finish surfaces of poured concrete, such as floors, walks, sidewalks or curbs using a variety of hand and power tools. Align forms for sidewalks, curbs or gutters; patch voids; use saws to cut expansion joints. Terrazzo workers apply a mixture of cement, sand, pigment or marble chips to floors, stairways and cabinet fixtures.
<b>Construction laborers</b> 2013-17 Code: 6260	Perform tasks involving physical labor at building, highway and heavy construction projects, tunnel and shaft excavations, and demolition sites. May operate hand and power tools of all types: air hammers, earth tampers, cement mixers, small mechanical hoists, surveying and measuring equipment, and a variety of other equipment and instruments. May clean and prepare sites, dig trenches, set braces to support the sides of excavations, erect scaffolding, clean up rubble and debris, and remove asbestos, lead and other hazardous waste materials. May assist other craft workers. Exclude construction laborers who primarily assist a particular craft worker, and classify them under “Helpers, Construction Trades.”
<b>Paving, surfacing and tamping equipment operators</b> 2013-17 Code: 6300	Operate equipment used for applying concrete, asphalt, or other materials to roadbeds, parking lots, or airport runways and taxiways, or equipment used for tamping gravel, dirt, or other materials. Include concrete and asphalt paving machine operators, form tampers, tamping machine operators and stone spreader operators.

Figure I-3 (continued).

2013–2017 ACS occupation codes used to examine workers in construction

2013–2017 ACS occupational title and code	Job description
<b>Miscellaneous construction equipment operators, including pile-driver operators</b> 2013-17 Code: 6320	Operate one or several types of power construction equipment, such as motor graders, bulldozers, scrapers, compressors, pumps, derricks, shovels, tractors, or front-end loaders to excavate, move, and grade earth, erect structures, or pour concrete or other hard surface pavement. Operate pile drivers mounted on skids, barges, crawler treads, or locomotive cranes to drive pilings for retaining walls, bulkheads, and foundations of structures, such as buildings, bridges, and piers.
<b>Drywall installers, ceiling tile installers and tapers</b> 2013-17 Code: 6330	Apply plasterboard or other wallboard to ceilings or interior walls of buildings, mount acoustical tiles or blocks, strips or sheets of shock-absorbing materials to ceilings and walls of buildings to reduce or reflect sound.
<b>Electricians</b> 2013-17 Code: 6355	Install, maintain and repair electrical wiring, equipment and fixtures. Ensure that work is in accordance with relevant codes. May install or service street lights, intercom systems or electrical control systems. Exclude “Security and Fire Alarm Systems Installers.”
<b>Painters, construction and maintenance</b> 2013-17 Code: 6420	Paint walls, equipment, buildings, bridges and other structural surfaces, using brushes, rollers and spray guns. Remove old paint to prepare surfaces prior to painting and mix colors or oils to obtain desired color or consistency.
<b>Pipelayers, plumbers, pipefitters and steamfitters</b> 2013-17 Code: 6440	Lay pipe for storm or sanitation sewers, drains and water mains. Perform any combination of the following tasks: grade trenches or culverts, position pipe or seal joints. Excludes “Welders, Cutters, Solderers and Brazers.” Assemble, install, alter and repair pipelines or pipe systems that carry water, steam, air or other liquids or gases. May install heating and cooling equipment and mechanical control systems. Includes sprinklerfitters.
<b>Plasterers and stucco masons</b> 2013-17 Code: 6460	Apply interior or exterior plaster, cement, stucco or similar materials and set ornamental plaster.
<b>Roofers</b> 2013-17 Code: 6515	Cover roofs of structures with shingles, slate, asphalt, aluminum and wood. Spray roofs, sidings and walls with material to bind, seal, insulate or soundproof sections of structures.
<b>Iron and steel workers, including reinforcing iron and rebar workers</b> 2013-17 Code: 6530	<i>Iron and steel workers</i> raise, place and unite iron or steel girders, columns and other structural members to form completed structures or structural frameworks. May erect metal storage tanks and assemble prefabricated metal buildings. <i>Reinforcing iron and rebar workers</i> position and secure steel bars or mesh in concrete forms in order to reinforce concrete. Use a variety of fasteners, rod-bending machines, blowtorches and hand tools. Include rod busters.

Figure I-3 (continued).

2013–2017 ACS occupation codes used to examine workers in construction

2013–2017 ACS occupational title and code	Job description
<b>Helpers, construction trades</b> 2013-17 Code: 6600	All construction trades helpers not listed separately.
<b>Highway maintenance workers</b> 2013-17 Code: 6730	Maintain highways, municipal and rural roads, airport runways and rights-of-way. Duties include patching broken or eroded pavement, repairing guard rails, highway markers and snow fences. May also mow or clear brush from along road or plow snow from roadway. Excludes "Tree Trimmers and Pruners."
<b>Driver/sales workers and truck drivers</b> 2013-17 Code: 9130	<i>Driver/sales workers</i> drive trucks or other vehicles over established routes or within an established territory and sell goods, such as food products, including restaurant take-out items, or pick up and deliver items, such as laundry. May also take orders and collect payments. Include newspaper delivery drivers. <i>Truck drivers (heavy)</i> drive a tractor-trailer combination or a truck with a capacity of at least 26,000 GVW, to transport and deliver goods, livestock, or materials in liquid, loose or packaged form. May be required to unload truck. May require use of automated routing equipment. Requires commercial drivers' license. <i>Truck drivers (light)</i> drive a truck or van with a capacity of under 26,000 GVW, primarily to deliver or pick up merchandise or to deliver packages within a specified area. May require use of automatic routing or location software. May load and unload truck. Exclude "Couriers and Messengers."
<b>Crane and tower operators</b> 2013-17 Code: 9510	Operate mechanical boom and cable or tower and cable equipment to lift and move materials, machines or products in many directions. Exclude "Excavating and Loading Machine and Dragline Operators."
<b>Dredge, excavating and loading machine operators</b> 2013-17 Code: 9520	<i>Dredge operators</i> operate dredge to remove sand, gravel or other materials from lakes, rivers or streams; and to excavate and maintain navigable channels in waterways. <i>Excavating and loading machine and dragline operators</i> operate or tend machinery equipped with scoops, shovels or buckets, to excavate and load loose materials. <i>Loading machine operators, underground mining</i> operate underground loading machine to load coal, ore or rock into shuttle or mine car or onto conveyors. Loading equipment may include power shovels, hoisting engines equipped with cable-drawn scraper or scoop, or machines equipped with gathering arms and conveyor.

Source: Keen Independent Research from the IPUMS program: <http://usa.ipums.org/usa/>.

## Survey of Small Business Finances (SSBF)

The study team used the SSBF to analyze the availability and characteristics of small business loans. The Federal Reserve Board conducted the SSBG every five years but stopped after 2003.

The SSBF collects financial data from non-governmental for-profit firms with fewer than 500 employees. The survey uses a nationally representative sample, structured to allow for analysis of specific geographic regions, industry sectors, and racial and gender groups. The SSBF is unique as it provides detailed data on both firm and owner financial characteristics. For the purposes of this report, Keen Independent used the survey from 2003, which is available at the Federal Reserve Board website.<sup>4</sup>

**Categorizing owner race/ethnicity and gender.** In the 2003 SSBF, businesses were able to give responses on owner characteristics for up to three different owners. The data also included a fourth variable, a weighted average of other answers provided for each question. In order to define race/ethnicity and gender variables, the study team used the final weighted average for variables on owner characteristics. Definition of race and ethnic groups in the 2003 SSBF are slightly different than the classifications used in the 2000 Census and 2013–2017 ACS.

The SSBF classified race and ethnicity of businesses according to the following five groups:

- African American;
- Asian American;
- Hispanic American;
- Native American;
- Other (unspecified); and
- Non-Hispanic white.

A business was considered Hispanic American-owned if more than 50 percent of the business was owned by Hispanic Americans, regardless of race. All businesses that reported 50 percent or less Hispanic American ownership were included in the racial group that owned more than half of the company. No firms reported the race/ethnicity of their owners as “other.”

Similar to race, firms were classified as female-owned if more than 50 percent of the firm was owned by women. Firms owned half by women and half by men were classified as male-owned.

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<sup>4</sup> The Federal Reserve Board. *Survey of Small Business Finances, 2003*. Retrieved from <http://www.federalreserve.gov/pubs>



**Defining selected industry sectors.** In the 2003 SSBF, each business was classified according to Standard Industrial Classification (SIC) code and placed into one of seven industry categories:

- Construction;
- Mining;
- Transportation, communications, and utilities;
- Finance, insurance, and real estate;
- Trade;
- Engineering; or
- Services (excluding engineering).

**Region variables.** The SSBF divides the United States into nine Census Divisions. Arizona is located in the Mountain Census Division (referred to in the marketplace appendices as the Mountain region), along with Colorado, Idaho, New Mexico, Montana, Utah, Nevada and Wyoming.

**Loan denial variables.** In the 2003 survey, firm owners were asked if they have applied for a loan in the last three years and whether loan applications were always approved, always denied, or sometimes approved and sometimes denied. For the purposes of this study, only firms that were always denied were considered when analyzing loan denial.

**Data reporting.** Due to missing responses to survey questions in SSBF datasets, data were imputed to fill in missing values. The missing values in the 2003 dataset were imputed using a different method than in previous SSBF studies. In the 1998 survey data, the number of observations in the dataset matches the number of firms surveyed. However, the 2003 data includes five implicates, each with imputed values that have been filled in using a randomized regression model.<sup>5</sup> Thus, there are 21,200 observations in the 2003 data, five for each of the 4,240 firms surveyed. Across the five implicates, all non-missing values are identical, whereas imputed values may differ.

As discussed in a recent paper about the 2003 imputations by the Finance and Economics Discussion Series, missing survey values can lead to biased estimates and inaccurate variances and confidence intervals.<sup>6</sup> Those problems can be corrected through the use of multiple implicates. For summary statistics using 2003 SSBF data, Keen Independent utilized all five implicates and included observations with missing values in the analyses. For the probit regression models presented in Appendix G, the study team used the first implicate and did not include observations with imputed values for the dependent variables.

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<sup>5</sup> For a more detailed explanation of imputation methods, see the “Technical Codebook” for the *2003 Survey of Small Business Finances*.

<sup>6</sup> Lieu N. Hazelwood, Traci L. Mach and John D. Wolken. *Alternative Methods of Unit Nonresponse Weight Adjustments: An Application from the 2003 Survey of Small Businesses*. Finance and Economics Discussion Series Divisions of Research and Statistics and Monetary Affairs, Federal Reserve Board. Washington, D.C., 2007.  
<http://www.federalreserve.gov/pubs/feds/2007/200710/200710pap.pdf>

## **Survey of Business Owners (SBO)**

The study team used data from the 2012 SBO to analyze mean annual firm receipts. The SBO is conducted every five years by the U.S. Census Bureau. Data for the most recent publication of the SBO was collected in 2012. Response to the survey is mandatory, which ensures comprehensive economic and demographic information for business and business owners in the U.S. All tax-filing businesses and nonprofits were eligible to be surveyed, including firms with and without paid employees. In 2012, approximately 1.75 million firms were surveyed. The study team examined SBO data relating to the number of firms, number of firms with paid employees, and total receipts. That information is available by geographic location, industry, gender, race and ethnicity.

The SBO uses the 2002 North American Industry Classification System (NAICS) to classify industries. The study team analyzed data for firms in all industries and for firms in selected industries that corresponded closely to construction, architecture and engineering, and food, beverage and selected retail.

To categorize the business ownership of firms reported in the SBO, the Census Bureau uses standard definitions for women-owned and minority-owned businesses. A business is defined as women-owned if more than half of the ownership and control is by women. Firms with joint male-/female-ownership were tabulated as an independent gender category. A business is defined as minority-owned if more than half of the ownership and control is by African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, American Indian or Alaska Native or by another minority group. Respondents had the option of selecting one or more racial groups when reporting business ownership. Racial categories are not available by both race and ethnicity, so race and ethnicity were analyzed independently. The study team reported business receipts for the following racial, ethnic and gender groups according to Census Bureau definitions:

- Racial groups — African Americans, Asian Americans, Asian-Pacific Americans, Subcontinent Asian American, American Indian or Alaska Native, other minority groups and whites.
- Ethnic groups — Hispanic Americans and non-Hispanics.
- Gender groups — men and women.

## **Annual Survey of Entrepreneurs (ASE) Data**

Keen Independent analyzed selected economic and demographic characteristics for business owners collected through the ASE. The ASE includes nonfarm businesses that file tax forms as individual proprietorships, partnerships or any type of corporation, have paid employees, and have receipts of \$1,000 or more. Unlike the SBO, the ASE samples only firms with paid employees (the SBO includes both employer firms and non-employer firms). The 2015 ASE sampled approximately 290,000 businesses that operated at any time during that year. Response to the survey is mandatory, ensuring comprehensive data for surveyed businesses and business owners.

The ASE collects information on businesses as well as business ownership (defined as having 51 percent or more of the stock or equity in the business). Data regarding demographic characteristics of business owners include gender, ethnicity, race and veteran status. Race/ethnicity and gender categories in the ASE are the same as those used in SBO and Census data. Because ethnicity is reported separately and respondents have the option of selecting one or more racial groups when reporting business ownership, all ASE calculations use non-mutually exclusive race/ethnicity definitions.

Topics within the ASE include some business information covered in the SBO, as well as information relating to the businesses' sources of capital and financing. Keen Independent used ASE data to analyze main sources of capital used to start or acquire a firm, firms that secured business loans from a bank or financial institution, firms that avoided additional financing because they did not think the business would be approved by lender, and firms that cited access to financial capital as negatively impacting the profitability of their business. Analyses included comparisons across race/ethnicity and gender groups.

### **Home Mortgage Disclosure Act (HMDA) Data**

The study team analyzed mortgage lending in Arizona using HMDA data that the Federal Financial Institutions Examination Council (FFIEC) provides. HMDA data provide information on mortgage loan applications that financial institutions, savings banks, credit unions and some mortgage companies receive. Those data include information about the location, dollar amount and types of loans made, as well as race/ethnicity, income and credit characteristics of loan applicants. Data are available for home purchase, home improvement and refinance loans.

Depository institutions were required to report 2017 HMDA data if they had assets of more than \$44 million on the preceding December 31 (\$42 million for 2013), had a home or branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. Non-depository mortgage companies were required to report HMDA if they were for-profit institutions, had home purchase loan originations (including refinancing) either (a) exceeding 10 percent of all loan originations in the past year, or (b) exceeding \$25 million, had a home or branch office in an MSA (or received applications for, purchase or originate five or more mortgages in an MSA), and either had more than \$10 million in assets or made at least 100 home purchase or refinance loans in the preceding calendar year.

The study team used those data to examine differences in racial and ethnic groups for loan denial rates and subprime lending rates in 2013 and 2017. Note that the HMDA data represent the entirety of home mortgage loan applications reported by participating financial institutions in each year examined. Those data are not a sample. Appendix G provides a detailed explanation of the methodology that the study team used for measuring loan denial and subprime lending rates.

## **APPENDIX J.**

### **Qualitative Information from In-Depth Interviews, Availability Surveys and Other Public Comments**

Appendix J presents qualitative information that Keen Independent collected as part of the Disparity Study. It is based on input from more than 330 business owners, trade association representatives and others (including 98 in-depth interviews). Appendix J includes six parts:

- A. Introduction and methodology;
- B. Background on the firm and industry;
- C. Working on projects with ADOT or other public agencies;
- D. Conditions for minority- and women-owned firms and small businesses in the Arizona marketplace;
- E. Insights regarding programs and certification; and
- F. Recommendations for Arizona Department of Transportation and other public agencies.

#### **A. Introduction and Methodology**

The Keen Independent study team gathered input through in-depth personal interviews and telephone, online and fax availability surveys from June through November 2019, as well as public comments via telephone/email/mail and other means.<sup>1</sup>

The study team presented a disparity study informational session at the ADOT DBE Conference in Tucson on October 23, 2019. Two DBEs and ten public entity representatives attended the session. Keen Independent collected additional public comments through the study website,<sup>2</sup> mail, designated telephone hotline (602-730-0466) and study email address.<sup>3</sup>

Keen Independent outreach efforts gave business owners and representatives the opportunity to provide input on the disparity study, as well as their experiences with ADOT and other public agencies in the Arizona marketplace and regarding construction, professional services and other industries.

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<sup>1</sup> In-depth interviewees are identified in Appendix J by #I-01, #I-02 and so on; availability survey respondents are identified as #AS-01, #AS-02 and so on; industry associations and trade organizations are identified as #TO-01, #TO-02, and so on.

<sup>2</sup> [www.azdot.gov/DBEDisparityStudy](http://www.azdot.gov/DBEDisparityStudy)

<sup>3</sup> [adotdisparitystudy2019@keenindependent.com](mailto:adotdisparitystudy2019@keenindependent.com)

## B. Background on the Firm and Industry

The Keen Independent study team asked business owners to report on their business history and industry. Topics included:

- Business history;
- Challenges to starting, sustaining and growing a business in the industry, and any barriers to entry;
- Business size, and any expansion and contraction over time;
- Type of work and any changes over time;
- Types and sizes of contracts;
- Geographic scope and any changes over time;
- Public or private sector, or both, and preferences/experiences in each;
- Prime or subcontractor/subconsultant;
- Current conditions for firms in the industry in the Arizona marketplace;
- Keys to business success; and
- Evidence of any barriers to business success.

**Business history.** The Keen Independent study team asked interviewees about their business start-up history and experience in the industry. Business owners of construction, professional services, goods and other services firms discussed when and how their businesses were established.

**Most business owners worked in the industry or related industry, before starting their firms, or had related experience.** Some business owners gained industry-related experience through family, friends or education and others started their own businesses after previously working for an employer in the same or similar industry. A few bought the firms where they previously worked. [e.g., #I-06, #I-07, #I-08, #I-09, #I-10, #I-11, #I-12, #I-14, #I-15, #I-16, #I-18, #I-20, #I-21a, #I-22, #I-23, #I-26, #I-27, #I-28, #I-29b, #I-31, #I-32, #I-34a, #I-35, #I-37, #I-38, #I-39, #I-40, #I-41, #I-42, #I-43a, #I-45, #I-46, #I-47, #I-48, #I-49, #I-52, #I-53, #I-55, #I-56, #I-57, #I-60, #I-61, #I-63, #I-64, #I-65, #I-67, #I-68, #I-70, #I-74, #I-76, #I-77] Comments include:

- The Hispanic American owner of a DBE construction-related firm reported that he started his business after his previous employer closed its Tucson location. He later commented, "... [I] always wanted to grow [the firm], and I did." [#I-01]
- When asked about the business' start-up, a representative of a majority-owned construction-related firm commented that the firm started a few decades ago as a small, family-owned business. [#I-13]
- A Hispanic American owner of a professional services firm reported that he decided to start his own firm when he realized he could have an advantage in the field due to his multidisciplinary "professional credentials." He now offers multiple types of professional services through "one house." [#I-33]

- A white female owner of a DBE professional services firm reported that she attended graduate school, worked her way up in the company and had experience in the field before becoming the owner. She added that moving from her original position to owner was a “jump.” [#I-59a]
- The white owner of a professional services firm indicated that he purchased the firm where he previously worked. [#I-17]
- Commenting on her experience, a white female owner of a DBE goods and services firm reported, “We used to be [with a franchise], and we left the network ... and we started our own name.” [#I-45]
- Responding to a marketplace need, a white owner of a construction-related firm reported that the company he previously worked for needed the services of a trucking service. This prompted him to buy his own truck to meet that need. [#I-51]
- The Hispanic American owner of a construction-related firm reported that his grandfather and father encouraged him to start the business because of his experience working in the industry throughout high school. [#I-71]
- The African American owner of a DBE professional services firm indicated that he worked at a larger firm before leaving to start his own business. He added that his first project was awarded three months after establishing the firm and that he opened an office suite location six months later and hired six employees within the first year. [#I-44]

**Challenges to starting, sustaining and growing a business in the industry, and any barriers to entry.** The study team asked business owners and representatives to report on their experiences starting, sustaining and growing their firms in Arizona. Some reported facing a myriad of challenges. Many business owners and representatives reported using personal funds, family funds or securing other sources of credit to start and sustain their firms. [e.g., #I-13, #I-14, #I-15, #I-16, #I-17, #I-18, #I-24, #I-29b, #I-32, #I-33, #I-34b, #I-35, #I-36, #I-37, #I-38, #I-39, #I-41, #I-48, #I-49, #I-51, #I-52, #I-53, #I-54a, #I-55, #I-56, #I-57, #I-63, #I-65, #I-66, #I-72, #I-73, #I-74, #I-75, #I-76, #I-77]

**Some business owners relied on financing from colleagues and family to operate their firms.** These include:

- The Hispanic American owner of a DBE construction-related firm reported that he was “extended” credit by a colleague in the industry who was retiring. He remarked, “[My colleague] wanted me to get my license so he wouldn’t be responsible for the jobs [and clients anymore].” [#I-01]
- The Hispanic American owner of a professional services firm reported that his relative and business partner provided the capital to start the business. [#I-20]

- Having purchased her firm from the original owner, a white female owner of a DBE professional services firm reported that her personal income was the capital used to purchase the business. She also added that the previous owner developed an affordable purchase plan for her and that she is currently paying him monthly for her portion of the business. She commented, “I got 51 percent of the stocks and he’s my bank, and I pay him back over a four-year period to get to that 51 percent point.” [#I-59a]
- A Hispanic American owner of a construction-related firm indicated using family resources to purchase needed business equipment. [#I-71]
- One white male owner of a professional services firm combined personal savings with a loan from a family member to start his business. [#I-11]

**Some business owners continued to work at another job, sold personal assets, refinanced mortgages, sought second mortgages or tapped personal savings to finance their firms. For example:**

- A white owner of a professional services firm commented that he was self-funded for the first three years. He commented that he used his pay from a local community college to start the business. He added, “The revenue I made from the community college, I put back into the business to buy additional equipment, hire employees and grow the company.” [#I-46]
- After the death of his mother, a white owner of a construction-related firm reported that he sold her house and used those funds to start his business. [#I-24]
- Reporting on how she started her firm, a white female owner of a DBE/SBC construction firm reported that she and her husband used their own capital and inheritance funds to start the business. [#I-40]
- One Hispanic American owner of a DBE professional services firm reported that he used money from sold shares in his stock option plan with the last company he worked for in order to start his new business. [#I-47]
- The Hispanic American owner of a goods and services firm reported that he funded the start of the business by taking a second mortgage on his home. [#I-42]
- A Hispanic American female owner of a construction-related firm reported that she took out a second mortgage on her house to start the business. She added that she absorbed \$1 million of her in-law’s debt when they purchased the company. She added, “It sucked. We worked our asses off to pay off that debt.” [#I-26]
- Commenting on her source of capital, a white female owner of a DBE/SBC goods and services firm commented that she used money from her divorce settlement and personal funds to start the business. [#I-61]

- An African American female owner of a DBE/SBE construction firm reported that she and her husband started the business with their savings and “faith.” [#I-31]
- The white female representative of a majority-owned construction firm reported that her husband used personal capital to start the firm. She added that he held an account with a local business for supplies and would remit payment after being paid for his projects. She added that his credit increased with the company over time. [#I-68]

Only a few business owners reported having had success securing loans or other outside funding sources to finance their businesses. For example:

- A white female owner of a professional services firm reported that she secured a business loan to purchase the business. [#I-28]
- The white female owner of a DBE goods and services firm indicated that she secured an SBA loan of about \$65,000 to start her firm. She added that she has paid the loan in full. [#I-58]
- Although one white owner of a professional services firm commented that he was self-funded for the first three years. He added, “After three years, I got a bank loan to lease a building and everything from there has been positive growth.” [#I-46]
- A representative of a Native American-owned goods and services firm indicated that funds from the tribe and assistance from the federal government were the sources of capital the owner used to start the business. [#I-50]

**Challenges to starting, sustaining and growing a business in the industry and any barriers to entry.** Most business owners and representatives reported facing challenges at start-up and beyond. [e.g., #I-04, #I-07, #I-12, #I-13, #I-16, #I-17, #I-20, #I-23, #I-24, #I-25, #I-26, #I-29b, #I-33, #I-34a, #I-35, #I-39, #I-40, #I-45, #I-46, #I-47, #I-48, #I-49, #I-51, #I-52, #I-55, #I-56, #I-59, #I-60, #I-63, #I-64, #I-68, #I-69, #I-71, #I-72, #I-73, #I-76, #I-77, #TO-01, #TO-04, #TO-06, #TO-07, #TO-08, #TO-09, #TO-11, #TO-13, #TO-15, #AS-20, #AS-22, #AS-24, #AS-26, #AS-29, #AS-32, #AS-35, #AS-46, #AS-49, #AS-52, #AS-56, #AS-61, #AS-76, #AS-77, #AS-79, #AS-80, #AS-89, #AS-93, #AS-94, #AS-104, #AS-107, #AS-109, #AS-110, #AS-116, #AS-123, #AS-124, #AS-127, #AS-146, #AS-148, #AS-151, #AS-157, #AS-158, #AS-161, #AS-163, #AS-166, #AS-178, #AS-187, #AS-193, #AS-198, #AS-200, #AS-204, #AS-208, #AS-209, #AS-210, #AS-216, #AS-217, #AS-218, #AS-221, #AS-222]

Typical challenges ranged from “staying afloat” to managing cash flow to building and sustaining business reputation. [e.g., #TO-1, #I-14a, #AS-18] For example:

- A female representative of a majority-owned professional services firm remarked that “keeping the business afloat” was difficult because her industry fluctuates with the economy. [#I-08]



- The white male owner of a professional services firm commented that it is important for small businesses not to overcommit because they cannot risk being unable to deliver and subsequently having a “bad reputation.” [#I-10]
- When surveyed, the representative of a Subcontinent Asian American-owned construction firm reported that the firm faces challenges with “manpower, money, inconsistent work and people not paying for jobs.” [#AS-18]

**Several business owners reported that being new to the area or having language barriers and other cultural challenges made building a business in Arizona difficult.** For example:

- The representative of a majority-owned small construction firm reported that there were educational, language and financial barriers to starting the business. He explained that his father, an immigrant to the United States, was often challenged in business meetings by discussions he could not fully comprehend. [#I-15]
- Regarding immigrating to the United States, an African American owner of a DBE professional services firm reported that moving to Arizona from out of state and lacking contacts or a network in a highly competitive market was a challenge. He added that being from Africa and having an accent caused additional barriers for him. [#I-44]

**Securing industry-related or other business licensing was a challenge for a few business owners.** Comments include:

- The white owner of a professional services firm reported that licensing is very difficult and that this is a typical challenge for this industry. He added that people entering the industry must go through an apprenticeship that requires them to shadow someone who is licensed before getting their own license. He indicated that it is very difficult to find someone who needs or wants to work with an apprentice. [#I-18]
- When asked, the Native American owner of a construction firm reported challenges with restrictive license requirements. He added that this is an issue for companies working on or around reservations. [#AS-34]

**Business owners and representatives reported that insurance, bonding and retainage caused barriers at start-up and beyond for many small firms.** [e.g., #I-66, #TO-06, #AS-06, #AS-142] Examples include:

- When surveyed, the representative of a Native American woman-owned construction firm reported, “Vehicle insurance is very expensive. [Paying] \$56,000 a year [for vehicle insurance] makes it hard to profit in a business that doesn’t generate much revenue and is labor intensive.” [#AS-50]
- When surveyed, the Hispanic American female owner of a goods and services firm reported, “... there are no competitive insurance brokers, they have a monopoly. Our biggest expense is insurance. We could buy two vehicles for what we pay for insurance.” [#AS-139]

- A female representative of a public agency reported that bonding is a challenge for small businesses. She explained that ADOT projects of large sizes typically require bonding that DBEs cannot secure. Because the associated project sizes are large, many DBEs have, in turn, requested that projects be unbundled. However, she explained that a challenge with unbundling is that it increases administration tasks for ADOT so that more project managers are needed to the point where “the left hand may not know what the right is doing.” [#I-02]
- A female representative of a public entity reported that bonding (often based on large project size) poses a challenge for DBEs seeking work in the public sector. [#I-02]
- One Hispanic American owner of a DBE construction firm indicated that he had a “really hard time” bonding. He continued, “I feel that those challenges are more directed to minority- and women-owned contractors.” He added, “They don’t look at us as true contractors.” [#I-01]

The same business owner reported that because he was unable to secure bonding at business start-up, general contractors held 20 percent instead of 10 percent retainage. He commented, “When someone keeps 20 percent of your money for a long period of time, it takes a while to get it back.” He went on to say that sometimes it would take a year or a year-and-a-half to get the money back. [#I-01]

- The Hispanic American female owner of a DBE/SBC construction firm indicated, “The bonding [was a challenge] .... It took some time to build up a financial statement, so it took about a year to take care of that.” [#I-08]
- A representative of a minority business industry association reported that bonding is a challenge because “if you can’t get bonded, then you can’t get the next big job.” She added that one of the members started a successful business that was not growing because he could not get bonded. With the help of bonding assistance from the association this firm went from working on \$80,000 projects to \$500,000 contracts. [#TO-07]

**Some reported restrictive regulations posed a barrier at start-up and beyond.** Some firms had difficulty learning about or complying with local, state and federal regulations that affected their business operations. [e.g., #AS-21, #AS-41, #AS-60, #AS-72, #AS-73, #AS-115, #AS-175] For example:

- The Hispanic American female owner of a DBE/SBC construction firm remarked, “There are so many regulations that we had to learn along the way ... starting off now ... there would be a disadvantage. I’m sure I am taking things for granted since we have been around for so long.” [#I-08]
- A Hispanic American female owner of a goods and services firm reported having trouble with local signage ordinances that affected her business. She commented that the regulations “change every six years.” [#AS-139]

- The white owner of a professional services firm reported that navigating procurement rules was a challenge for his business. He added, “There was a lot of red tape from the federal level to even some of the state issues like regulations ... and the outlay for software and hardware.” [#I-11]
- One white male owner of a professional services firm remarked that there are always challenges with a startup, especially with the accounting and the Federal Acquisition Regulation (FAR System) requirements that deal with cost accounting standards. [#I-10]
- The white female owner of a construction-related firm reported confusion from [police] about the laws required to operate her trucks. She indicated that her company is not required to follow the laws for “big trucks,” but some police officers believe they do. She added that now she holds the licenses needed to drive “big trucks” do avoid any confusion. [#I-34b]

Another white co-owner of the same construction firm added that ADOT should have more people that can be called to ask questions about rules and regulations. He reported that police often do not know the rules and regulations and have subsequently pulled over drivers and given them tickets that they should not have received. [#I-34a]

**For several, understanding how to competitively price goods and services or how to stay competitive in the local marketplace posed barriers at start-up and beyond.** Comments include:

- When starting her firm, a Hispanic American female owner of a DBE professional services firm reported facing challenges writing proposals and “getting the price right.” She added that understanding the pricing structure of agencies was also a challenge. [#I-57]
- The Hispanic American female co-owner of a construction-related firm indicated difficulty staying competitive in the local marketplace. She stated, “The problem with our business is that we are close to the border and people who cross the border for work charge a lot less than we do.” [#I-54b]

**Many business owner and representatives reported facing difficulties finding and retaining qualified employees.** Most business owners reported difficulty recruiting and retaining skilled workers. [e.g., #I-36, #I-65, #TO-12, #AS-08, #AS-09, #AS-10, #AS-13, #AS-17, #AS-19, #AS-25, #AS-27, #AS-28, #AS-31, #AS-33, #AS-36, #AS-37, #AS-38, #AS-40, #AS-44, #AS-45, #AS-47, #AS-51, #AS-53, #AS-55, #AS-58, #AS-59, #AS-63, #AS-65, #AS-66, #AS-67, #AS-68, #AS-69, #AS-75, #AS-81, #AS-82, #AS-83, #AS-84, #AS-87, #AS-90, #AS-91, #AS-95, #AS-97, #AS-100, #AS-101, #AS-103, #AS-106, #AS-129, #AS-134, #AS-135, #AS-137, #AS-138, #AS-145, #AS-159, #AS-162, #AS-170, #AS-171, #AS-174, #AS-180, #AS-183, #AS-184, #AS-185, #AS-186, #AS-188, #AS-189, #AS-190, #AS-191, #AS-192, #AS-194, #AS-195, #AS-201, #AS-202, #AS-205, #AS-206, #AS-207, #AS-213, #AS-219, #AS-220] For example:

- One female representative of a majority-owned professional services firm indicated that because the firm’s owner had worked his way up in the company and understood the experience of being an employee, he felt obligated to provide his workers stable employment even during the economic downturns that are common to his industry. [#I-08]
- A representative of a public entity reported that the number of skilled laborers in the industry is low, which forces DBEs to compete against large firms offering higher wages and better benefits. He indicated that, additionally, smaller firms often have owners who are out in the field working on projects, making it difficult for them to spend time recruiting and finding skilled employees. [#I-03]
- One white male owner of a professional services firm reported that there is limited pool of talent and technicians to draw from when hiring. [#I-11]
- A representative of a majority-owned construction-related firm reported that it is difficult to find seasonal employees during the busiest time of the year, so they must be selective when taking on projects. [#I-13]
- When asked, the white female owner of a construction firm reported that she faces challenges finding qualified employees. She recommended that trade schools fill the gap by training qualified workers. [#AS-15]
- Responding, the representative of a majority-owned construction firm reported that finding qualified employees is a challenge. He stated, “This generation is lazy and irresponsible.” [#AS-78]
- The representative of a majority-owned construction firm reported, “Insufficient labor force [and an] inexperienced labor force ... we could take on additional employees and additional work if there were qualified people available to hire with at least some level of skill in our industry.” [#AS-182]

**Access to capital and financing was reported as challenging by many business owners and representatives.** Limited access to capital combined with limited understanding of how to secure financing challenged many minority- and women-owned businesses and other small businesses interviewed. [e.g., #I-06, #I-08, #I-19, #I-21a, #I-22, #I-24, #I-36, #I-42, #I-47, #I-52, #I-55, #I-59, #I-60, #I-65, #I-66, #I-75, #TO-01, #TO-02a, #TO-03, #TO-06, #AS-23, #AS-39, #AS-57, #AS-64, #AS-70, #AS-88, #AS-95, #AS-102, #AS-126, #AS-136, #AS-144, #AS-173, #AS-176, #AS-196, #AS-197, #AS-199, #AS-203, #AS-212] Examples include:

- A Hispanic American owner of a construction firm indicated that operating capital was one of the primary challenges to starting his business. He added that general contractors can be slow to pay subcontractors, putting an additional strain on his ability to make payroll. [#I-53]

- The white female owner of a DBE goods and services firm reported that obtaining capital was a challenge at start-up. She indicated, “Definitely capital. We needed to apply to get our initial insurance. We did that on credit. We did get a vehicle. That was done on credit. I was working an outside job. My business partner was working an outside job. We were putting that money into the business until we got our first account.” [#I-61]
- The representative of a minority business industry association commented that the businesses he represents are struggling to understand the requirements to secure capital. He reported that banks are about “risk management.” He added, “If you bring me a situation that is high in risk, we’re probably going to be very stringent on the requirements or we’re probably going to decline that person for a loan and it has nothing to do with the color of a person’s skin color.” [#TO-05]
- One white male owner of a construction firm reported, “In order to get a loan you have to show two years’ worth of tax returns, then show a decent profit, and then show that you make enough money — it’s almost impossible to get a loan in a business unless you’re established and very large and make lots and lots of money.” [#I-51]

**Business size, and any expansion and contraction over time.** Some business owners reported to carefully control the size of their firms. Many more indicated that their firm size is based on workload or fluctuates seasonally. [e.g., #I-11, #I-12, #I-15, #I-17, #I-25, #I-26, #I-36, #I-37, #I-39, #I-41, #I-47, #I-51, #I-52, #I-55, #I-57, #I-60, #I-61, #I-64, #I-66, #I-67, #I-69, #I-70, #I-71, #I-74, #I-76]

Several reported controlled staffing with limited expansion and contraction or having achieved the “ideal size” for their firm. Comments include:

- The Hispanic American female owner of a DBE/SBC construction firm indicated, “We really sat down at the beginning and made some decisions on the direction that we wanted to go .... We knew that we wanted to stay small ... control the type of projects we got and size of employees at the firm.” [#I-08]
- When asked if the size of his firm size fluctuates or remains relatively stable, a white owner of a professional services firm reported that he maintains a small business and keeps the size of his contracts small. [#I-06]
- The African American owner of a DBE professional services firm reported that the business expanded and relocated to a larger office space that the firm has occupied since the late 1990s. He remarked that he began his business to create a work environment that would provide true equal opportunity for everyone with an environment for everyone to “be the best that they can be” and has controlled the size of his firm to achieve this environment. [#I-44]

- One Hispanic American representative of a majority-owned goods and services firm reported that the firm has maintained 16 employees over time without fluctuation. [#I-43a]
- A representative of a Native American-owned goods and services firm indicated that the firm has grown since its inception but has now reached the “ideal size” and does not plan to grow any more. [#I-50]

**Many business owners reported both expansion and contraction, or “cyclical” changes in staffing over time.** For example:

- A representative of a majority-owned professional services firm reported that the industry is “cyclical” with frequent expansion and contraction. He added that the unknown factor is the level of work which affects the number of staff he employs. [#I-07]
- The Hispanic American owner of a DBE/SBC construction firm commented, “There have been times where we’ve expanded to 25 employees, with several superintendents. We really like where we are at now with two project superintendents and two crews. Currently, we’re [with our current workload] ... stretched us a bit with the employees we have.” [#I-08]
- A representative of a majority-owned construction-related firm reported that due to his difficulty finding seasonal employees, over the past 15 years, the number of employees working at the firm has been cut in half. [#I-13]

**A few business owners reported downsizing their businesses, for varied reasons.**

Examples include:

- The white female owner of a construction firm reported that the firm used to operate in multiple states, but they have since downsized to operate only in Arizona [#I-34b]
- Commenting on the size of her firm, a white female owner of a woman-owned construction firm indicated that the firm has “significantly downsized in the last three years.” She added, “The work has drastically decreased. We’ve cut our workforce in half.” [#I-77]

**Only a few reported mostly business growth.** Comments include:

- The representative of a minority business industry association indicated, “The firms are getting bigger [and] small firms [have] grown. Our assistance is divided into four tiers ... I’ve seen firms grow from the smallest tier to the largest tier.” [#TO-09]
- The white female representative of a majority-owned construction firm reported that the firm has “grown over time.” She further explained that the firm contracts during the winter due to weather in the mountains and then expands in the summer when they need the largest staff. [#I-68]

- The white female representative of a minority-/woman-owned DBE/SBC construction-related firm indicated that the business has grown from a “couple of workers.” It has, she said, “Progressively grown into ... [having] a fleet of trucks and five acres ....” [#I-38]
- The white female representative of a minority- and woman-owned DBE/SBC professional services firm reported that the company grew more when it switched to focusing on staffing a few years ago. [#I-48]

**A number of business owners reported that the Great Recession affected the size of their firm, although many have recovered.** [e.g., #I-24, #I-35, #I-44, #I-45, #I-65] Comments included:

- The representative of a Native American-owned goods and services firm indicated that the firm was affected by the Great Recession. [#I-50]
- Reporting that the Great Recession negatively impacted his business, a white owner of a professional services firm commented that at one time his firm employed 17–18 people, but that the firm is now down to one employee. [#I-73]
- The white female owner of a DBE/SBC construction firm indicated that the firm’s size expanded and contracted over time based largely on the economic downturn of 2008. She added that she is more cautious in business since the economic downturn. [#I-40]
- A white female owner of a DBE professional services firm reported that the firm has grown gradually over time though her field remains negatively affected by the recession. She commented that firms of similar size in her field downsized by around 30 percent during the recession. She added that the firm had a maximum of 40 full-time employees before conducting layoffs in the mid-2010s due to late correction from the recession and has since grown to 30 full-time employees. [#I-59a]

**Type of work and any changes over time.** The study team asked interviewees to report type of work and any changes in work performed. [e.g., #I-09, #I-12, #I-13, #I-15, #I-16, #I-18, #I-20, #I-21a, #I-22, #I-23, #I-24, #I-25, #I-26, #I-27, #I-28, #I-29a, #I-33, #I-34a, #I-36, #I-37, #I-39, #I-40, #I-41, #I-43, #I-44, #I-45, #I-49, #I-50, #I-52, #I-53, #I-54a, #I-57, #I-59, #I-60, #I-65, #I-67, #I-68, #I-69, #I-71, #I-72, #I-73, #I-76, #I-77]

**A number of interviewees reported that their firms largely perform transportation-related work.** For example:

- When asked what type of work he performs, a white male owner of a professional services firm stated that the firm is limited to transportation-related work like that which is available with ADOT. [#I-17]
- A white owner of a professional services firm reported that the firm conducts highway-related work. He added that the firm also works on projects for private sector clients. [#I-35]

- The Hispanic American male owner of a DBE professional services firm reported that the firm works in the transportation industry spanning transit, aviation and roadway projects. [#I-47]
- When asked what type of work her firm performs, a white female owner of a professional services firm reported that the firm performs as consultants on transportation industry projects. [#I-56]

**A few reported a broader range of services.** Comments include:

- A Hispanic American male owner of a goods and services vendor reported that the business specializes in a broad range of equipment sales and repairs. [#I-42]
- One white female owner of a DBE specialty services firm reported that the firm provides services for construction sites for “just about everything ....” [#I-61]
- The white male owner of a construction-related goods and services firm reported that the business provides raw materials for construction projects. [#I-62]

**Some interviewees reported that the work their firm performs has changed over time and shared how it has changed.** [e.g., #I-01, #I-07, #I-21a, #I-25, #I-28, #I-40, #I-50, #I-59, #I-68, #I-69, #I-73, #I-74, #I-77] For example:

- The white male owner of a professional services firm reported that the firm focused on engineering-related work until more recently when it added services tailored to the transportation and solar industries. [#I-11]
- One representative of a professional services firm reported that originally, the firm performed analysis related to [a specialized] industry. He added, “Over the years, we’ve expanded to ... other [transportation-related] activities.” [#I-30]
- The white female representative of a minority- and woman-owned DBE/SBC construction-related firm indicated that the business has expanded its type of work to include a [specialty] material business. [#I-38]
- Reporting that his work type has changed, a white male owner of a professional services firm indicated, “... Initially we started as a construction[-related] company, we have added the [specialty transportation] market and that is the primary market I envision the company working in.” [#I-46]
- The white female representative of a minority- and woman-owned DBE/SBC professional services firm reported that initially the company was too focused on the consulting aspect but then, in response, added other specialties that they could fulfill. [#I-48]



A few reported that advancements in technology have allowed their firms opportunity to expand or redirect services. For example:

- According to a white male owner of a professional services firm, employing advanced technology has permitted his firm to expand services. [#I-14a]
- The Hispanic American female owner of a professional services firm reported expansion from its original specialty into technology-related and other industries. [#I-75]
- Commenting that technology resulted in changes to the types of work the company has performed, a white female owner of a DBE/SBC professional services firm reported that the firm has expanded its specialty services. [#I-55]

**Types and sizes of contracts.** Business owners and representatives reported the types and sizes of projects or contracts their firms perform. [e.g., #I-01, #I-05, #I-06, #I-09, #I-10, #I-11, #I-14, #I-15, #I-16, #I-17, #I-20, #I-22, #I-24, #I-26, #I-27, #I-28, #I-29b, #I-30, #I-36, #I-39, #I-42, #I-43b, #I-44, #I-46, #I-47, #I-48, #I-49, #I-51, #I-59, #I-60, #I-62, #I-63, #I-64, #I-65, #I-66, #I-67, #I-68, #I-69, #I-70, #I-72, #I-73, #I-74, #I-75, #I-78, #TO-01, #TO-07, #TO-09, #TO-10, #TO-11, #TO-12, #TO-13, #TO-14]

The study team interviewed business owners representing a wide range of project sizes ranging from \$100 to \$590 million. For many there was a range in contract size. Comments include:

- One white male owner of an SBC construction firm indicated, “It varies ... I go anywhere from \$100 to \$7,000.” [#I-41]
- The white male representative of a woman-owned professional services firm reported that the most of the firm’s contracts are from \$5,000 to \$25,000. [#I-32]
- A white female representative of a minority-/woman-owned DBE/SBC construction firm indicated that for residential projects, the contracts are typically between \$5,000 and \$20,000 with some larger jobs in the \$40,000 to \$70,000 range. She added that their biggest commercial job was over \$800,000. [#I-38]
- The white female owner of a WBE construction firm reported that they typically work on smaller projects and these purchase orders are estimated to be \$300,000 to \$400,000. [#I-77]
- One representative of an industry association commented that the typical size of contracts ranges from \$1 million to \$5 million. [#TO-06]
- The white female owner of a DBE/SBC construction firm reported that the firm currently holds a two-year, \$1.63 million-dollar contract. She added that the types and sizes of projects vary. [#I-40]

- A Hispanic American female owner of a DBE/SBC construction firm reported that the firm's largest contract value was \$3.2 million, some other contracts were in a lower \$2 million range. [#I-08]
- The minority female representative of a minority-owned professional services firm reported that the firm "runs the full gamut." She added that a small project could be less than 500 square feet and a large one could be up to \$50 million. [#I-21b]
- A female representative of a majority-owned professional services firm reported that the firm is involved in contracts of all sizes, "from the \$5,000 residential remodel to the \$590 million airport terminal modernization project." [#I-25]

Many interviewees discussed factors that determine the types and sizes of projects or contracts that their firm and others in the industry perform. [e.g., #I-05, #I-07, #I-10, #I-16, #I-19, #I-28, #I-29a, #I-33, #I-35, #I-37, #I-39, #I-43b, #I-44, #I-47, #I-49, #I-51, #I-54a, #I-59, #I-60, #I-62, #I-63, #I-66, #I-67, #I-68, #I-69, #I-72, #I-73, #I-75, #I-77, #TO-07, #TO-12, #TO-14]

For some bonding capacity determined what types and sizes of contracts the firm performed. For example:

- Reporting on the factors that determine the types and sizes of project of members' contracts, a representative of a minority business industry association reported that the bonding capacity of each firm determines the types and sizes of projects or contracts they can perform. [#TO-01]
- The Hispanic American female owner of a DBE/SBC construction firm, "Our bonding is approved for \$3.8 million so that also determines what we perform." [#I-08]
- A female representative of a public entity reported that bonding is a challenge for small businesses. She explained that projects of large sizes typically require bonding that DBEs cannot secure. [#I-02]

Project scope and schedule, staffing requirements and access to operating capital were other determinants of type and size of contracts pursued. For example:

- A representative of a majority-owned construction-related firm reported that timing and scheduling determines the types and sizes of projects. He added that the firm used to travel all over Arizona but that this has changed recently. He reported that the firm has smaller crew sizes and that this impacts the projects they perform. [#I-13]
- When asked what determines size of his contracts, a Hispanic American owner of a construction firm indicated that operating capital and the capacity of his employees are the key determinants of the size of projects that his business works on. [#I-53]

- The representative of a majority-owned professional services firm reported that with existing resources their ceiling for capacity is a \$5 million contract. He added, “Anything that is larger than that, we are unable to submit our qualification packages because it’s too big to be able to justify hiring us for that. The second factor is the scope of services. If those things line up, then we go after it. We also do a “go-no-go matrix” to determine if we should pursue a contract.” [#I-23]
- The white female owner of a DBE/SBC professional services firm reported that the firm would not take a contract if they “were not resourced enough to do it.” She indicated, “If we had to double our staff overnight that would be too much of a challenge .... I think we would take on things where we could incrementally grow our staff .... but I don’t see us doubling overnight.” [#I-55]
- A representative of a Native American-owned goods and services firm indicated that the only thing limiting the business’ ability to complete a project is the capacity to produce the needed amount of materials. [#I-50]
- The white owner of an SBC construction firm reported that he does not really set limits on the size of projects that the firm can take on as long as the deadline for the work is realistic. He indicated, “.... There are limitations ... but given enough time we can take on almost any job that gets thrown at us.” [#I-52]

To stay below the health care benefits threshold, one business owner selected only contracts which could be performed with 49 or fewer employees. This white female owner of a DBE/SBC goods and services firm commented that the number of employees needed per job is one of the factors that determines the types and size of contracts for the firm. She indicated, “My cutoff right now is 49 employees because of the requirement for medical insurance. I have to compete against people who don’t have to give out medical insurance, so my cost would go up and I would not be able to get a contract.” [#I-61]

**Geographic scope and any changes over time.** Business owners and representatives reported where they conducted business and if over time, they had expanded the geographic locations where they perform work. [e.g., #I-08, #I-09, #I-13, #I-15, #I-17, #I-18, #I-19, #I-20, #I-22, #I-23, #I-25, #I-26, #I-28, #I-29a, #I-32, #I-34b, #I-35, #I-36, #I-39, #I-42, #I-43a, #I-44, #I-45, #I-46, #I-47, #I-49, #I-50, #I-52, #I-53, #I-55, #I-56, #I-58, #I-59, #I-60, #I-62, #I-63, #I-64, #I-65, #I-66, #I-67, #I-68, #I-69, #I-70, #I-71, #I-72, #I-73, #I-75, #I-76, #I-77, #TO-05, #TO-07, #TO-08, #TO-09, #TO-10, #TO-12, #TO-13, #TO-14]

Some reported to primarily perform work in Central Phoenix but were open to other working in other areas of the state. Comments include:

- Reporting on the geographic area that he works, a Hispanic American owner of a DBE professional services firm reported that he conducts work in the Central Phoenix area, as well as Pinal County and the Gila River area. [#I-37]

- A white male owner of an SBC construction firm indicated, “At this moment I work mostly in the Valley [Phoenix area], but I have worked in Tucson or Payson. I am open to working anywhere in the state.” [#I-41]

**Some others reported to work primarily in Northern Arizona.** These include:

- The white owner of a professional services firm reported that the majority of the firm’s work is conducted in Northern Arizona where he lives and has established client relationships. [#I-06]
- One white female owner of a DBE/SBC construction firm commented that her firm typically conducts work in Northern Arizona but is currently completing a job in Tucson. She added that the firm operates statewide depending on the job. [#I-40]
- A white female owner of a DBE/SBC goods and services firm reported that the firm works within Mohave County and the cities of Parker and Quartzsite. [#I-61]

**A few firms reported a statewide presence or a territory that spans many cities and counties across Arizona.** For example:

- The white female representative of a minority- and woman-owned DBE/SBC construction firm reported that the company does work in Navajo, Apache and Gila counties as well as Tucson, Sedona, Kingman, Show Low and Pinetop. She added that they have done projects for the Navajo Nation and LDS church. She stated, “Very rarely do we go down in the metropolitan areas.” [#I-38]
- A white female representative of a majority-owned construction firm reported that the firm works statewide. She explained that the firm does not work outside of Arizona because of the different rules and regulations from state to state. She commented, “We’re based out of Arizona so we’re going to stay in Arizona.” [#I-68]

**Many interviewees reported working out of state.** A number of businesses combine working in Arizona with other states. [e.g., #I-15, #I-25, #I-26, #I-29b, #I-30, #I-32, #I-37, #I-40, #I-43b, #I-44, #I-46, #I-52, #I-55, #I-56, #I-59, #I-60, #I-61, #I-67, #I-70, #I-71, #I-72, #I-73, #I-76, #I-77, #TO-12] For example:

- A representative of a majority-owned professional services firm reported that his office conducts work all over Arizona and across the United States., especially in Nevada and New Mexico. [#I-07]
- Reporting working primarily in the southwest part of Arizona, a white male owner of a professional services firm reported being registered to conduct business in California and New Mexico. [#I-11]

- The white owner of a professional services firm reported that the firm has worked nationwide for a number of professional and sports associations. He added that the firm has worked in Barbuda, Antigua and other islands as part of the Hurricane Disaster Relief Team. [#I-14a]
- One representative of a majority-owned professional services firm commented that they worked overseas on a project but indicated that it was not successful. He added that they are looking into performing work in Nevada and New Mexico. [#I-23]
- A Hispanic American female owner of a DBE professional services firm reported that her firm has conducted work in Colorado, Nevada, Texas and California. She explained that Arizona is “less burdensome in terms of [state] regulations.” [#I-57]
- The white female representative of a minority- and woman-owned DBE/SBC professional services firm indicated the company conducts work internationally. She added, “The majority of our work is outside the state of Arizona.” [#I-48]
- An Asian American owner of a DBE/SBC professional services firm reported being in the process of getting registered to conduct business in Texas. He added, “Given the market conditions here [Arizona], I am looking to open an office in Texas because there is more opportunity for work out there.” [#I-63]

**Public or private sector, or both, and preferences/experiences in each.** Business owners and representatives discussed whether their firm conducts work in public, private or both sectors. [e.g., #I-05, #I-08, #I-09, #I-11, #I-14, #I-15, #I-17, #I-18, #I-19, #I-21a, #I-22, #I-23, #I-24, #I-25, #I-27, #I-29a, #I-30, #I-34b, #I-36, #I-38, #I-43a, #I-48, #I-50, #I-59, #I-68, #I-72, #TO-01, #TO-07, #TO-08, #TO-12, #TO-13, #TO-14, #TO-15]

Some businesses interviewed reported to conduct work in both public and private sectors. Comments include:

- When asked what sector in which his firm performs, a representative of a majority-owned construction-related firm reported that the firm works in both sectors. [#I-13]
- The white female owner of a DBE/SBC professional services firm reported that most of the firm’s work is considered “quasi-public sector” under government or “authority” governance. She added that the firm also does work on the private sector teaming with other companies that need extra staffing and expertise. [#I-55]
- A representative of a majority-owned professional services firm reported that the firm works in both sectors to provide services to many different customers. [#I-07]
- One white male owner of a professional services firm reported having extensive experience with state departments of transportation as well as private sector clients. [#I-06]

- The white male co-owner of a woman-owned professional services firm reported that about 35 percent of the firm's work is in the private sector and about 65 percent is in the public sector. [#I-39]
- The Asian American owner of a DBE/SBC professional services firm reported working on both public and private sector contracts. However, he added, "The private sector work is a lot less ... I'd say 10 percent of our billing is in the private sector and 90 percent is in the public sector." [#I-63]
- One white representative of a woman-owned professional services firm reported that because private sector work is "more straightforward" the firm initially started work in that sector, but the firm has slowly pursued opportunities in the public sector. He added that most of the large contracts available are with public agencies. [#I-32]

**Many interviewees reported that most of their work is in the public sector.** [e.g., #I-16, #I-31, #I-35, #I-44, #I-45, #I-47, #I-49, #I-57, #I-60, #I-62, #I-65, #I-67, #I-70, #I-75] For example:

- A Hispanic American owner of a construction firm reported that his firm performs "very little" in the private sector because he "lost a lot of money" in the private sector in the mid-1980s. He added, "I lost a lot of trust in that arena." He indicated that his firm performs mostly on federally funded public sector jobs. [#I-01]
- The Hispanic American female owner of a construction firm reported that to only do large projects, not residential or private, because "our equipment is too big." [#I-26]
- One white female owner of a DBE/SBC construction firm commented that she does not like to conduct private sector work. She reported that 95 percent of the work her company performs is through public contracts. [#I-40]

**Other business owners reported primarily working in the private sector.** [e.g., #I-12, #I-20, #I-28, #I-42, #I-46, #I-51, #I-54b, #I-56, #I-58, #I-64, #I-73, #I-74, #I-76] A number of the business owners who worked primarily in private sector reported having made unsuccessful attempts to secure public sector contracts or simply lacked the knowledge and feedback to successfully navigate public sector procurement opportunities. Comments include:

- A Hispanic American owner of a professional services firm reported that his firm has pursued public sector work in the past, but now strictly works on private sector projects. As an explanation, he reported not being awarded multiple public sector contracts because his firm could not demonstrate the required past experience. Consequently, the firm "decided to drop [its DBE certification] and just keep working with ... the private sector." [#I-33]

He further commented, "[We have] nothing to do with the government ... we don't get involved with that... because of those restrictions ... at the end of the day it's going to be very disappointing to have to walk away after 100s of hours spent trying to qualify... the government is trying to get new people but it's also saying 'no' because you don't have enough experience. When is this vicious cycle going to break?" [#I-33]

- A white owner of an SBC construction firm reported that the firm works primarily in the private sector since facing challenges securing public sector work. He indicated, “It’s been so difficult because you have to sit down with it for many hours and try to figure out how it works and there is no feedback if you did it wrong. They just don’t respond to you.” [#I-52]
- The white female owner of a DBE/SBC goods and services firm indicated that she currently only sells her goods to private sector customers, though she has made efforts to sell her products to public sector customers as well. [#I-58]
- The Hispanic American owner of a construction firm reported that his business’ work is “99 percent” private. He commented, “I don’t even know where to go to look for state projects.” [#I-53]

**Types of public sector entities for which business owners have conducted work.** Business owners and representatives reported on the public sector clients that their firm works for, including prime and subcontracting assignments. [e.g., #I-01, #I-11, #I-15, #I-19, #I-21a, #I-22, #I-25, #I-26, #I-29b, #I-30, #I-35, #I-36, #I-38, #I-39, #I-40, #I-42, #I-44, #I-47, #I-50, #I-55, #I-57, #I-58, #I-62, #I-63, #I-65, #I-66, #I-68, #I-69, #I-70, #I-71, #I-72, #I-73, #I-75, #TO-07] For example:

- The male representative of a majority-owned professional services firm reported that the firm works for small towns, state government and the federal government. [#I-07]
- Reporting on her public sector clients, a Hispanic American female owner of a DBE/SBC construction firm reported that her firm conducts work for the City of Tucson, public schools and ADOT. [#I-08]
- A female representative of a majority-owned professional services firm reported that they are subs for specialty consultants or contracting firms, the federal government, U.S. Department of Agriculture, cities, counties and Native American nations. [#I-05]
- Although work has slowed down because of the competitive nature of public sector work, one representative of a majority-owned construction-related firm reported that the firm conducts work for the National Forest, ADOT and the City of Prescott. [#I-13]
- The white male owner of a construction firm reported that the firm has worked for the U.S. Army Corps of Engineers, U.S. Air Force, the cities of Tucson, and Phoenix and several fire departments. [#I-16]
- The white male owner of a professional services firm reported that the firm has conducted work for a myriad of out-of-state public sector clients, as well as ADOT. [#I-17]

- When asked what public entities the firm has worked with, a white male representative of a woman-owned professional services firm indicated that most of the public sector work the firm has completed has been for sewage plants, schools and military bases. [#I-32]
- The Hispanic American male representative of a majority-owned smallgoods and services firm indicated that the firm provides services for school districts, cities, counties, rural agencies, municipalities and the State of Arizona. [#I-43a]
- The white female representative of a minority- and woman-owned DBE/SBC professional services firm reported that the company works for Department of Defense, Department of Energy, Public Works and wastewater treatment plants. [#I-48]
- The white female owner of a DBE professional services firm reported that the firm has worked with ADOT, as well as many other city, county and state agencies. [#I-59a]
- The Hispanic American representative of a Native American-owned DBE/MBE professional services firm reported that they work for cities, counties, Native American communities, state and federal clients. He added, “When we first started, we had a large federal contract on the border which helped us get on our feet.” [#I-60]
- A representative of a majority-owned construction-related firm reported that the firm used to get a lot of work with local colleges but that this has changed over time. [#I-13]
- The representative of an SBE construction firm reported that the firm did a lot of housing development in the past and that more recently, the firm has worked more often on public works projects. [#I-15]

**Prime or subcontractor/subconsultant.** The study team asked business owners and representatives whether they worked as a prime or subcontractor/subconsultant. Comments varied. [e.g., #I-11, #I-14, #I-26, #I-29b, #I-32, #I-37, #I-40, #I-45, #I-47, #I-49, #I-52, #I-53, #I-58, #I-62, #I-71, #I-73, #I-75, #I-77], prime [e.g., #I-08, #I-19, #I-20, #I-21b, #I-27, #I-35, #I-42, #I-54b, #I-55, #I-56, #I-65, #I-66, #I-68, #I-69, #I-70, #I-74] or as both. [e.g., #I-01, #I-07, #I-09, #I-15, #I-16, #I-17, #I-22, #I-23, #I-25, #I-28, #I-30, #I-33, #I-36, #I-38, #I-41, #I-43, #I-44, #I-48, #I-51, #I-59, #I-60, #I-63, #I-64, #I-67, #I-68, #I-72, #TO-01, #TO-02b, #TO-07, #TO-08, #TO-12, #TO-13]

Some reported that largely based on opportunity and scope of work, their firms worked as both **primes and subs**. For example, the white owner of a professional services firm reported that his firm works as both a prime and subconsultant. He explained, “It depends on the opportunities that become available ... some of the procurement methods require some sort of teaming. Sometimes we’re in the better position to pursue it as a prime, and other times we should be the sub.” [#I-11]



One DBE reported on its recent award to serve as a prime contractor on a transit agency project. This Hispanic American male owner of a DBE/SBE professional services firm commented that the firm recently got its first prime contract with a transit agency and that it hopes to get more prime contracts in the future. [#I-47]

**Other businesses reported serving strictly as a sub, or as a prime on some types of contracts and as a sub on others.** Comments include:

- A female representative of a majority-owned professional services firm remarked that in the past five to ten years they have started working as a sub more often. [#I-05]
- Reporting on the role his firm holds on projects, a male representative of a majority-owned construction-related firm reported that the firm is rarely the prime contractor outside of residential work. [#I-13]
- The white male owner of a professional services firm reported that the firm does not go after prime contracts because there are not any contracts that are specific to what work the firm performs. [#I-14a]
- A representative of a majority-owned professional services firm reported that the firm has recently started to work as a subcontractor for engineering firms. He added that his firm offers many services which makes it easier for them to be hired as a sub. [#I-07]
- The African American female owner of a DBE/SBE construction firm reported that her business currently only works as a subcontractor, but she would love the opportunity to be a prime contractor. [#I-31]
- A female representative of a majority-owned professional services firm reported that the firm works as either a prime or a subconsultant. She cited working for a city entity as an example of when the firm may be a prime and working with projects related to eminent domain as a time when they may be a sub. [#I-05]

**For some business owners, “competition” from other, often larger, businesses impacted whether their firm performed as a prime or a sub.** Examples include:

- The Hispanic American male representative of a majority-owned smallgoods and services firm indicated that the work as a prime or subcontractor varies year to year and depends on their competition. [#I-43a]
- The representative of a majority-owned small construction firm reported that the firm works as a subcontractor “90 percent of the time” and that this has not changed. He added that the larger contractors get most of the prime contracting work in the industry. [#I-15]

**Current conditions for firms in the industry in the Arizona marketplace.** Interviewees reported on the economic conditions in the local marketplace, including public and private sector arenas. [e.g., #I-08, #I-18, #I-23, #I-27, #I-28, #I-30, #I-31, #I-32, #I-37, #I-40, #I-41, #I-52, #I-54a, #I-55, #I-57, #I-64, #I-70, #I-75, #I-78, #TO-01, #TO-03, #TO-10, #TO-11, #TO-15, #TO-16, #AS-03].

**Many business owners reported that current economic and market conditions negatively impact the environment for businesses of all kinds in Arizona.** [e.g., #I-05, #I-17, #I-26, #I-73, #I-74, #TO-02a, #TO-12, #AS-211, #AS-215] For example:

- The representative of a Subcontinent Asian American-owned construction firm reported that the market is “very saturated.” [#AS-01]
- A white female owner of a DBE/SBC professional services firm indicated that the economic conditions are “horrible” for companies in her field in Arizona. [#I-72]
- An African American owner of a DBE professional services firm reported that federal funding is increasingly limited in the public sector. He commented that many communities are slow to approve budgets and tax increases that provide project funding. [#I-44]
- One representative of a majority-owned professional services firm reported that the current economic conditions are “not really good.” He added that he believes that this is due to a lack of federal funding and the current lack of major projects in Arizona. [#I-07]
- The Hispanic American owner of a DBE construction firm reported that in 2009 “when the economy got really bad,” his business almost closed. He added, “We started rebuilding the business and changed the business model [to adapt].” As for the future, he commented that the primes he subs with are all “aging” along with him. [#I-01]
- A representative of a trade association reported that “work is plentiful” but added that the bidding environment is complex due to Arizona’s “underground economy.” He explained that although there is work, the firms he represents have seen “unprecedentedly low bids” from the competition. [#TO-14]
- The white female owner of a DBE/SBC goods and services firm reported, “In Phoenix it is growing. In Mohave County it’s shrinking ... this is a very, very depressed area.” [#I-61]
- A white female owner of a WBE construction firm indicated that under current conditions, “It’s really hard ... for small companies, our mark-up can’t even be 10 percent and we’re still being told, even at that, we can’t compete with these large companies ....” [#I-77]

- The representative of a majority-owned small construction firm reported that as the economy slows, subcontracting opportunities diminish because prime contractors subcontract less and less of the work. [#I-15]
- Describing current conditions for vendors, the Hispanic American male owner of a goods and services firm commented, “Most of the big manufactures are closing down dealerships and taking over territories ... getting rid of the middleman and just selling direct.” [#I-42]
- A representative of trucking firm reported that the conditions are not great right now. He added that for half of the season, the trucks must “move empty” or transport a lighter load. He indicated that the firm has to spend money on gas even when the load is not full. [#I-12]
- The white owner of a construction firm reported that rates are uniquely strained in the Arizona industry due to the seasonal presence of “snowbird” truckers. He commented, “You get the snowbird guys who come in with their trucks from the snow country in the winter and that’ll be another fight because then rates go down .... My rate is [a] pretty standard going, lower-end rate. [Snowbirds] come over here and work for [less per] hour.” [#I-51]
- The representative of a Native American-owned goods and services firm reported that the firm’s success is “tightly tied” to the economy because a large part of their business is residential construction. He commented, “When the economy goes down people quit buying homes, they quit putting \$3,000 worth of sand out for their horse. It definitely affects us.” [#I-50]

**A few business owners described how specific changes in state and federal regulations and other initiatives have been a challenge for their businesses. These include:**

- The Subcontinent Asian American owner of a DBE professional services firm reported that the most impactful decision ADOT made that negatively effects market conditions for his firm was the elimination of discipline specific on-call services. [#I-63]
- An African American owner of a DBE professional services firm reported that ADOT jobs were broken up into smaller projects in the past and are now consolidated into larger projects that provide diminished opportunities for DBEs. He recommended that the survival of local small businesses should be factored into project decisions. [#I-44]
- A white female owner of a DBE professional services firm remarked that changes in federal environmental regulations has had a huge effect on the firm. She stated that the anti-regulatory and anti-environmental approach that the current administration favors is damaging to firms in her industry. [#I-59a]
- Commenting about tariffs, the white male owner of a construction firm reported that the steel tariffs have made the steel fabrication industry very “volatile.” [#I-62]

Others commented that the current shortage of skilled workers, technicians and potential subcontractors makes operating an Arizona business a challenge. Examples include:

- A white owner of a construction firm reported that finding qualified employees is very difficult. He added, “You can’t find anyone to work, there is a lost generation and no millennials want to work in this field.” [#I-16]
- A representative of a majority-owned construction-related firm reported that employees and hiring impacts the firm’s growth and success. He added that it has been very difficult to find good, qualified workers. He commented that the firm has a hard time bringing in new employees for jobs that require a larger staff. He indicated that this impacts how they select projects. [#I-13]
- The Hispanic American owner of a goods and services firm indicated that a shortage of trained technicians puts a particular strain on his industry. He commented, “Unless you offer a very nice benefit package deal it’s pretty hard to get qualified, experienced technicians.” [#I-42]
- A female representative of a public entity reported that there is a shortage of subcontractors in general in the Arizona marketplace. [#I-04]

Many interviewees reported on market and economic conditions that specifically affect their ability to secure opportunities for work. [e.g., #I-19, #I-24, #I-25, #I-29b, #I-59, #I-74]

For example:

- A female representative of a majority-owned professional services firm remarked that the status of the market is the biggest factor. She remarked that when government entities have significant tax revenues, they can spend more on projects which generates work for them. [#I-05]
- Regarding the economic conditions, a white owner of a construction firm reported that there are not enough revenues to sustain growth. He indicated that it is “Damn near impossible to get work with the United States government.” [#I-24]
- The white owner of a construction firm reported, “[The marketplace is] cyclical ... depends on who is in office and how the economy is doing.” He added that the economy affects the firm’s ability to get work; when there is no money in the public sector, there are no jobs. He commented that companies “have to fight through the hard times and when times are fat, there is more work than can be done.” [#I-16]
- The white female owner of a DBE/WBE/SBC goods and services firm commented that shrinking opportunities in Mohave County have driven the firm to look for work in other states. She added that the firm prefers to work in smaller areas instead of big cities. She indicated, “We stay out of the large cities. Our specialty is the small communities. I hire local people. I spend my money in those communities ... so the sales tax circulates in that community and actually become a part of that community.” [#I-61]

- The Hispanic American representative of a Native American-owned DBE/MBE professional services firm commented that the Native American communities that they work with do not see rapid market changes like the local cities experience. He added that it provides steady work. [#I-60]
- The Subcontinent Asian American owner of a DBE/SBC professional services firm reported that the elimination of the on-call services “cut the roots” of his firm’s ability to get work at ADOT. [#I-63]
- The white female owner of an SBC/DBE/WBE professional services firm indicated that ADOT’s transit division has stopped renewing their “on call contract list,” which has reduced her work opportunities with both ADOT and other municipalities.

She reported that insurance requirements are “ridiculous” and indicated that ADOT’s “blanket insurance requirement” doesn’t apply appropriately to her field of work. She commented, “I believe the last time I purchased insurance it was \$8,000 for a year, which included a commercial auto policy when my getting to and from a place is not even part of my contract ... It seems overwhelmingly ridiculous. It’s been my largest complaint throughout my time with ADOT.” [#I-72]

Several in the construction industry reported on the challenges associated with the “hit or miss” economy-driven industry. For example:

- A representative of a majority-owned professional services firm reported that it is difficult to plan for and secure project work due to the inconsistent nature of the firm’s industry. [#I-07]
- The white female representative of a minority- and woman-owned DBE/SBC construction firm reported that work is “hit and miss” in construction. She remarked, “A lot of times it goes with the flow of the economy.” [#I-38]

She added that the company has been awarded some year-long jobs. Referring to one job like this, she said, “That really pumped up our income.” She reported also that in the large residential private sector market, “People have money to burn.” [#I-38]

- The white owner of a construction firm indicated that seasons, more specifically the “temperature,” affects the firm’s ability to get work. He reported that “the key factor” to his business’ success is the “economic growth of the state.” He added that if the economy is “doing well, there’s a lot of building,” which means higher demand for his services. [#I-51]

**Other interviewees reported that the conditions in the Arizona marketplace are generally positive for businesses.** [e.g., #I-06, #I-09, #I-11, #I-14, #I-20, #I-21a, #I-22, #I-25, #I-34a, #I-35, #I-36, #I-39, #I-43a, #I-45, #I-46, #I-47, #I-48, #I-49, #I-56, #I-60, #I-65, #I-67, #I-68, #I-71, #I-76, #TO-08] Examples follow:

- Some interviewees reported a “very positive” economy with “growth” potential, as well as “plentiful,” “stable” and “fantastic” work in the western states construction industry. [#I-10, #I-33, #I-38, #I-53, #TO-05]
- A Hispanic American male owner of minority-owned construction firm stated, “Maricopa County is the fastest growing county in Arizona ... business is booming!” [#I-66]
- The representative of a minority business industry association indicated, “I think it is good, depending on the industry.” However, she added that a lot of the Hispanic-owned firms are not be aware of potential opportunities in the marketplace. [#TO-09]
- One white female owner of a construction firm reported that the growth of Arizona is contributing to their success, because new businesses and houses are being built. She added, “As long as the people keep moving here ... it will just continue to grow.” [#I-34b]
- The white representative of a majority-owned smallgoods and services firm reported that their firm does not have competition in the field and is currently the only organization in the area providing the services offered. He added, “We’re kind of a standalone business, we’re a specialty, we have stuff here that we can do that nobody else can do.” [#I-43b]

**Keys to business success.** The study team asked interviewees to describe factors that contribute to their and others’ business success. [e.g., #I-01, #I-19, #I-22, #I-27, #I-32, #I-40, #I-42, #I-44, #I-46, #I-49, #I-50, #I-51, #I-52, #I-58, #I-59, #I-68, #I-70, #I-71, #I-75, #TO-07, #TO-08, #TO-09, #TO-15]

**Many business owners and representatives agreed that success was achieved through networking, relationship building and securing repeat customers.** [e.g., #I-06, #I-07, #I-09, #I-12, #I-14, #I-15, #I-16, #I-19, #I-21a, #I-22, #I-26, #I-27, #I-28, #I-29, #I-30, #I-31, #I-34a, #I-38, #I-39, #I-41, #I-42, #I-43a, #I-44, #I-45, #I-46, #I-48, #I-49, #I-50, #I-53, #I-55, #I-56, #I-57, #I-59, #I-60, #I-62, #I-64, #I-66, #I-67, #I-68, #I-71, #I-73, #I-74, #I-75, #I-77, #TO-02a, #TO-12, #TO-14] For example:

- A representative of a majority-owned construction-related firm reported that the contracting business is related to relationships and creating a good working relationship. [#I-13]
- One white female owner of a DBE/SBC goods and services firm reported that relationships with customers and others are important. She indicated, “Without them I wouldn’t be a company.” [#I-58]

- A Hispanic American female owner of a DBE/SBC construction firm commented that relationships are important. She added, “One of the things we like to do is go over the project with the owner or end user to make sure it is exactly what they wanted. We try to be very communicative.” [#I-08]
- One white female owner of a DBE/SBC goods and services firm indicated, “Definitely relationships. People see that I am not a ‘carpetbagger.’ I’m actually there in their community, I care about their community, I hire their people, the money stays there other than profit ... the employee income stays there ....” [#I-61]
- The white owner of a professional services firm commented that 85 to 95 percent of his clients are repeat customers. He added, “Those relationships are paramount to us.” [#I-11]
- The white female representative of a majority-owned construction firm indicated that the company depends on “word of mouth” for business and does not utilize any social media. She commented that all the firm’s success can be attributed to “relationships with customers.” She added that her husband is a perfectionist and honest and ensures quality work to the customer’s satisfaction. [#I-68]

**A large number of interviewees reported keys to business success as quality work, reputation, good customer service and longevity in the industry.** [e.g., #I-14, #I-15, #I-28, #I-34a, #I-36, #I-37, #I-38, #I-44, #I-47, #I-53, #I-55, #I-59, #I-65, #I-68, #TO-02b] Comments from the in-depth interviews include:

- A Hispanic American owner of a professional services firm reported that doing good work and meeting deadlines are factors that contribute to success. He added, “We have a high satisfaction rate with all of the customers that we’ve had.” [#I-20]
- The white male owner of a professional services firm reported that experience and longevity in the industry has contributed to the firm’s success. [#I-35]
- One white male owner of a construction firm reported that relationships are “huge” and that reputation and keeping people satisfied are important explaining that the firm has an excellent relationship with its clients. [#I-16]
- The white owner of a professional services firm reported that relationships contribute to the firm’s success. He added, “You have to do good business with good people ... there are certain customers I will not work for.” He commented that reputation is “big” in his industry. [#I-17]
- A Hispanic American owner of a professional services firm reported that performance is the “only thing that matters” in his industry. For example, he indicated that his firm’s quality performance has contributed to the firm’s growth. [#I-33]

- The white owner of a goods and services firm reported that the key factor contributing to his firm's success is the diligence of employees and self to meet clients' needs. He added that this includes the ability to keep particular product stocked based on what the market demand is. He indicated, "Our customers have to have trust and faith in us that we know what we're talking about ... that we are going to make a safe and informed decision in case they don't know what they need. They know that we can figure it out and help them." [#I-76]

**Many business owners and representatives reported that hiring, retaining and diversifying qualified staff contributed significantly to business success.** [e.g., #I-08, #I-11, #I-14, #I-17, #I-19, #I-23, #I-24, #I-28, #I-36, #I-42, #I-43a, #I-45, #I-47, #I-48, #I-56, #I-64, #I-68, #I-69, #TO-12].

- One white male owner of a professional services firm reported that his employees are in demand and a huge part of business success. [#I-46]
- The female representative of a majority-owned professional services firm indicated that the talent and diversity of the firm's employees contributes to the firm's success. She commented, "We just did a debrief with [an airport] and they commented on the age diversity of our group and the perspective and value that brings to a project .... Our diversity is probably our number one asset." [#I-25]
- A representative of a majority-owned professional services firm reported that the firm seeks the highest quality employees they can find, meaning that they do more than just meet the basic qualifications. [#I-07]
- The white female owner of a DBE professional services firm commented that it is important to find employees that instill confidence in firm leadership and clients. For example, her firm has been commended for its staff abilities to manage a project successfully without much oversight. She reported that it is important to find employees with the same values and who want to grow with the company. She added that the company has been fortunate with the new employees that have been onboarded within the last year. [#I-59a]
- Although the representative of a Native American-owned goods and services firm reported that finding and retaining quality employees is a key to business success, he explained that hiring is "always difficult for everyone." He added that the business is approximately 60 percent tribal employed. He commented that employing tribal members "can be a challenge because of the casino ... the tribal members get a per capita share from the profits of the casino ... the younger the individual from the tribe, the harder it is to motivate them. 'Why would I get a job? I'm going to get a check every month.'" He added that despite this challenge employing tribal members is a goal of the business in order to add value to the tribe. [#I-50]



The importance of securing and maintaining equipment and new technologies was important for many. For others, access to favorable pricing drove success. [e.g., #I-15, #I-16, #I-24, #I-26, #I-34a, #I-46, #I-68, #I-69, #I-71, #I-77] Some business owners reported the types of equipment and technology they use and how they secured the equipment they needed, for example:

- A Hispanic American owner of a construction-related firm reported being fortunate that his family helped finance the purchase of the equipment he needed while he was still in high school. [#I-71]
- A representative of a majority-owned professional services firm reported that technology helps the firm work more efficiently, which saves the company and client money. [#I-07]
- The white female owner of a DBE goods and services firm reported that equipment is important and that the firm leases equipment because technology changes so fast that it becomes obsolete before it is pays for itself [#I-45]
- One white owner of a construction reported that the firm has millions of dollars of equipment and can get any equipment they need because the firm has great credit. [#I-16]
- The representative of a Native American-owned DBE professional services firm indicated, “We have a fleet of vehicles ... some of the pieces of equipment we use cost \$50,000. You need good equipment to be successful.” [#I-60]
- A white owner of a construction firm reported that minority- and woman-owned and other small businesses can be disadvantaged by equipment required on jobs. He commented, “If you don’t have enough equipment, you cannot satisfy the customer’s needs ... and they don’t like to split the billing ... they’d rather just go to one big company.” [#I-51]
- A Hispanic American representative of a majority-owned smallgoods and services firm reported that equipment has been a factor in growth for the firm. He stated that customers and the manufacturer expect high quality equipment and employees with specialized training. He commented that the firm has expanded and improved technology and equipment, as well as training, throughout the years. He added that early on the firm secured a valuable distributorship opportunity that afforded the firm access to favorable pricing and credit, another key to business success. [#I-43a]

Access to capital, credit, bonding and low-cost insurance and health care are keys to success for some businesses. [e.g., #I-06, #I-08, #I-23, #I-24, #I-32, #I-38, #I-47, #I-52, #I-55, #I-60, #I-68, #I-76, #TO-02a, #TO-08] For some, access to capital, credit, bonding and low-cost insurance and health care are attainable, for others they are a barrier to business success, for example:

- A Hispanic American female owner of a DBE/SBC construction firm stated, “My banking relationship is one of my most important relationships because there have been so many changes in the industry.” [#I-08]

- The representative of a majority-owned construction-related firm reported that the firm has “outstanding” credit and works well with suppliers to keep the on-going relationships that contribute to business success. [#I-13]
- A Hispanic American owner of a construction firm reported that access to operating capital directly affects the success of his firm. He commented that his lack of access to financing restricts his ability to accept and complete projects. He commented, “I have people offering me more work that I can accept because of financial challenges, because I know in the end, I have to finance it.” [#I-53]
- The African American female owner of a DBE construction firm indicated that she has difficulties getting bonding, because the business has to have some type of collateral or history to prove their ability to pay, do the work and “hold your own.” [#I-31]
- Although many interviewed reported challenges with bonding, one white male owner of a construction that reported to have access to bonding up to \$5 million. [#I-16]
- One white owner of a professional services firm reported, “We get clients because of our [professional liability/general liability] insurance policy ... some projects require a \$10 million policy, which we have, and many other companies don’t have.” He added that this has allowed the firm to attract more “higher-end clients.” [#I-14a]
- The white owner of a professional services firm commented that insurance has not affected his business, as he has not needed it yet. However, he reported that when he does, the minimum he will spend is \$8,500. He indicated that departments of transportation need to examine their requirements for insurance policies, especially for design-builds, because they are especially restrictive. He explained that often, small firms cannot afford nor obtain the level of insurance specified. [#I-10]
- A Hispanic American owner of a goods and services firm reported that health care pricing has a large impact on the success of his business. He commented, “We’re so small, obviously we’re not going to get decent pricing .... [And] most people looking for employment want decent health care.” [#I-42]

**Evidence of any barriers to business success.** Business owners and representatives discussed whether their firm faced moments when their success was in doubt and if they needed help to overcome any challenges. [e.g., #I-05, #I-09, #I-10, #I-14a, #I-15, #I-17, #I-19, #I-21a, #I-22, #I-23, #I-24, #I-28, #I-29a, #I-30, #I-34a, #I-37, #I-38, #I-42, #I-44, #I-45, #I-46, #I-47, #I-51, #I-52, #I-53, #I-57, #I-60, #I-61, #I-64, #I-66, #I-68, #I-73, #I-74, #I-77]

Some business owners identified “start-up anxiety,” limited access to opportunity, slow payments, payroll challenges and other barriers to business success. Examples include:

- The Hispanic American male owner of a professional services firm commented that “start-up anxiety” made it unclear if he was going to be successful. [#I-20]

- To truly grow his business, a Hispanic American owner of a professional services firm reported that the firm would need to have access to more opportunities to secure larger contracts. [#I-20]
- A white female owner of a DBE professional services firm reported that there were difficulties during the transition of management when she took over ownership. She added that the previous owner had stopped seeking out new opportunities and she did not feel empowered to seek out new projects. She commented that, over the next year after the transition, work was slower until she built up some momentum. [#I-59a]
- A Hispanic American female owner of a DBE/SBC construction firm indicated, “Yes, there are some years where we questioned if this is what we want to go forward with. We’ve had to make adjustments because we wanted to stay small ... we’ve made those adjustments and commitments and it’s been good.” She added, “There were years that were very tough ... sometimes making payroll can be very tough.” [#I-08]
- The white female owner of a DBE/SBC professional services firm reported that the firm’s success is unclear “every day.” She added, “When you’re self-employed and [work as] a private contractor ... especially when one of your key [sources of contracts such as ADOT] isn’t maintaining an on-call list, it becomes very difficult to forecast what [future work] might be available.” She indicated that the lack of work with ADOT has required her to pursue work outside of her expertise. [#I-72]

**Business owners and representatives shared their thoughts on the most significant obstacles that firms face to building a strong future.** [e.g., #I-08, #I-10, #I-11, #I-14a, #I-15, #I-16, #I-17, #I-20, #I-21a, #I-25, #I-27, #I-28, #I-29a, #I-31, #I-32, #I-33, #I-39, #I-43a, #I-56, #I-59, #I-60, #I-67, #I-68, #I-69, #I-71, #I-72, #I-73, #I-76, #I-77, #TO-08, #TO-13] Many reported barriers related to workforce, securing and expanding work opportunities and restrictive regulations. These include:

- When asked about barriers to success, a representative of a majority-owned construction-related firm reported that the limited workforce is a big issue that affects many firms across the industry because people are not encouraged to work in the trades. [#I-13]
- A representative of a minority business industry association reported that finding constant work and qualified workers is a big challenge. She added that some members have turned down large contracts because they do not have enough employees. She commented that many contracts are tailored towards certain firms. [#TO-07]
- The white female owner of a DBE/SBC construction firm reported that continuing to find work opportunities and finding qualified [staff] are the biggest challenges. She added, “Millennials just don’t want to work, a lot of people don’t want to work.” She added that finding qualified drivers is a common problem as well. [#I-40]

- Regarding pathways to success, a representative of a minority business industry association commented that companies need someone who is bilingual on their teams because they are missing out on a portion of the market. [#TO-09]
- The representative of an industry association commented that finding labor is challenging. She added that due to Arizona having to E-Verify employees, finding legal labor poses challenges. [#TO-12]
- The representative of an industry association reported that the lack of a path to citizenship for immigrants will be a challenge as it contributes to the underground economy. He added, “We need to find a way for the hard working to work legally for employers.” [#TO-14]
- Regarding future success, the representative of a minority business industry association remarked that small businesses need to be given the opportunity to perform. [#TO-01]
- The white male owner of a professional services firm reported that having consistent, predictable work and receiving timely payments are some of the biggest challenges to moving forward. [#I-06]
- A representative of a majority-owned professional services firm reported that the number of projects and receiving the opportunity to do work are the biggest challenges. He added that “the market is very tight right now.” [#I-07]
- When asked about future success a female representative of a majority-owned professional services firm remarked that “keeping enough work in the door to keep everyone busy” is the biggest challenge. [#I-05]
- A Hispanic American male owner of a DBE professional services firm indicated that having “strategic, well-managed, solid growth and making sure we know what we’re chasing and not to get out of control” are some of the biggest challenges for the firm to be successful. [#I-47]
- One white female owner of a DBE/SBC professional services firm reported that diversification in work is one of the biggest challenges for the firm. She commented, “Right now we recognize we are very much into airports. I would like to see us move into port, seaport, cruise port security. I’d like to see us move into, perhaps transit security.” [#I-55]
- Reporting on barriers to her firm’s future success, a white female owner of a DBE goods and services firm reported that regulations and the minimum wage were going to be some of the biggest challenges for the firm to be successful. [#I-61]
- The representative of a white woman-owned goods and services firm remarked that ensuring that manufacturers within the industry continue to partner with distributorships is a challenge for the firm adding, “... a couple of manufacturers that are not necessarily ‘distributor friendly.’” [#I-70]

- The white owner of a professional services firm reported that “slow-paying” clients from the private sector negatively affected the firm when it first started. He reported to have learned that budgeting and persistent calls to primes help him overcome these challenges. [#I-06]

**Despite having faced a myriad of barriers to business success, some business owners reported that grit and perseverance kept their firms afloat.** These business owners reported “hard work” as a primary factor that helped them overcome challenges, for example:

- The white owner of a construction business reported that he “worked very hard” to overcome challenges. He added, “Do what you say, be honest and work very hard to please your customers. If you don’t, “See you later!” It’s a very competitive field.” [#I-16]
- A Hispanic American female owner of a construction firm reported that their house was almost repossessed, had to borrow money from her mother and had to work to clean up the past. She added, “It was a very hard time in my life.” She indicated, “When we first started out, I think I cried for six months straight. I honest to god didn’t think we were going to make it. A lot of hard work helped fix these issues.” [#I-26]
- The white female owner of a DBE/SBC construction firm reported that the first years were the hardest. She added the most difficult time was juggling a full-time job and starting the firm to ease the transition financially. She commented that friends from other companies helped her through the learning curve of becoming a small business owner. She added that in the beginning she was unaware of the many requirements associated with owning a small business, insurance terms, how to execute certified payroll and fulfill bidding requirements. [#I-49]
- After parting ways with an initial mentor, one white owner of a professional services firm reported that there was a time during his apprenticeship where he was searching for nine months for a new mentor. He added that he had to cold call people and network to find a new mentor. [#I-18]

**Representatives from businesses and industry association representatives discussed how companies overcame challenges and barriers they faced.** [e.g., #I-59, #I-61, #I-73, #TO-03, #TO-07, #TO-08] For example:

- The representative of a minority business industry association reported that companies got “lean and mean,” adding that they “cut the fat to keep the doors open.” He added that community partners aided firms facing challenges. [#TO-01]
- The African American owner of a DBE professional services firm reported that he has gotten lots of help along the way from many unexpected places and would not have a company today if not for the help he received. He added that networking with other industry professionals at local meetings who were willing to take a chance on his firm has provided many opportunities. He commented that being persistent and reaching out to public employees to find available resources has been beneficial. [#I-44]

- The white female owner of a DBE/SBC professional services firm reported that she had lots of help along the way. She indicated, “I think early on I asked for the small business development centers in and around the Phoenix area and SCORE...I went to them and I was just asking for advice and was given either classes or counseling.” [#I-55]
- The representative of an industry association indicated that many small businesses seek help – from formal legal help to business advice – from programs such as SCORE (Service Corps of Retired Executives). He added that some small businesses may choose to pay for expert assistance, but the cost associated with this type of assistance often presents a barrier to small businesses. [#TO-04]
- The Hispanic American representative of a Native American-owned DBE/MBE professional services firm indicated, “Money started coming in from the projects that we had ... It took 4 or 5 years to pay off the personal debt since we didn’t take any personal loans.” He reported, “I have a friend that owns a civil engineering firm. He let me sit at one of his cubicles, connect my phone and use his internet.” He added, “He would give me advice like where to go to get registered with the state, or contacts for insurance ... things like that.” [#I-60]
- The representative of a white woman-owned goods and services firm reported that the firm was involved in a partnership. He added that the partnership was disbanded a decade ago. He commented that the partnership was formed between friends working in the business and at the company daily. [#I-70]
- The white female representative of a majority-owned construction firm remarked that the economic downturn in 2008 was a difficult time for the company. She reported that she and her husband took second jobs to keep the firm running during the 2008 recession. [#I-68]
- A white female owner of a WBE construction firm reported that the firm is trying to diversify and expand their market. She added that she has applied for DBE certification through the City of Phoenix but has not completed that certification process. [#I-77]
- The representative of a minority business industry association reported that companies need to understand that when they purchase business items, there has to be a return on their investment. She added that is how firms with passion and drive overcome challenges. [#TO-09]

**Some interviewees reported that their firm’s success had never been in question.** [e.g., #I-27, #I-39, #I-41, #I-43a, #I-56, #I-62, #I-69, #I-71, #I-75, #I-76] Several interviewees reported always having had confidence in their skills and abilities to achieve business success. [e.g., #I-13, #I-48, #I-58]

### C. Working on Projects with ADOT or Other Public Agencies

Business owners and representatives were asked about their experiences regarding opportunities for contracts with ADOT. Many reported the experiences they had when conducting work with ADOT. Topics included:

- Experiences with ADOT and other public agencies;
- Pursuit of opportunities with ADOT and other public agencies;
- Challenges for minority- and woman-owned businesses and other small businesses seeking opportunities with ADOT or other public agencies;
- Barriers for DBE-certified firms or other small businesses seeking opportunities with ADOT or other public agencies;
- Suggestions for improvement to public sector procurement practices;
- Input on contractor-subcontractor relationships in the Arizona marketplace; and
- Opportunity to bid as a prime contractor with ADOT and other public agencies.

**Experiences with ADOT and other public agencies.** Business owners and representatives discussed their experience working with or attempting to get work with ADOT.

Many interviewees reported having worked with ADOT as a prime, subcontractor or subconsultant. Many business owners and representatives indicated having positive experiences while working with ADOT. [e.g., #I-05, #I-06, #I-09, #I-14a, #I-18, #I-19, #I-25, #I-26, #I-32, #I-34a, #I-35, #I-38, #I-39, #I-40, #I-42, #I-44, #I-51, #I-60, #I-61, #I-67, #I-68, #I-70, #I-71, #I-73, #I-78] For example:

- A white owner of a professional services firm reported that he has had positive experiences with ADOT on a technical and business issues adding that ADOT pays on time and has qualified staff. [#I-17]
- The Hispanic American owner of a professional services firm reported a positive experience working on an ADOT. He commented, "... construction went well, and it was on schedule." [#I-20]
- One white female owner of a professional services firm indicated that the business originally learned about work with ADOT through a friend. She added that the bid process was "pretty easy" and that the ADOT staff was "professional and congenial." She reported that the firm has not pursued opportunities with public agencies other than ADOT because they were "so satisfied" with their work with ADOT. [#I-28]
- The representative of an industry association indicated, "To me, ADOT has always done a great job ... there are a few things that they have done really well ... they have excellent involvement with the community for all programs related to contracting ... they also do a great job using resources to make their programs better." [#TO-06]

Some participants shared negative experiences while working with ADOT. [e.g., #I-31, #I-64, #TO-03, #TO-10, #AS-168, #AS-177] Some of the interviewees spoke in detail about on-going challenges with new ADOT initiatives, size and type of available contracts, contract negotiations, site inspections, staffing, feedback/communications, competition from larger firms and other barriers, for example:

- The representative of a majority-owned professional services firm indicated, “One of the things that has been very damaging for us is ADOT’s delivery methods for large-sized contracts. There is nothing out there for us to fit a large fee range. ADOT has also shifted its philosophy from capital improvements to preservation ....” [#I-23]
- A white owner of a construction firm reported having been awarded a Job-Order-Contracting (JOC) prime contract for ADOT. He added that it was a challenge to get the contract underway commenting, “[ADOT] wanted financials, work history, qualified people, jobs completed ....” He indicated that ultimately ADOT did not bring the firm on for any actual work even though it won the contract. [#I-16]

This owner reported that the firm got selected for Job-Order-Contracting (JOC) but that they did not get any work as a prime with ADOT explaining that the insurance for JOC cost the firm an extra \$30,000 and that this was too expensive to sustain when they weren’t getting any work. [#I-16]

He concluded, “It was awful to get all the information and arduous and tedious to fill out the paperwork, buy the insurance and not get any work.” He added, “It cost me a lot of money to try to work for ADOT ... we spent a fortune on insurance and a lot of office work ... and got nothing in return.” [#I-16]

- The white owner of a professional services firm indicated, “ADOT is different from local governments. ADOT has really changed their procurement philosophy the last couple years with the on-call methods. Before, it was a lot easier to participate on contracts and help us build talent, experience, reputation ... when they cancelled all of that ... what that did was focus all of the [attention] to larger firms, not smaller firms.” [#I-11]

He continued, “[This process] subjected us to a subconsultant role which means the big firm only uses you when the district has a desire to use someone local or surveying.” [#I-11]

This business owner added, “My involvement with ADOT projects has dropped dramatically in the last five years to the point where I’m not sure I want to go through all those regulations and expense when my other clients don’t require that.” [#I-11]



- One white female owner of an DBE/SBC professional services firm reported on on-call lists. She remarked that the absence of the on-call list has left “a lot of DBEs in a lurch because it’s through ADOT that DBEs get the most opportunity ....” [#I-72]

This business owner went on to discuss the transit division of ADOT describing it as the “stepchild” of the department. She said that “transit division leadership has been ‘abysmal’ ...” She added that transit work is a relatively “low budget” item and thus a lower priority for ADOT, which, in the past, “left people in [transit] leadership ... that simply were not capable.” She indicated that new transit leadership within the past four years has struggled to “clean up the mess” of the division. [#I-72]

- An African American owner of a DBE professional services firm reported that she became disengaged from ADOT by the lack of opportunities that followed the DBE/SBC program. She added that although ADOT has many platforms, she perceives that public agencies and other entities already know what firms they want to work on a project. [#I-19]
- A representative of a small majority-owned construction firm reported on recent struggles with newer ADOT inspectors and employees coming into the field trying to do everything “by the book.” He went on to explain that past, more experienced inspectors in the industry recognized that conditions are different “in the field” and everything cannot be done “by the book.” [#I-15]
- One white co-owner of a small professional services firm reported, “Our experience with ADOT has been really bad ... lately. They are difficult ... they don’t treat us fairly... they are not a good client .... They’ll ask for something from us and we’ll jump, we’ll turn it around in a day or two then we won’t hear anything from them from a month or two .... ADOT is probably from an organizational standpoint, with the clients that we deal with, it’s one of the worst.” [#I-29b]
- The white female owner of a DBE professional services firm indicated that the firm has worked with ADOT for many years. She commented that “shifts within ADOT” have affected the firm. For example, she explained that [her industry work] was previously accomplished “through the construction side of the house.” She stated that projects are now announced on the ProcureAZ website and with the shift in project development, there have been many changes that now impact her access to projects. [#I-59a]
- The representative of a majority-owned small construction firm reported that the barriers include the fact that the larger companies have control over the ADOT jobs. He added that even if his firm has the necessary equipment and employees to work on an ADOT project, the bigger companies will “swoop in so fast you won’t have time to think.” [#I-15]
- When surveyed, the white male owner of a professional services firm reported, “The major concern is called ‘knowledge.’ I have 50 years of experience. I see the individuals who work for ADOT, who do not have the knowledge required [that understand] my line of work.” [#AS-125]

- The white co-owner of a small professional services firm conveyed that the firm has had “unfair negotiations” with ADOT regarding employee rates. He commented that ADOT should pay clients based on the rates that they pay their employees, not the ones that ADOT sets. [#I-29b]

**Pursuit of opportunities with ADOT and other public agencies.** Business owners and representatives reported on their pursuit of work with ADOT and other public agencies.

Many business owners and representatives discussed the motivations for pursuing or not pursuing opportunities with ADOT or other public sector agencies. [e.g., #I-01, #I-14a, #I-15, #I-16, #I-17, #I-18, #I-21a, #I-23, #I-28, #I-29a, #I-31, #I-35, #I-43a, #I-47, #I-49, #I-50, #I-58, #I-59, #I-60, #I-61, #I-65, #I-67, #I-71, #I-75, #AS-85, #AS-154] For many, project workscope, budget, skillset, work location, schedule, profitability, DBE goal and other similar factors help to define the projects they pursue or have pursued. Examples include:

- The white owner of a professional services firm reported that the firm decides to pursue opportunities based on the project, location of the project and the potential to be profitable. He added that budgetary certainty and budgetary consistency are important considerations when seeking working with ADOT and other public agencies. [#I-06]
- A representative of a majority-owned professional services firm reported that the firm is always looking for request for qualifications (RFQs) and requests for proposals (RFPs) from ADOT and other government agencies. He added that the firm pays attention to the scope of work for projects before pursuing work. [#I-07]
- One female representative of a majority-owned professional services firm remarked that if they are qualified for a project, they will bid on the contract. She reported that about one out of every three bids will allow them to be on the list of approved vendors. She remarked that some other organizations consult this list, so obtaining a spot on the list is worthwhile even if they do not win the specific contract they originally bid. [#I-05]
- A representative of a majority-owned construction-related firm reported that scheduling and the location of the project are deciding factors for the firm. He added that another consideration is that there is “double-checking” on government projects during the work approval process that is overwhelming and time consuming that is not prevalent in the private sector. [#I-13]
- The female representative of a majority-owned professional services firm indicated that the firm considers their skill set, the skills required by the project, their current workload and potential competition on a bid when deciding whether to pursue an opportunity. She added that an additional consideration of whether to pursue an opportunity is if the firm will be able to assemble a strong team that meets the DBE goals of the project. [#I-25]

- A Hispanic American owner of a goods and services and other services firm indicated that he is “always on the lookout” for bid opportunities with ADOT and other local agencies. [#I-42]
- The female representative of a minority- and woman-owned DBE/SBC professional services firm reported that if the company cannot get someone on a project full-time then “it would be more advantageous” for them to “pass on the opportunity and pursue a larger project.” [#I-48]
- An African American owner of a DBE professional services firm commented that it is important to be in contact with project managers and attend any professional liaison meetings where information on upcoming projects is discussed. He added that collecting information from previous projects and connecting with the project manager is essential in determining if a firm should pursue an opportunity. He reported that gathering information allows the firm to determine if they can serve as a prime on a project or if they will subcontract the work. [#I-44]
- Reporting on what types of work the firm avoids, one white owner of a construction firm indicated that the firm tends to “stay away” from projects that have a “prevailing wage.” He added that the business also stays away from Tribal Employments Rights Office (TREO) projects that have “tribal labor requirements.” [#I-62]
- The representative of a minority business industry association indicated little motivation to work with ADOT as many out-of-state vendors often get work with ADOT that prevents local businesses from seeking those projects. [#TO-02a]
- A representative of a majority-owned construction-related firm reported that he has heard that the amount of paperwork and involved costs of bidding is not worth the amount of paperwork. [#I-13]

A number of interviewees conveyed how they typically find out about opportunities for work in the Arizona marketplace. [e.g., #I-42, #I-45, #I-47, #I-49, #I-50, #I-57, #I-58, #I-59, #I-60, #I-61, #I-63, #I-65, #I-66, #I-67, #I-70, #I-72, #I-75]. Third-party sources, online portals and networking were common resources. Comments follow:

- Several minority business industry associations reported sharing bid opportunities from a variety of databases and other sources with their members. [#TO-02b, #TO-05, #TO-07]
- The white female representative of a majority-owned construction firm indicated that the firm often learns about and pursues opportunities through subcontractors adding that she would like to learn about opportunities independent of subcontractors. [#I-68]

- One white female owner of a DBE/SBC construction firm remarked information is available online for many opportunities. She reported that she contacts primes and primes will also contact her firm related to project opportunities. She added that the communication is 50/50 between her company and primes when jobs are available. [#I-40]
- The white representative of a majority-owned small goods and services firm commented that opportunities and contracts available for projects with local schools and government agencies can be found through third-party sources such as BidSync and ProcureAZ; however, he added that he is unsure if ADOT lists projects through those sites. [#I-43b]

**Now with the prevalence of listservs and online bid listings, some interviewees reported no challenges to learning about opportunities with ADOT and other public agencies.**

[e.g., #I-07, #I-08, #I-25, #I-27, #I-28, #I-31, #I-32, #I-40, #I-42, #I-44, #I-61, #TO-15]

For example:

- The white owner of a professional services firm reported that there are no challenges in learning about projects with ADOT. He added that he checks numerous websites to find work. [#I-06]
- One representative of a professional services firm remarked that once a business is on ADOT's list, it is easy to find out about projects that it is qualified for. [#I-05]
- A representative of a majority-owned construction-related firm reported that the firm has "good access" to jobs that are available to bid. He added that they may not get notifications from ADOT but that they have access to projects that are posted by other entities. [#I-13]
- One representative of a minority business industry association reported that ADOT does a great job notifying him when opportunities are coming up. He added, "Once I get a notification from ADOT, I get that opportunity out to our member base as well as our social [media] following as well." [#TO-05]
- The white female owner of a DBE/SBC construction firm reported that there are no challenges learning about available ADOT opportunities in recent years. She added that when the company first started, ADOT opportunities were not available online and plans had to be purchased at the Contracts and Specifications office. She commented that having opportunities available electronically is "amazing." [#I-49]
- A representative of ADOT reported on ADOT's new and improved procurement system to assist firms looking for work opportunities. He added that the old procurement system had many flaws but that he has not heard any complaints from firms using the new system. [#I-03]

On the other hand, many more business owners and representatives identified barriers to learning about work opportunities with ADOT and other public agencies. [e.g., #I-01, #I-17, #I-22, #I-23, #I-29a, #I-30, #I-33, #I-36, #I-38, #I-39, #I-51, #I-53, #I-56, #I-66, #I-67, #I-68, #I-69, #I-77, #I-78, #AS-11, #AS-12, #AS-41, #AS-42, #AS-71, #AS-92, #AS-98, #AS-105, #AS-108, #AS-111, #AS-121, #AS-132, #AS-147, #AS-149, #AS-150, #AS-152, #AS-155, #AS-156, #AS-157, #AS-160, #AS-164, #AS-169, #AS-172, #AS-177, #AS-181, #AS-214] These comments include:

- A representative of a majority-owned professional services firm reported that the firm faces challenges learning about opportunities with local agencies because they all use different methods of notification for projects. [#I-07]
- One white male owner of a professional services firm indicated, “It’s probably my fault for not knowing where to go or how to decipher the process ... the type work I do ... doesn’t pair with the right categories, so we don’t get exposed to the right opportunities.” [#I-46]
- A representative of an industry association serving woman-owned businesses commented that information is not readily available. She added, “Unless you are connected ... or registered in their many different portals ... it can be very difficult.” [#TO-03]
- The representative of a minority-owned small professional services firm reported that “communication is lacking” and finding projects is difficult. She added, “There are so many lists, logins and websites ... to monitor all of those is a part-time job itself.” [#I-21b]
- When asked, the representative of an Asian American woman-owned construction firm reported that interpreting requirements and politics are challenges. [#AS-30]
- The Hispanic American representative of a majority-owned small goods and services firm indicated that there are few opportunities available. He added that the firm is not currently on a list to bid on projects. He reported that recently he was contacted for a project, but the firm does not provide the requested services. [#I-43a]
- A Hispanic American owner of a construction firm indicated that he has “no idea where to look” for relevant work with ADOT or other local public agencies. He added that when he considers working for ADOT, he envisions the work being all “paving, or very remote, or if it is close to Phoenix, super competitive.” [#I-53]
- A Subcontinent Asian American owner of a DBE/SBC professional services firm indicated, “Back when ADOT had on-call services, every time a bid was released ... there were two tiers of searching that we would have to do. First, we needed to find out if we were qualified for the work. Second, we were at the mercy of the primes to see if they even wanted to work with us.” [#I-63]

- One representative of a majority-owned small construction firm reported that there is not a lot of information for ADOT projects and that he does not know how to find information to secure those opportunities. [#I-15]
- The Hispanic American male owner of a construction firm reported, “I’m always bidding and working on current contracts, so it is hard to find out the opportunities available through ADOT. Being small, it’s hard to look for work while working on the work we have.” [#I-71]
- The white owner of a professional services firm reported that getting on the bid list and learning about opportunities with ADOT are challenges. He added that working with the local agencies is “equally difficult.” [#I-18]
- The Hispanic American owner of a professional services firm reported that while he has not worked for ADOT, he believes that they would pass on his firm due to their small size. He added, “I haven’t seen any opportunities posted for [my industry] that I could respond to, so I don’t know what they’re looking for.” He commented that getting on the vendor lists is “tough.” [#I-20]
- The white female owner of a DBE/SBC goods and services firm reported that she does face challenges learning about opportunities with ADOT. She indicated, “That would be my fault, not theirs. I think it’s because I don’t take the time to keep learning the different programs that I have to learn.” She added that she has also had trouble placing bids because she is still working on getting new products. She commented, “I think that’s my dilemma. I have no products to bid.” [#I-58]
- The white female owner of a DBE professional services firm commented that many professional services firms engaged by ADOT do not know the contracting process well enough to advise firms in future planning. [#I-59a]

She added that the firms are unaware of how services fit in procurement and what the cost is because the process is constantly changing. She reported that ADOT is constantly changing how it utilizes the various contracting portals. She indicated, “If the internal people don’t even understand it, the external people have an even harder time understanding it.” [#I-59a]

- The representative of a white woman-owned professional services firm indicated that it is unclear how to learn about and be awarded work with ADOT and other local agencies. He commented, “I really don’t have a clear understanding of how to get government business.” He added that this is particularly difficult for small businesses because they can’t “hire an outside firm” to find government opportunities for their business, like larger firms can. [#I-64]

- One white female owner of a DBE/SBC professional services firm reported that the lack of an on-call list for contractors in the transit division has significantly reduced her and other DBEs' access to work with ADOT and similar local agencies. She added, "I get lots of opportunities from ADOT through their regular procurement for DBEs but it's all construction, there's never a transit thing that comes through .... I don't know what opportunities I'm missing because I do depend a lot on that ADOT channel to see what's happening." She commented that because ADOT is no longer providing [on-call] opportunities, she's changed focus "to keep looking at the transit association website to see if people have posted opportunities there." [#I-72]

**Challenges for minority- and woman-owned businesses and other small businesses seeking opportunities with ADOT and other public agencies.** Business owners and representatives discussed barriers that unfairly disadvantage minority- or woman-owned businesses or other small businesses in learning about or participating in contracts with ADOT or other public sector agencies. [e.g., #I-01, #I-04, #I-19, #I-23, #I-26, #I-59, #I-68, #TO-03, #TO-13, #AS-150, #AS-165]

A number of minority- and woman-owned businesses reported difficulty securing work with ADOT and other public agencies because they are not known to or recruited by those agencies. Examples follow:

- A Hispanic American owner of a construction firm reported that there is an "unspoken expectation" for a business to have a relationship with the public agency in order to be awarded projects. He stated that this presents a barrier to minority- and woman-owned businesses and other small businesses. He commented, "The projects we get awarded as small, unknown businesses are because they are designated to be awarded to small, unknown businesses." He added, "It's hard ... you have to work in that [public sector] arena to be qualified to work in that arena." [#I-53]
- The representative of a woman-owned professional services firm reported that ADOT does not reach out to the firm, being woman-owned, as much as other government agencies do. He commented, "Of the government entities, I hear much less from [ADOT] than I do from any of the others." He added that the firms hear from prisons, schools, sewage plants but from "ADOT probably by far the least." [#I-32]
- A representative of a minority business industry association commented that many contracts are tailored towards "certain firms." She added, for example, that the City of Phoenix has as program that is "very exclusionary rather than inclusionary." [#TO-07]

Many minority- and woman-owned and other small business owners reported that primes do not include them on their teams, or solely work with subcontractors/subconsultants they already know. Comments include:

- A representative of a Native American-owned DBE professional services firm reported that subconsulting opportunities depend on who is in leadership positions at the larger primes. He added, "Arizona is still prejudice towards minorities." [#I-60]

- The Hispanic American male owner of a professional services firm reported that it is difficult for a minority-owned business to enter the Arizona marketplace because most of the projects are awarded to large ... prime contractors and these primes already have “go-to minority-owned subcontractors or consultants that they choose to work with.” [#I-33]
- The white owner of a professional services firm stated that finding a prime contractor to work with as a subconsultant can be difficult because many contractors have companies that they prefer to work with that they already know. [#I-14a]
- A Subcontinent Asian American owner of a DBE/SBC professional services firm indicated, “Back when ADOT had on-call services ... we were at the mercy of the primes to see if they even wanted to work with us.” [#I-63]
- The white owner of a professional services firm stated that finding a prime contractor to work with can be difficult because many contractors have “preferred” companies that have previously worked with them. [#I-14a]
- The white female representative of a minority- and woman-owned DBE/SBC construction firm reported, “We just stick with local people here that we know.” [#I-38]
- A male representative of a majority-owned construction-related firm reported that they have “a circle of people that [they] work with that work in specialized areas.” [#I-13]
- While working at a larger firm, the white owner of a professional services firm observed that unless a small firm has a specialty, prime contractors bring on subcontractors with existing relationships. He added that large firms tend to “micromanage” the small firms they engage explaining that often the small firms are used to supplement the labor for projects rather than being given responsibility for specific project tasks. [#I-10]
- The female representative of a majority-owned professional services firm reported having “a group [of DBE-certified firms] that we like to use.” As the firm is expanding services, however, she finds “it difficult to forge those relationships” with potential subconsultants she does not know. [#I-25]

**Several business owners specifically reported self-performing.** Examples include:

- One white male owner of a construction firm reported that his business does not hire subcontractors. [#I-51]
- An African American male owner of a DBE professional services firm indicated that he tries to self-perform all the work. [#I-22]



- The white female representative of a minority- and woman-owned DBE/SBC professional services firm remarked that due to the highly specialized nature of her work, “We self-perform. It’s very rare that we will hire someone in as a third party.” [#I-48]
- The representative of a majority-owned small construction firm reported that since the company is an SBE, they are supposed to get certain opportunities for work, but many companies self-perform the contracts without engaging subs. [#I-15]

Some interviewees reported that when seeking or working on public sector projects with ADOT or other public agencies, minority- and women-owned firms can be easy targets for unfair treatment, or be faced with lower profit margins when serving as a sub. For instance:

- The representative of a minority business industry association reported that many large primes target disadvantaged businesses to show a good faith effort without ever intending to use them on a contract. [#TO-02a]
- One African American female owner of a DBE construction-related firm reported working only three days on an ADOT job before being “kicked out.” She stated that the prime contracted her business for multiple trucks, so she leased 10 trucks, but the prime would only use one truck (and therefore only pay for one). She added, “My drivers were being targeted .... The loaders ... were damaging my equipment on purpose.” [#I-31]
- A Hispanic American female owner of a DBE/SBC construction firm reported that ADOT has a “partnering” program where it works with businesses to help them succeed on contracts. However, she remarked that sometimes ADOT “throws partnering back at them” when it works to ADOT’s advantage and then does not help them at other times when they need it. [#I-08]
- The representative of a white woman-owned professional services firm indicated that when working as a subcontractor, “the profit margins start slipping down” because the general contractor has to maintain its own profits. [#I-64]

Some participants shared that financial barriers, as well as bonding, often prevent minority- and women-owned firms and other small businesses from securing contracts with ADOT or other public agencies. [e.g., #I-66, #TO-16] Comments include:

- A representative of a public agency reported that minority- and woman-owned businesses and other small businesses with limited capital are often at a disadvantage when bidding work with ADOT. She reasoned that the scope of ADOT projects is typically large, with many bid items bundled together. [#I-02]

- Another representative of a public agency reported that a lot of the contracts posted by ADOT are bundled and that many minority- and woman-owned businesses and other small businesses do not have the financial or staffing capacity to work on large contracts. [#I-03]

This agency representative indicated that minority- and woman-owned businesses and other small businesses may have a difficult time accessing capital and are often not paid promptly for the work they complete on ADOT projects. He added that further disadvantaging firms with limited access to bonding, is the \$1 million bonding capacity required on State of Arizona contracts. [#I-03]

- A representative of a majority-owned professional services firm reported that lack of experience and financial situation might affect minority- or woman-owned businesses that want to participate in ADOT contracts. [#I-07]
- The Hispanic American female owner of a DBE professional services firm reported that financing is a barrier her minority- and woman-owned firm faces explaining, “Knowing how long it can be to get paid. That first invoice could be quite a few months out, especially if you’re a lower tier [subcontractor], and being able to finance that.” [#I-57]

**Two reported on lack of awareness or misperceptions and misinformation related to defining and achieving the financial strength required for ADOT and other public agency contracts. These include:**

- The representative of a minority business industry association reported that “people don’t know what they don’t know.” She added that many business owners are not aware of the different assistance programs available and they may not know where to find ADOT contracts. She reported that ADOT needs to branch out to different community groups and talk about how to start a business and the different processes.

She reported that how quick firms get paid is a barrier to participation for minority- and women-owned firms. She added that the association represents multiple firms that have had to close because they were not getting paid on time. [#TO-07]

- The Subcontinent Asian American owner of a DBE/SBC professional services firm reported that there is a misperception that a firm has to have a lot of financial backing in order to be successful. He added, “I’m not sure where that came from ... I can understand that for a contractor, but not for [professional] services.” [#I-63]

**Some commented that lack of resources, as well as small business size, makes opportunities more difficult for minority- and women-owned firms and other small businesses seeking work with ADOT and other public agencies. For instance:**

- The white male owner of a professional services firm reported that the lack of procurement opportunities and resources causes challenges for minority- and women-owned businesses. [#I-06]

- A representative of a majority-owned professional services firm reported that lack of experience, financial situation and firm size are barriers. [#I-07]
- One white male owner of a construction firm indicated that there are not unfair barriers for small firms to conduct work with ADOT or other local agencies suggesting that small firms are “naturally limited” in the projects they can complete due to smaller capacity. [#I-62]

Others commented that large contract sizes and large firms bidding work that minority- and women-owned firms and other small businesses have the capacity to perform, makes competition for even smaller ADOT and other public sector contracts very difficult for small firms to overcome. For example:

- A representative of a majority-owned professional services firm remarked that staffing large projects could be difficult for these [minority- and woman-owned and other small businesses] firms, especially given certain time constraints. [#I-05]
- The representative of a majority-owned small construction firm reported that the small firms have the same issues as the minority- and women-owned businesses. He added that the larger companies know how to win jobs. He commented that he knows of \$100,000 to \$200,000 projects that his firm can self-perform but the larger companies that make \$20 million a year bid on them and win them. He reported that some of these projects should be left for smaller companies. [#I-15]

**Barriers for DBE-certified firms or other small businesses seeking opportunities with ADOT or other public agencies.** The study team asked interviewees whether small firms or DBE firms face barriers in the Arizona marketplace. Many business owners offered input. [e.g., #I-01, #I-18, #I-19, #I-20, #I-21a, #I-23, #I-26, #I-28, #I-29a, #I-31, #I-33, #I-42, #I-57, #I-59, #I-64, #I-66, #I-68, #I-69, #I-71, #I-73, #AS-16, #AS-86, #AS-112, #AS-113, #AS-114, #AS-118, #AS-119, #AS-120, #AS-131, #AS-133, #AS-140, #AS-143, #AS-167, #AS-179]

A number of comments conveyed the on-going disadvantage DBEs have when meeting time constraints, compliance and other regulations combined with “in-the-field” commitments. Examples follow:

- The representative of a woman-owned professional services firm reported that DBEs and other small businesses face barriers learning about bid opportunities with government agencies. He commented, “For example: two, three, four people are starting a business. They get a local job and one or two are going out to do the job, the other one is running the office, the other one is going to buy supplies and keeping the other two busy. ‘Where on earth do, they have the time to go through every single city, state, county, federal bid? They can’t.’ The big companies have departments and software and everything to filter through this and they can afford it and they can capture those [bid opportunities.]” [#I-32]

- The white female owner of a DBE/SBC professional services firm reported that insurance requirements set by ADOT are difficult to meet for DBEs and other small businesses. She added, “Sometimes the contracting requirements have provisions that you’d like to ... change out but you know you want the work, so you don’t .... Occasionally, I just don’t think ADOT ... writes the qualifications for the work at hand. They just cut and paste a template and say here you go. There’s way too much of that.” [#I-55]
- The white female owner of a DBE/SBC professional services firm reported that ADOT’s work experience requirements limit new, small businesses’ ability to get work. She indicated, “Starting business is hard with ADOT contracts because to be a winning proposal you have to show that you’ve done ADOT work in the past. If you’re just starting that’s rather difficult ... it’s impossible. So, your only hope is to sub and then even with subs they need your experience in order to be a successful applicant or proposer.”

She added that the administrative, compliance requirements of working with organizations that receive federal funds are a burden on DBEs and other small businesses. She indicated, “... I suggest they [DBEs and other small businesses] look for other ways. It’s not just ADOT, it’s the federal requirements that come with it, are so overwhelming. The compliance cost alone ... makes it cost prohibitive.” [#I-72]

**One white male contractor reported to the contrary that DBEs “steer away” from difficult work.** This owner of a construction firm commented, “One of the difficulties would be that they [DBEs] ‘don’t want to work’ and it’s very hard to do, so they steer away from it ... If it’s not easy, they’re not going to do it.” [#I-16]

**Suggestions for improvement to public sector procurement practices.** Many interviewees offered their insights on ways to improve ADOT and other public sector procurement protocols. [e.g., #I-07, #I-19, #I-20, #I-23, #I-26, #I-28, #I-30, #I-32, #I-33, #I-36, #I-42, #I-43b, #I-44, #I-46, #I-48, #I-58, #I-59, #I-60, #I-66, #I-67, #I-68, #I-69, #I-70, #I-72, #I-73, #I-75, #I-77, #TO-03]

**A number of interviewees reported on barriers to bidding/proposing as well as contract award and administration challenges.** These include:

- The representative of a majority-owned small construction firm reported that smaller businesses should have access to bidding on projects and need more information on how to win projects. [#I-15]
- A representative of a majority-owned professional services firm reported that for an RFQ, she had to watch tutorials about how to submit some of the documentation and that it took her three days to gather the required documents. She remarked that other businesses have told her that for the amount of time it takes to put together proposals, it is not always worth it. [#I-05]

- The representative of a minority business industry association reported that contract administration should have a longer timeframe. She added that a market survey should go out before contracts are put out to bid. [#TO-02b]

As part of ADOT's and other public agency contract awards processes, another representative of the same minority business industry association remarked that there needs to be more transparency and that local companies should be considered before out-of-state firms are. She added that the timelines for certification, for example, through the City of Phoenix should be shortened. [#TO-02a]

- Regarding administration, the Hispanic American female owner of a DBE/SBC construction firm indicated, "I noticed that the different ADOT offices [in different cities] don't always function the same. It would be nice if all of the offices could be uniform." [#I-08]
- A Hispanic American owner of a DBE professional services firm reported that it would be good for ADOT to change the way that it discounts for provisional overhead rates in its contracts, since not doing so can lead businesses to lose out due to fluctuating overhead levels. He added that this is especially true if they are smaller firms. [#I-47]
- The white owner of a professional services firm commented that he is an advocate for a "best value procurement approach." [#I-17]

Several indicated the need for a streamlined DBE certification process or recommended other changes to the ADOT DBE Program and other certification programs, as well as more rigorous compliance regarding utilization of DBEs. For example:

- The white owner of a professional services firm suggested that ADOT should create a different category of contract depending on the dollar value. He added that most small businesses and DBEs are almost exclusively subcontractors. He reported that providing a smaller procurement contract for DBEs would be helpful and ensure that projects are completed in the way that they were proposed. He added that there needs to be more accountability in terms of DBE commitments on projects. [#I-06]
- A representative of a majority-owned professional services firm suggested that the criteria for being a certified firm be expanded beyond the firm's ownership. She indicated, "I wish that instead of the certification being so focused on the ownership of a firm that it would also give some degree of credit ... to the diversity of the firm. When you compare our men to women here, I think that we are probably close to 50/50 ... which is unique, especially in the [specified] industry .... It's a good mix of people. I wish that was valued as much as if we were owned by a woman or owned by a minority ... that doesn't quite align with what I think the goals of that rule is." [#I-25]
- One representative of a minority business industry association commented that the timelines for certification ... should be shortened. [#TO-02a]

- The white owner of a professional services firm suggested, that for ADOT and other public agency contracts, there needs to be more accountability in terms of compliance with DBE commitments on projects. [#I-06]

Some recommended small or unbundled projects be made more accessible to DBEs and other small businesses. These include:

- A white male owner of a professional services firm reported that ADOT should put out more contracts for specialty services and contracting rather than lumping them into larger contracts. [#I-14a]
- The representative of a majority-owned small construction firm reported that opportunities need to be spread out and smaller contracts should go to small firms. [#I-15]
- An African American owner of a DBE professional services firm, a proponent of unbundling, stated that ADOT is creating a monopoly through the consolidation of smaller projects into larger projects that only large firms can compete for successfully. He added that his firm saw the most growth when he had several prime contracts working simultaneously. [#I-44]
- A white owner of a professional services firm suggested that ADOT should create a different category of contract depending on the dollar value. He added that most small businesses and DBEs are almost exclusively subcontractors. He reported that providing a smaller procurement contract for DBEs would be helpful. [#I-06]
- The Hispanic American male owner of a DBE professional services firm indicated that ADOT could offer big contracts to large firms and small contracts to small firms because “otherwise they [DBEs] will forever, or for a long time, be a sub working under the bigger firms for the big contracts.” [#I-47]
- One Subcontinent Asian American owner of a DBE/SBC professional services firm reported that ADOT needs to have an “internal champion” that can speak to the importance of making “discipline specific work” available. He added, “The lack of organizational structure has consolidated the power at the project management or district level. The disciplines are not strong enough.” [#I-63]
- A Hispanic American female owner of a DBE professional services firm suggested that ADOT segment out big projects into smaller projects so that “you have smaller firms who can possibly compete for prime or [have a] meaningful participation level on a smaller project.” She added, “What I don’t like with ADOT’s construction side is ... your entry level for prequalification in construction is like \$300,000 to \$500,000, so I don’t know if it was intended to be for small firms, but I don’t think they procure [projects worth under \$500,000], so [for small firms] it becomes an irrelevant prequalification process.” [#I-57]

- One white owner of a construction firm reported that ADOT should throw out the lowest and highest bids, so it is more competitive. He added that out of town companies will have a hard time competing with the local firms on projects if ADOT is concerned with dollar amount. [#I-16]

**Regarding ADOT, some interviewees reported the need for improved communication, outreach, business assistance and transparency with varied groups sitting at the decision-making table.**

For instance:

- A minority female representative of a minority-owned small professional services firm reported that ADOT and other public agency job listings need to be more accessible and easier to find. She added that small firms need the opportunity to show their “personal side” since the larger firms will always have a better resume. [#I-21b]
- An African American female owner of a DBE construction firm suggested that ADOT provide feedback on why a DBE does not get a contract and assistance with securing the qualifications needed to get contracts in the future. She added that she would like ADOT to do more “hand-holding” and help her business make connections that can result in a contract. [#I-31]
- The white male representative of a majority-owned professional services firm reported that it would help if ADOT was more proactive in reaching out to the industries through the various organizations and industry associations that support them. [#I-27]
- A representative of a minority business industry association suggested that decisions should not be made behind closed doors and that the business owners and workers should be involved in the decision-making process. She added, “Maybe have a task force or side-committee meeting that involves [others] outside of the same people over and over again ... [include] the ones who have failed and are getting rejection notices. I think a lot would come out of that.” [#TO-07]

**Some interviewees reported on the need for project management classes and improved training that taps the expertise of multiple sources.** For instance:

- The Hispanic American owner of a DBE construction firm reported that he would like to see ADOT offer classes on “project management and scheduling” for DBE-certified firms and minority- and women-owned firms “so that they could be successful.” [#I-01]
- A representative of a minority business industry association reported that ADOT needs to create more training programs and encourage small businesses to reach out when they need support. He added that ADOT should find a way to bring all the community organizations together so minority- and woman-owned and other small businesses can have the benefit of multiple resources. [#TO-01]

- One white owner of a professional services firm reported that he would like to see a “contractor’s trade show or convention” that gives contractors the opportunity to educate ADOT staff on “what that contractor brings to bear on an on-call contract.” [#I-17]

Furthermore, he commented that the public sector needs a mechanism to educate the private sector on upcoming needs and procurement opportunities that they want the private sector to respond to. He added, “There needs to be an open dialogue between ADOT and contractors that addresses upcoming opportunities, [any] previous issues and how to solve these issues.” [#I-17]

**Input on contractor-subcontractor relationships in the Arizona marketplace.** Business owners and representatives were asked to comment on their experiences with contractor-subcontractor relationships. [e.g., #I-01, #I-04, #I-20, #I-23, #I-25, #I-26, #I-27, #I-29a, #I-32, #I-43b, #I-47, #I-72, #I-78, #TO-02b, #TO-03, #TO-08]

**Many business owners and representatives reported on their level of utilization of subcontractors.** [e.g., #I-01, #I-09, #I-11, #I-13, #I-14a, #I-16, #I-19, #I-21b, #I-23, #I-25, #I-26, #I-28, #I-29a, #I-32, #I-33, #I-35, #I-36, #I-40, #I-42, #I-43a, #I-44, #I-45, #I-47, #I-50, #I-53, #I-60, #I-62, #I-63, #I-64, #I-66, #I-67, #I-69, #I-71, #I-72, #I-73, #TO-07, #TO-08, #TO-12]

**A number of interviewees gave input on prime-sub relationships, and how to successfully build them.** For some of these interviewees, relationship-building is on-going. Comments include:

- The representative of a white woman-owned professional services firm reported that the business is currently building relationships as a subcontractor on several projects and “has no problem working for a general contractor.” [#I-64]
- An African American owner of a DBE professional services firm commented that if a firm needs subcontractors, it is important to do research and find the best subcontractor to add to the team. [#I-44]
- The white female representative of a DBE professional services indicated that the firm selects the “best subcontractors” available in the category of professional services the firm is performing work. [#I-59b]
- One representative of a minority business industry association reported, “Like everything, it’s a relationship ... it’s a matter of trust. You have to ‘date’ before you ‘marry.’” However, she added that once firms “get screwed over” by a contractor or subcontractor, they can become leery of reaching out to unfamiliar companies. [#TO-07]



- A white female owner of a woman-owned construction firm advised that due to economics, contractors and subcontractors must learn to work closely with one another because “money is very tight on these projects.” [#I-77]
- Some other interviewees reported having established relationships with “go to” subcontractors, and not typically seeking out new relationships. [#I-07, #I-13, #I-25, #I-38]

Many interviewees discussed their firm’s efforts to include DBE-certified firms and other small businesses in public sector contracts. [e.g., #I-01, #I-16, #I-19, #I-21a, #I-22, #I-26, #I-28, #I-29b, #I-32, #I-39, #I-40, #I-44, #I-47, #I-49, #I-53, #I-59, #I-63, #I-66, #I-67, #I-72, #I-73, #TO-07] For example:

- The white owner of a professional services firm reported that he does not make overt efforts to include DBEs, because he wants to use the best person for the job. He added that he looks for those that “have good experience.” [#I-11]
- When a project has DBE goals, the representative of a majority-owned professional services firm conveyed that he will seek out new DBEs but his preferred DBEs are those that have previously established relationships with his firm. [#I-07]
- The representative of a Native American-owned DBE professional services firm commented that the firm does everything it can to make sure that any work they must sub out goes to a DBE-certified firm. [#I-60]
- One representative of a majority-owned professional services firm reported that the firm “absolutely” includes DBE firms in public contracts. She commented, “We do have a group [of DBE-certified firms] that we like to use. It’s dependent on sector, location.” [#I-25]

Several interviewees reported no efforts to specifically seek out DBE-certified firms as subcontractors/subconsultants. These include

- One white owner of an SBC professional services firm indicated that he does not make specific efforts to include DBE-certified firms in contracts. [#I-36]
- A white male owner of a professional services firm reported that certification does not factor into the firm’s decision to hire subcontractors. [#I-35]
- The representative of a Native American-owned goods and services firm reported that the business does not try to add DBE-certified firms because his type of work “is so hard to get.” [#I-50]

Business owners and representatives discussed any barriers faced when engaging minority- and woman-owned businesses or other small businesses on contracts with ADOT or other public agencies. [e.g., #I-11, #I-14, #I-16, #I-25, #I-32, #I-47, #I-50, #I-60, #I-67, #I-71, #I-78, #TO-01, #TO-02a, #TO-02b, #TO-07] For example:

- The Hispanic American owner of a DBE construction firm indicated, “I think a lot of them [minority- and woman-owned businesses] don’t understand the benefits of being part of the [DBE] program.” He went on to say that he tries to include minority- and women-owned firms on contracts with DBE goals, but some of the firms he would like to engage do not pursue certification because they do not understand the benefits of the DBE Program. [#I-01]
- An African American owner of a DBE professional services firm reported that the firms do not have some of the “backend” systems in place and that her firm tries to bridge the gap to work with them. She added that there should be more meetings with DBEs on how to prepare for projects. She commented that ADOT does a good job of conducting DBE meetings but that the turnout is very small. She added that she wonders if people ask themselves “Why show up?” regarding the meetings with ADOT. [#I-19]
- The representative of a public agency indicated that DBEs often do not have the capacity to work on large projects. He stated that small businesses sometimes become overextended by agreeing to work on multiple projects that overlap. [#I-03]

This representative added that prompt payment can be a barrier for primes and in turn subs since it is a requirement that general contractors pay subs within seven days of the prime receiving their payment for a project. [#I-03]

- A white female representative of a DBE professional services firm reported that there have been challenges with the scale of the work required. She added that the firm attempted to subcontract a small DBE company to conduct traffic control, but the firm did not have the capacity to fulfill the project needs. [#I-59b]
- The representative of a majority-owned professional services firm indicated, “One of the biggest challenges to working with DBEs is their accounting systems. When we get paid from ADOT, the DBE has to go on to the ADOT website and report that they were paid ... well they don’t do that so then we as the prime get flagged for prompt payment and are subject to a \$1,000 fine.” [#I-23]
- One representative of a minority business industry association reported that the bonding capacity of small and certified firms are barriers for primes seeking to engage DBEs. [#TO-02a]
- A female representative of a public entity reported that many DBEs have trouble staying on schedule and are not available when primes need them to work on projects which can result in some “fundamental scheduling challenges.” [#I-04]

- One female representative of a public agency reported that some firms are classified by specific NAICS codes and others more general ones, meaning that depending on how primes search for a DBE, they may or may not find what they are looking for. She remarked that sometimes a contract does not go to the lowest bidder because a firm signs an affidavit saying they will use a DBE based on the DBE's NAICS code. She commented that after the contract is awarded, sometimes the prime finds out the NAICS code was too general and that the DBE does not do the type of work needed. [#I-02]
- The white owner of a professional services firm reported that some prime contractors have a fear about mentoring a firm that will then become a competitor, but he remarked that competition is important in the market. [#I-10]

Some interviewees discussed how prime contractors/consultants are encouraged by ADOT and other public agencies to utilize DBE-certified firms or other certified businesses. [e.g., #I-16, #I-25, #I-26, #I-29b, #I-33, #I-38, #I-45, #I-47, #I-52, #I-59, #I-62, #I-67, #I-73, #TO-07]

A number of business owners concluded that primes will primarily engage DBE-certified businesses only when bidding projects with DBE goals or with agencies that specifically encourage DBE participation. For example:

- An African American female owner of a DBE construction firm reported that she was once asked to be a subcontractor so the prime could “meet their DBE goal.” [#I-31]
- The Hispanic American owner of a DBE construction firm indicated that prime contractors/consultants “won’t include” these groups in state contracts without DBE goals. He stated that many prime contractors only use DBEs and minority- and women-owned firms on federally funded jobs with goals, adding that these groups aren’t utilized in the private sector due to the lack of contract goals. [#I-01]
- The representative of a minority business industry association reported that there are contract goals included on projects and that many primes use the same DBEs for different contracts. [#TO-01]
- A representative of a majority-owned professional services firm reported that federally funded projects require DBE participation adding that the firm typically re-engages firms it has worked with in the past. [#I-07]
- The white owner of a professional services firm reported that prime contractors are encouraged to include DBEs. [#I-10]
- One white female owner of a DBE/SBC professional services firm reported that prime contractors “know that they will compete better in the ADOT procurement process if they have DBEs as subcontractors. And they want to win, so they include them.” [#I-72]

Some business owners and representatives discussed whether certified firms or other disadvantaged businesses could be successful in obtaining work on public sector contracts without special efforts to hire them. [e.g., #I-01, #I-11, #I-19, #I-25, #I-26, #I-31, #I-47, #I-59, #I-67, #I-72, #TO-07, #TO-15]

Some interviewees commented that given, business assistance followed by opportunity to build experience, certified firms could be successful in obtaining work with public agencies. These include:

- A representative of a minority business industry association remarked, “I would like to say yes, but many small and certified firms need help.” [#TO-01]
- The representative of a majority-owned professional services firm reported that it depends on the size of the project. He added that if those firms have the experience, they can be successful. [#I-07]
- The African American owner of a DBE professional services firm commented that small or certified firms can be successful. He explained that success is dependent on the type of work and who the firm is working with. He reported that qualifications and experience are the most important factors in success. He added, “The decisions we make are put on paper and can save lives ... if it’s not done properly, people can get hurt, so it’s critically important that you have the experience.” [#I-44]
- In his case, a representative of a Native American-owned DBE professional services firm explained that experience was key to securing public agency contracts. He stated, “I think it’s always done on expertise ... they’ll see on my resume that I have experience ... if I get myself in front of the right people.” [#I-60]

Interviewees reported on how prime contractors find out about opportunities to bid or propose on ADOT or other government agency projects. [e.g., #I-01, #I-45, #I-72, #TO-03, #TO-12]  
For example:

- A representative of a minority business industry association reported that the association shares ADOT bid opportunities with their members and encourages their members to attend ADOT meetings. [#TO-02b]
- A representative of a majority-owned professional services firm reported that there are two steps. He added that the firm first searches open contracts, then looks at specific projects. However, he commented that the firm has been discouraged bidding over the last couple of years. [#I-67]
- The representative of a minority business industry association reported that the association sends out opportunities to members. She added that many firms are not aware of where to find work associated business assistance programs. She commented that ADOT and other public agencies should start working with the Arizona Corporation Commission. [#TO-07]

- A representative of a majority-owned professional services firm reported that ADOT and the City of Phoenix have websites that inform firms of available projects. He added that this website also provides lists of certified firms in different industries. [#I-07]

Interviewees reported on how subcontractors find out about opportunities to bid or propose on ADOT or other government agency projects. [e.g., #I-01, #I-09, #I-10, #I-16, #I-19, #I-20, #I-25, #I-26, #I-28, #I-29b, #I-31, #I-40, #I-45, #I-47, #I-53, #I-59, #I-60, #I-62, #I-64, #I-67, #I-68, #I-72, #I-77, #TO-03, #TO-07, #TO-12] Comments include:

- The representative of a minority business industry association reported that the ADOT and state website have project postings for subs to use. He added that his association also helps members stay informed about work opportunities. [#TO-01]
- One representative of a minority business industry association reported that the association shares ADOT bid opportunities with their members and encourages their members to attend ADOT meetings. [#TO-02b]
- A representative of a majority-owned construction-related firm reported that the firm has good relationships with a few general contractors that have helped them gain access to projects and that the firm belongs to a couple of “plan rooms” that give them access to bid opportunities. [#I-13]
- The white male owner of a professional services firm reported that subs can receive notifications via plan services, word-of-mouth or other sources. [#I-14a]
- One white male owner of a professional services firm reported that the firm uses PTAC and the procurement portal to find out about opportunities with ADOT. [#I-35]

Interviewees who work as a sub, supplier or trucker discussed whether they faced any barriers securing work as a subcontracts or vendors on projects for ADOT and other public agencies. [e.g., #I-01, #I-29b, #I-44, #I-59, #I-60, #I-68, #I-73] Although a representative of a majority-owned professional services firm reported that the firm has no difficulties because they have a good amount of work experience, others reported challenges, for example:

- A Hispanic American owner of a goods and services firm indicated that there are difficulties getting primes to consider his business as a subcontractor. He commented, “I’ve had new clients call me and then somehow they find out that I’m the owner and the next thing I know they disappear .... I tell all my employees here not to tell anybody I’m the owner ....” [#I-42]
- The white female owner of a DBE/SBC goods and services firm reported that tracking down the people in charge of projects, communicating with them and persuading them to work with the firm were some of the biggest difficulties in working with other companies as a supplier. [#I-58]

- One Hispanic American owner of a construction firm reported that there are barriers. He explained, “It’s usually ‘who you know’ and not ‘what you know.’” [#I-71]
- The white female owner of a DBE/SBC professional services firm reported that the only difficulty she has faced working with primes is their “asking DBEs to be exclusive to them for that particular proposal process.” She added, “I’ve had instances where multiple primes have asked me to sub and so I have to be careful because they all want exclusivity .... I try to choose which one I think will win the contract, but if they don’t, I’ve lost out completely.” [#I-72]

Interviewees discussed any challenges for subs and vendors regarding working with primes on ADOT and other public agency projects. [e.g., #I-01, #I-11, #I-14, #I-16, #I-33, #I-35, #I-59, #I-64, #I-68] For example, a representative of a minority business industry association reported that some subs have issues with primes when the lines of communication are not open or when expectations are not clear. [#TO-01]

Other barriers included restrictive prequalification by primes, not being utilized once a contract is awarded, not getting paid or paid on time, workscope and communication challenges and other conflicts. Examples follow:

- The representative of a Native American-owned DBE professional services firm reported that getting approved as a subconsultant is “a paperwork nightmare” and that there are financial disclosures that a lot of people would not be comfortable sharing. [#I-60]
- When asked, the representative of a white woman-owned professional services firm reported that the firm has experienced issues with the “bait and switch.” She added, “A proposal is submitted with us as a part of the team but then the prime does the work in house.” [#AS-99]
- The African American female owner of a DBE construction firm indicated that she was once approached to subcontract for a prime so the prime could “meet their goal.” She indicated “being used just to meet the DBE goal.” Once the prime secured a contract, they fired her company indicating that her company did not do its job and then hired the company they actually wanted. She added, “It’s all ‘bait and switch’ at the end of the day.” She explained that she has seen this happen with other DBE’s, as well. She concluded, “It’s disheartening.” [#I-31]
- The representative of an industry association serving woman-owned businesses reported that she knows of a case where one of the firms she represents was awarded the contract to meet the goal on the project but was not given any work. She added, “There needs to be more due diligence to make sure these situations are not happening.” [#TO-03]

- A representative of a minority business industry association reported that one of the members had to close their business because a prime did not pay them on time during an ADOT highway contract. Associated court fees resulted in layoffs of his employees because he could not afford both court fees and payroll at the same time. [#TO-02a]
- The white owner of a construction firm reported that there are “always” difficulties with receiving prompt payment from primes but indicated that this is “accepted” in the business. He commented, “It’s accepted in our industry that you’re not going to get paid until the general contractor gets paid.” [#I-62]
- If communication is weak or broken, a representative of a majority-owned professional services firm reported that conflicting interpretations of regulations as well as personality differences can lead to challenges for subs working with primes. [#I-07]
- The representative of a woman-owned professional services firm reported that communication with primes has presented difficulties for the business. He added that there have been challenging instances where primes have not communicated the details of work the client needs or wants to be completed by his firm. [#I-32]
- A white female owner of a DBE/SBC construction firm reported that there have been issues with primes in the past. She added that there are primes she prefers to work with and others she avoids. For instance, she commented that her firm has experienced “bid shopping” by a prime in the past. [#I-40]

**Opportunity to bid as a prime contractor with ADOT and other public agencies.** The study team asked interviewees whether their firm faced difficulties winning prime contracts with ADOT and other public agencies. [e.g., #I-01, #I-05, #I-06, #I-08, #I-17, #I-18, #I-19, #I-21a, #I-22, #I-23, #I-25, #I-26, #I-32, #I-33, #I-43a, #I-44, #I-53, #I-59, #I-67, #I-70, #I-71, #I-72, #AS-02, #AS-141, #AS-168] Many reported challenges, examples follow:

- A Hispanic American female owner of a professional services firm reported that ADOT makes it difficult to learn from unsuccessful awards, because there is not a debriefing process if a company does not win a bid. [#I-75]
- One representative of a majority-owned professional services firm reported that it is difficult to win contracts with many local public agencies if firms do not have the required experience to back their bids on projects. He indicated that ADOT’s prequalification process helps his firm know when to seek work as a prime contractor. [#I-07]
- The white owner of a professional services firm commented that it is difficult to win prime contracts with ADOT. He added “... because [others] have more experience and it’s always an experienced based system. It’d be nice to go back to a cost-based system because my firm could do a job at half the price ... and probably do it better and more efficiently.” [#I-73]

- A white owner of a professional services firm reported that the firm does not go after prime contracts because there aren't any contracts that are specific to his firm's work. [#I-14a]
- One representative of a majority-owned professional services firm reported that it is difficult to win prime contracts with ADOT and local agencies. He added for example, "I applied with the City of Phoenix. It's been a long time now, relatively speaking. Six months or more and we haven't heard back .... It's weird." [#I-27]
- A representative of a Native American-owned DBE professional services firm indicated, "I think it is impossible to win [prime] contracts with ADOT. A lot of selection criteria ... they are going to consider capacity ...." [#I-60]
- The white female representative of a majority-owned construction firm reported that it is difficult to win prime contracts with ADOT because of competition. She added that the firm pursues opportunities through contractors and subcontractors because the firm is not included on the list of contractors with ADOT. On the other hand, she reported that it is not difficult to win prime contracts with local agencies. She added that the firm performs "a lot of city work." [#I-68]

#### **D. Conditions for Minority- and Women-Owned Firms in the Arizona Marketplace**

Business owners and representatives reported on whether there is a level playing field in the Arizona marketplace, and any associated barriers. Topics include:

- Whether there is a level playing field for minority- and women-owned firms or other small businesses in the Arizona marketplace;
- "Good ol' boy" and other closed networks;
- Issues with prompt payment;
- Denial of opportunity to bid or unfair rejection of bid;
- Submitting bids or proposals and not getting feedback;
- Bid shopping and bid manipulation;
- Knowledge of false reporting of good faith efforts or front companies; and
- Unfair treatment or disadvantages for woman-owned or minority-owned businesses in the Arizona marketplace.

#### **Whether there is a level playing field for minority- and women-owned firms or other small businesses in the Arizona marketplace.**

Many business owners and representatives reported whether there is a "level playing field" in Arizona for minority- and woman-owned businesses. [e.g., #I-01, #I-15, #I-29a, #I-30, #I-33, #I-38, #I-44, #I-45, #I-52, #I-58, #I-59, #I-61, #I-64, #I-69, #TO-01, #TO-05, #TO-07, #TO-10, #TO-11, #TO-13]



For varying reasons, many interviewees reported a playing field that is not level. Comments include:

- The white owner of a professional services firm reported that a true level playing field would have smaller contracts for small firms to win as primes and would have contracts that are awarded based on qualifications rather than low bid. He added that firms working in both sectors often have to “mark-up” their bids in the private sector to make up for low bids in the public sector. [#I-06]
- An African American female owner of a DBE construction firm reported that minority-owned businesses are “1 percent of the industry” and she would like to see that percentage grow to 2 to 3 percent. She indicated, “Racism is still real ... we would like to have it squashed. It’s still very hurtful to these businesses to have to deal with this in this day in age.” [#I-31]
- One representative of a majority-owned small construction firm reported that a level playing field would have contracts that are available for smaller firms and contracts that are tailored to larger firms. He added that when everything slows down, larger firms go after smaller contracts and win larger contracts disadvantaging small firms. [#I-15]
- The white female owner of a DBE/SBC professional services firm indicated that there is not a level playing field in rural Arizona for minority- and women-owned businesses. She indicated, “From a policy standpoint, Arizona makes a very good effort to create a level playing field, but when you go from policy to implementation it’s ... different. They talk a lot about getting suppliers that they know that could qualify as DBEs to become DBEs, but I’ve never seen any real effort in the rural areas. The easiest and most cost-effective way to do it is in Tucson and Phoenix and outside of that there’s no real commitment to creating a more level-playing field. There are tons of women- and minority-owned businesses in rural Arizona that do their work every day but have never been approached by ADOT about becoming DBEs.” [#I-72]
- A Hispanic American female owner of a DBE/SBC construction firm indicated, “If it was a level playing field, a larger company would [be] charged liquidated damages [for late completion]; the same as if a small company were late.” [#I-08]
- One female representative of a majority-owned professional services firm reported that lack of experience or expertise keeps the playing field from being level. She commented, “Without experience [the playing field] isn’t level.” [#I-25]
- The white owner of a professional services firm reported that he does not believe there is a level playing field in Arizona. He added that some small businesses make millions of dollars, while other small businesses do not. He indicated that businesses making millions is not the “true definition of a small business.” [#I-35]

- The representative of an industry association indicated, “I am under the impression from information shared by my members that it is not a level playing field.” He commented that there is an “underground economy” that exists in the Arizona marketplace where dishonest contractors report that they are paying higher wages than they are actually paying their subcontractors. He added, “There are some environments where contractors are paying according to [Form] 1099 contractors’ laws, but they are performing all of the work as an ‘actual employee’ of that company ... what that’s doing is removing the tax liability of the employer and putting that burden on the employee.” He reported that this experience is happening on both public and private contracts, and puts those firms not doing this at a disadvantage. [#TO-14]
- When asked about a level playing field, one business owner reported that unequal labor cost is a challenge when some agencies allow contractors to employ undocumented workers at lower hourly wages. This white owner of a construction firm stated, “If the prime contractor allows the competition to hire any ‘illegals,’ it is extremely difficult to compete with the labor costs. We’ve lost several contracts with universities and sanctuary cities that do not follow the labor laws. We cannot compete because I don’t pay my guys \$10 an hour.” He added, “No one enforces the law and there are no penalties, so you are pretty much out on your own.” [#I-16]
- A representative of a majority-owned construction-related firm reported that he is used to the competitiveness of the marketplace and that he is unsure how the firm would participate if the playing field were leveled. [#I-13]
- The white co-owner of a small professional services firm reported that ADOT is not currently leveling the playing field. He indicated, “ADOT is choosing ‘winners and losers’ that are actually making the playing field worse.” [#I-29b]

**Several business owners and representatives described what factors could build and sustain a level playing field.** [e.g., #I-14a, #I-16, #I-17, #I-18, #I-19, #I-28, #I-43a, #I-44, #I-55, #I-58, #I-60, #I-64, #I-67, #I-70, #I-78, #TO-14] For example:

- The Hispanic American owner of a goods and services firm reported that the playing field is level if the owner’s ethnicity or race doesn’t matter to the process of receiving a bid. He commented that a firm should be hired without being asked, “What are you as far as your background or what ethnicity you are?” [#I-42]
- A representative of a majority-owned professional services firm reported that a level playing field would have a statewide database with all available work across industries that could be accessed by all approved vendors. He indicated that it would also send notifications to all relevant firms. He added that this could eliminate some firms’ complaints. [#I-07]
- Regarding a level playing field, an African American owner of a DBE professional services firm reported that he’s like to see firms like his getting contracts that can grow their firms rather large jobs going to primes. He stated, “If we got a \$1,000,000 job, that would help us ‘grow’ ....” [#I-22]

- One white female owner of a DBE professional services firm commented that a qualifications-based call for proposal with qualifications elevated beyond a basic level would be indicative of a level playing field. She added that open solicitations would be beneficial. [#I-59a]
- The representative of a minority-owned professional services firm reported that smaller firms should be allowed to “show their strengths” during the bidding process instead of relying on a resume. He added, “The more generic the process is, the less ability the small firms have to show their strengths.” He commented that smaller firms would benefit from an interview where they can discuss the work they do and what they bring to the table [#I-21a]
- One white female owner of a DBE/SBC goods and services firm indicated that making opportunities available throughout the state, and in smaller communities, instead of concentrating them in large, urban areas would help. She indicated, “Everything seems to be Phoenix-centric. It’s hard for someone to travel six+ hours or more to get to a one-hour meeting. Towns are being left out in the process.” [#I-61]
- The white co-owner of a small professional services firm reported that not having to have a DBE or SBE program would be a “true level playing field.” He indicated, “Everybody gets to compete on quality, and you go from there.” He added that there may also be a small business component, but one that was more structured and scrutinized than the current one. [#I-29b]
- One white owner of a professional services firm commented that the selection process for professional service firms is very difficult. He added, “If ADOT is looking for a professional panel, they need to do more than the bare minimum when announcing these opportunities.” He reported that in a level playing field everyone in the field should be notified if anything came up. [#I-65]

**Some business owners and representatives perceived that the Arizona marketplace has leveled.** [e.g., #I-27, #I-42, #I-43b, #I-48, #I-56, #I-68, #TO-08, #TO-09, #TO-12] For example, a Hispanic American male owner of a DBE professional services firm indicated, “I don’t think it’s not leveled right now ... I haven’t encountered any issues.” [#I-47]

**A number of business owners and representatives reported their insights on what gives one firm in the industry an advantage over another.** [e.g., #I-06, #I-09, #I-14a, #I-15, #I-16, #I-17, #I-23, #I-24, #I-25, #I-26, #I-27, #I-28, #I-30, #I-42, #I-46, #I-47, #I-48, #I-55, #I-56, #I-60, #I-61, #I-68, #I-69, #I-70, #I-71, #I-73, #TO-05, #TO-12, #TO-14]

**Many interviewees reported that experience, reputation and relationships in the industry can give one firm an advantage over others.** [e.g., #I-18, #I-19, #I-33, #I-44, #I-51, #I-64, #I-66, #I-67, #I-72, #I-74, #I-77, #TO-07, #TO-08] Comments included:

- A female representative of a majority-owned professional services firm remarked that experience allows firms to create better products and build a reputation for producing quality work. [#I-05]

- The white owner of a goods and services firm reported that product knowledge and product inventory are central to success as a business. He indicated, “Rule number one, know what you’re talking about ... be able to help. And, rule number two, have what they need.” [#I-76]
- A representative of a majority-owned construction-related firm reported that experience, cost of doing business and relationships give firms an advantage. [#I-07]
- The white owner of a professional services firm reported that technical expertise and relationships are the two most important factors. He remarked that even if someone is a one-person firm, they can get onto a project if he or she has the right relationships. [#I-10]
- The Hispanic American owner of a professional services firm commented that ADOT experience would give a firm an advantage over another. [#I-20]

**Business size, capacity, resources and pricing advantaged some firms over others.** Input includes:

- The representative of an industry association reported that large contractors have advantages over smaller contractors. She added, “Larger firms have the extra capital to bid on projects and expand their capacity.” [#TO-10]
- The Hispanic American male owner of a DBE construction firm reported that larger firms having more equipment and employees giving them an advantage. [#I-12]
- A representative of a majority-owned construction-related firm reported that there are certain jobs that require an amount of “manpower” that his firm does not possess. He remarked, “The firm would rather turn clients down than let them down.” [#I-13]
- The white male owner of a construction firm reported that access to technology and automation in his industry gives one business an advantage over another. [#I-62]
- Regarding what gives one firm an advantage over another, a white male owner of an SBC construction firm indicated, “One ... advantage is my ability to keep my pricing low because I am small ... my overhead is a lot less than bigger companies.” [#I-41]
- Reporting on reasons one firm has an advantage over another, a white female representative of a DBE professional services firm indicated that firms that can take losses in some areas and gains in other areas and can provide low bids have a major advantage. She commented, “It’s pretty amazing to find out what the low bid is on some project that’s being competitive ... the presumption is that they’re taking a loss and presumably making up for it in one way or another.” [#I-59b]

In some instances, business owners perceived DBEs or other certified firms as advantaged over non-certified firms. [e.g., #I-16, #I-26, #I-29b, #I-77, #I-78, #AS-54, #AS-128] Input follows:

- The white owner of a professional services firm reported that firms in the industry have an advantage when the government wants to create an “artificial” goal to help one group over another. He added, “Since age 15, I’ve been in this business doing ADOT projects. I’ve never seen someone lose a project because they were a minority, woman or veteran ... I just don’t see the disparity.” [#I-11]
- The white female owner of a DBE/SBC goods and services firm reported that being a white woman instead of a minority has caused barriers for her. She indicated, “If I’m not ‘African American, Spanish, or Indian or whatever’ ... I’m a white woman, and that holds me back ....” She added, “... companies [that] are locked into [woman-owned small business] WOSB ... that certification ... won’t even look at me and I think that’s unfair.” [#I-58]
- When surveyed, the white female owner of a construction firm reported that companies that are DBEs “have all the money” and “get all the work.” She added, “[DBEs] take millions of dollars away from small [uncertified] companies like [mine].” [#AS-48]
- When asked, the white owner of a construction firm reported, “We bid several projects, but because of the DBE “set-asides,” they have to use the DBEs and it’s ‘bogus.’ The DBE Program is being taken advantage of even if we under bid. There is no provision for veteran-owned businesses in our state.” He added, “We won a bid, then we lost it because the [prime’s] accountant said they would lose money if they didn’t go with a DBE. Most DBEs only have one female employee/owner. The program should look into the number of [minority and women] employees for DBE eligibility.” [#AS-130]
- A white co-owner of a small professional services firm reported that the DBE “quotas” set by the DBE Program have worked against his firm. He commented, “It’s interesting because back in 2012 the ‘federal register’ said that the feds wanted to move away from a sex-, race-based system and go to a small-business [system]. ADOT has said that they would do that, but they have not .... What the feds were worried about was firms concentrating in specific specialties ... people ‘gaming the system’ and that’s exactly what’s happened.” [#I-29b]

**“Good ol’ boy” and other closed networks.** Many interviewees discussed closed networks that negatively affected minority and female business owners, or others outside of a network. [e.g., #I-05, #I-09, #I-19, #I-21a, #I-22, #I-24, #I-25, #I-31, #I-34a, #I-35, #I-38, #I-39, #I-40, #I-42, #I-44, #I-55, #I-58, #I-59, #I-60, #I-61, #I-66, #I-67, #I-68, #I-69, #I-72, #I-74, #I-78, #TO-01, #TO-03, #TO-06, #TO-07, #TO-09, #AS-62]

Many business owners and representatives reported on the prevalence of closed networks in the Arizona marketplace that particularly affect minority- and woman-owned businesses and other small businesses. These include:

- The Hispanic American owner of a DBE construction firm reported, “There’s a ‘good ol’ boy’ network that’s been there since the 80s, and it’s going to continue to be there even after I’m gone.” He added that this “of course” affects DBEs and minority- and women-owned firms negatively because their “pool” is small, “when one doesn’t like you, they ‘all’ don’t like you.” Further, he reiterated that many prime contractors limit utilization of DBEs and minority- and women-owned firms to federally funded jobs that have contract goals. [#I-01]
- A representative of a minority business industry association reported that “good ol’ boy” networks exist and negatively impact small and certified firms. She added that many association members do not attend outreach events. Her members have reported that the firms that host the events do so “to show good faith efforts,” with no intention of engaging any of the minority- and women-owned firms that they meet through the events. [#TO-02a]
- The representative of a minority business industry association indicated, “It’s still a ‘good ol’ boy’ network and if you’re not in that group then you’ll get overlooked.” He commented that we work best in the networks we feel comfortable in. He added, “The way you fix this is deliver diversity and inclusion training programs to the ‘good ol’ boys” so they understand. We just have to continue educating that network about the value of diversity and inclusion.” [#TO-05]
- The white owner of an SBC professional services firm reported, “The State gets used to working with people and there is certain people that know how to make the most, or exploit, working with the State .... There’s always going to be a little bit of a ‘good ol’ boy’ network in any large government entity, it’s just kind of the way it works, people get used to it and they know that’s how it’s done.” [#I-36]
- A representative of an industry association indicated, “We are aware in some public works environments that there is a group of contractors that scratch each other’s back and share work ... it creates an environment where other contractors will not waste the time and effort to bid once they hear if ‘good ol’ boys’ are bidding on that work.” [#TO-14]
- A white owner of a construction firm indicated that there is preferential treatment in the awarding of government work in general. He commented, “... there’s a fair amount of ‘nepotism or cronyism’ where the same people ... get the work. They’re the only ones that are notified of the work. They [public agencies] need to be more transparent and more public with their bidding process and who’s invited.” [#I-62]

- The white owner of a professional services firm reported that closed networks exist and that they affect firms in the industry. He stated that although this was a bigger problem ten years ago, it still persists today. He commented that this often results in a select group of firms having access to project and evaluation information before it is released and certain firms having more opportunities to perform work. He reported that minority, women and other small business owners may not have the time to attend conferences and networking events that would give them access to people in the industry and help them build those kinds of relationships. [#I-06]
- When asked if “good ol’ boy” networks exist in the Arizona marketplace, the white owner of a professional services firm responded, “Oh hell, yes ... [these networks] have an effect on any company that is not in the network.” He added that there is a distinction between companies that have an ‘embedded relationship’ with the departments of transportation and companies that do not have these relationships. [#I-17]
- A Hispanic American owner of a professional services firm indicated, “Coming from working for bigger firms, I definitely know that they are ‘relationship based.’ Once you do a couple of good projects for someone, whether that be a developer or a public entity ... you get the work.” [#I-20]
- The representative of a majority-owned smallgoods and services firm remarked that there are “good ol’ boy” networks. He commented that the big companies have a lot of leverage and establish repeat customers using specific manufactured parts, suppliers and technical information. that independent firms are unable to order or utilize and create a captive market. [#I-43a]

He added that larger firms typically have larger “buying power” is often better than smaller firms, even with protections in place. He reported that the volume in which larger organizations purchase in vehicles or parts allows for incentives that organizations operating on a smaller scale will not receive. [#I-43a]

- A Hispanic American owner of a construction firm reported that “of course” there are closed networks that negatively affect small, minority- and women-owned firms in his industry adding that the “good ol’ boy” network is “just there and it’ll be there.” He explained that even some government programs intended to overcome “nepotism” unintentionally perpetuate it. He commented, “The 8(a), for instance, the mentor-protégé [program], by taking on a mentor you’re adopting those relationships, you’re taking their past performances to qualify you for this.” [#I-53]

This business owner commented that Arizona is “just using the ‘good ol’ boy’ system and the big Arizona businesses that ‘own’ Arizona get to keep being the big Arizona businesses that ‘own’ Arizona.” [#I-53]

- The white owner of a small construction firm reported that there are “good ol’ boy” networks that unfairly affect small construction firms (such as his) within the Arizona marketplace. He commented that there have been instances when the firm has wanted to provide services to government agencies, but that they have been denied the opportunity because the agency selects from an in-place list of vendors. He added that there have been instances when the firm has lost bids even when the prices have been substantially lower than other competitors. [#I-52]
- One white owner of a construction firm confirmed that there is a “good ol’ boy” network in his industry, and he is in that network. He commented, “[It’s] something I even fall under, because of the fact that I have so much history with these people. I would actually fall under the benefits of the “good ol’ boy club” only because I know them. Whereas reaching out to new people ... if you don’t know the other people, how they work, that’s a big risk.” He added, “It’s tough ... especially in the [specified industry] world because ‘everybody knows everybody.’ A new person is going to struggle.” [#I-51]
- A white owner of a construction firm indicated that there seems to be a closed network of firms who are awarded government contracts. He commented, “It’s not that bad in Maricopa County. It’s horrible in Pinal County! It’s not good in Graham County. There’s no transparency in Pinal and Graham County .... In southern Nevada we’ve done a fair amount of work and in some of the counties in Southern California and the Bay Area, we don’t see that at all.” [#I-62]
- The Asian American owner of a DBE/SBC professional services firm indicated, “That’s a given fact, but we just have to work around that. As long as there is work for everyone. As humans, we are going to want to work with people we know, but as long as you were willing to give me a chance to show you that I can also do it, then I’m ok with it.” [#I-63]
- The African American owner of a DBE professional services firm commented that there is no such thing as a level playing field. He indicated, “If you’re black, there will never be a level playing field. If you’re a woman, there will never be a level playing field.... In the construction industry, it’s a “good ol’ boy” network ... if you’re in with these boys then you will be able to make a living.” [#I-22]
- A representative of majority-owned construction-related firm reported that the economic downturn took down many of the “good ol’ boy” networks in Arizona. He added that people moving into Arizona from other places has also helped to break down this barrier. [#I-13]
- An African American female owner of a DBE construction firm reported on being an outsider to the ADOT “circle” of contractors and that ADOT should guide DBEs on how to “get into the circle” as well identify new opportunities. [#I-31]



Some interviewees reported that although closed networks may still persist, relationship-building and loyalty are an expected part of doing business. For example:

- The white male co-owner of a small professional services firm reported, “The ‘good ol’ boy’ network is now the ‘DBE network’ that protects itself, manages itself ... continually grows.” [#I-29b]
- A representative of a majority-owned small construction firm perceived that a “good ol’ boy” network is one that operates with “handshake agreements” to keep work “local.” Now, he added that due to the intensity of work and bidding requirements as well as the increase in statewide and national competition, local “good ol’ boy” networks are disbanding. [#I-15]
- When asked about closed networks, a white male owner of a professional services firm indicated, “I don’t currently see “good ol’ boy” networks. I think there are opportunities to hear about potential work coming down the pike and that is a natural thing that happens when you work with someone.” [#I-11]
- A representative of a white woman-owned professional services firm indicated that there is a “good ol’ boy” network in the Arizona marketplace in both public and private sector work. He stated, “you have worked with someone in the past, you trust them, you have to get a job done ... and so you go with someone you have experience with.” [#I-64]
- Regarding closed networks, a white owner of a professional services firm reported that “good ol’ boy” networks exist and that firms find companies that they like, and they use them often. He added, “That’s the nature of business ... makes America strong.” [#I-14a]
- One representative of a Native American-owned goods and services firm commented that his business has several “customers that get all their material from us.” He added that the market is “a lot about loyalty and those relationships,” but not to the exclusion of minority- or woman-owned businesses. [#I-50]
- When asked about his knowledge of closed networks, a white male owner of a goods and services firm reported that customers do tend to “get stuck in their ways” and remain customers of certain firms. [#I-76]

A number of other interviewees reported no experience with closed networks. [e.g., #I-07, #I-16, #I-18, #I-23, #I-30, #I-32, #I-41, #I-46, #I-47, #I-48, #I-49, #I-70, #I-71, #I-73, #I-75]

**Issues with prompt payment.** Many interviewees provided comments about untimely payments, including that ADOT’s payment practices cause barriers for certified businesses and other small firms. [e.g., #I-03, #I-05, #I-07, #I-11, #I-14a, #I-16, #I-18, #I-17, #I-19, #I-20, #I-21a, #I-22, #I-25, #I-27, #I-28, #I-29a, #I-30, #I-33, #I-34b, #I-36, #I-38, #I-39, #I-40, #I-42, #I-45, #I-46, #I-51, #I-57, #I-59, #I-61, #I-62, #I-63, #I-66, #I-67, #I-69, #I-71, #I-75, #I-76, #I-77, #TO-01, #TO-02a, #TO-03, #TO-07, #TO-12, #TO-15, #AS-14, #AS-122]

A number of interviewees reported instances of repeat prompt payment issues. Examples include the following:

- A Hispanic American owner of a construction firm reported that access to operating capital directly affects the success of his firm. He commented, “I just collected a check on a project that was 118 days from completion. So, we had green tags, everything 100 percent done, and I had received no money ... I have people that are working, and they want to get paid on pay-day.” He indicated that late payment affects his ability to accept and complete projects. He commented, “I have people offering me more work than I can accept because of financial challenges, because I know in the end, I have to finance it [due to untimely payments].” [#I-53]
- Regarding prompt payments, a white female owner of a DBE/SBC professional services firm indicated, “Government doesn’t care! We’re dealing with [one public entity] right now and they are 35 days late and they are putting us on a bid contract that’s going to run us another 45 days .... If we needed their paycheck it would be hard.” [#I-55]
- A white owner of a professional services firm reported that “cash flow is king” and that he has waited 90 days for payment. He added that a firm needs to pay multiple cycles of payroll before they even receive a fraction of the payment due. [#I-10]
- Regarding prompt payment issues, the representative of a minority business industry association reported that some members have to discount the amount of money they charge on a project to secure on-time payments. [#TO-02b]
- Reporting on ADOT’s way of resolving prompt payment issues, a female representative of a public agency reported that her agency deals with 20 to 30 prompt payment issues each month. She reported that primes must report their payments within seven days and that if they do not do this or pay within 30 days, they are fined \$1,000 per instance of noncompliance. She reported that she has seen primes sanctioned for up to \$70,000. [#I-04]

Continuing, she added, that even if primes report that they paid, subs have the option to report that they did not. She indicated that this is one step to remedying the prompt payment issue but that as of now, this remedy is limited to construction contracts, so far. She remarked that even if a prime is sanctioned, the agency does not have the power to pay a DBE if the prime does not. [#I-04]

- The representative of a majority-owned small construction firm reported that his firm has experienced issues with prompt payment. He added, “[Prompt payment] is one of the biggest, worst hurdles in running a business ... it’s horrible, we have a lot of trouble with collecting prompt payment. When I say it’s not on time, I don’t mean a day or two late, sometimes it’s 60 or 90 days that we have to wait.” [#I-15]

Some interviewees indicated that they had limited issues securing payment. [e.g., #I-08, #I-09, #I-35, #I-47, #I-48, #I-56, #I-2] For example:

- The representative of a Native American-owned DBE professional services firm commented that prompt payment has not been an issue with his firm. He added, “All of the ADOT work is monitored online. Private work is riskier, and I have experienced issues with that on the private side.” [#I-60]
- The representative of a white woman-owned professional services firm indicated that the general contractors the business works for, pay the business on time and will even pay them early “when we have a little cash flow crunch.” [#I-64]

**Denial of opportunity to bid or unfair rejection of bid.** Business owners and representatives reported on their knowledge or experience with denial of opportunity to bid.

Some firms reported denial of opportunity experiences. [e.g., #TO-01, #I-16, #I-39, #I-76] For instance, comments include:

- One firm reported that restrictive bidding requirements “push out” small companies from bidding and securing opportunities in the public sector. This Native American owner of a construction firm reported that with restrictive license requirements “government gives money to bigger companies and pushes smaller companies out [from bidding opportunities].” [#AS-34]
- The white owner of a small construction firm reported that the firm has sought opportunities to provide services to government agencies, but that they have been denied the opportunity to bid because some agencies select from a preferred list of vendors. [#I-52]
- A representative of an industry association commented that a lot of firms that come to her feel like “they didn’t get a fair shake” regarding an opportunity to secure a bidding opportunity. [#TO-06]

Other interviewees indicated no experience with any issues regarding denial of opportunity to bid. [e.g., #I-05, #I-06, #I-09, #I-10, #I-13, #I-14a, #I-19, #I-21a, #I-25, #I-27, #I-28, #I-36, #I-42, #I-47, #I-48, #I-55, #I-71, #I-72, #TO-07]

Many interviewees gave examples of unfair rejection of bid. [e.g., #I-06, #I-19, #TO-01, #I-28, #I-35, #I-39, #I-55, #I-71, #I-77, #TO-07] Comments include:

- A representative of a majority-owned professional services firm reported that the firm submitted a proposal for an airport commission project that was rejected while the company that was awarded the project had a relative working for the commission. He added that the commission was later sued by another competitor. [#I-07]
- The Hispanic American female owner of a construction firm reported that experienced an had an unfair rejection of bid because they were not DBE certified. [#I-26]

- An African American owner of a DBE professional services firm reported that although ADOT has many platforms, they pre-determine firms they want to work on a project. [#I-19]
- The white owner of a small professional services firm reported, “Not having the ability to bid on bigger projects restricts my ability to grow ... the industry is top heavy.” [#I-18]

Some other business owners indicated no experience with unfair rejection of bids.

[e.g., #I-05, #I-09, #I-10, #I-14a, #I-16, #I-25, #I-36, #I-42, #I-47, #I-48, #I-53, #I-56, #I-62]

**Submitting bids or proposals and not getting feedback.** Lack of feedback from a prime or public entity causes challenges for small or certified firms. Comments include:

- The representative of a majority-owned small construction firm reported that smaller businesses need more access to bidding and feedback on how to win projects, when they are not awarded a project. [#I-15]
- One representative of a minority business industry association reported that many small companies bid work but do not get debriefed on why they did not win the bid. He added that it is important to educate subs that do not win bids on what they need to improve and how they can work to win bids in the future. [#TO-01]
- The white female owner of a DBE/SBC construction firm indicated that firms are not always offered feedback on why a bid was rejected. She reported that bids are typically rejected because of price point. [#I-49]

**Bid shopping and bid manipulation.** Business owners described their experiences with or knowledge of bid shopping and bid manipulation. [e.g., #I-06, #I-07, #I-10, #I-11, #I-16, #I-22, #I-26, #I-34a, #I-35, #I-36, #I-38, #I-39, #I-51, #I-53, #I-61, #I-63, #I-67, #I-71, #I-74, #I-75, #TO-01, #TO-02a, #TO-07, #TO-12]

A number of business owners provided details of bid shopping and bid manipulation experiences. For example:

- Regarding bid shopping and bid manipulations, a white co-owner of a small professional services firm reported that bid shopping “happens all the time.” He added, “There are plenty of firms that go out there and they ask for multiple bids and they just go for the ‘cheapest’ person. I think that happens on a weekly basis.” [#I-29b]
- A white female owner of a DBE/SBC construction firm reported experiencing bid shopping by a prime. Her firm now is more selective when working with prime contractors. [#I-40]

- An African American owner of a DBE professional services firm reported experience with bid shopping. However, he perceived that shopping for quotes is within the rights of the project manager if the entities being considered are all responsible and fair in pricing and not undercutting the competition to win the project. [#I-44]
- The white owner of a construction firm reported that the firm has experienced bid shopping. He explained that it is part of the process of doing business in the industry. [#I-62]

Some interviewees indicated no knowledge of bid shopping or bid manipulation.

[e.g., #I-05, #I-09, #I-14a, #I-19, #I-21a, #I-25, #I-27, #I-47, #I-48, #I-55, #I-72]

**Knowledge of false reporting of good faith efforts or front companies.** The study team asked interviewees about their knowledge of false reporting of good faith efforts, fraudulent reporting of DBE participation or front companies.

A few business owners and representatives reported on evidence of false reporting of good faith efforts or DBE participation on contracts. [e.g., #I-58, #TO-01, #TO-02a]. Comments include:

- The representative of a minority business industry association reported that many large primes only reach out to DBEs to show a good faith effort without ever intending to use them on a contract. [#TO-02a]
- One representative of a minority business industry association reported that a firm working in Mesa insisted that they tried to reach out to DBEs and couldn't find any for a specific type of work. She added that the association was able to provide a list of DBEs that conducted work in that industry and that the firm had not seriously tried to find potential subcontractors to work with. She commented, "They could've used a Google search and two of our firms would've shown up at the top ... clearly there wasn't a good faith effort and they ended up giving the work to their 'friends' in the industry." [#TO-07]
- The African American female owner of a DBE construction firm reported that her firm was kicked off as a subcontractor on a job where the prime was a DBE. She added that due to the prime's certification status, the DBE goal was met, but the prime did not have resources to complete the work and instead engaged her old (large, non-certified) company to do all the work within 30 to 60 days of project launch. [#I-31]

Some interviewees reported having no knowledge of "fronts," or false reporting of good faith efforts. [e.g., #I-07, #I-25, #I-28, #I-29a, #I-42, #I-47, #I-71]

**Unfair treatment or disadvantages for woman-owned or minority-owned businesses in the Arizona marketplace.** Business owners and representatives reported on evidence of any unfair treatment they experienced or observed in the Arizona marketplace.

Many business owners commented that double standards and stereotyping is prevalent in the marketplace that disadvantages minority- and women-owned firms. For example:

- The Hispanic American female owner of a DBE/SBC construction firm reported that there was a large ADOT project where a large firm was told they could ignore the deadlines without penalty. She remarked, “For me, when I hear those types of stories, knowing what I have to do ... it makes me wonder why someone who’s bigger can get away with that [when a DBE like her firm would not]. To me, that is very frustrating.” [#I-08]
- A Hispanic American owner of a goods and services firm reported that the firm had recently dropped their last name [a Hispanic surname] from the name of their company in order to appeal to a larger market and not just Hispanic customers. [#I-74]
- The Hispanic American owner of a goods and services firm reported that at bid meetings, other bidders make assumptions about the quality of his work based on his ethnicity “all the time.” He commented, “... usually when I go to the bid meetings where they invite all the vendors ... for some reason every time someone is going to make a comment about ‘just any landscaper coming in here and bidding on this stuff.’ I know it’s directed to me ... I’m kind of used to it now. It’s happened several times .... I’m not even a landscaper ... I’m bidding the same job you are, I’m just here because I was invited.” [#I-42]
- One white male owner of a goods and services firm indicated when discussing difficulties for minority- or women-owned firm, “My business partner is [from] Bangladesh and feels that if his ‘face’ were associated with the business that we would not be as successful ... a lot of minorities ... have dealt with so much racism. I’m privileged.” [#I-76]
- A representative of a majority-owned construction-related firm reported that he believes that there are additional difficulties for these groups. He explained that the specialty and trade aspect of his firm’s industry has been traditionally viewed as a “man’s work.” He indicated that he is unsure of how to describe the challenges minorities face but that he knows they face challenges that majority-owned firms do not face. [#I-13]
- One white male owner of a construction firm stated, “Women are normally perceived as technically not truck drivers ... I happen to know two of them that could outrun pretty much any guy around.” [#I-51]

- An African American female owner of a DBE construction firm reported that companies stick to using subcontractors that they have worked with before. She added that her business is “being judged before being given a chance,” because firms don’t believe her small company could accomplish the work. She remarked, “If you’re not ... begging ... then you really won’t get the contract.” [#I-31]
- A white female owner of a construction firm indicated that being a woman-owned business is a disadvantage. She added, “When you think of construction, you don’t think of women ... I find it very difficult just because of the nature of the people that actually drive the trucks.” She added that some contractors don’t want to talk to her because she is a woman, and she reported that she has asked her drivers to be on the phone with her so a contractor would hear a man’s voice and then speak with her. She indicated, “It’s just the way society is ... it will never change.” [#I-34b]
- The white owner of a professional services firm reported that there are biases against women-owned businesses in engineering because “it’s a male-dominated culture.” He added, “... women-owned businesses are not given the same credibility.” [#I-17]
- The white female owner of a construction firm reported that there are not very many women in her field. She added that the women that work in her field are not business owners and are typically working for someone else as engineers. She added “You don’t see a lot of women in construction industries ... I grew up around construction ... I still will go to meetings and they’ll (men) look to my husband for answers. He’ll have to say, ‘You’ll have to ask her’” [#I-77]

**A number of interviewees reported additional examples of unfair treatment to exclude or target minority- and woman-owned businesses. Examples include:**

- A representative of a majority-owned construction-related firm reported that minority-owned firms face hard-to-describe covert challenges that majority-owned firms do not face. [#I-13]
- When asked, the Hispanic American female owner of a construction firm reported that there are barriers simply because the firm is “Hispanic and woman-owned.” [#AS-04]
- When asked about unfair treatment in the marketplace, the representative of a minority business industry association remarked, “Certain large companies would do everything they can to get away with not hiring diverse businesses.” He indicated that large companies often make excuses for not hiring DBEs. [#TO-01]
- The Hispanic American male owner of a professional services firm reported that the procurement process for public sector projects is “a very impractical and unfair system because the rich get richer and nobody ... will have access. Unless ... I have the ‘right last name,’ or having the ‘right friends’ in the right position within the big company ... in other words, if I have the network and connections personally and use those to my advantage, which is basically illegal, you can be favored to a small job here and another one there.” [#I-33]

- A white owner of a construction firm reported that there are “absolutely” disadvantages for minority- and woman-owned and other small businesses in his industry due to the large equipment capacity required to obtain large projects and firms’ unwillingness to split project billing between multiple small firms. He commented, “If you don’t have enough equipment, you cannot satisfy the customer’s needs... and they don’t like to split the billing ... they’d rather just go to one big company.” [#I-51]

## E. Insights Regarding Programs and Certification

The study team asked business owners and representatives about their knowledge and experience of business assistance programs and certification. Topics discussed include:

- Contract goals programs or business assistance programs in Arizona;
- Outside expert assistance for the firm;
- Perception of DBE certification process or that of other certifications; and
- Any advantages or disadvantages to DBE certification.

**Contract goals programs or business assistance programs in Arizona.** Interviewees discussed whether their firm has taken advantage of or has any knowledge of any contract goals programs or any business assistance programs in Arizona. [e.g., #I-31, #I-38, #I-43b, #I-44, #I-45, #I-46, #I-47, #I-48, #I-49, #I-57, #I-60, #I-61, #I-67, #I-78, #I-70, #TO-02a, #TO-05, #TO-07, #TO-11, #TO-15, #TO-16, #AS-157]

A number of business owners and representatives commented on DBE goals and preference programs, some positively, others negatively. For example:

- A representative of a majority-owned construction-related firm reported that his firm is fine with any “advantage” given to minority- and women-owned firms during the bidding process. [#I-13]
- The Hispanic American owner of a DBE construction firm reported that it is important to realize that many prime contractors limit utilization of DBEs to federally funded jobs that have contract goals, making DBE goals even that much more important for minority- and woman-owned businesses. [#I-01]
- One white female owner of a DBE/SBC professional services firm reported that ADOT having DBE goals on some of its projects encourages primes to use minority- and women-owned firms, “if they want to win.” [#I-72]
- A representative of a minority business industry association reported the need for “set-asides or goals” that “actually represent the community” and higher expectations for primes to comply. [#TO-02a]
- The representative of a majority-owned small construction firm reported that ADOT should give small businesses an opportunity to work on projects. [#I-15]



- Regarding improvements ADOT could make, a white female representative of a majority-owned construction firm commented that there should not always be a DBE goal. She added, “Just because a company doesn’t have a DBE, they shouldn’t be deleted from consideration of a contract.” [#I-68]
- The white owner of a professional services firm indicated, “If there is going to be a ‘set aside’ to help firms get started, I don’t think it needs to be racial- or gender-based.” [#I-11]
- A Hispanic American owner of a construction firm indicated that issuing “sole source” women-owned business projects or “sole source” minority-owned business projects would be the best way to “level the playing field.” He added that although this might be difficult for ADOT to manage, these projects “do work” to level the playing field. [#I-53]

**Many business owners reported to have taken advantage of business assistance programs provided via ADOT or other agencies or non-profits.** Regarding business assistance programs, a representative of ADOT reported that the agency offers business development, a mentor-protégé program, networking and one-on-one counseling for businesses, as well as a class on bidding. [#I-03] Interviewees reported taking advantage of a number of the programs hosted by ADOT, as well as other public agencies. Examples follow:

- The representative of a minority business industry association reported that every piece of instruction is important. [#TO-01]
- One Hispanic American owner of a DBE construction firm reported that he received “a lot of assistance from ADOT.” He commented that the DBE program “helped [him] out a lot.” He explained, “They had a lot of educational programs that I went through.” He went on to say that an ADOT representative that used to assist him “had the answers to everything.” [#I-01]
- A representative of a majority-owned professional services firm reported that the firm has knowledge of contract goals through ADOT and the other government agencies. He added that there is a “DBE fair” that his firm attends to meet firms in the industry. He indicated that ADOT and the City of Phoenix offer a “DBE workshop.” [#I-07]
- The Hispanic American female owner of a DBE/SBC construction firm reported that ADOT has offered many business programs that she has attended including a few tax sessions. One white female owner of another DBE/SBC construction firm indicated that she has attended ADOT-sponsored classes and workshops tailored to DBE-certified firms. [#I-08, #I-40]
- A white female owner of a DBE/SBC goods and services firm reported to have taken some of the classes provided by ADOT. [#I-58]

- One white female owner of a DBE professional services firm reported that she graduated from the DBE workshop and works to stay connected in the DBE network. As a firm offering professional services, she commented that although ADOT's business assistance is beneficial for those in construction it does not provide a firm like hers with all the information needed to better understand ADOT procurement and contracting. [#I-59a]
- A white female owner of a DBE/SBC professional services firm reported that the firm has taken advantage of multi-technical assistance opportunities in Phoenix as part of a technology project. [#I-55]
- The representative of a minority business industry association indicated that they have a group of individuals at the Chamber of Commerce that are "Small business champions." She added, "Once a month they meet and get involved with small firms at chamber meetings. She added that they bring representatives from insurance agencies, banks, and other industry contacts and make warm introductions with them." [#TO-09]

The white owner of a construction firm indicated that "it would be great if you could just go to a website or get notified of upcoming projects to bid and the appropriate contact within that agency." This business owner added that if ADOT offered classes on how to complete a bid with ADOT he would "definitely go" and that a comprehensive website and webinar could be helpful. [#I-62]

Some business owners and representatives discussed time constraints that limit ability to take advantage of available in-person supportive services, or no interest or participation. Comments varied, for example:

- When asked about business assistance programs, a Hispanic American female owner of a construction firm reported that she has not taken advantage of contract goals or business assistance programs because she does not have time to take advantage of them. [#I-26]
- A female representative of a public agency reported that DBEs are usually so busy that they cannot do additional things that could help them, like attending debriefings. [#I-04]
- One white owner of a professional services firm that small businesses do not have enough employees to necessarily attend in-person meetings. [#I-10]
- The white owner of a professional services firm indicated, "I went to a DBE matchmaking thing that was open to small businesses as well. The problem is a lot of those are 'Phoenix-centric.'" He added, "In this day and age, you think we'd be able to do teleconferencing or video conferencing." [#I-11]

- A Hispanic American owner of a professional services firm reported that he has attended the SBA events and classes but didn't find them useful for his business model. [#I-20]
- A white female owner of an SBE professional services firm reported that sometimes seminars offered for small businesses are not that useful since they focus too much on DBEs instead of SBEs. [#I-29a]
- The white female owner of a DBE/SBC professional services firm reported that the firm has not really gained much from the ADOT job fairs or contractor outreach days. She added, "I didn't get any benefit. I think the barriers are again, they don't come with any list of, 'Hey we need these types of people'.... They're taking resumes, but they're not doing anything with them. They're sticking them in a file." [#I-55]
- The white female owner of a DBE/SBC goods and services firm reported that classes, webinars, and financing or bonding assistance would not be useful to the firm. She added, "Most of the webinars that are sent to me by email ... they are things that are more construction-related ... my business is a niche business and [the assistance] never really covered anything that we need." [#I-61]
- Regarding usefulness of programs, a representative of a Native American-owned DBE professional services firm indicated, "Most of the classes regarding preparation of bids, bonding issues or change order requests are programs that I've seen posted, but most of the information was not relevant to me and my business as a professional services firm." [#I-60]
- The white female owner of a DBE/SBC professional services firm reported that small business organizations have not been a "useful" tool for her because they focus on training for financing ability, planning and advertising where she doesn't need assistance. She added that all the DBE supportive services she has been invited to have been in Phoenix, have not been available for live streaming .... This has not been useful for her. [#I-72]

**Some interviewees reported no awareness of supportive services for small businesses.**

[e.g., #I-05, #I-15, #I-27, #I-28, #I-34b, #I-42, #I-54b, #I-56, #I-68, #I-69, #I-74] For example, the Hispanic American owner of a construction firm indicated that there is lack of awareness of tools available for small businesses such as 8(a), SAM or SBA programs. He commented, "A lot of people don't know what SAM is, a lot of people don't know what the SBA is." [#I-53]

**Outside expert assistance for the firm.** The study team asked interviewees if their firm has received assistance from accountants, attorneys or other experts and at what point in the development of the business the firm started getting assistance. [e.g., #I-01, #I-14a, #I-15, #I-16, #I-19, #I-20, #I-27, #I-28, #I-29a, #I-30, #I-32, #I-35, #I-36, #I-37, #I-38, #I-42, #I-44, #I-46, #I-47, #I-48, #I-52, #I-54b, #I-55, #I-56, #I-60, #I-61, #I-62, #I-65, #I-66, #I-67, #I-68, #I-70, #I-72, #I-73, #I-75, #I-76, #TO-07, #TO-08, #TO-12]

**Some firms reported expert assistance at start-up, others at key junctures in their business development.** The representative of a minority business industry association suggested that “all businesses” should take advantage of the tools and programs that exist to help them. He added, “They spend too much time working in their business and not on their business.” [#TO-05] Those who had engaged experts reported:

- When asked about outside expert assistance, a white owner of a professional services firm reported that he gets support from an accounting firm and a law firm. He added that he uses these firms to handle any legal or financial problems and has done so since the start of the company. [#I-17]
- A Hispanic American female owner of a construction firm reported that she had a lot of great friends in IT that helped with the infrastructure of the business. She commented that they use a payroll company and Cloud-based back-office software. She added, “I hired a friend that did payroll ... she came in and did payroll for me and taught me a lot about the business which was great.” [#I-26]
- The white female owner of a construction firm reported that the business has used an accountant for taxes since the business opened. She added that they use an insurance broker as well. She commented, “Small business looking out for a small business.” [#I-34b]
- Regarding professional services assistance for the firm, a white female owner of a DBE goods and services firm reported that she took advantage of consultants that ADOIT provided as part of supportive services and she still uses some of them today. She added, “My accountant was actually paid by the City of Phoenix to help us when we were struggling in the beginning.” She added that after things got better, she hired the accountant to be her CPA. [#I-45]
- The white female owner of a DBE professional services firm indicated that the firm has an accountant and employment lawyer. She explained that she wants to make sure the firm is in a good place as movements such as “Me Too” are on the rise. She reported that she utilized a lawyer during the transition to ownership of the firm. She added that she is considering seeking an additional lawyer specializing outside of employment law. [#I-59a]
- The white owner of an SBC construction firm stated that expert advice can come from competitors. He explained, “A weird resource...is your competitors. A lot of times, they’ve been through it. They go on, they tell you, so you don’t make their same mistakes.” [#I-52]

Interviewees discussed whether there were any barriers to taking advantage of outside experts. [e.g., #I-40, #I-46, #I-48, #I-49, #I-59, #TO-07, #TO-08] For example:

- The representative of a minority business industry association reported that sometimes small businesses cannot afford to hire companies that offer outside expert assistance. He added that legal battles are tough for small companies because they lack financial equity. [#TO-01]
- An African American owner of a DBE professional services firm indicated that “cost is the biggest barrier” to obtaining outside expert assistance. He added that he prefers to patronize small businesses that provide the necessary legal and monetary services at a lower cost and utilizes employees in house when possible to complete tasks under the supervision of his CPA. [#I-44]
- One representative of a Native American-owned DBE professional services firm indicated, “If you’re a small firm I think your 401k fees and brokerage fees are a lot higher because your firm is not worth as much. I don’t think it’s hard to get the help ... it’s hard to get a ‘good deal’ [for that help] when you’re small. Once your portfolio is over a \$1 million you start to see better rates.” [#I-60]
- The co-owner of a woman-owned professional services firm reported that he has reached out to lawyers in the past. He indicated that construction lawyers “don’t really like to go after [disputes between contractors] because they may or may not represent my opponent.” He added that there may be (for example) 800 contractors but only five construction lawyers. [#I-39]

**Perception of DBE certification process or that of other certifications.** Interviewees discussed their perception of DBE certifications and other certifications. [e.g., #I-20, #I-22, #I-31, #I-37, #I-40, #I-44, #I-48, #I-55, #I-58, #I-60, #I-61, #AS-43, #AS-74]

**Many reported challenges or lacked information to certify.** Some of business owners lacked the information they needed to secure certification or misunderstood what firms can qualify for DBE certification and the role of business ownership. Examples follow:

- A female representative of a public Agency commented that many businesses do not see “value in becoming certified” because, with limited information, they think that they will not get work with ADOT regardless of certification status. [#I-02]
- The representative of a minority business industry association reported that the form and interview process for DBE certification is tailored to the construction industry making it difficult for firms from other industries to understand and complete. [#TO-02b]
- Regarding certification, a white owner of a professional services firm reported that it is “impossible” for his firm to qualify as a DBE. He added that due to the criteria for qualification, his firm cannot secure certification as a DBE. [#I-35]

- Offering her insights on DBE certification, a representative of a majority-owned professional services firm reported that the ownership requirements to become a certified firm present a barrier to the firm. She added that because the business is not minority-owned, it does not qualify for the certifications even though the firm employs a very diverse workforce. She commented, “One of our issues is that we check the boxes in theory on diversity and size ... but because of our ownership structure we are not able to get the certification that other firms have .... We’re still supporting diversity and inclusivity without it being at the top in an ownership.” [#I-25]

**Some interviewees gave their insights on the certification process.** A number of these businesses reported that the process was challenging, paperwork-heavy and “intense,” for example, one white female owner of a construction firm reported submitting all of the required documentation to the City of Phoenix, at the request of ADOT. She indicated that the process for applying for DBE certification has been “onerous.” [#I-77] Other comments include:

- Commenting on certification processes, a white female owner of a goods and services firm reported that she started working on the DBE certification, but “there was a lot of paperwork involved and I didn’t follow through.” [#I-69]
- A white female owner of a DBE professional services firm reported that the obtaining DBE certification is “invasive.” She added that the process requires very specific financial information and proof of gender. [#I-59a]
- The white female owner of a DBE/SBC construction firm reported that the DBE certification was a “multi-year process” for her. She added that she filled out the application online many times but would experience “snags.” She commented that a consulting firm assisted in the process for her company to become DBE. She reported that she had started the process and filled out the forms eight or nine times before finally completing the process (with the consultant’s assistance). [#I-49]
- The white female owner of a DBE/SBC professional services firm reported that the process to become certified was not simple or straightforward. She indicated, “The thing I hated most about that process is the last time I had a site visit, I would answer questions and the next question would be ‘Are you or your husband ....’ I’ve already explained 15 times that I am not married .... ‘Quit asking about my husband, I have none!’ They’re trying to catch someone who’s lying about the influence of a non-DBE ownership, but if I make it clear that that doesn’t exist .... ‘Quit asking me!’” [#I-72]
- When asked for her insights on certification, the representative of a minority business industry association reported that members are “treated like criminals” during the City of Phoenix certification review process. [#TO-02a]

A representative of the same minority business industry association reported that the City of Phoenix certification may take up to four months. She added, “Rather than creating opportunities for people, [the City of Phoenix] looks for every possible reason to disqualify firms from certification.” She indicated that this causes many firms to give up on certification. [#TO-02b]

- The representative of a minority business industry association reported that she worked with a firm that was given a hard time by the City of Phoenix during the certification process. She added, “[Agencies] need to do some level of due diligence to understand they type of work that people are trying to be certified for” and better empathize with minorities trying to start a business and find work. [#TO-07]

Several business owners commended the assistance they received, reported improvements to the certification process or noted that certification renewal is far less challenging. For example:

- The Hispanic American female owner of a professional services firm reported that the certifying agency did a great job following up, checking in and guidance was much appreciated throughout the certification process. [#I-75]
- A Hispanic American female owner of a DBE/SBC construction firm commented that the DBE certification process is easier now because it is online. [#I-08]
- The white female owner of a DBE goods and services firm reported that renewing a DBE certification is easier than starting over. Regarding the changes ADOT has made to the DBE certification process, she indicated, “The idea is not to ... deny them. It’s to encourage them to do this better .... They made the process a little more streamlined.” [#I-45]
- Reporting on her experience with certification, an African American owner of a DBE professional services firm stated that the renewals have been easier. [#I-19]
- A white female owner of a DBE professional services commented DBE certification renewal is a less invasive process. [#I-59a]

**Any advantages or disadvantages to DBE certification.** Interviewees expressed their opinions on whether certification is advantageous or disadvantageous to them. [e.g., #I-22, #I-33, #I-36, #I-44, #I-47, #I-48, #I-72, #I-75, #I-60, #AS-05]

**Some reported the advantages of DBE certification.** Interviewees reported that DBE certification can result in increased access to contracting and networking opportunities. Comments include:

- A white female owner of a DBE/ construction firm reported that her firm has gotten more requests for quotes from companies they have not previously worked with since becoming DBE. [#I-49]
- The Hispanic American owner of a DBE professional services firm reported that once a firm is accomplished as a DBE firm, the advantage would be they would have access to more contracts. He added, “I am not seeing any disadvantages yet though.” [#I-37]
- The white female owner of a DBE/SBC construction firm indicated that DBE goals can give her an idea of whether her firm will be more seriously considered for a project. [#I-49]

- The white female owner of a DBE/SBC goods and services firm commented that having a DBE certification brings about a lot of advantages. She added that this is the reason why many firms do not graduate or leave the certification. [#I-58]
- The white female owner of a DBE professional services firm commented that she hopes that DBE certification is beneficial. She added that the firm is assessing financial impact over time to determine if the certification is fiscally beneficial. She reported that work obtained through project development contracts from DBE status can aid in the firm proving themselves to engineering firms, networking and ensuring future projects with large firms. [#I-59a]
- A representative of a minority business industry association reported DBE status an advantage when there are participation goals on projects and contracts. She added that the disadvantage is that DBEs are awarded small parts of contracts and have a hard time growing out of the certification. [#TO-07]

**A number of interviewees reported limited benefit from having DBE certification or that DBE certification is a “hinderance” or does not significantly impact the work they secure. These include:**

- A representative of a minority business industry association reported, “[Some] feel it is a ‘disadvantage’ to them ... we have seen that as being more of a ‘hinderance’ unfortunately.” This representative explained that DBEs are often only awarded small parts of contracts and have a hard time growing out of the certification. [#TO-07]
- The African American owner of a DBE professional services firm commented that he is frustrated by the lack of opportunities for smaller businesses that are working to survive in a difficult market. He added that he would like to grow beyond being a small business and that being a DBE “is a joke.” [#I-44]
- The Hispanic American owner of a professional services firm reported that ADOT does not respect DBE certification. He added that he became frustrated in trying to work with ADOT, specifically because DBE certification did not help his firm get work due to “past experience” requirements. He explained that once the firm had secured certification ADOT informed him, “Ok you can work, but you cannot work with this — you don’t have the experience.” He concluded, “So, what is the point of all this? So basically, it was a big waste of time.” [#I-33]
- A representative of a minority- and woman-owned DBE/SBC construction firm indicated that very few contracts are obtained due to their DBE certification. [#I-38]
- The white female representative of a DBE professional services commented, “Typically the weighting that is given to DBE status is small so that it’s not that hard to overcome in other categories.” [#I-59b]



- The white female owner of a WBE construction firm indicated, “Everyone kept telling me that we need to get WBE certified. It took a while to get all the documents together. And after I got WBE certified ... they were like ‘what about your DBE?’ They are not counting WBE as a DBE entity ... It has been really kind of confusing. ‘Did I really need to get the WBE certification?’ I’ve been WBE-certified for over a year now but haven’t gotten anything because of it. ‘Nothing!’ Nobody has come to us and said, ‘we need a WBE.’” [#I-77]
- When asked about advantages to DBE certification, a white female owner of a DBE/SBC goods and services firm indicated, “Not in Arizona. It matters in California but not here.” [#I-61]
- When asked about advantage or disadvantage to DBE certification, a representative of a woman-owned professional services firm reported that his firm has not experienced any notable benefit from being certified. He commented, “Although we’re a small business, woman-owned, disadvantaged business we don’t know how to use that. We don’t know what to do with it. We don’t know how it’s an advantage at all because we haven’t seen anything of it. We’ve been told a lot of things but haven’t actually seen an advantage or any help.” [#I-32]
- The white female representative of a minority- and woman-owned DBE/SBC professional services firm remarked, “Whether it’s a DBE contract or not is irrelevant to what we are doing.” [#I-48]

**Interviewees from minority- or women-owned firms and representatives of industry trade associations discussed why some firms are not certified.** [e.g., #I-66, #TO-09] For example, some reported no benefit to being certified, others reported limited awareness of the value of having DBE certification, time constraints that impact decisions to apply or not being prepared or able to qualify. Some firms that responded had once been certified but had not renewed. Examples follow:

- One minority female representative of a minority-owned small professional services firm reported that when a DBE-certified firm, it did not reap any benefits. She added that the firm currently has SBE certification which put them on more lists. [#I-21b]
- The Hispanic American owner of a professional services firm reported that his firm was previously certified but found that the certification did not help his firm get any work because of the “previous experience” requirement that his firm could not meet. He concluded that the firm would not pursue DBE certification again. [#I-33]
- Time as a factor, a Hispanic American owner of a construction firm reported that his business is not currently certified due to lack of time to complete the certification application. [#I-53]

- The representative of a minority business industry association reported that some firms are not certified because they have a lack of awareness of the value and benefit of DBE certification, or he added, “Possibly their business operations that aren’t maintained that allows them to get through the qualifying process.” [#TO-05]
- Indicating why she was not certified, a white female owner of a construction firm reported that she was not aware of any certifications. [#I-34b]
- A white female owner of a professional services firm reported that the business is not certified because she was not previously aware of the availability of certification. She added that she would “absolutely” pursue certification now that she is aware of it. [#I-28]

A number of DBEs sought projects with ADOT and other public agencies when no goals were in place. [e.g., #I-38, #I-44, #I-48, #I-57]

## **F. Recommendations for Arizona Department of Transportation and Other Public Agencies**

Business owners and representatives offered recommendations for how to begin to level the playing field for minority- and women-owned firms, as well as what efforts are working and what needs improvement. Topics include:

- Suggestions to address barriers or disadvantages faced by minority- and women-owned firms in the Arizona marketplace;
- What ADOT is doing well to level the playing field for minority- and woman-owned businesses or other small businesses, and any suggestions for improvements; and
- Other insights, feedback or recommendations for ADOT.

### **Suggestions to address barriers or disadvantages faced by minority- and women-owned firms in the Arizona marketplace.** [e.g., #I-25, #I-44, #I-47, #TO-08, #TO-16]

Interviewees provided a wide range of recommendations to address barriers that certified firms and other small businesses face in the Arizona marketplace. Comments include:

- When addressing ways to eliminate barriers, a representative of a minority business industry association reported that there needs to be fair and open contracting and that small businesses need training to grow and be successful. [#TO-01]
- Despite added complexity for the agency, a female representative of a public agency reported that unbundling of large contracts would remove barriers for DBEs seeking work with ADOT and other public agencies. [#I-02]

- A representative of a public agency suggested a myriad of improvements ADOT could initiate including relaxing bonding requirements, requiring contracts under \$200,000 to go to small businesses, removing high insurance requirements, adjusting prequalification requirements, listing expiration dates for ADOT projects, facilitating faster payment, relaxing retention and providing mobilization support for subs. [#I-03]
- One white owner of a professional services firm reported that departments of transportation should provide an accessible forum for small businesses so that they understand where the work comes from. He added that to remove barriers, small business utilization goals are equally important. [#I-10]
- Regarding ways to eliminate barriers, a white female owner of a professional services firm indicated that a platform that listed all work opportunities for small or women-owned would reduce barriers to work. She commented, “It would be helpful if there was a place that you could go to see all of the opportunities as far as government contracts ... and the companies that have the requirements that they have a certain selection of small, woman-owned [businesses] and ... what percentage [of small, woman-owned businesses] was still needed for that company.” [#I-28]
- An African American female owner of a DBE construction firm suggested that to level the playing field, legal support should be provided for small businesses in the event of any unfair treatment while performing in the public sector. [#I-31]
- The white female owner of a small professional services firm commented that having only one “SBE program” combining DBEs and current SBEs would be a good idea. She added that the government could “set aside projects for the small local firms.” She reported that it would be good to move away from mega-projects which small businesses spend too much time and resources on bidding and proposing. [#I-29a]
- One white female owner of a DBE/SBC goods and services firm reported that making opportunities available throughout the entire state would be beneficial to smaller businesses who are not based in the Phoenix area. [#I-61]
- The white female owner of an DBE professional services firm reported that clearer communication would reduce barriers for certified, minority- and women-owned firms. She added, “For instance, if ADOT is not going to renew it’s on call list, it would be nice if those who had been on it, knew that. So that we could prepare and look elsewhere .... Communication is a barrier.” She indicated that re-evaluating the insurance requirements could reduce barriers for small firms, as the amount required often “doesn’t even make sense.” [#I-72]
- When asked about ways to eliminate barriers, white owner of a professional services firm indicated, “ADOT should have a process where firms that want to be considered for a future vendor list can put their name in a hat and be contacted when the vendor application process begins. I’ll be in my mid-60’s by the time I am eligible to get on the list again at ADOT.” [#I-65]

- A female representative of a public agency reported that DBEs view BECO as an agency that is there to protect them and help them run their businesses, including helping them with contracts in detail. She reported that there are some programs that they have that help with that but that the compliance department is not directly supposed to assist DBEs in that way. She remarked that there is a “misconception” about the DBE program and that DBEs need to realize that they are small businesses with a designation that helps them overcome barriers but that ultimately, they must run their own businesses. [#I-04]

**One business owner demonstrated that the barriers faced by minority- and women-owned firms can impact the culture and economics of many Arizona communities. This business owner stated:**

- The female African American owner of a DBE professional services firm reported that although networking events are great, there needs to be more awareness of the small and certified firms that can provide solutions and work in the industry. She commented, “The ‘202’ is a 20-year project ... what does that do for communities? [There are DBE firms and other small businesses in the industry that are not awarded contracts] that do nothing.” She explained, “That does not leave a financial impact on the local community [if primes are not hiring] local subs for their jobs, [and to] see a recirculation of dollars back in the community. ‘What things would the ‘202’ do for South Phoenix? Who is going to hire minorities and felons that cannot [currently find jobs] but could get jobs if there are positions and provisions that are made that allow for communities to be a part of [projects]?’ There are so many things that the local community fights against because they don’t feel that they are respected ... recognized, [and] they don’t feel that their voice matters ... a lot of that resistance would go away ... if there was an outreach [effort]. ‘Who is going to reach out to the local community for jobs?’ Your minority firms because they’re in those communities. These big companies don’t drive through South Phoenix unless they are going to work.” [#I-19]

She noted that there needs to be resources to help; ADOT has grants that can help these businesses and communities. She commented that ADOT needs to do a better job of finding new firms to work with and expand their reach beyond who they have worked with before. She added that there are “viable companies” in Phoenix that need a level playing field. [#I-19]

**What ADOT is doing well to level the playing field for minority- and woman-owned businesses or other small businesses, and any suggestions for improvements.** [e.g., #I-13, #I-14a, #I-22, #I-25, #I-28, #I-38, #I-58, #I-60, #I-71, #I-72, #TO-07, #TO-11]

**Many interviewees reported on what ADOT is doing well to support and encourage development of DBEs and other small businesses. Comments include:**

- An African American female owner of a DBE/SBE construction firm reported that having expos, “Friday Forums,” keeping DBEs in the loop about events and inviting her to events are all helpful practices of ADOT. [#I-31]

- A representative of a minority business industry association reported that ADOT offers beneficial networking opportunities and that they are making other “good efforts.” [TO-02a]
- When asked what ADOT is doing well, a representative of a majority-owned professional services firm reported that ADOT does a good job reaching out to notify firms of the opportunities for work. [I-07]
- The Hispanic American female owner of a DBE/SBC construction firm indicated, “If you have an issue, [ADOT is] very open to talking with you and I appreciate that very much. It’s not something that the City of Tucson does, so I am extremely appreciative.” [I-08]
- An African American owner of a DBE professional services firm stated that BECO is doing a good job. [I-44]
- The white female representative of a minority- and woman-owned DBE/SBC professional services firm commented, “Everything that they’re doing is a genuine effort.” She added that ADOT is doing a genuinely good job at helping small businesses be successful. [I-48]
- A Hispanic American female owner of a DBE professional services firm reported that ADOT’s business development program is “really effective.” She added, “[ADOT’s] great as leaders in terms of driving the marketplace to be accepting of small businesses.” [I-57]
- One white female owner of a DBE/SBC construction firm reported that workshop opportunities provided by ADOT are beneficial. She added that she was unaware the workshops were available at the time the business started because her firm was not yet DBE. [I-49]
- The white female owner of a DBE professional services firm commented, “My impression is that they continually evaluate their DBE Program and their DBE goals.” She added that ADOT hosts meetings, workshops and luncheons for various groups and task forces to discuss the DBE Program and goals. [I-59a]
- One Hispanic American owner of a DBE professional services firm indicated, “I appreciate the fact that consideration is given to minority-owned businesses. It speaks highly to the fairness that ADOT is going towards. The agencies I’ve dealt with have the public’s best interest at heart, they work best to do what’s right.” [I-37]
- Regarding what ADOT is doing well, a representative of a minority business industry association reported that ADOT does a “great job” with investigations and compliance issues. [TO-01]

A number of interviewees indicated that the ADOT Disparity Study further demonstrates ADOT's interest in supporting the development of minority- and women-owned firms and other small businesses. [e.g., #I-45, #TO-07] Comments include:

- Some firms commented positively on being contacted to participate in the ADOT Disparity Study and that ADOT conducting a disparity study is a “step in the right direction.” For example, an African American owner of a DBE professional services firm reported that she was happy that her firm received a call to be a part of the study. The white female owner of a professional services firm reported that the call to participate in the ADOT Disparity Study is a “step in the right direction.” [#I-19, #I-56]
- The Hispanic American female co-owner of a construction firm commented that she appreciates that ADOT is reaching out to minority- and women-owned firms like her own. [#I-54b]
- One white female owner of a small professional services firm commented that she appreciates ADOT conducting this study and talking to the community in order to learn about current marketplace conditions. [#I-29a]
- A white representative of a minority-owned small professional services firm reported happiness that the firm was called to participate in the disparity study adding that he was not aware of any other agencies reaching out to firms for similar studies. [#I-21a]
- The representative of a minority business industry association commented that he was really impressed with how extensive the availability survey questions were and that he is happy that ADOT is taking the time to conduct a study to make their programs and offerings “more successful and competitive.” [#TO-05]
- Offering his insights on the study, a white male co-owner of a small professional services firm reported appreciation for the disparity study adding that it is important for ADOT to follow through and make changes based on the results of the research. [#I-29b]

Interviewees discussed how ADOT-sponsored programs or practices could be improved or changed. [e.g., #I-33, #I-36, #I-66, #I-70, #I-71, #I-72, #TO-07, #AS-117] Comments include:

- A representative of a public agency reported that establishing SBE goals, providing qualified firms access to ADOT-supported training and loan programs and creating an ADOT-sponsored “construction management development academy” would help small firms compete as primes and learn the expectations of the industry. [#I-03]
- Regarding suggestions for improvement, a representative of a minority business industry association reported that there needs to be more transparency and that local companies should be considered before out-of-state firms. She added that the timelines for certification through should be shortened (specifically identifying the City of Phoenix certifying agency's process). [#TO-02a]

- To secure a contract, a female representative of a majority-owned professional services firm reported that the challenge for any small firm seeking work with ADOT would be to prove “expertise” in any given area. Additionally, she stated that the RFQ for “blanket contracts” should be streamlined with an easier way to extend contracts that are going well. [#I-05]

- The representative of a Native American-owned goods and services firm reported that it would be helpful for ADOT, as much as possible, to not cancel projects after businesses have already gone through the work of preparing bids. [#I-50]

He commented, “It would be great if they would communicate a little more than just ‘that’s been deleted’.... It’s frustrating to put in three days of work for nothing.” He offered that he hasn’t experienced projects being cancelled with public agencies other than ADOT. [#I-50]

- The white owner of a professional services firm indicated, “If there is going to be a set aside to help firms get started, I don’t think it needs to be racial- or gender-based.” [#I-11]

He added, “The portal they use for proposal and invoicing is very cumbersome. I think they’ve gone over the top trying to secure it to the point where a small business doesn’t have the resources to address things that are heavily bureaucratic that take away from productivity.” [#I-11]

- The white owner of a construction firm reported that ADOT should throw out the highest and lowest bid to get bids that are “tight and more reflective of the actual costs and a fair profit for the job.” He added that a JOC should give an allowance to firms that are outside of the Phoenix area and per diem for transportation and employee costs. [#I-16]
- When surveyed, the Asian American owner of a professional service firm reported, “ADOT systematically eliminated discipline-specific on-calls which eliminated the ability of small businesses to directly do business with ADOT. ‘I personally tried contacting the ADOT director and management regarding this and it is disheartening that the largest agency in the state does not give any business to small sized firms.’” [#AS-96]
- When asked, the female representative of a white woman-owned construction firm reported that “... support small businesses” and “political people need to stop the BS.” [#AS-07]

**Any other insights, feedback or recommendations for ADOT.** [e.g., #I-36, #I-47, #I-66, #I-72, #TO-07, #AS-06]

Many reported on the specifics of ADOT procurement practices and compliance, and how they could be improved. Comments include:

- An African American owner of a DBE professional services firm remarked that the BECO office is doing a good job but should be led by top level officials. He reported that in Texas the BECO office reports directly to the governor. He added that increasing the level of leadership in charge of the office would create a greater opportunity for changes and improvements. [#I-44]
- Offering his recommendations, a Hispanic American owner of a construction firm indicated suggested that a mentor program that matches small, disadvantaged firms with established, but similarly disadvantaged firms would help small businesses thrive. He suggested that a mentor program could stop the continuous cycle of “good ol’ boy” networks in Arizona. [#I-53]
- The representative of a minority business industry association reported that it would be very valuable if ADOT would engage “third-party” firms to improve the certification process. She added that current certifying agencies, such as the City of Phoenix, need to be more “customer friendly” and give applicants a “fair chance” instead of “denying for the sake of denying.” [#TO-02a]
- An African American owner of a DBE professional services firm reported that ADOT “needs to make a harder push with the primes.” She added that the large primes need to go into Phoenix communities and that they could help mentor DBE and other small businesses. [#I-19]
- The white owner of a professional services firm reported that he would like to see ADOT present details of the statewide opportunities and what projects are upcoming. He commented that many agencies give a forecast of what projects are coming up. [#I-17]
- One white female owner of a DBE/SBC construction firm commented that the quantities and scopes of work use to be listed on advertisements for ADOT projects. She added that the information has not been listed on advertisements for the last year or two. She reported that the entire bid packet must be downloaded to see the different scopes of work and can take a lot of time. [#I-49]
- The white female owner of a DBE professional services firm commented that it is important for ADOT not to treat professional services as if it is asphalt procurement or other services. She added that it is important to consider criteria beyond logistics and the lowest bid to ensure the highest quality work is accomplished. She reported that there are a variety of survey techniques to determine the best fit for a professional services job. She added that many individuals within the professional services category have high degrees and could be better serving ADOT. [#I-59a]



- A white owner of a professional services firm reported that ADOT should create more projects for veteran-owned businesses. He added that ADOT should allow local agencies to help select subs and primes on ADOT projects in their area. [#I-35]
- One white owner of an SBC construction firm reported that recently there have been companies from other states that have started undercutting prices on contracts. He indicated, “One of the trends that I’m seeing is a lot of out-of-state companies go and do the many stages of contractor work and basically end up hiring people for barely enough money. It’s a trap for everybody.” [#I-52]

**Some reported the need for more training opportunities for small businesses.** Examples include:

- The representative of an industry association reported that it would help small businesses if there was training on how to navigate government procurement. He commented, “Arizona Public Service has a program ... they do some education, some training classes on how to do procurement with APS. It’s multiple classes over a couple of months, a series of classes to learn the ins and outs of putting together the proposals to do business with APS. It’s targeted towards small businesses. It might be beneficial if ADOT had something to that effect if they’re wanting to get more small businesses.” [#TO-04]
- One white representative of a woman-owned professional services firm indicated that it could be helpful if a “trade show” of sorts were hosted in which DBE firms could “introduce” themselves to prime contractors. [#I-32]
- When asked for suggestions, a Hispanic American female owner of a DBE professional services firm suggested that ADOT make podcasts and videos on “specific and recurring topics.” [#I-57]
- The white owner of a construction firm indicated that it would be “fantastic” if ADOT offered classes on how to work with ADOT. He commented, “I wouldn’t even know where to begin, how to even bid on something or even where to go look for something to bid on. I don’t know any of that information.” [#I-51]
- The Asian American owner of a DBE/SBC professional services firm indicated, “There should be a process where the other disciplines should not be able to cross over after a certain amount of years in the program because the primes are learning from the DBE sub and then they will cut them off for future work and do that type of work in-house.” [#I-63]
- Commenting on the paper intensiveness of working with ADOT, a Hispanic American owner of a construction firm reported that paperwork should be simplified. He added that he had to hire help for paperwork. [#I-71]

- A Hispanic American owner of a goods and services firm reported that he would like training on how to better understand what the time commitment and requirements would be for pursuing DBE contracts and certification. He added that he would like to know about “common mistakes” that people make when submitting bids to ADOT and how to ensure that bids are successful. [#I-74]
- The white female owner of a WBE construction firm reported that she would like to see additional clarification of the distinction between DBE and WBE certifications. She added that she thought the two certifications were synonymous. She indicated, “When I got my WBE, I was told that counted for a DBE certification. But when we went to go pursue projects requiring that, I was told “NO!” ...That the WBE that we got...that didn’t count. Nothing counted except getting a DBE through the Department of Transportation. So technically, women-owned businesses in the eyes of these contracts are not a disadvantaged business. That doesn’t count.” [#I-77]

## APPENDIX K.

### Business Assistance Programs in Arizona

ADOT directly provides business assistance to DBEs and other small firms. Appendix K provides examples of small business assistance provided nationally or in Arizona by other organizations.

#### A. National Programs

**Internal Revenue Service Small Business and Self-Employed Tax Center.** The IRS provides a one-stop assistance center for small businesses or self-employed entrepreneurs. It includes information on independent contractors, preparing and filing taxes, online learning workshops, and the stages of owning a business.<sup>1</sup>

**Minority Business Development Agency (MBDA).** MBDA fosters establishment and growth of minority-owned businesses by providing technical assistance and resources related to business financing, contract opportunities, and job creation and retention.<sup>2</sup>

**National Minority Supplier Development Council (NMSDC).** The council is a corporate member organization focused on increasing business opportunities for certified minority-owned businesses. It operates the Business Consortium Fund, a nonprofit business development program, which offers financing programs and business advisory services for its members.<sup>3</sup>

**Procurement Technical Assistance Centers (PTACs).** PTACs help small businesses access government contracts. PTAC assistance includes help with government certifications, a bid matching service, a mentor-protégé program, procurement workshops and advice on proposals.<sup>4</sup> AZPTAC has sites in Glendale, Mesa, Phoenix, Sierra Vista, Tucson and Yuma.

**Operation Hope Small-Business Empowerment Program.** The Operation Hope program assists aspiring entrepreneurs in low-wealth neighborhoods. The program combines business training and financial counseling with access to small business financing options. Participants complete a 12-week training program, plus workshops on business financing, credit and money management.<sup>5</sup>

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<sup>1</sup> See <https://www.irs.gov/businesses/small-businesses-self-employed>

<sup>2</sup> See <https://www.mbda.gov/>

<sup>3</sup> See <https://www.nmsdc.org/>

<sup>4</sup> See <https://azptac.com/>

<sup>5</sup> See <https://operationhope.org/small-business-development/>

**Small Business Development Centers (SBDCs).** U.S. Small Business Administration financially supports SBDCs throughout the country to provide small business training and business counseling to small business owners and prospective entrepreneurs. In Arizona, the U.S. SBA partners with community colleges to operate SBDCs in Casa Grande, Flagstaff, Kingman, Phoenix, Prescott, Show Low, Sierra Vista, Thatcher, Tucson and Yuma.<sup>6</sup>

**Southwest Small Business Transportation Resource Center (SBTRC).** The Southwest SBTRC serves small businesses in Arizona, California, Hawaii and Nevada. It provides technical assistance to build the capacity of small and disadvantaged businesses, including business analyses, market research and procurement assistance, general management and technical assistance, business counseling and coaching, regional planning committees, liaison between prime contractors and subcontractors, outreach/conference participation, and capital access and surety bond assistance.<sup>7</sup>

**U.S. Chamber Small Business Division.** The Small Business Division offers free tools such as the Small Business Office Playbook and helps with selecting offices, cost control and choosing suppliers.<sup>8</sup>

**U.S. Department of Defense.** The U.S. Department of Defense provides assistance to small businesses interested in participating in DoD contracts. It also applies incentives for using small businesses, American Indian-owned businesses, women-owned small businesses and firms located in historically underutilized business zones (HUBzones). Certain prime contracts are required to establish small business subcontracting programs.

DoD also operates a mentor-protégé program that matches large firms with small disadvantaged businesses, women-owned small businesses, service-disabled veteran-owned small businesses and. Mentors are reimbursed for mentoring expenses or are provided credit toward their small disadvantaged business subcontracting goals.

**U.S. Department of Transportation Office of Small and Disadvantaged Business Utilization (OSDBU).** The OSDBU offers a range of programs and resources to assist small and disadvantaged businesses. Initiatives include a mentor-protégé program, a bonding assistance program, the Women and Girls in Transportation Initiative and a short-term lending program. OSDBU partners with the Surety and Fidelity Association of America (SFAA) to help small businesses become bond ready.<sup>9</sup>

**U.S. Small Business Administration (SBA) Office of Veterans Business Development.** U.S. SBA Office of Veterans Business Development provides programs related to business training, counseling and assistance. It also oversees federal procurement programs for veteran- and service-disabled veteran-owned small businesses.<sup>10</sup>

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<sup>6</sup> See <http://www.azsbd.net/>

<sup>7</sup> See <https://www.transportation.gov/osdbu/sw-region-sbtrc>

<sup>8</sup> See <https://www.uschamber.com/members/small-business>

<sup>9</sup> See <https://www.transportation.gov/content/office-small-and-disadvantaged-business-utilization>

<sup>10</sup> See <https://www.sba.gov/offices/headquarters/ovbd>

**U.S. Small Business Administration (SBA) 7(a) Loan Program.** The SBA 7(a) Program provides small businesses access to up to \$5 million in loans to fund startup costs, buy equipment, purchase new land, repair existing capital and expand an existing business.<sup>11</sup>

**U.S. Small Business Administration (SBA) 8(a) Business Development Program.** The SBE 8(a) Business Development Program is a business assistance program for small disadvantaged businesses. It offers a broad scope of assistance to firms certified under the program (companies that are owned and controlled at least 51 percent by socially and economically disadvantaged individuals).<sup>12</sup> Program participants can compete for set-aside and sole-source federal contracts.

## **B. Statewide and Local Programs**

Examples of programs provided by Arizona-based organizations (or local chapters of national organizations) include the following.

**American Subcontractors Association (ASA) of Arizona.** ASA offers members subcontractor advocacy, workshops covering contract negotiations, seminars, networking opportunities, insurance guidance and information on the bidding process.<sup>13</sup>

**Arizona@Work.** This statewide workforce development network helps employers recruit, develop and retain the best employees for their needs. Arizona@Work provides information and links for a variety of issues, from recruitment and training to tax credit programs and business consulting.<sup>14</sup>

**Arizona Builders Alliance (ABA).** The Arizona Builders Alliance represents over 300 member companies, including contractors and professional service firms. The ABA offers members education services in the form of craft training and management education, networking, business development opportunities and legislative advocacy on behalf of the Commercial Construction Industry.<sup>15</sup>

**Arizona Chapter of Associated General Contractors of America (AZAGC).** Members of AZAGC have access to classes taught by industry professionals, networking events and other business assistance. The AZAGC serves as a certified collective bargaining agent that can provide representation for individual firms with labor unions.<sup>16</sup>

**Arizona Commerce Authority Small Business Support (ACA).** The ACA provides information, incentives and support for small businesses. It provides event calendars, information about incentives for small businesses and a checklist program to help navigate the process of starting a business.<sup>17</sup>

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<sup>11</sup> See <https://www.sba.gov/partners/lenders/7a-loan-program/types-7a-loans>

<sup>12</sup> See <https://www.sba.gov/category/business-groups/minority-owned>

<sup>13</sup> See <https://www.asa-az.org/>

<sup>14</sup> See <https://arizonaatwork.com/>

<sup>15</sup> See <https://www.azbuilders.org/>

<sup>16</sup> See <http://www.azagc.org/>

<sup>17</sup> See <https://www.azcommerce.com/small-business>

**Arizona Construction Trades (ACT).** ACT is a non-profit trade association representing more than 177 specialty trade contractors and material supplier in the construction industry. ACT offers members access to networking, safety training and legislative lobbying.<sup>18</sup>

**Arizona Small Business Association (ASBA).** ASBA is a membership organization helping small businesses grow and achieve success. It provides education, mentoring and one-on-one counseling.<sup>19</sup>

**Arizona State Trade Expansion Program (STEP).** AZ STEP assists small businesses to enter export markets for the first time or to expand into new markets. This will enable 98 percent of the businesses in Arizona to increase their revenues via international sales and to be engines for job creation and economic growth in Arizona.<sup>20</sup>

**Arizona Transportation Builders (ATB) Association.** ATB represents construction contractors, material suppliers, architects and engineers who work in the infrastructure construction industry. Members of ATB have access to advocacy, networking and safety training courses provided by the association.<sup>21</sup>

**Arizona Women's Education and Entrepreneur Center (AWEEc).** AWEEc provides education and resources through our business training and workshops, one-on-one counseling, online programs, mentoring and support networks to increase the number of women-owned small businesses and assist with their growth; support women who see entrepreneurship and small business as a form of self-sufficiency; and assist those who are socially and/or economically disadvantaged.<sup>22</sup>

**Associated Minority Contractors of Arizona (AMCA).** AMCA is an Arizona-based advocacy group dedicated to promoting minority- and women-owned contracting firms. It provides seminars and workshops designed to help minority contractors better compete in the public and private sectors.<sup>23</sup>

**City of Scottsdale Economic Development Department.** The City of Scottsdale's Economic Development Department offers small business owners resources in the form of training workshops that cover insurance, advertising, billing and creating a project schedule.<sup>24</sup>

**City of Tucson Office of Economic Initiatives.** The Office of Economic Initiatives in Tucson offers small businesses assistance in the form of a Small Business Enterprise Program (SBE) and a Small Business Assistance line. The SBE program offers benefits to small businesses in Tucson that include bid preferences and subcontracting goals for construction, goods, services and materials.<sup>25</sup>

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<sup>18</sup> See <http://www.actaz.net/index.html>

<sup>19</sup> See <https://www.asba.com/>

<sup>20</sup> See <https://www.azcommerce.com/programs/arizona-step-grant/>

<sup>21</sup> See <http://www.movingoureconomy.org/>

<sup>22</sup> See <http://aweecenter.org/>

<sup>23</sup> See <http://amcaaz.com/contents/>

<sup>24</sup> See <https://www.choosescottsdale.com/grow/small-business-startups>

<sup>25</sup> See <https://www.tucsonaz.gov/business/business-incentives-and-assistance-programs#business-assistance-programs>

**Coconino County Basic Business Empowerment (BBE).** BBE is a business development plan training program for Coconino County residents. The program offers business feasibility plan development training utilizing the Centro Business Planning App and Workbook to help entrepreneurs translate business ideas into business plans.<sup>26</sup>

**Expansion Assistance and Development Program (EXPAND).** The Community & Economic Development Department EXPAND program supplies additional collateral on business expansion loans to support companies in obtaining loans from area lending institutions. The program works with conventional commercial loans or U.S. Small Business Administration loans.<sup>27</sup>

**Management and Technical Assistance Program (MTA).** The MTA Program sponsored by the Community & Economic Development Department offers the owners of Phoenix-based small businesses an opportunity to work with private sector consultants and community organizations at no cost. Expertise is available in general business planning, marketing, accounting, financing and loan packaging, organizational development, human resource planning, information systems, quality control, and public and private procurement.<sup>28</sup>

**Phoenix Community Development & Investment Corporation (PCDIC).** The mission of PCDIC is to attract and provide funds for projects that will improve the quality of life of those individuals who live and work in underserved areas of the community. PCDIC focuses on commercial real estate gap financing to attract employers creating jobs, gap financing for commercial real estate for small businesses and non-profits having difficulty securing loans at favorable rates, blight within the city's most distressed New Markets Tax Credit census tracts, and nonprofits expanding services to the disadvantaged communities they serve.<sup>29</sup>

**SCORE Arizona.** SCORE provides small businesses mentoring, webinars/courses on demand, a library of online resources and free or low-cost in-person workshops.<sup>30</sup>

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<sup>26</sup> See <http://www.coconino.az.gov/144/Basic-Business-Empowerment>

<sup>27</sup> See <https://www.phoenix.gov/eod/programs/sbeservices/sbeservices/education-and-networking>

<sup>28</sup> See <https://www.phoenix.gov/eod/programs/sbeservices/sbeservices/education-and-networking>

<sup>29</sup> See <https://pcdic.org/>

<sup>30</sup> See <https://greaterphoenix.score.org/>