



2017 Nevada Transportation Consortium Disparity Study

Nevada Department of Transportation

FINAL REPORT

Final Report

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2017 Nevada Transportation Consortium Disparity Study

Prepared for

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CHAPTER ES.

Executive Summary

CHAPTER ES.

Executive Summary

The Nevada Department of Transportation (NDOT) retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help inform the agency's implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program is designed to address potential discrimination against DBEs in the award and administration of United States Department of Transportation (USDOT)-funded contracts. The program comprises various measures to encourage the participation of minority- and woman-owned businesses including *race- and gender-neutral* measures—which are designed to encourage the participation of all businesses—and, potentially, *race- and gender-conscious* measures—which are designed to specifically encourage the participation of minority- and woman-owned businesses (e.g., using DBE contract goals).

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

- The percentage of contracting dollars (including subcontract dollars) that minority- and woman-owned businesses received on construction; professional services; and goods and support services contracts that NDOT awarded between January 1, 2012 and December 31, 2015 (i.e., *utilization*);¹ and
- The percentage of construction; professional services; and goods and support services contracting dollars that minority- and woman-owned businesses might be expected to receive based on their availability to perform specific types and sizes of NDOT prime contracts and subcontracts (i.e., *availability*).

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

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

NDOT could use information from the study to help refine its implementation of the Federal DBE Program including setting an overall goal for the participation of DBEs in NDOT's Federal Highway Administration (FHWA)-funded contracting; determining which program measures to use to encourage the participation of minority- and woman-owned businesses and DBEs; and, if appropriate, determining which groups would be eligible for any race- or gender-conscious program measures.

¹ The study team considered businesses as minority- or woman-owned regardless of whether they were certified as DBEs through the Nevada Unified Certification Program.

BBC summarizes key information from the 2017 NDOT Disparity Study in four parts:

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

A. Analyses in the Disparity Study

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

- The study team conducted an analysis of federal regulations, case law, and other information to guide the methodology for the disparity study. The analysis included a review of federal, state, and local requirements related to minority- and woman-owned business programs including the Federal DBE Program (see Chapter 2 and Appendix B).
- BBC conducted quantitative analyses of the success of minorities; women; and minority- and woman-owned businesses throughout Nevada. In addition, the study team collected qualitative information about potential barriers that minority- and woman-owned businesses face in the local marketplace through in-depth interviews, telephone surveys, public meetings, and written testimony (see Chapter 3, Appendix C, and Appendix D).
- BBC analyzed the percentage of relevant NDOT contracting dollars that minority- and woman-owned businesses are available to perform. That analysis was based on telephone surveys that the study team completed with more than 1,390 Nevada businesses that work in industries related to the types of construction; professional services; and goods and support services contracts that NDOT awards (see Chapter 5 and Appendix E).
- BBC analyzed the dollars that minority- and woman-owned businesses received on more than 1,600 construction; professional services; and goods and support services prime contracts and subcontracts that NDOT awarded between January 1, 2012 and December 31, 2015 (i.e., the study period) (see Chapter 6).
- BBC examined whether there were any disparities between the participation and availability of minority- and woman-owned businesses on the construction; professional services; and goods and support services contracts that NDOT awarded during the study period (see Chapter 7, Chapter 8, and Appendix F).
- BBC provided NDOT with information from the availability analysis and other research that the agency might consider in setting its three-year overall DBE goal including the base figure and consideration of a "step-2" adjustment (see Chapter 9).
- BBC reviewed NDOT's current contracting practices and DBE program measures and provided guidance related to additional program options and refinements to those practices and measures (see Chapter 10 and Chapter 11).

B. Utilization and Disparity Analysis Results

NDOT used DBE contract goals on many of the FHWA-funded contracts that it awarded during the study period. Prime contractors could meet contract goals by either making subcontracting commitments with certified DBEs at the time of bid or by showing that they made all reasonable good faith efforts to fulfill the goals but could not do so. Utilization and disparity analysis results are relevant to NDOT’s determination of which groups could be eligible for any race- or gender-conscious measures. Courts have considered the existence of substantial disparities between utilization and availability for particular groups as inferences of discrimination in the local marketplace against those groups and as support for using race- and gender-conscious program measures. In addition, that information is useful for NDOT to examine the effectiveness of the measures that it is currently using to encourage the participation of minority- and woman-owned businesses.

Utilization results. BBC measured the participation of minority- and woman-owned businesses in terms of *utilization*—the percentage of prime contract and subcontract dollars that minority- and woman-owned businesses received on NDOT prime contracts and subcontracts during the study period. Figure ES-1 presents the overall percentage of contracting dollars that minority- and woman-owned businesses received on construction; professional services; and goods and support services contracts that NDOT awarded during the study period. The darker portion of the bar represents the percentage of contracting dollars that certified DBEs received during the study period. As shown in Figure ES-1, overall, minority- and woman-owned businesses received 5.2 percent of the relevant contracting dollars that NDOT awarded during the study period. The darker portion of the bar shows that very few of those contracting dollars—1.6 percent—went to certified DBEs.

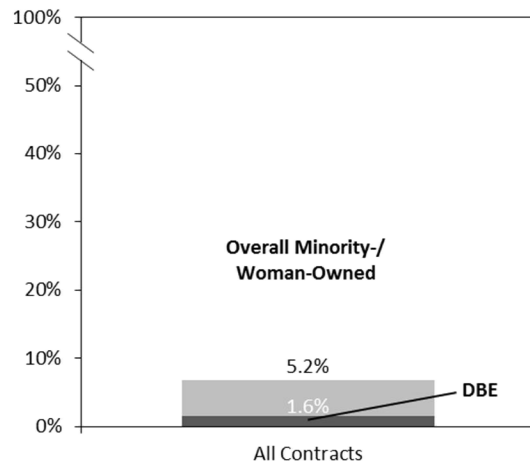
Figure ES-1.
Participation of minority- and woman-owned businesses

Notes:

The study team analyzed 1,679 prime contracts and subcontracts.
The darker portion of the bar represents participation of certified DBEs.
For more detail, see Figure F-2 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.



Disparity analysis results. Although information about the participation of minority- and woman-owned businesses in NDOT contracts is useful on its own, it is even more useful when it is compared with the level of participation that might be expected based on the availability of minority- and woman-owned businesses for NDOT work. In the disparity analysis, BBC compared the participation of minority- and woman-owned businesses in NDOT prime contracts and subcontracts with the percentage of contract dollars that those businesses might be expected to receive based on their availability for that work. BBC expressed both participation

and availability as percentages of the total dollars that a particular group received for a particular set of contracts. BBC then calculated a *disparity index* by dividing participation by availability and multiplying by 100.² A disparity index of 100 indicates an exact match between participation and availability for a particular group for a specific set of contracts (often referred to as *parity*). A disparity index of less than 100 may indicate a disparity between participation and availability, and disparities of less than 80 are described in this report as *substantial*.³ Disparity analysis results for key contract sets are described below.

All contracts. Figure ES-2 presents disparity analysis results for all in-scope construction; professional services; and goods and services contracts that NDOT awarded during the study period. The line down the center of the graph shows a disparity index of 100, which indicates parity between participation and availability. For reference, a line is also drawn at a disparity index level of 80, because many courts use 80 as a threshold for what indicates a substantial disparity. As shown in Figure ES-2, overall, the participation of minority- and woman-owned businesses in contracts that NDOT awarded during the study period was substantially lower than what one might expect based on the availability of those businesses for that work. The disparity index of 35 indicates that minority- and woman-owned businesses considered together received approximately \$0.35 for every dollar that they might be expected to receive based on their availability for the relevant prime contracts and subcontracts that NDOT awarded during the study period. All groups except Native American-owned businesses exhibited disparity indices substantially below parity.

Figure ES-2.
Disparity indices by group

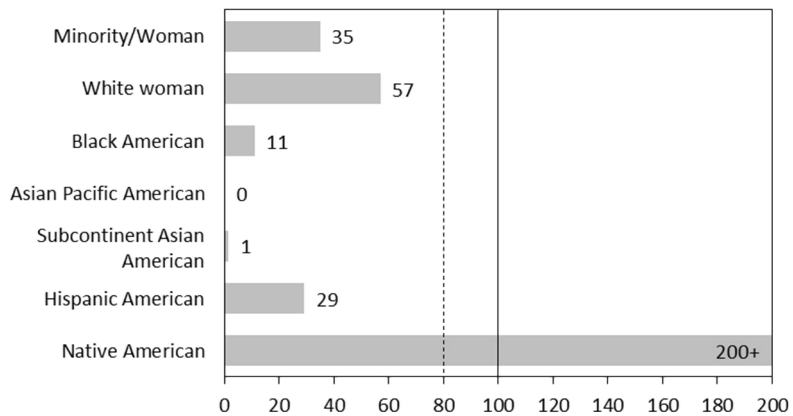
Note:

The study team analyzed 1,679 prime contracts/subcontracts.

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

Source:

BBC Research & Consulting disparity analysis.



NDOT applied DBE contract goals to most of the FHWA-funded contracts that it awarded during the study period, so the disparity analysis results shown in Figure ES-2 are reflective of the use of those measures.

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

³ Several courts deem a disparity index below 80 as being “substantial” and have accepted it as evidence of adverse conditions for minority- and woman-owned businesses. For example, see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng’g Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). See Appendix B for additional discussion of those and other cases.

FHWA-funded contracts. NDOT is a recipient of FHWA funds and awarded FHWA-funded contracts during the study period.⁴ NDOT awarded those contracts using policies and practices that are part of its implementation of the Federal DBE Program including the use of DBE contract goals on most of those contracts. Figure ES-3 presents disparity analysis results separately for FHWA-funded contracts. As shown in Figure ES-3, overall, the participation of minority- and woman-owned businesses in the FHWA-funded contracts that NDOT awarded during the study period was substantially lower than what one might expect based on the availability of those businesses for that work. The disparity index of 40 indicates that minority- and woman-owned businesses considered together received approximately \$0.40 for every dollar that they might be expected to receive based on their availability for the FHWA-funded prime contracts and subcontracts that NDOT awarded during the study period. All groups except Native American-owned businesses exhibited disparity indices substantially below parity.

Figure ES-3.
Disparity indices for
FHWA-funded contracts

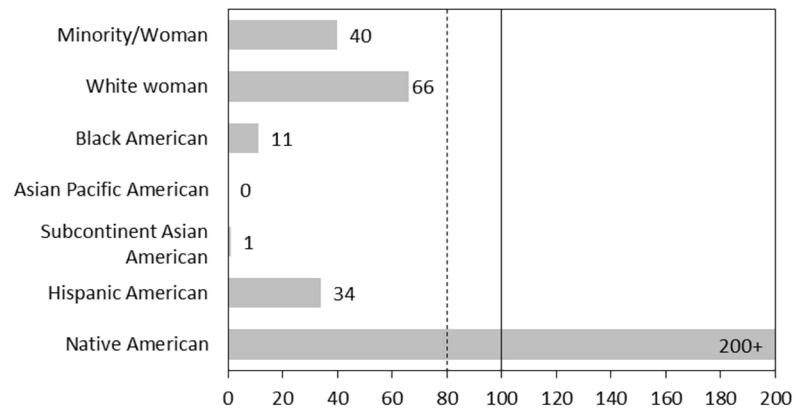
Note:

The study team analyzed 1,039 FHWA-funded prime contracts/subcontracts.

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

Source:

BBC Research & Consulting disparity analysis.



State-funded contracts. Because NDOT awarded most of its FHWA-funded contracts using DBE contract goals, it is important to examine disparities for minority- and woman-business owners on a set of contracts that did not use DBE goals. That analysis will help inform NDOT on whether the continued use of DBE contract goals is appropriate and, if so, which race/ethnic and gender groups might be included as eligible to satisfy those contract goals. Figure ES-4 presents disparity analysis results separately for state-funded contracts. As shown in Figure ES-4, overall, the participation of minority- and woman-owned businesses in the state-funded contracts that NDOT awarded during the study period was substantially lower than what one might expect based on the availability of those businesses for that work. The disparity index of 16 indicates that minority- and woman-owned businesses considered together received approximately \$0.16 for every dollar that they might be expected to receive based on their availability for the state-funded prime contracts and subcontracts that NDOT awarded during the study period. All groups exhibited disparity indices substantially below parity.

⁴ BBC considered a contract to be FHWA-funded if it included at least one dollar of FHWA funding.

Figure ES-4.
Disparity indices for state-
funded contracts

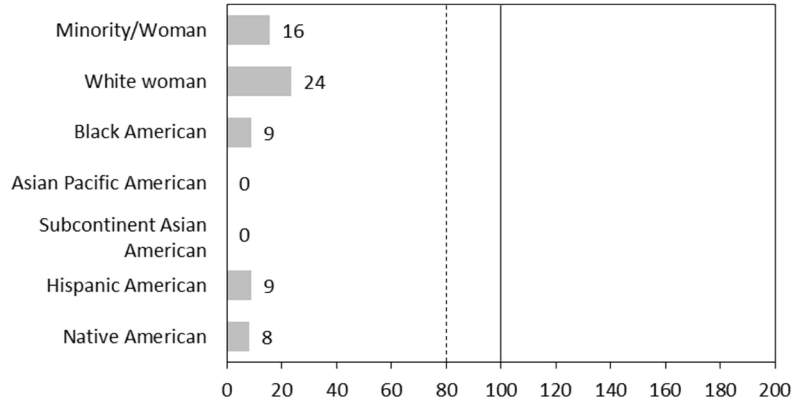
Note:

The study team analyzed 640 state-funded prime contracts/subcontracts.

For more detail, see Figures F-6 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



C. Overall DBE Goal

According to 49 Code of Federal Regulations (CFR) Part 26, an agency is required to develop and submit an overall goal for DBE participation. The goal must be based on demonstrable evidence of the availability of DBEs relative to the availability of all businesses to participate on the agency’s USDOT-funded contracts. The agency must try to meet the goal using race- and gender-neutral means and, if necessary, race- and gender-conscious means.⁵ As specified in the Final Rule effective February 28, 2011, an agency is required to submit its overall DBE goal every three years.⁶ However, the overall DBE goal is an *annual* goal in that an agency must monitor DBE participation in its USDOT-funded contracts every year. If DBE participation for a particular year is less than the overall DBE goal, then the agency must analyze the reasons for the difference and establish specific measures that enable it to meet the goal in the next year.

NDOT must prepare and submit an overall DBE goal for federal fiscal years (FFYs) 2017 through 2019 that is supported by information about the steps that it used to develop the goal. Federal regulations require NDOT to establish its overall DBE goal using a two-step process:

1. Determining a base figure; and
2. Considering a “step-2” adjustment.

Determining a base figure. Establishing a base figure is the first step in calculating an overall DBE goal for NDOT’s FHWA-funded contracts. BBC calculated the base figure by measuring the availability of *potential DBEs*—that is, minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Part 26. BBC examined the availability of potential DBEs for FHWA-funded prime contracts and subcontracts that NDOT awarded during the study period. BBC’s approach to calculating NDOT’s base figure is consistent with relevant court decisions, federal regulations, and USDOT guidance. BBC’s analysis indicates that the availability of potential DBEs for NDOT’s

⁵ 49 CFR Sections 26.45, 26.51.

⁶ <http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/html/2011-1531.htm>

FHWA-funded contracts is 12.8 percent. NDOT might consider 12.8 percent as the base figure for its overall goal for DBE participation.⁷

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

- Current capacity of DBEs to perform agency work as measured by the volume of work DBEs have performed in recent years;
- Information related to employment, self-employment, education, training, and unions;
- Any disparities in the ability of DBEs to get financing, bonding, and insurance; and
- Other relevant data.⁸

Based on information from the disparity study, there are several reasons why NDOT might consider adjusting the 12.8 percent base figure:

- NDOT might consider making an upward adjustment to its base figure to account for barriers that minorities, women, and minority- and woman-owned businesses face in the Nevada marketplace related to human capital, financial capital, business ownership, and business success (for details, see Chapter 3 and Appendices C and D). Such an adjustment would correspond to a “determination of the level of DBE participation you would expect absent the effects of discrimination.”⁹
- NDOT might also consider a downward adjustment to its base figure based on the volume of work that DBEs have performed in recent years on its contracts. NDOT’s utilization reports for FFYs 2011 through 2015 indicated median annual DBE participation of 8.5 percent for those years, which is lower than its base figure. (BBC’s analyses also showed DBE participation on NDOT contracts during the study period to be 1.6 percent.) USDOT’s “Tips for Goal-Setting” suggests that an agency can make a step-2 adjustment by averaging the base figure with past median DBE participation.
- USDOT “Tips for Goal-Setting” states that an agency is not required to make a step-2 adjustment to its base figure as long as it can explain what factors it considered and can explain its decision in its Goal and Methodology document.

⁷ NDOT should consider whether the types, sizes, and locations of FHWA-funded contracts that the agency anticipates awarding in the time period that the goal will cover will be similar to the types of FHWA-funded contracts that the agency awarded during the study period.

⁸ 49 CFR Section 26.45.

⁹ 49 CFR Section 26.45 (b).

D. Program Implementation

Chapter 11 reviews information relevant to NDOT's implementation of the Federal DBE Program. NDOT should review study results and other relevant information in connection with making decisions concerning the program. Key areas of potential refinement include the following:

- NDOT should consider continuing its efforts to network with minority- and woman-owned businesses. NDOT might also consider broadening its efforts to establish a local consortium that hosts quarterly outreach and networking events and training sessions for businesses seeking public sector contracts.
- NDOT should consider exploring ways to increase prime contracting opportunities for small businesses including many minority- and woman-owned businesses. For example, NDOT might consider setting aside small prime contracts for small business bidding to encourage the participation of minority- and woman-owned businesses as prime contractors. NDOT could use the Nevada Emerging Small Business certification economic eligibility requirements or develop their own small business certification program as a component of their Small Business Enterprise (SBE) Program to determine which businesses would be eligible for small business set asides.
- NDOT should also explore ways to increase subcontracting opportunities for small, minority-, and woman-owned businesses. NDOT could consider implementing a program that requires prime contractors to include certain minimum levels of subcontracting as part of their bids and proposals. Prime contractors bidding on the contract would be required to subcontract a percentage of the work equal to or exceeding the minimum for their bids to be responsive.
- NDOT should consider ways to provide more opportunities to learn about contracting opportunities and the bidding process. Small business owners expressed that they would benefit from having NDOT staff available to answer questions related to contracting opportunities. NDOT could also consider offering pre-bid conferences or sample bid documents to offer potential bidders more information related to the bidding process.
- Disparity analysis results indicated that most racial/ethnic and gender groups showed disparities on contracts to which NDOT applied DBE contract goals during the study period. In addition, most racial/ethnic and gender groups showed substantial disparities on contracts to which NDOT did not apply DBE contract goals. NDOT should consider continuing its use of DBE contract goals in the future. The agency will need to ensure that the use of those goals is narrowly tailored and consistent with other relevant legal standards (for details, see Chapter 2 and Appendix B).

As part of the disparity study, the study team also examined information concerning conditions in the local marketplace for minorities; women; and minority- and woman-owned businesses including results for different racial/ethnic and gender groups. NDOT should review the full disparity study report, as well as other information it may have, in determining whether it needs to use any race- or gender-conscious measures as part of its efforts to comply with the Federal DBE Program, and if so, what groups might be considered eligible to participate in such measures.

CHAPTER 1.

Introduction

CHAPTER 1.

Introduction

The Nevada Department of Transportation (NDOT) is responsible for the planning, construction, operation, and maintenance of 5,400 miles of highway and more than 1,000 bridges throughout the entire state of Nevada. As a United States Department of Transportation (USDOT) fund recipient, NDOT implements the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program is designed to address potential discrimination against DBEs in the award and administration of USDOT-funded contracts. NDOT retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help evaluate the effectiveness of its implementation of the Federal DBE Program in encouraging the participation of minority- and woman-owned businesses in its federally-funded contracts. A disparity study examines whether there are any disparities between:

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

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

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

There are several reasons why a disparity study is useful to an agency that implements the Federal DBE Program:

- The types of research that are conducted as part of a disparity study provide information that is useful to an agency that is implementing the program (e.g., setting an overall DBE goal);
- A disparity study often provides insights into how to improve contracting opportunities for local small businesses including many minority- and woman-owned businesses;
- An independent, objective review of the participation of minority- and woman-owned businesses in an agency's contracting is valuable to agency leadership and to external groups that may be monitoring the agency's contracting practices; and
- Agencies that have successfully defended implementations of the Federal DBE Program in court have typically relied on information from disparity studies.

BBC introduces the 2017 NDOT Disparity Study in three parts:

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

A. Background

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

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

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

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

The Federal DBE Program requires an agency to project the portion of its overall DBE goal that it will meet through race- and gender-neutral measures and the portion that it will meet through

¹ <http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/html/2011-1531.htm>

² 49 CFR Part 26.51.

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

NDOT applies DBE contract goals—which are considered a race- and gender-conscious measures—to many of the federally-funded contracts that it awards. Prime contractors bidding on those contracts must either meet the goals by making subcontracting commitments to certified DBEs or by requesting “good faith efforts” waivers. NDOT reviews waiver requests and will grant waivers if prime contractors demonstrate good faith efforts towards compliance with the goals. If prime contractors do not meet the goals through subcontracting commitments or through approved waivers, then NDOT may reject prime contractors’ bids.

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

B. Study Scope

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

Definitions of minority- and woman-owned businesses. To interpret the core analyses presented in the disparity study, it is useful to understand how the study team treats minority- and woman-owned businesses and businesses that are certified as DBEs through NDOT, the McCarran International Airport (McCarran), and the Reno-Tahoe International Airport (RTA). It is also important to understand how the study team treats businesses owned by minority women in its analyses.

Minority- and woman-owned businesses. The study team focused its analyses on the minority- and woman-owned business groups that the Federal DBE Program presumes to be disadvantaged:

- Asian Pacific American-owned businesses;
- Black American-owned businesses;
- Hispanic American-owned businesses;
- Native American-owned businesses;

³ <http://www.dotcr.ost.dot.gov/Documents/Dbe/49CFRPART26.doc>

- Subcontinent Asian American-owned businesses; and
- Woman-owned businesses.

The study team analyzed the possibility that race- or gender-based discrimination affected the participation of minority- and woman-owned businesses in NDOT work based specifically on the race/ethnicity and gender of business ownership. That is, the study team considered businesses as minority- or woman-owned regardless of whether they were or could be certified as DBEs through NDOT, McCarran, or RTA. Analyzing the participation and availability of minority- and woman-owned businesses regardless of DBE certification allowed the study team to assess whether there are disparities affecting all minority- and woman-owned businesses and not just certified businesses.

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

Businesses seeking DBE certification in Nevada are required to submit an application to NDOT, McCarran, or RTA. The application is available online and requires businesses to submit various information including business name; contact information; tax information; work specializations; and race/ethnicity and gender of the owners. The certifying agency reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information.

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

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

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

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

- Classifying minority woman-owned businesses with all other woman-owned businesses; and
- Classifying minority woman-owned businesses with their corresponding minority groups.

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

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

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

Analyses in the disparity study. BBC examined whether there are any disparities between the participation and availability of minority- and woman-owned businesses in NDOT contracts. The study focused on transportation-related construction and engineering contracts that NDOT and subrecipient local agencies awarded between January 1, 2012 and December 31, 2015 (i.e., the study period). NDOT applied DBE contract goals to many of the federally-funded contracts that it awarded during the study period.

Figure 1-1. Definition of potential DBEs

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

- Minority- and woman-owned businesses that have graduated from the DBE Program and have not been recertified;

- Minority- and woman-owned businesses that are not currently DBE-certified but that have applied for DBE certification and have been denied; and

- Minority- and woman-owned businesses that are not currently DBE-certified that appear to have average annual revenues over the most recent three years so high as to deem them ineligible for DBE certification.

At the time of this study, the overall revenue limit for DBE certification was \$22,410,000 based on a three-year average of gross receipts. There were lower revenue limits for specific subindustries according to the U.S. Small Business Administration (SBA) small business size standards. Only a few minority- and woman-owned businesses appeared to have exceeded those revenue limits based on information that they provided as part of availability surveys. The revenue categories that the study team used to classify businesses reflect recent changes to the Table of Small Business Size Standards published by the SBA.

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

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

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

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

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

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

Data collection and analysis. BBC examined data from multiple sources to complete the utilization and availability analyses including telephone surveys that the study team conducted with hundreds of businesses throughout Nevada. The scope of the study team's data collection and analysis as it pertains to the utilization and availability analyses is presented in **Chapter 4**.

Availability analysis. As part of the availability analysis, BBC estimated the percentage of NDOT's prime contract and subcontract dollars that minority- and woman-owned businesses are *ready, willing, and able* to perform. That analysis was based on NDOT data and on telephone surveys that the study team conducted with hundreds of Nevada businesses that work in industries related to the types of contracting dollars that NDOT awards. BBC analyzed availability separately for businesses owned by specific minority groups and white women and for different types of contracts. Results from the availability analysis are presented in **Chapter 5** and **Appendix E**.

Utilization analysis. BBC analyzed prime contract and subcontract dollars that NDOT spent with minority- and woman-owned businesses on contracts that the agency and subrecipient local agencies awarded between January 1, 2012 and December 31, 2015. Those data included

information about associated subcontracts.⁴ Note that NDOT applied DBE contract goals to many of those contracts. BBC analyzed participation separately for businesses owned by specific minority groups and white women and for different types of contracts. Results from the utilization analysis are presented in **Chapter 6**.

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

Further exploration of disparities. BBC explored any additional disparities between the participation and availability of minority- and woman-owned businesses on contracts that NDOT awarded during the study period. Those analyses included comparisons of results for different subsets of NDOT contracts and examinations of bids for a sample of contracts. BBC presents the results of those analyses in **Chapter 8**.

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

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

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

C. Study Team Members

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

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

⁴ Note that prime contractors—not NDOT—actually *award* subcontracts to subcontractors. However, for simplicity, throughout the report, BBC refers to NDOT as *awarding* subcontracts.

Ramirez Group. Ramirez Group is a Hispanic American-owned professional services firm with offices in Las Vegas and Reno, Nevada. Ramirez Group conducted in-depth interviews with businesses throughout Nevada as part of the study team’s qualitative analyses of marketplace conditions.

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

Exstare Federal Services Group (Exstare). Exstare is a Black American-owned disparity study and management consulting firm based in Alexandria, Virginia. Exstare provided advisory services as part of the study and provided reviews of the disparity study report.

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

CHAPTER 2.

Legal Framework

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Legal Framework

As a United States Department of Transportation (USDOT) fund recipient, the Nevada Department of Transportation (NDOT) implements the Federal Disadvantaged Business Enterprise (DBE) Program. The Federal DBE Program is governed by 49 Code of Federal Regulations (CFR) Part 26 and related federal regulations. BBC Research & Consulting (BBC) presents the Legal Framework for the 2017 NDOT Disparity Study in two parts:

- A. Federal DBE Program; and
- B. Legal standards.

A. Federal DBE Program

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

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

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

A determination of economic disadvantage also includes assessing business' gross revenues and business owners' personal net worth (maximum of \$1.32 million excluding equity in a home and in the business). Some minority- and woman-owned businesses do not qualify as DBEs because

¹ BBC considers a contract as USDOT-funded if it includes at least \$1 of USDOT funding.

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

of gross revenue or net worth requirements. Businesses owned by non-Hispanic white men can be certified as DBEs if those businesses meet the requirements in 49 CFR Part 26.

Certification requirements. Businesses seeking DBE certification in Nevada are required to submit an application to NDOT, the McCarran International Airport, or the Reno-Tahoe International Airport. The application is available online and requires businesses to submit various information including business name; contact information; tax information; work specializations; and race/ethnicity and gender of the owners. The certifying agency reviews each application for approval. The review process may involve on-site meetings and additional documentation to confirm required business information.

Measures to encourage DBE participation. Regulations that govern an agency's implementation of the Federal DBE Program require that the agency meets the maximum feasible portion of its overall DBE goal through the use of race- and gender-neutral measures.³ If an agency cannot meet its overall DBE goal solely through race- and gender-neutral means, then it is permitted to use race- and gender-conscious measures—such as using DBE contract goals on individual USDOT-funded contracts—as part of its implementation of the Federal DBE Program. Prime contractors can meet DBE contract goals by either making subcontracting commitments with certified DBE subcontractors at the time of bid or by submitting a waiver showing that they made all reasonable good faith efforts to meet the goals but could not do so.

Given that context, there are several approaches that government agencies could use to implement the Federal DBE Program.

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

2. Using a combination of race- and gender-neutral and race- and gender-conscious measures with only certain groups of certified DBEs considered eligible. Some agencies limit DBE participation in race- and gender-conscious measures to certain racial/ethnic or gender groups based on evidence of those groups facing discrimination within the agencies' relevant geographic market areas (*underutilized DBEs, or UDBEs*). For example, the California Department of Transportation (Caltrans) sets DBE contract goals for which only UDBEs—which does not include all DBE groups—are considered eligible. Caltrans counts the participation of all DBEs toward meeting its overall DBE goal, but only UDBE participation counts toward prime

³ 49 CFR Part 26.51.

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

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

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

B. Legal Standards

NDOT's use of DBE contract goals on certain contracts is considered to be a race- and gender-conscious measure. The United States Supreme Court has established that government programs that include race- and gender-conscious measures must meet the *strict scrutiny* standard of constitutional review.⁵ The two key U.S. Supreme Court cases that established the strict scrutiny standard for such measures are:

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

The strict scrutiny standard is extremely difficult for a government agency to meet. It presents the highest threshold for evaluating the legality of race- and gender-conscious measures short of

⁴ 49 CFR Part 26.43.

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

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

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

prohibiting them altogether. Under the strict scrutiny standard, an agency must:

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

An agency must meet both the compelling governmental interest and the narrow tailoring components of the strict scrutiny standard. A program that fails to meet either component is unconstitutional.

Compelling governmental interest. A government agency must demonstrate a *compelling governmental interest* in remedying past identified discrimination in order to implement race- or gender-conscious measures. A government agency that uses race- or gender-conscious measures as part of a minority- or woman-owned business program has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. Agencies cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions. Rather, they must assess discrimination within their own relevant geographic market areas.⁸

In *City of Richmond v. J.A. Croson Company*, the U.S. Supreme Court held that, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” Lower court decisions since *City of Richmond v. J.A. Croson Company* have held that a compelling governmental interest must be established for each racial/ethnic and gender group to which race- and gender-conscious measures apply. Note that it is not necessary for an agency itself to have discriminated against minority- or woman-owned businesses for it to act. In *City of Richmond v. J.A. Croson Company*, the Supreme Court found, “if [the governmental entity] could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry ... [i]t could take affirmative steps to dismantle such a system.”

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

Narrow tailoring. In addition to demonstrating a compelling governmental interest, an agency must also demonstrate that its use of race- and gender-conscious measures is *narrowly tailored*.

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

There are a number of factors that a court considers when determining whether the use of such measures is narrowly tailored including:

- The necessity of such measures and the efficacy of alternative, race- and gender-neutral measures;
- The degree to which the use of such measures is limited to those groups that actually suffer discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration including the availability of waivers and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.⁹

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

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

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

CHAPTER 3.

Marketplace Conditions

CHAPTER 3.

Marketplace Conditions

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

Minorities in Nevada faced similar barriers. In the 19th and early 20th centuries, discriminatory treatment was common for minorities in Nevada. Black Americans and Hispanic Americans lived in impoverished, racially-segregated neighborhoods that offered poor living conditions. Black Americans and Hispanic Americans also attended racially-segregated schools with few minority teachers and were barred from using the same lunch counters and movie theater seating as non-Hispanic whites. Disparate treatment also extended into the labor market. Hispanic Americans and Black Americans were concentrated in low wage work in the extraction, agriculture, and railroad industries with few advancement opportunities.⁶ They were even barred from working in casinos until the 1970s.⁷

In the middle of the 20th century, many legal and workplace reforms opened up new opportunities for minorities and women nationwide. *Brown v. Board of Education*, *The Equal Pay Act*, *The Civil Rights Act*, and *The Women's Educational Equity Act* outlawed many forms of race- and gender-based discrimination. Workplaces adopted formalized personnel policies and implemented programs to diversify their staffs.⁸ Those reforms increased diversity in workplaces and reduced educational and employment disparities for minorities and women^{9, 10, 11, 12} However, despite those improvements, minorities and women continue to face barriers—such as incarceration, residential segregation, and family responsibilities—that have made it more difficult to acquire the human and financial capital necessary to start and operate businesses successfully.^{13, 14, 15}

Federal Courts and the United States Congress have considered any barriers that minorities, women, and minority- and woman-owned businesses face in a local marketplace as evidence for the existence of race- and gender-based discrimination in that marketplace.^{16, 17, 18} The United States Supreme Court and other federal courts have held that analyses of conditions in a local marketplace for minorities, women, and minority- and woman-owned businesses are instructive in determining whether agencies' implementations of minority- and woman-owned business programs are appropriate and justified. Those analyses help agencies determine whether they are *passively participating* in any race- or gender-based discrimination that makes it more difficult for minority- and woman-owned businesses to successfully compete for their contracts. Passive participation in discrimination means that agencies unintentionally perpetuate race- or

gender-based discrimination simply by operating within discriminatory marketplaces. Many courts have held that passive participation in any race- or gender-based discrimination establishes a *compelling governmental interest* for agencies to take remedial action to address such discrimination.^{19, 20, 21}

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

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

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

A. Human Capital

Human capital is the collection of personal knowledge, behavior, experience, and characteristics that make up an individual's ability to perform and succeed in particular labor markets. Human capital factors such as education, business experience, and managerial experience have been shown to be related to business success.^{22, 23, 24, 25} Any race- or gender-based barriers in those areas may make it more difficult for minorities and women to work in relevant industries and prevent some of them from starting and operating businesses successfully.

Education. Barriers associated with educational attainment may preclude entry or advancement in certain industries, because many occupations require at least a high school diploma, and some occupations—such as occupations in professional services—require at least a four-year college degree. In addition, educational attainment is a strong predictor of both income and personal wealth, which are both shown to be related to business formation and success.^{26, 27} Nationally, minorities lag behind non-Hispanic whites in terms of both educational attainment and the quality of education that they receive.^{28, 29} Minorities are far more likely than non-Hispanic whites to attend schools that do not provide access to core classes in science and math.³⁰ In addition, Black American students are more than three times more likely than non-Hispanic whites to be expelled or suspended from high school.³¹ For those and other reasons,

minorities are far less likely than non-Hispanic whites to attend college; enroll at highly- or moderately selective four-year institutions; or earn college degrees.³²

Educational outcomes for minorities in Nevada are similar to those for minorities nationwide. In Nevada public schools, Black Americans; Hispanic Americans; and American Indian and Alaska Natives exhibit substantially higher dropout rates than non-Hispanic whites.³³ In addition, the study team’s analyses of the Nevada labor force indicate that certain minority groups are far less likely than non-Hispanic whites to earn a college degree. Figure 3-1 presents the percentage of Nevada workers that have earned a four-year college degree by racial/ethnic and gender group. As shown in Figure 3-1, Black American, Hispanic American, and Native American workers in Nevada are substantially less likely than non-Hispanic white workers to have four-year college degrees.

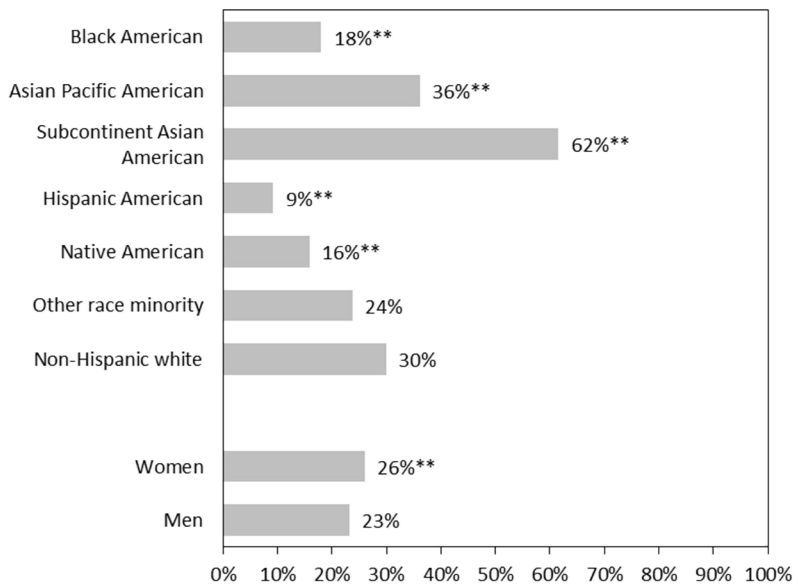
Figure 3-1.
Percentage of all workers 25 and older with at least a four-year degree, Nevada, 2010-2014

Note:

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

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



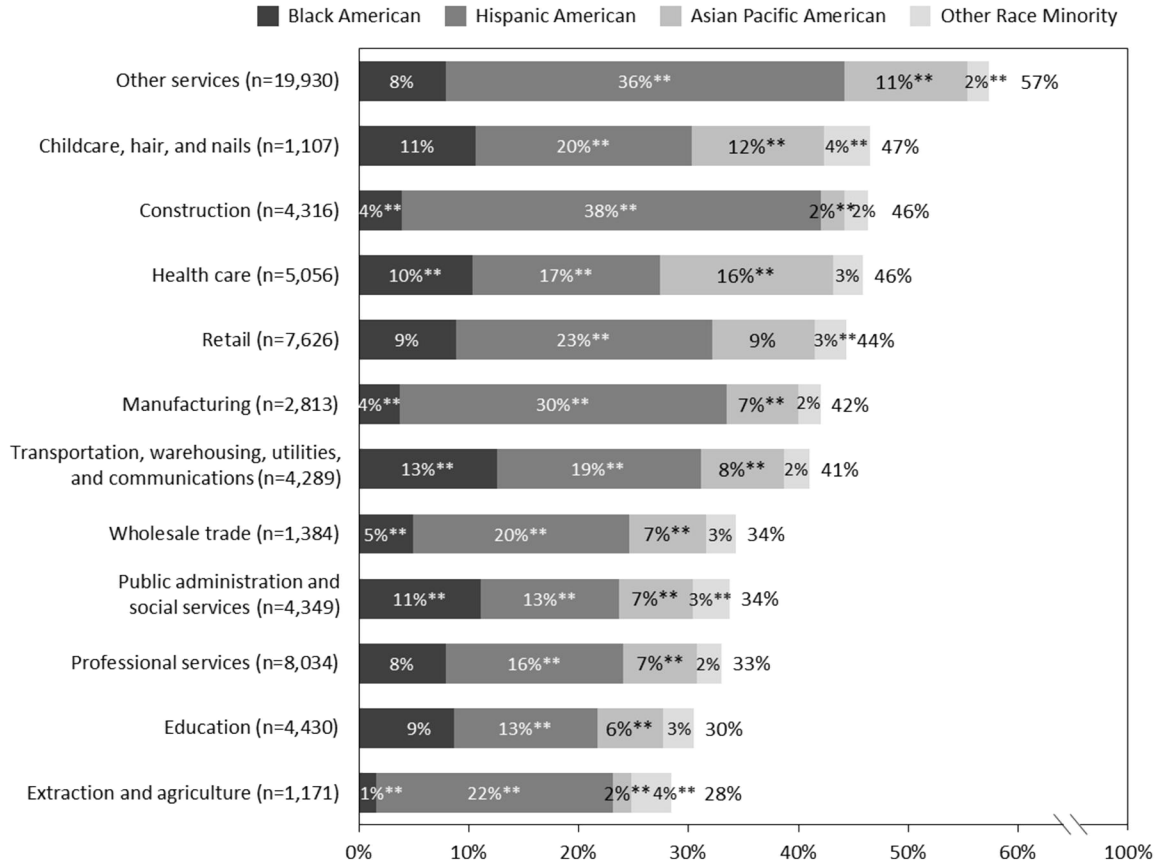
Employment and management experience. An important precursor to business ownership and success is acquiring direct work and management experience in relevant industries. Any barriers that limit minorities and women from acquiring that experience could prevent them from starting and operating related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

Employment. On a national level, prior industry experience has been shown to be an important indicator for business ownership and success. However, minorities and women are often unable to acquire relevant work experience. Minorities and women are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market.^{34, 35, 36} When employed, minorities and women are often relegated to peripheral positions in the labor market and to industries that exhibit already high concentrations of minorities or women.^{37, 38, 39, 40, 41} In addition, minorities are incarcerated at a higher rate than non-Hispanic whites in Nevada and nationwide, which contributes to a number of labor difficulties including difficulties finding jobs and relatively slow wage growth.^{42, 43, 44, 45}

The study team’s analyses of the labor force in Nevada is largely consistent with those findings. Figures 3-2 and 3-3 present the representations of minority and women workers in various

Nevada industries. As shown in Figure 3-2, the Nevada industries with the highest representations of minority workers are other services; childcare, hair, and nails; and construction. The Nevada industries with the lowest representations of minority workers are professional services; education; and extraction and agriculture.

Figure 3-2.
Percent representation of minorities in various industries in Nevada, 2010-2014



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

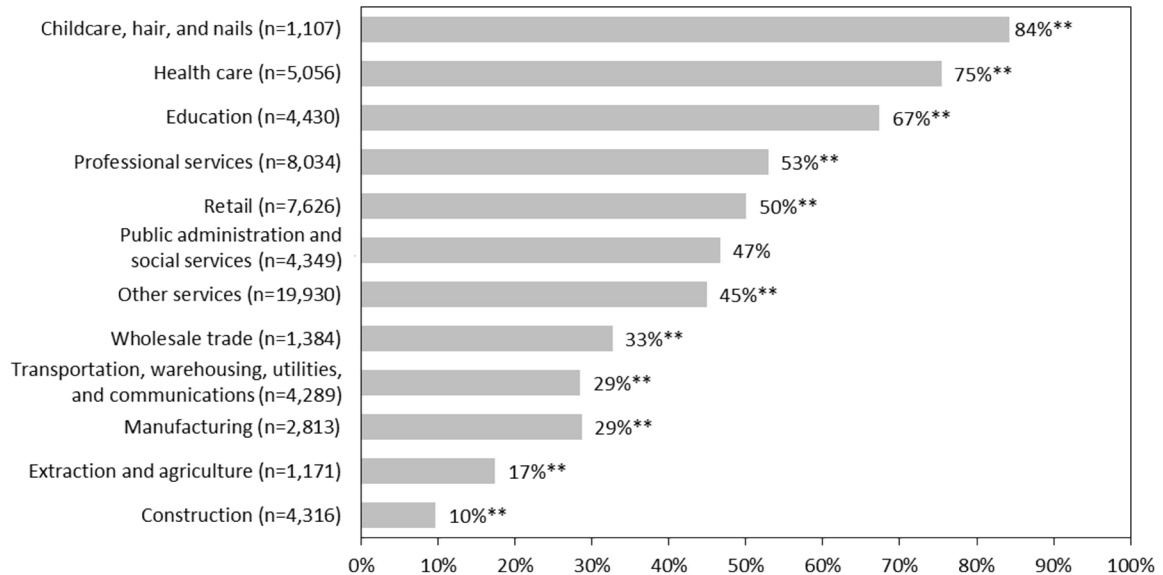
The representation of minorities among all Nevada workers is 8% for Black Americans, 8% for Asian Pacific Americans, 25% for Hispanic Americans, 2% for other race minorities, and 46% for all minorities considered together.

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

Source: BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figures 3-3 indicates that the Nevada industries with the highest representations of women workers are childcare, hair, and nails; healthcare; and education. The Nevada industries with the lowest representations of women workers are manufacturing; extraction and agriculture; and construction.

Figure 3-3.
Percent representation of women in various industries in Nevada, 2010-2014



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

The representation of women among all Nevada workers is 46%.

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

Source: BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Management experience. Managerial experience is an essential predictor of business success. However, race- and gender-based discrimination remains a persistent obstacle to greater diversity in management positions.^{46, 47, 48} Nationally, minorities and women are far less likely than non-Hispanic white men to work in management positions.^{49, 50} Similar outcomes appear to exist for minorities and women in Nevada. The study team examined the concentration of minorities and women in management positions in the Nevada construction; professional services; and goods and services industries. As shown in Figure 3-4:

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

Figure 3-4.
Percentage of Nevada workers who worked as a manager in each study-related industry, 2010-2014

Note:

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

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

	Construction	Professional Services	Goods & Services
Race/ethnicity			
Black American	3.1 % **	1.6 %	1.6 % **
Asian Pacific American	2.6 **	3.6	2.9
Subcontinent Asian American	8.7	0.0	3.5
Hispanic American	2.4 **	2.9	1.4 **
Native American	12.9	5.3	2.6
Other race minority	8.5	0.0	0.0
Non-Hispanic white	10.1	2.8	3.7
Gender			
Women	7.0 %	1.5 %	2.2 % **
Men	6.8	3.6	3.2
All individuals	6.8 %	2.8 %	2.8 %

Intergenerational business experience. Having a family member who owns a business and is working in that business is an important predictor of business ownership and business success. Such experiences help entrepreneurs gain access to important opportunity networks; obtain knowledge of best practices and business etiquette; and receive hands-on experience in helping to run businesses. However, at least nationally, minorities have substantially fewer family members who own businesses and both minorities and women have fewer opportunities to be involved with those businesses.^{51,52} That lack of experience makes it more difficult for minorities and women to subsequently start their own businesses and operate them successfully.

B. Financial Capital

In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.^{53,54,55} Individuals can acquire financial capital through a variety of sources including employment wages, personal wealth, homeownership, and financing. If race- or gender-based discrimination exists in those capital markets, minorities and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.

Wages and income. Wage and income gaps between minorities and non-Hispanic whites and between women and men are well-documented throughout the country, even when researchers have statistically controlled for various factors unrelated to race and gender.^{56, 57, 58} For example, national income data indicate that, on average, Black Americans and Hispanic Americans have household incomes that are less than two-thirds those of non-Hispanic whites.^{59, 60} Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 84 percent the median hourly wage of men.⁶¹ Such disparities make it difficult for minorities and women to use employment wages as a source of business capital.

The study team observed wage gaps in Nevada that are consistent with those that researchers have observed nationally. Figure 3-5 presents mean annual wages for Nevada workers by race/ethnicity and gender. As shown in Figure 3-5, Black Americans, Asian Pacific Americans, Hispanic Americans, Native Americans, and other race minorities in Nevada earn substantially less than non-Hispanic whites. In addition, women workers earn substantially less in wages than men. The study team also conducted regression analyses to determine whether those wage

disparities exist even after statistically controlling for various race- and gender-neutral factors such as age, education, and family status. The results of those analyses indicated that being Black American, Asian Pacific American, Hispanic American, or Native American was associated with substantially lower earnings than being non-Hispanic white, even after accounting for various race- and gender-neutral factors. Similarly, being a woman was associated with lower earnings than being a man (for details, see Figure C-10 in Appendix C).

Figure 3-5.
Mean annual wages among
Nevada workers, 2010-
2014

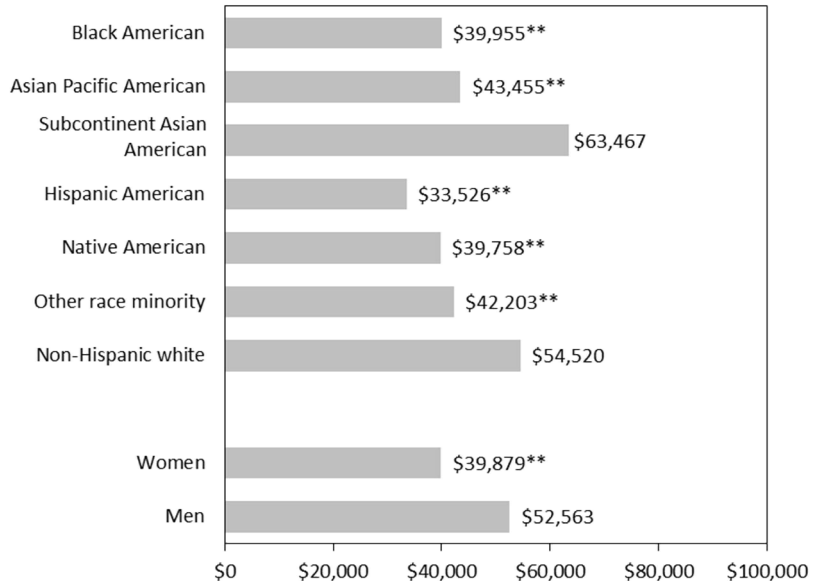
Note:

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

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

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



Personal wealth. Another important potential source of business capital is personal wealth. As with wages and income, there are substantial disparities between minorities and non-Hispanic whites and between women and men in terms of personal wealth.^{62, 63} For example, in 2010, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 5 percent and 1 percent, respectively, that of non-Hispanic whites. In Nevada and nationwide, approximately one-fifth of Black Americans and Hispanic Americans are living in poverty, approximately double the comparable rates for non-Hispanic whites.⁶⁴ Wealth inequalities also exist for women relative to men. For example, the median wealth of non-married women nationally is approximately one-third that of non-married men.⁶⁵

Homeownership. Homeownership and home equity have been shown to be key sources of business capital.^{66, 67} However, minorities appear to face substantial barriers nationwide in owning homes. For example, Black Americans and Hispanic Americans own homes at less than two-thirds the rate of non-Hispanic whites.⁶⁸ Discrimination is at least partly to blame for those disparities. Research indicates that minorities continue to be given less information on prospective homes and have their purchase offers rejected because of their race.^{69, 70} Minorities who own homes tend to own homes that are worth substantially less than those of non-Hispanic whites and also tend to accrue substantially less equity.^{71, 72} Differences in home values and equity between minorities and non-Hispanic whites can be attributed—at least, in part—to the depressed property values that tend to exist in racially-segregated neighborhoods.^{73, 74}

Minorities appear to face homeownership barriers in Nevada that are similar to those observed at the national level. The study team examined homeownership rates in Nevada for relevant

racial/ethnic groups. As shown in Figure 3-6, Black Americans, Asian Pacific Americans, Hispanic Americans, Native Americans, and other race minorities in Nevada exhibit homeownership rates that are significantly lower than that of non-Hispanic whites.

Figure 3-6.
Home Ownership Rates in Nevada, 2010-2014

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

Source:
BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

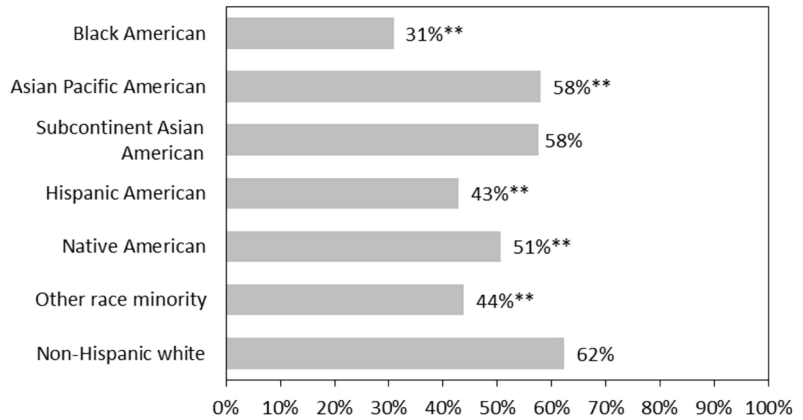
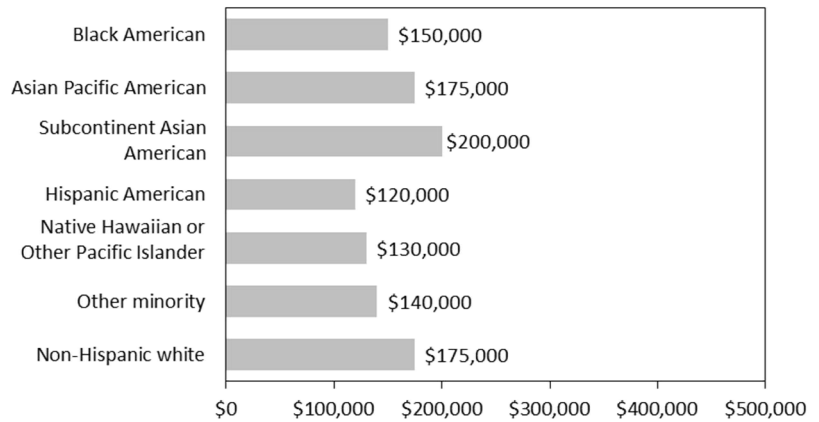


Figure 3-7 presents median home values among homeowners of different racial/ethnic groups in Nevada. Consistent with national trends, homeowners of certain minority groups—Black Americans; Hispanic Americans; Native Americans; Native Hawaiian and Other Pacific Islanders; and other race minorities—own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

Figure 3-7.
Median home values in Nevada, 2010-2014

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

Source:
BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



Access to financing. Minorities and women face many barriers in trying to access credit and financing, both for home purchases and for business capital. Researchers have often attributed those barriers to various forms of race- and gender-based discrimination that exist in credit markets.^{75, 76, 77, 78, 79, 80} The study team summarizes results related to difficulties that minorities, women, and minority- and woman-owned businesses face in the home credit and business credit markets.

Home credit. Minorities and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of minorities and women during the pre-application phase and disproportionate targeting of minority and women borrowers for subprime home loans.^{81, 82, 83, 84, 85} Race- and gender-based barriers in home credit

markets, as well as the recent foreclosure crisis, have led to decreases in homeownership among minorities and women and have eroded their levels of personal wealth.^{86, 87, 88, 89}

To examine how minorities fare in the home credit market relative to non-Hispanic whites, the study team analyzed home loan denial rates for high-income households by race/ethnicity. The study team analyzed those data for Nevada and the United States as a whole. As shown in Figure 3-8, all relevant groups exhibit higher home loan denial rates than non-Hispanic whites when considering the United States and Nevada in particular. In addition, the study team’s analyses indicate that certain minority groups in Nevada are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure C-15 in Appendix C).

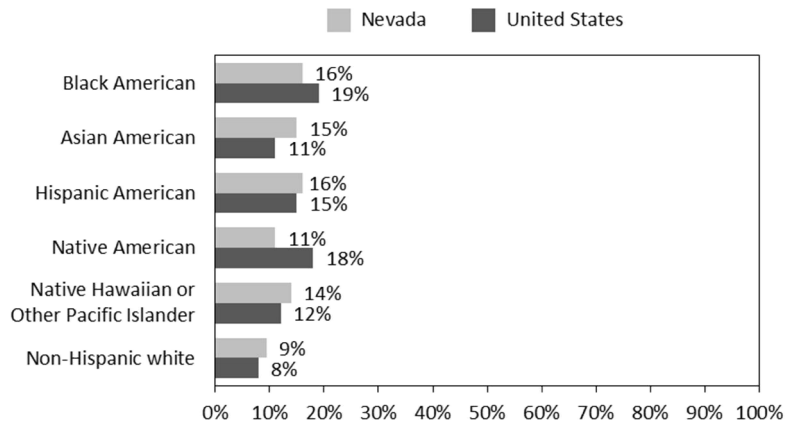
Figure 3-8.
Denial rates of conventional purchase loans for high-income households, Nevada and the United States, 2014

Note:

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

Source:

FFIEC HMDA data 2007 and 2014. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explorable>.



Business credit. Minority- and woman-owned businesses face substantial difficulties accessing business credit. For example, during loan pre-application meetings, minority-owned businesses are given less information about loan products, are subjected to more credit information requests, and are offered less support than their non-Hispanic white peers.⁹⁰ Researchers have shown that Black American-owned and Hispanic American-owned businesses are more likely to forego submitting a business loan application and be denied business credit when they do seek loans, even after accounting for various race- and gender-neutral factors.^{91, 92, 93} In addition, women are less likely to apply for credit and receive loans of less value when they do.^{94, 95} Without equal access to business capital, minority- and woman-owned businesses must operate businesses with less capital than their non-Hispanic white male contemporaries and rely more on their personal finances.^{96, 97, 98, 99}

C. Business Ownership

Nationally, there has been substantial growth in the number of minority- and woman-owned businesses over the past 5 years. For example, from 2007 to 2012, the number of woman-owned businesses increased by 27 percent, the number of Black American-owned businesses increased by 35 percent, and the number of Hispanic American-owned businesses increased by 46 percent.¹⁰⁰ Despite the progress that minorities and women have made with regard to business ownership, important barriers in starting and operating businesses remain. Black Americans, Hispanic Americans, and women are still less likely to start businesses than non-Hispanic white men.^{101, 102, 103, 104} In addition, although rates of business ownership have increased among minorities and women, they have been unable to penetrate all industries evenly. Minorities and

women disproportionately own businesses in industries that require less human and financial capital to be successful and that already include large concentrations of individuals from disadvantaged groups.^{105, 106, 107}

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

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

Figure 3-9.
Business ownership rates in study-related industries in Nevada, 2010-2014

Note:

*, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

	Construction	Professional Services	Goods & Services
Race/ethnicity			
Black American	10.7 %	13.4 %	3.9 % **
Asian Pacific American	10.3	5.8 **	5.3 **
Hispanic American	11.2 **	14.1 *	6.4 **
Native American	6.9 **	11.7	5.7 **
Other minority group	5.2	27.9	9.1
Non-Hispanic white	14.4	22.0	11.7
Gender			
Women	8.7 % **	17.7 %	7.6 % **
Men	13.3	20.9	9.6
All individuals	12.8 %	19.8 %	8.9 %

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

Figure 3-10.
Statistically significant relationships between race/ethnicity and gender and business ownership in study-related industries in Nevada, 2010-2014

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Industry and Group	Coefficient
Construction	
Native American	-0.4118
Women	-0.4117
Professional Services	
Asian Pacific American	-0.6570
Goods & Services	
Black American	-0.4983
Asian Pacific American	-0.4086
Hispanic American	-0.1525
Women	-0.1525

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

- Being Native American was associated with lower rates of business ownership in construction. In addition, being a woman was associated with lower rates of business ownership.
- Being Asian Pacific American was associated with lower rates of business ownership in professional services.
- Being Black American, Asian Pacific American, and Hispanic American was associated with lower rates of business ownership in goods and services. In addition, being a woman was associated with lower rates of business ownership.

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

D. Business Success

There is a great deal of research indicating that, nationally, minority- and woman-owned businesses fare worse than businesses owned by non-Hispanic white men. For example, Black Americans, Native Americans, Hispanic Americans, and women exhibit higher rates of moving from business ownership to unemployment than non-Hispanic whites and men. In addition, minority- and woman-owned businesses have been shown to be less successful than businesses owned by non-Hispanic whites and men using a number of different indicators such as profits, closure rates, and business size (but also see Robb and Watson 2012).^{108, 109, 110} The study team examined data on business closure, business receipts, and business owner earnings to further explore the success of minority- and woman-owned businesses in Nevada.

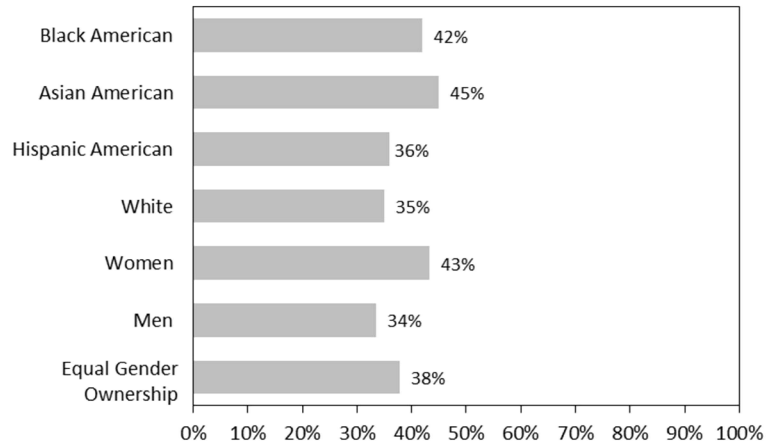
Business closure. The study team examined the rates of closure among Nevada businesses by the race/ethnicity and gender of the owners. Figure 3-11 presents those results. As shown in Figure 3-11, Black American-, Asian American-, and Hispanic American-owned businesses in Nevada appear to close at higher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

men. Increased rates of business closure among minority- and woman-owned businesses may have important effects on their availability for government contracts in Nevada.

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

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

Source:
 Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.
 Lowrey, Ying. 2014. "Gender and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

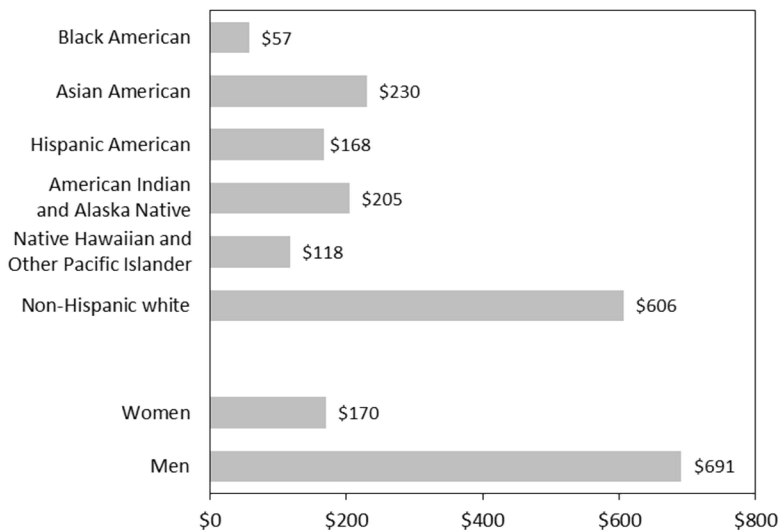


Business receipts. The study team also examined data on business receipts to assess whether minority- and woman-owned businesses in Nevada earn as much as businesses owned by non-Hispanic whites or business owned by men, respectively. Figure 3-12 shows mean annual receipts for Nevada business by the race/ethnicity and gender of owners. The data in Figure 3-12 indicates that in 2012 Black American-; Asian American-; Hispanic American-; American Indian and Alaskan Native-; and Native Hawaiian and Other Pacific Islander-owned businesses in Nevada showed lower mean annual business receipts than businesses owned by non-Hispanic whites. In addition, woman-owned businesses in Nevada showed lower mean annual business receipts than businesses owned by men.

Figure 3-12.
Mean annual business receipts (in thousands) in Nevada, 2012

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

Source:
 2012 Survey of Business Owners, part of the U.S. Census Bureau's 2012 Economic Census.



Business owner earnings. The study team analyzed business owner earnings to assess whether minorities and women in Nevada earn as much from the businesses that they own as non-Hispanic whites and men do. As shown in Figure 3-13, Black Americans, Hispanic Americans, and Native Americans earned less on average from their businesses than non-Hispanic whites earned from their businesses. In addition, women in Nevada earned less from their businesses than men earned from their businesses. The study team also conducted regression analyses to determine whether earnings disparities in Nevada exist even after statistically controlling for various race- and gender-neutral factors such as age, education, and family status. The results of those analyses indicated that, compared to non-Hispanic white Americans in Nevada, being Native American was associated with significantly lower business earnings. In addition, being a woman was associated with substantially lower business owner earnings than being a man (for details, see Figure C-30 in Appendix C).

Figure 3-13.
Mean annual business owner earnings in Nevada, 2010-2014

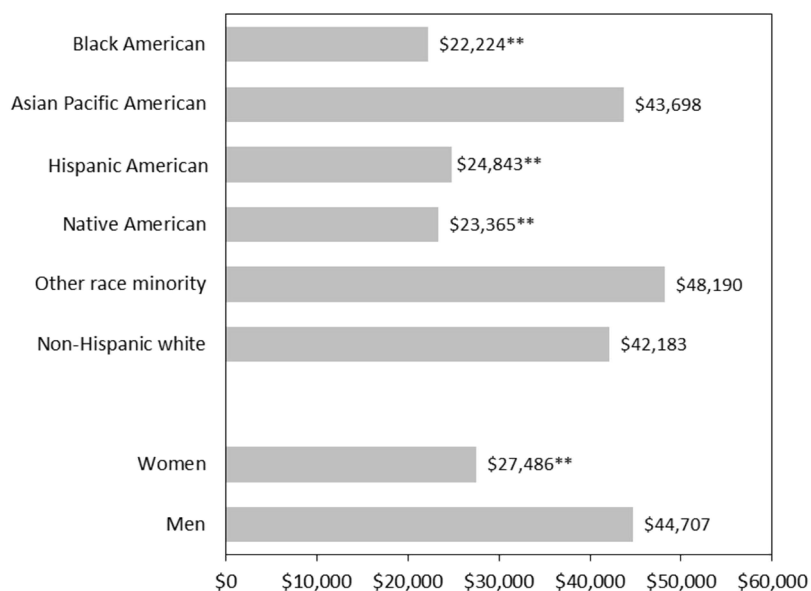
Note:

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2014 dollars.

*, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



E. Summary

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

Barriers in the marketplace likely have important effects on the ability of minorities and women to start businesses in relevant Nevada industries—construction; professional services; and goods and services—and operating those businesses successfully. Any difficulties that minorities and women face in starting and operating businesses may reduce their availability for government agency work and may also reduce the degree to which they are able to successfully compete for government contracts. In addition, the existence of barriers in the Nevada

marketplace indicates that government agencies in the state are passively participating in race- and gender-based discrimination that makes it more difficult for minority- and woman-owned businesses to successfully compete for their contracts. Many courts have held that passive participation in any race- or gender-based discrimination establishes a compelling governmental interest for agencies to take remedial action to address such discrimination.

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CHAPTER 4.

Collection and Analysis of Contract Data

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Collection and Analysis of Contract Data

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

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

A. Overview of Contracting Policies

NDOT's Administrative Services Division is responsible for awarding construction and professional and other services contracts and agreements. The Administrative Services Division's policies are governed by Nevada Revised Statute 408 (NRS 408). Separate procurement policies are used to award construction and professional and other services contracts and agreements.

Construction. NDOT uses informal and competitive procurement processes to award construction contracts. NDOT contracting policies can be grouped into three categories: purchases worth up to \$50,000; purchases worth more than \$50,000 and up to \$250,000; and purchases worth more than \$250,000.

Purchases worth up to \$50,000. The Administrative Services Division uses an informal process to award construction contracts worth up to \$50,000. For purchases of that size, the Administrative Services Division is required to request at least one quote or bid from a licensed contractor. The lowest responsive and responsible bidder is then awarded the contract.

Purchases worth more than \$50,000 and up to \$250,000. NDOT uses an informal procurement process to award construction contracts worth more than \$50,000 and up to \$250,000. For purchases of that size, the Administrative Services Division is required to request three bids from licensed contractors. The lowest responsive and responsible bidder is awarded the contract.

¹ The terms "contract" and "procurement" are used interchangeably in this report, unless otherwise noted.

Purchases worth more than \$250,000. NDOT uses a competitive procurement process to award construction contracts worth more than \$250,000. For contracts of that size, the Administrative Services Division conducts a public bidding process. NDOT will advertise the project and hold a pre-bid conference to offer bidders the chance to learn more about the project. NDOT's Bid Review and Analysis Team reviews each submitted bid. The lowest responsive and responsible bidder is awarded the contract.

Professional and other services. NDOT uses informal and competitive procurement processes to award professional and other services agreements and contracts. For state-funded projects, the Administrative Services Division will identify a vendor that is qualified to provide the services needed and will enter into negotiations with that vendor regarding the scope of work and budget needed to complete the project. Once NDOT and the vendor agree to terms, a professional services agreement is signed. For federally-funded projects, the Administrative Services Division will conduct a competitive procurement process via a request for proposal (RFP). NDOT awards the contract to the lowest responsive and responsible bidder.

B. Collection and Analysis of Contract Data

The study team examined contracts that NDOT and subrecipient local agencies awarded between January 1, 2012 and December 31, 2015. The study team worked closely with NDOT staff to collect data on NDOT FHWA-funded and state-funded construction; professional services; and goods and support services prime contracts and subcontracts. NDOT provided information on whether each contract was FHWA-funded.²

NDOT B2GNow. Construction data collection from NDOT's B2GNow system began at the project initiation meeting in August 2015. BBC met with NDOT staff to determine what types of construction data were available during the study period. NDOT provided BBC with a partial list of construction prime contracts and associated subcontractors from their B2GNow system. NDOT also gave BBC access to their B2GNow data system to pull any additional data needed for the study. BBC reviewed NDOT's construction contract data on B2GNow and collected additional prime contract and subcontract information not included in the initial lists. NDOT advised BBC on how to interpret those data including how to identify unique bid opportunities.

Professional services agreements. Professional services agreement data collection also began during the project initiation meeting in August 2015. NDOT's staff informed BBC that records of professional service agreements are not maintained in the B2GNow system. NDOT provided BBC with a description of each professional services agreement awarded during the study period. BBC identified the transportation-related professional services agreements on that list, and NDOT provided further information about each agreement.

NDOT project managers collect information related to the subcontractors used on professional service agreements, but that information is not collected for the Administrative Services Division. BBC worked closely with NDOT project managers to collect subcontract information on each professional services agreement included in the study. If the project manager did not retain subcontract information on an agreement, BBC worked with the project manager to contact the

² NDOT considers a contract to be FHWA-funded if there is at least \$1 of FHWA funding included on the contract.

vendor who completed the work to collect the subcontract information. BBC collected subcontract data on 97 percent of all professional service agreement dollars awarded during the study period.

NDOT Local Program Agency (LPA) contracts. BBC met with NDOT’s LPA staff to discuss what types of data were available for the projects that subrecipient local agencies awarded during the study period. NDOT provided BBC with a list of the LPA projects that subrecipient local agencies awarded during the study period. NDOT does not collect any information on the prime contractors and subcontractors that subrecipient local agencies used on LPA projects. BBC worked directly with the relevant subrecipient local agencies to collect that information.

The study team worked with NDOT’s LPA staff to obtain contact information for all subrecipient local agencies. After receiving that information, BBC mailed data request forms to each agency.³ Follow-up requests were sent to all agencies that did not respond to the initial request. BBC sent surveys to 24 subrecipient local agencies to collect prime and subcontractor information on 98 contracts. Those contracts accounted for approximately \$192 million of NDOT’s contracting dollars during the study period. Through the survey effort, BBC collected prime and subcontract data for more than \$191 million, or 99 percent, of those contract dollars.

Contracts analyzed. As shown in figure 4-1, BBC identified 147 B2GNow contracts, 345 professional services agreements, and 49 Local Program Agency contracts awarded during the study period.

Figure 4-1.
Number of NDOT prime contracts by contract source, 2012-2015

Source:
BBC Research & Consulting from NDOT contract data

NDOT contracts	Number	Dollars (Thousands)
Contract sources		
B2GNow	147	\$871,359
Professional Services Agreements	345	\$694,510
Local Program Agency	49	\$150,792
Total	541	\$1,716,661

Contracts included in study analyses. BBC collected information on 541 prime contracts and 1,138 associated subcontracts that NDOT awarded during the study period in the areas of construction; professional services; and goods and support services. BBC collected information on both federally-funded and state-funded contracts. Those contracts accounted for approximately \$1.7 billion of NDOT contracting dollars during the study period. Figure 4-2 presents dollars by relevant contracting area for the prime contracts that BBC included in its analyses.

³ As part of that process, many local agencies requested Excel/Word files to facilitate the data collection process. The study team provided electronic forms to all agencies that requested them.

Figure 4-2.
Number of NDOT contracts included in the study

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

Source:
 BBC Research & Consulting from NDOT contract data.

NDOT Contracts	Number	Dollars (Thousands)
Construction contracts		
Federally-funded	114	\$1,416,278
State-funded	190	167,788
Total	304	\$1,584,066
Professional Services contracts		
Federally-funded	113	\$93,637
State-funded	86	23,866
Total	199	\$117,503
Goods and Support Services contracts		
Federally-funded	14	\$13,148
State-funded	24	1,945
Total	38	\$15,092
Total contracts		
Federal-funded	241	\$1,523,063
State-funded	300	193,599
Total	541	\$1,716,661

Prime contract and subcontract amounts. For each contract included in key analyses, BBC examined the dollars that NDOT awarded to each prime contractor and the dollars that the prime contractor awarded to any subcontractors.

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

C. Collection of Vendor Data

NDOT maintains a list of businesses that have worked with the agency on construction; professional services; or goods and support services contracts. BBC compiled the following information on businesses that participated on NDOT construction; professional services; or goods and support services contracts during the study period:

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

- Year of establishment; and
- Additional contact information.

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

- NDOT contract data;
- NDOT vendor lists;
- State of Nevada Unified Certification Program (UCP) DBE directory;
- City of Las Vegas Diverse Business Directory;
- Small Business Administration certification and ownership lists including 8(a) HUBZone and self-certification lists;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Telephone surveys that BBC conducted with business owners and managers as part of the utilization and availability analyses;
- Business websites; and
- Reviews that NDOT conducted of study information.

D. Relevant Geographic Market Area

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

E. Relevant Types of Work

For each prime contract and subcontract, BBC determined the *subindustry* that best characterized the prime contractor’s and subcontractor’s primary line of work (e.g., heavy construction). BBC identified subindustries based on NDOT contract data; telephone surveys that BBC conducted with prime contractors and subcontractors; business certification lists; D&B business listings; and other sources. BBC developed subindustries based in part on 8-digit D&B industry classification codes. Figure 4-3 presents the dollar amounts that BBC examined in the various construction; professional services; and goods and support services subindustries that BBC included in its analyses.⁴

⁴ Total construction; professional services; and goods and support services contract dollars presented in Figure 4-3 differ from those presented in Figure 4-2. Figure 4-2 presents contract dollars based on the primary line of work of prime contractors, whereas Figure 4-3 presents total contract dollars based on the primary line of work of prime contractors and subcontractors.

Figure 4-3.
NDOT contract dollars by
subindustry, January 1, 2012
– December 31, 2015

Note:

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

Source:

BBC Research & Consulting from NDOT contract data and Availability Surveys.

Industry	Total (in Thousands)
Construction	
Heavy construction	\$1,202,249
Concrete, asphalt, sand, and gravel products	\$81,469
Electrical work	\$69,627
Structural steel erection	\$47,950
Fencing, guardrails, and signs	\$22,051
Structural metal supply	\$20,993
Water, sewer, and utility lines	\$19,359
Other construction services	\$18,348
Excavation, drilling, wrecking, and demolition	\$14,982
Trucking, hauling, and storage	\$12,980
Painting	\$6,759
Landscape services	\$4,960
Electrical equipment and supplies	\$4,493
Vertical building trades	\$4,427
Plumbing and HVAC	\$1,665
Other construction materials	\$918
Industrial equipment and machinery	\$49
Total Construction	\$1,533,278
Professional Services	
Engineering	\$97,925
Transportation planning	\$45,661
Architectural and design services	\$7,882
Surveying and mapmaking	\$4,408
Environmental services	\$3,707
Testing services	\$3,489
Construction management	\$1,121
Total Professional Services	\$164,193
Goods and Support Services	
Towing	\$11,571
Cleaning and janitorial services	\$1,841
Other services	\$1,652
Other goods	\$1,257
Business services and consulting	\$1,089
Advertising, marketing and public relations	\$606
Petroleum and petroleum products	\$447
Computer systems and services	\$286
Security services	\$220
Office supplies	\$96
Furniture	\$65
Printing and copying	\$56
Transit Equipment	\$3
Total Goods and Support Services	\$19,191
Total Contracting	\$1,716,661

BBC combined related subindustries that accounted for relatively small percentages of total contracting dollars into “other construction services,” “other construction materials,” “other goods,” and “other services.” For example, the contracting dollars that NDOT awarded to contractors for “glass and glazing work” represented less than 1 percent of total NDOT contract dollars that BBC examined in the study. BBC combined “glass and glazing work” with other construction services subindustries that also accounted for relatively small percentages of total contracting dollars and that were relatively dissimilar to other subindustries into the “other construction services” subindustry.

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

- Were classified in industries that were not directly related to transportation contracting (e.g., management consulting services) (\$188,000 of associated contract dollars);
- Were classified as state education institutions (\$1.4 million of associated contract dollars); or
- NDOT awarded to government agencies or nonprofit organizations (\$838,000 of associated contract dollars).

F. Collection of Bid and Proposal Data

BBC conducted a case study analysis of bids and proposals for a sample of construction; professional services; and goods and support services contracts and agreements that NDOT awarded during the study period. NDOT provided documents related to bid, proposal, and other related information to BBC for a sample of its contracts. BBC successfully collected and examined bid and proposal information for a sample of 167 construction and 81 professional services contracts and agreements that NDOT awarded during the study period. For details about the case study analysis, see Chapter 8.

G. Agency Review Process

NDOT reviewed BBC’s prime contract and subcontract data during several stages of the study process. BBC met with NDOT staff to review the data collection process, information that BBC gathered, and summary results. NDOT staff also reviewed contract and vendor information. BBC incorporated NDOT’s feedback into the final contract and vendor data that BBC used as part of the disparity study.

CHAPTER 5.

Availability Analysis

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Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of minority- and woman-owned businesses that are ready, willing, and able to perform on Nevada Department of Transportation (NDOT) construction; professional services; and goods and support services prime contracts and subcontracts. Chapter 5 describes the availability analysis in seven parts:

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

Appendix E provides supporting information related to the availability analysis.

A. Purpose of the Availability Analysis

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

B. Potentially Available Businesses

BBC's availability analysis focused on specific areas of work (i.e., *subindustries*) related to the types of construction; professional services; and goods and support services prime contracts and subcontracts that NDOT awarded during the study period. BBC began the availability analysis by identifying the specific subindustries in which NDOT spends the majority of its contracting dollars (for details, see Chapter 4) as well as the geographic areas in which the majority of the businesses with which NDOT spends those contracting dollars are located (i.e., the *relevant geographic market area*, which BBC identified as the entire state of Nevada). The study team then developed a database of potentially available businesses through surveys with businesses located in the relevant geographic market area that do work within relevant subindustries. That method of examining availability is referred to as a *custom census* and has

been accepted in federal court as a valid methodology for conducting availability analyses. Figure 5-1 summarizes the strengths of BBC's custom census approach.

Overview of availability surveys. The study team conducted telephone surveys with business owners and managers to identify Nevada businesses that are potentially available for NDOT construction; professional services; and goods and support services prime contracts and subcontracts.¹ BBC began the survey process by collecting information about business establishments from Dun & Bradstreet (D&B) Marketplace.² BBC collected information about all business establishments listed under 8-digit work specialization codes (as developed by D&B) that were most related to the contracts that NDOT awarded during the study period. BBC obtained listings on 7,155 Nevada businesses that do work related to those work specializations. However, 821 of those business listings did not include a working phone number. BBC attempted availability surveys with the remaining 6,334 business establishments.

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

- Status as a private business (as opposed to a public agency or nonprofit organization);
- Status as a subsidiary or branch of another company;
- Primary lines of work;
- Qualifications and interest in performing work for NDOT or other local government agencies;
- Qualifications and interest in performing work as a prime contractor or as a subcontractor;
- Largest prime contract or subcontract bid on or performed in the previous five years;

Figure 5-1.
**Summary of BBC's custom
census availability approach**

Federal courts have reviewed and upheld custom census approaches to conducting availability analyses. Compared with other court-reviewed approaches, BBC's approach adds several layers of screening to determine which businesses are potentially available for work in relevant industries and subindustries. For example, BBC collects detailed information from businesses about their roles as contractors, their interest in local government work, and the geographic locations of their work—items not included in some previous court-reviewed availability analyses. BBC also analyzes the sizes of contracts and subcontracts on which businesses have bid on or performed in the past to determine the *relative capacity* of businesses.

The objective of BBC's availability approach was not to collect information about each and every relevant business that is operating in Nevada. Instead, it was to collect information from a large, unbiased subset of Nevada businesses that appropriately represents the entire relevant business population of Nevada. That approach allowed BBC to estimate the availability of minority- and woman-owned businesses in an accurate, statistically-valid manner.

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

² D&B Marketplace is accepted as the most comprehensive and unbiased source of business listings in the nation.

- Year of establishment; and
- Race/ethnicity and gender of ownership.

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

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

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

BBC also considered the following information about businesses to determine if they were potentially available for specific prime contracts and subcontracts that NDOT awarded during the study period:

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

C. Businesses in the Availability Database

After conducting availability surveys with hundreds of local businesses, the study team developed a database of information about businesses that are potentially available for NDOT construction; professional services; and goods and support services contracting work. Information from the database allowed BBC to develop a representative depiction of businesses that are ready, willing, and able to perform work for NDOT. Figure 5-2 presents the percentage of businesses in the study team's *availability database* that were minority- or woman-owned. The information in Figure 5-2 reflects a simple *head count* of businesses with no analysis of their availability for specific NDOT prime contracts and subcontracts. Thus, it represents only a first step toward analyzing the availability of minority- and woman-owned businesses for NDOT work. The study team's analysis included 637 businesses that are potentially available for specific construction; professional services; and goods and support services contracts that

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

NDOT awarded during the study period. As shown in Figure 5-2, of those businesses, 32 percent were minority- or woman-owned.

D. Availability Calculations

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

Figure 5-2.
Percentage of businesses in the availability database that were minority- or woman-owned

Note:

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

Source:

BBC Research & Consulting availability analysis.

Race/Ethnicity and Gender	Number of Firms	Percent of Firms
Black American-owned	11	1.7 %
Asian Pacific American-owned	9	1.4
Subcontinent Asian American-owned	3	0.5
Hispanic American-owned	59	9.3
Native American-owned	6	0.9
Total minority-owned	88	13.8 %
White woman-owned	113	17.7 %
Total minority-/woman-owned	201	31.6 %
Total majority-owned firms	436	68.4 %
Total firms	637	100.0 %

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

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

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

- Were in business in the year that NDOT awarded the contract element.
2. The study team then counted the number of minority-owned businesses (separately by race/ethnicity), white woman-owned businesses, and businesses owned by non-Hispanic white men in the availability database that met the criteria specified in Step 1.
 3. The study team translated the numeric availability of businesses for the contract element into percentage availability.

BBC repeated those steps for each contract element that the study team examined as part of the disparity study. BBC multiplied the percentage availability for each contract element by the dollars associated with the contract element, added results across all contract elements, and divided by the total dollars for all contract elements. The result was dollar-weighted estimates of the availability of minority- and woman-owned businesses, both overall and separately for each racial/ethnic and gender group. Figure 5-3 provides an example of how BBC calculated availability for a specific subcontract associated with a construction prime contract that NDOT awarded during the study period.

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

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

If 90 percent of an agency's contracting dollars is spent on heavy construction and 10 percent on trucking, the agency would calculate the percentage of heavy construction

**Figure 5-3.
Example of the availability calculation
for a NDOT subcontract**

On a contract that NDOT awarded in 2013, the prime contractor awarded a subcontract worth \$161,720 for vertical building trades work. To determine the overall availability of minority- and woman-owned businesses for that subcontract, the study team identified businesses in the availability database that:

- a. Were in business in 2013;
- b. Indicated that they performed vertical building trades work;
- c. Reported bidding on work of similar or greater size in the past;
- d. Reported being able to work or serve customers in the Nevada District 2 area; and
- e. Reported qualifications and interest in working as a subcontractor on NDOT or other local agency projects.

The study team found 40 businesses in the availability database that met those criteria. Of those businesses, 10 were minority- or woman-owned businesses. Thus, the availability of minority- and woman-owned businesses for the subcontract was 25 percent (i.e., $10/40 \times 100 = 25$).

businesses that are [minority- or woman-owned] and the percentage of trucking businesses that are [minority- or woman-owned], and weight the first figure by 90 percent and the second figure by 10 percent when calculating overall [minority- and woman-owned business] availability.⁴

The BBC study team took type of work into account by examining 37 different subindustries related to construction; professional services; and goods and support services as part of estimating availability for NDOT prime contracts and subcontracts.

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

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

BBC’s approach accounts for the relative capacity of businesses. BBC considered the size—in terms of dollar value—of the prime contracts and subcontracts that a business bid on or received in the previous five years (i.e., *relative capacity*) when determining whether to count that business as available for a particular contract element. BBC considered whether businesses had previously bid on or received at least one contract of an equivalent or greater dollar value. BBC’s approach is consistent with many recent, key court decisions that have found relative capacity measures to be important to measuring availability (e.g., *Associated General Contractors of America, San Diego Chapter vs. California Department of Transportation, et al.*,⁵ *Western States Paving Company v. Washington State DOT*,⁶ *Rothe Development Corp. v. U.S. Department of Defense*,⁷ and *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*⁸).

As part of the disparity study, BBC used regression analysis to examine whether the relative capacity of minority- and woman-owned businesses differs from that of businesses owned by

⁴ Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program, <http://www.osdbu.dot.gov/dbeprogram/tips.cfm>.

⁵ *AGC, San Diego Chapter v. California DOT*, 2013 WL 1607239 (9th Cir. April 16, 2013).

⁶ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

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

⁸ *Engineering Contractors Association of S. Fla. Inc. vs. Metro Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996).

non-Hispanic white men after accounting for various other factors. That analysis indicated that the capacity of minority- and woman-owned businesses was not depressed relative to that of business owned by non-Hispanic white men after accounting for differences in industry and age of businesses.

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

E. Availability Results

BBC estimated the availability of minority- and woman-owned businesses for the 1,679 construction; professional services; and goods and support services prime contracts and subcontracts that NDOT awarded between January 1, 2012 and December 31, 2015. Figure 5-4 presents overall dollar-weighted availability estimates by racial/ethnic and gender group for those contracts.

Figure 5-4.
Overall dollar-weighted availability estimates by racial/ethnic and gender group

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Race/Ethnicity and Gender	Utilization Benchmark (Availability %)
Black American-owned	1.9 %
Asian Pacific American-owned	2.6
Subcontinent Asian American-owned	0.1
Hispanic American-owned	3.1
Native American-owned	0.1
Total minority-owned	7.7 %
White woman-owned	6.9
Total minority/woman-owned	14.7 %

Overall, the availability of minority- and woman-owned businesses for NDOT construction; professional services; and goods and support services contracts is 14.7 percent. White woman-owned businesses (6.9%) and Hispanic American-owned businesses (3.1%) exhibited the highest availability percentages among all groups. Note that availability estimates varied when the study team examined different subsets of those contracts (for availability results for specific contract sets, see Appendix F). Assuming that the mix of the types, sizes, and locations of the contracts that NDOT awards in the future are similar to that of the contracts that the agency awarded during the study period, one might expect 14.7 percent of NDOT’s contracting dollars to go to minority- and woman-owned businesses based on their availability for that work.

F. Base Figure for Overall DBE Goal

Establishing a base figure is the first step in calculating an overall goal for DBE participation in NDOT's Federal Highway Administration (FHWA)-funded transportation contracts.⁹ BBC calculated the base figure using the same availability database and approach described above except that calculations only included potential DBEs—that is, minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 Code of Federal Regulations Part 26—and only included FHWA-funded prime contracts and subcontracts. BBC's approach to calculating NDOT's base figure is consistent with:

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

BBC's availability analysis indicates that the availability of potential DBEs for NDOT's FHWA-funded transportation contracts is 12.8 percent. NDOT might consider 12.8 percent as the base figure for its overall goal for DBE participation, assuming that the types, sizes, and locations of FHWA-funded contracts that the agency awards in the time period that the goal will cover are similar to the types of FHWA-funded contracts that the agency awarded during the study period. For details about NDOT's base figure for its overall DBE goal, see Chapter 9.

Differences from overall MBE/WBE availability. The availability of potential DBEs for FHWA-funded contracts is slightly lower than the overall availability of minority- and woman-owned businesses that is presented in Figure 5-4. BBC's calculation of the overall availability of minority- and woman-owned businesses includes three groups of minority- and woman-owned businesses that the study team did not count as potential DBEs when calculating the base figure:

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

In addition, the study team's analyses for calculating the base figure for FHWA-funded contracts only included FHWA-funded prime contracts and subcontracts. The calculations for the overall

⁹ The study team considered a contract to be FHWA-funded if it included at least one dollar of FHWA funding.

availability of minority- and woman-owned businesses included both FHWA- and state-funded transportation prime contracts and subcontracts.

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

G. Implications for Any DBE Contract Goals

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

CHAPTER 6.

Utilization Analysis

CHAPTER 6.

Utilization Analysis

Chapter 6 presents information about the participation of minority- and woman-owned businesses in construction and engineering contracts that the Nevada Department of Transportation (NDOT) awarded between January 1, 2012 and December 31, 2015. (Chapter 4 provides additional information about data collection and methodology related to the utilization analysis.) Chapter 6 is organized in two parts:

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

A. Overview of Utilization Analysis

BBC Research & Consulting (BBC) measured the participation of minority- and woman-owned businesses in NDOT contracting in terms of *utilization*—the percentage of prime contract and subcontract dollars that NDOT awarded to minority- and woman-owned businesses during the study period. For example, if 5 percent of NDOT prime contract and subcontract dollars went to non-Hispanic white woman-owned businesses on a particular set of contracts, utilization of non-Hispanic white woman-owned businesses for that set of contracts would be 5 percent.¹ The study team measured the participation of all minority- and woman-owned businesses regardless of certification and separately of minority- and woman-owned businesses that were certified as Disadvantaged Business Enterprises (DBEs).

The United States Department of Transportation (USDOT) requires NDOT to submit reports about the participation of DBEs in its Federal Highway Administration (FHWA)-funded transportation contracts twice each year (typically in June and December). BBC's analysis of the participation of minority- and woman-owned businesses in NDOT contracting goes beyond what the agency currently reports to USDOT. Two key differences are that:

- BBC counts all minority- and woman-owned businesses in its analysis, not only certified DBEs; and
- BBC examines FHWA- and state-funded contracts, not only FHWA-funded contracts.

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

¹ BBC uses the term "white woman-owned businesses" to refer to "non-Hispanic white woman-owned businesses."

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

BBC provides utilization results for all minority- and woman-owned businesses and separately for minority- and woman-owned businesses that were DBE-certified during the study period.²

FHWA- and state-funded contracts. USDOT requires NDOT to prepare DBE participation reports only for its FHWA-funded contracts. Thus, NDOT reports the participation of certified DBEs only for those contracts. In contrast, BBC analyzed the participation of minority- and woman-owned businesses in both FHWA- and state-funded NDOT contracts.

B. Utilization Analysis Results

Figure 6-1 presents the overall percentage of contracting dollars that minority- and woman-owned businesses received on construction and engineering contracts that NDOT awarded during the study period (including both prime contracts and subcontracts). The darker portion of the bar represents the percentage of contracting dollars that certified DBEs received during the study period. As shown in Figure 6-1, overall, minority- and woman-owned businesses received 5.2 percent of the relevant contracting dollars that NDOT awarded during the study period. The darker portion of the bar shows that only 1.6 percent of relevant contracting dollars went to certified DBEs.

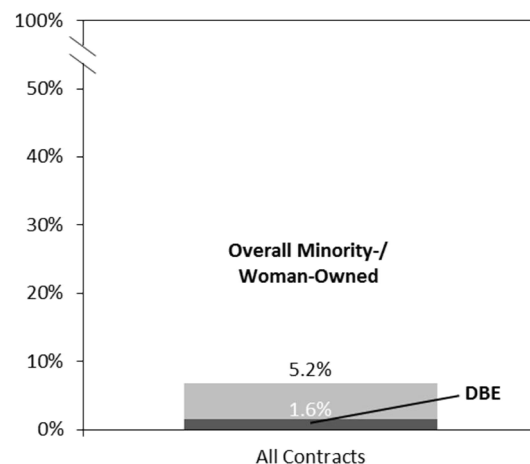
Figure 6-1.
Participation of minority- and woman-owned businesses

Notes:

The study team analyzed 1,679 prime contracts and subcontracts.
The darker portion of the bar represents participation of certified DBEs.
For more detail, see Figure F-2 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.



In addition, BBC examined participation in NDOT contracting separately for each relevant racial/ethnic and gender group. Those results are presented in Figure 6-2. Overall, Hispanic American-owned businesses and non-Hispanic white woman-owned businesses exhibited higher levels of participation on NDOT contracts than all other groups (0.9% for Hispanic American-owned businesses and 3.9% for non-Hispanic white woman-owned businesses).

² Although businesses that are owned and operated by socially- and economically-disadvantaged non-Hispanic white men can become certified as DBEs, BBC did not identify any DBE-certified businesses that were owned by non-Hispanic white men that participated on NDOT contracts during the study period.

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

Note:

The study team analyzed 1,679 prime contracts and subcontracts.

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

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

Source:

BBC Research & Consulting utilization analysis.

	Total	
	\$ in Thousands	Percent
Minority-/Woman-owned		
Black American-owned	\$3,541	0.2 %
Asian Pacific American-owned	0	0.0
Subcontinent Asian American-owned	30	0.0
Hispanic American-owned	15,411	0.9
Native American-owned	2,170	0.1
White woman-owned	67,769	3.9
Total minority-/woman-owned	\$88,921	5.2 %
Majority-owned	1,627,740	94.8
Total	\$1,716,661	100.0 %
DBEs		
Black American-owned	\$373	0.0 %
Asian Pacific American-owned	0	0.0
Subcontinent Asian American-owned	0	0.0
Hispanic American-owned	4,489	0.3
Native American-owned	31	0.0
Unknown minority DBE-owned	0	0.0
White male-owned	0	0.0
White woman-owned	22,966	1.3
Total DBE	\$27,859	1.6 %
Non-DBE	1,688,802	98.4
Total	\$1,716,661	100.0 %

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

- A Black American-owned trucking business received 46 percent of the total dollars that went to Black American-owned businesses (approximately \$1.6 million of \$3.5 million);
- A Hispanic American-owned electrical contractor received 32 percent of the total dollars that went to Hispanic American-owned businesses (approximately \$4.9 million of \$15 million);
- A Native American-owned water, sewer, and utility line contractor received 84 percent of the total dollars that went to Native American-owned businesses (approximately \$1.8 million of \$2.2 million);
- A Subcontinent Asian American-owned architecture business received 100 percent of the total dollars that went to Subcontinent Asian American-owned businesses (all of \$30,200); and
- A non-Hispanic white woman-owned fencing, guardrail, and sign supply business received 21 percent of the total dollars that went to non-Hispanic white woman-owned businesses (approximately \$14 million of \$68 million).

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

CHAPTER 7.

Disparity Analysis

CHAPTER 7.

Disparity Analysis

The disparity analysis compared the participation of minority- and woman-owned businesses on contracts that the Nevada Department of Transportation (NDOT) awarded between January 1, 2012 and December 31, 2015 (i.e., the study period) to what those businesses might be expected to receive based on their availability for that work. The analysis focused on construction; professional services; and goods and support services contracts. Chapter 7 presents the disparity analysis in five parts:

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

A. Overview of Disparity Analysis

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

BBC expressed both actual participation and availability as percentages of the total dollars associated with a particular set of contracts, making them directly comparable (e.g., 5% participation compared with 4% availability). BBC then calculated a *disparity index* to help compare participation and availability results across relevant racial/ethnic and gender groups and across different sets of contracts. A disparity index of 100 indicates a match between actual participation and availability (referred to as *parity*). A disparity index of less than 100 indicates a disparity between participation and availability, and a disparity index of less than 80 is often considered *substantial*.¹ Figure 7-1 describes how BBC calculates disparity indices.

¹ Many courts have deemed disparity indices below 80 as being “substantial” and have accepted them as evidence of adverse conditions for minority- and woman-owned businesses (e.g., see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng’g Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); and *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). See Appendix B for additional discussion of those and other cases.

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

- Construction; professional services; and goods and support services contracts;
- Prime contracts and subcontracts;
- Federal Highway Administration (FHWA)- and state-funded contracts; and
- Large and small prime contracts.

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

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

- “All businesses” in row (1) pertains to information about all businesses owned by non-Hispanic white men (i.e., majority-owned businesses) and all minority- and woman-owned businesses considered together.
- Row (2) provides results for all minority- and woman-owned businesses, regardless of whether they were certified as Disadvantaged Business Enterprises (DBEs).
- Row (3) provides results for all non-Hispanic white woman-owned businesses, regardless of whether they were certified as DBEs.
- Row (4) provides results for all minority-owned businesses, regardless of whether they were certified as DBEs.
- Rows (5) through (10) provide results for businesses of each individual minority group, regardless of whether they were certified as DBEs.

Figure 7-1.
Calculation of disparity indices

The disparity index provides a way of assessing how closely the actual participation of minority- and woman-owned businesses matches the percentage of contract dollars that those businesses might be expected to receive based on their availability for specific sets of contracts. One can directly compare a disparity index for one racial/ethnic or gender group to that of another group and compare disparity indices across different sets of contracts. BBC calculates disparity indices using the following formula:

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

For example, if actual participation of non-Hispanic white woman-owned businesses on a set of contracts was 2 percent and the availability of non-Hispanic white woman-owned businesses for those contracts was 10 percent, then the disparity index would be 2 percent divided by 10 percent, which would then be multiplied by 100 to equal 20. In this example, non-Hispanic white woman-owned businesses would have actually received 20 cents of every dollar that they might be expected to receive based on their availability.

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

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	1,679	\$1,716,661	\$1,716,661				
(2) MBE/WBE	371	\$88,921	\$88,921	5.2	14.7	-9.5	35.3
(3) WBE	277	\$67,769	\$67,769	3.9	6.9	-3.0	56.9
(4) MBE	94	\$21,152	\$21,152	1.2	7.7	-6.5	16.0
(5) Black American-owned	22	\$3,541	\$3,541	0.2	1.9	-1.6	11.1
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	2.6	-2.6	0.0
(7) Subcontinent Asian American-owned	1	\$30	\$30	0.0	0.1	-0.1	1.4
(8) Hispanic American-owned	63	\$15,411	\$15,411	0.9	3.1	-2.2	29.1
(9) Native American-owned	8	\$2,170	\$2,170	0.1	0.1	0.1	200+
(10) Unknown MBE	0	\$0					
(11) DBE-certified	112	\$27,859	\$27,859	1.6			
(12) Woman-owned DBE	91	\$22,966	\$22,966	1.3			
(13) Minority-owned DBE	21	\$4,893	\$4,893	0.3			
(14) Black American-owned DBE	3	\$373	\$373	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	16	\$4,489	\$4,489	0.3			
(18) Native American-owned DBE	2	\$31	\$31	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

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

Source: BBC Research & Consulting disparity analysis.

The bottom half of Figure 7-2 presents utilization results for businesses that were certified as DBEs. BBC does not report availability or disparity analysis results separately for DBE-certified businesses.

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

- Column (a) presents the total number of prime contracts and subcontracts (i.e., contract elements) that the study team analyzed as part of the contract set. As shown in row (1) of column (a) of Figure 7-2, the study team analyzed 1,679 contract elements. The value presented in column (a) for each individual racial/ethnic and gender group represents the number of contract elements in which businesses of that particular group participated (e.g., as shown in row (5) of column (a), Black American-owned businesses participated in 22 prime contracts and subcontracts).
- Column (b) presents the dollars (in thousands) that were associated with the set of contract elements. As shown in row (1) of column (b) of Figure 7-2, the study team examined approximately \$1.7 billion for the entire set of contract elements. The dollar totals include both prime contract and subcontract dollars. The value presented in column (b) for each individual racial/ethnic and gender group represents the dollars that the businesses of that particular group received on the set of contract elements (e.g., as shown in row (5) of column (b), Black American-owned businesses received approximately \$3.5 million).
- Column (c) presents the dollars (in thousands) that were associated with the set of contract elements after adjusting those dollars for businesses that the study team identified as minority-owned or as DBEs, but for which specific race/ethnicity information was not available. The dollar totals include both prime contract and subcontract dollars.
- Column (d) presents the utilization percentage of each racial/ethnic and gender group as a percentage of total dollars associated with the set of contract elements. The study team calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage (e.g., for Black American-owned businesses, the study team divided \$3.5 million by \$1.7 billion and multiplied by 100 for a result of 0.2%, as shown in row (5) of column (d)).

Availability results. Column (e) of Figure 7-2 presents the availability of each relevant racial/ethnic and gender group for all contract elements that the study team analyzed as part of the contract set. Availability estimates, which are represented as a percentage of the total contracting dollars associated with the set of contracts, serve as benchmarks against which to compare utilization results for specific groups for specific sets of contracts (e.g., as shown in row (5) of column (e), the availability of Black American-owned businesses is 1.9%).

Differences between utilization and availability. The next step in analyzing whether there was a disparity between the participation and availability of minority- and woman-owned businesses is to subtract the utilization percentage from the availability percentage. Column (f) of Figure 7-2 presents the percentage point difference between utilization and availability for each relevant racial/ethnic and gender group. For example, as presented in row (5) of column (f)

of Figure 7-2, the participation of Black American-owned businesses in NDOT contracts was 1.6 percentage points less than their availability.

Disparity indices. It is sometimes difficult to interpret absolute percentage differences between participation and availability. Therefore, BBC also calculated a disparity index for each relevant racial/ethnic and gender group, which measured actual participation relative to availability and served as a metric to compare any disparities across different groups and different sets of contracts. BBC calculated disparity indices by dividing the utilization percentage for each group by the availability percentage for each group and multiplying by 100. Smaller disparity indices indicate greater disparities (i.e., a greater degree of underutilization).

Column (g) of Figure 7-2 presents the disparity index for each relevant racial/ethnic and gender group. For example, as reported in row (5) of column (g), the disparity index for Black American-owned businesses was approximately 11, indicating that Black American-owned businesses actually received only \$0.11 for every dollar that they might be expected to receive based on their availability for prime contracts and subcontracts that NDOT awarded during the study period.

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

- When BBC’s calculations showed a disparity index exceeding 200, BBC reported an index of “200+.” A disparity index of 200+ means that participation was more than twice as much as availability for a particular group for a particular set of contracts.
- When there was no participation and no availability for a particular group for a particular set of contracts, BBC reported a disparity index of “100,” indicating parity.
- When participation for a particular group for a particular set of contracts was greater than 0 percent but availability was 0 percent, BBC reported a disparity index of “200+.”²

B. Overall Disparity Analysis Results

BBC used the disparity analysis results from Figure 7-2 to assess any disparities between the participation of minority- and woman-owned businesses in prime contracts and subcontracts that NDOT awarded during the study period as well as their availability for that work. Figure 7-3 presents disparity indices for all relevant racial/ethnic and gender groups considered together and separately for each group. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. Disparity indices less than 100 indicate disparities between participation and availability (i.e., underutilization). For reference, a line is also drawn at a disparity index level of 80, because some courts use 80 as a threshold for what indicates a substantial disparity.

² A particular racial/ethnic or gender group could show a utilization percentage greater than 0 percent but an availability percentage of 0 percent for many reasons including the fact that one or more businesses that participated in NDOT contracts during the study period were out of business at the time that BBC conducted availability surveys.

Figure 7-3.
Disparity indices by group

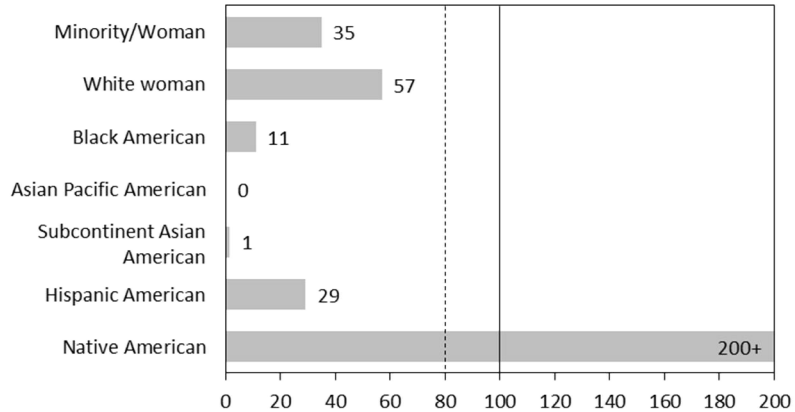
Note:

The study team analyzed 1,679 prime contracts/subcontracts.

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

Source:

BBC Research & Consulting disparity analysis.



As shown in Figure 7-3, overall, the participation of minority- and woman-owned businesses in contracts that NDOT awarded during the study period was lower than what one might expect based on the availability of those businesses for that work. The disparity index of 35 indicates that minority- and woman-owned businesses considered together received approximately \$0.35 for every dollar that they might be expected to receive based on their availability for the relevant prime contracts and subcontracts that NDOT awarded during the study period. Disparity analysis results by individual group showed that:

- Five groups exhibited disparity indices substantially below parity—Black American-owned businesses (disparity index of 11), Asian-Pacific American-owned businesses (disparity index below 1), Subcontinent-Asian American-owned businesses (disparity index of 1), Hispanic American-owned businesses (disparity index of 29), and non-Hispanic white woman-owned businesses (disparity index of 58).
- Native American-owned businesses were the only group that did not exhibit a disparity (index of 200+). However, the majority of dollars that went to Native American-owned businesses (approximately \$1.8 million of \$2.2 million) went to a single Native American-owned business.

Note that NDOT applied DBE contract goals to many of the contracts that it awarded during the study period so the disparity analysis results shown in Figure 7-3 are reflective of the use of those measures.

C. Disparity Analysis Results for Federal Highway Administration-funded Contracts

NDOT is a recipient of FHWA funds and awarded many FHWA-funded contracts during the study period.³ NDOT awarded those contracts using policies and practices that are part of its implementation of the Federal DBE Program including the use of DBE contract goals. Figure 7-4 presents disparity analysis results for the FHWA-funded contracts that NDOT awarded during the study period to help assess the effectiveness of its implementation of the Federal DBE Program. As shown in Figure 7-4, overall, the participation of minority- and woman-owned

³ BBC considered a contract to be FHWA-funded if it included at least one dollar of FHWA funding.

businesses in the FHWA-funded contracts that NDOT awarded during the study period was substantially lower than what one might expect based on the availability of those businesses for that work. The disparity index of 40 indicates that minority- and woman-owned businesses considered together received approximately \$0.40 for every dollar that they might be expected to receive based on their availability for the FHWA-funded prime contracts and subcontracts that NDOT awarded during the study period.

Figure 7-4.
Disparity indices for
FHWA-funded contracts

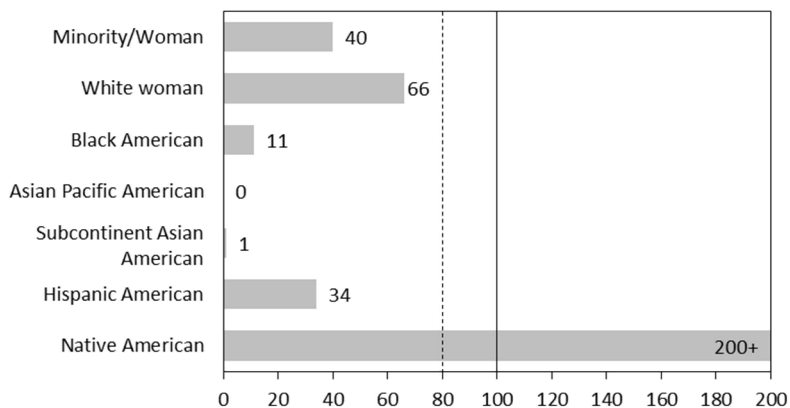
Note:

The study team analyzed 1,039 FHWA-funded contracts/subcontracts.

For more detail, see Figure F-7 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



- Five groups exhibited disparity indices substantially below parity—Black American-owned businesses (disparity index of 11), Asian-Pacific American-owned businesses (disparity index below 1), Subcontinent-Asian American-owned businesses (disparity index of 1), Hispanic American-owned businesses (disparity index of 34), and non-Hispanic white woman-owned businesses (disparity index of 66).
- Native American-owned businesses were the only group that did not exhibit a disparity (index of 200+). However, the majority of dollars that went to Native American-owned businesses (approximately \$1.8 million of \$2.2 million) went to a single Native American-owned business.

Note that NDOT applied DBE contract goals to many of the FHWA-funded contracts that it awarded during the study period so the disparity analysis results shown in Figure 7-4 are reflective of the use of those measures.

D. Disparity Analysis Results for State-funded Contracts

Figure 7-5 presents disparity analysis results for the state-funded contracts that NDOT awarded during the study period.⁴ As shown in Figure 7-5, overall, the participation of minority- and woman-owned businesses in state-funded contracts that NDOT awarded during the study period was substantially lower than what one might expect based on the availability of those businesses for that work. The disparity index of 16 indicates that minority- and woman-owned businesses considered together received approximately \$0.16 for every dollar that they might be expected to receive based on their availability for the state-funded prime contracts and subcontracts that NDOT awarded during the study period. All groups exhibited a disparity index substantially below parity for state-funded contracts.

⁴ BBC considered a contract to be state-funded if it did not include any federal funding.

Figure 7-5.
Disparity indices for
state-funded contracts

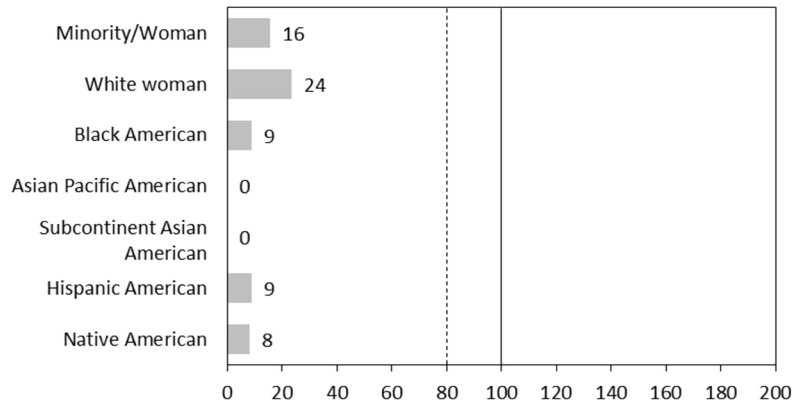
Note:

The study team analyzed 640 state-funded contracts/subcontracts.

For more detail, see Figure F-6 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



E. Statistical Significance of Disparity Analysis Results

Statistical significance tests allow researchers to test the degree to which they can reject random chance as an explanation for any observed quantitative differences. In other words, a statistically significant difference is one that one can consider to be reliable or *real*. Random chance is the factor that researchers consider most in determining the statistical significance of results that are based on population samples.

Monte Carlo analysis. BBC used a computational algorithm that relies on repeated, random simulations to examine the statistical significance of disparity analysis results. That approach is referred to as a *Monte Carlo* method. The analyses that the study team completed as part of the disparity study were well-suited for using Monte Carlo analysis to test statistical significance. Monte Carlo analysis was appropriate for that purpose, because, among the contracts that NDOT awarded during the study period, there were many individual chances for businesses to win prime contracts and subcontracts, each with a different payoff (i.e., each with a different dollar value). Figure 7-6 provides additional information about how the study team used a Monte Carlo method to test the statistical significance of disparity analysis results.⁵

Results. The study team identified substantial disparities for various racial/ethnic and gender groups on all contracts considered together (see Table F-2 in Appendix F). BBC used Monte Carlo analysis to test whether the disparities that the study team observed were statistically significant.

As shown in Figure 7-7, results from the Monte Carlo analysis indicated that the disparities for all minority- and woman-owned businesses, non-Hispanic white woman-owned businesses, all minority-owned businesses, Asian Pacific American-owned businesses, Subcontinent Asian American-owned businesses and Hispanic American-owned businesses were statistically significant at the 95 percent confidence level. Disparities for all Black American-owned businesses were statistically significant at the 90 percent confidence level.

⁵ It is important to note that Monte Carlo simulations may not be appropriate to use with very small populations of contracts.

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

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

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

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

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

MBE/WBE Group	Disparity index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"
Total minority-/woman-owned	35	0	<0.1 %
White woman-owned	57	10,116	1.0 %
Total minority-owned	16	0	<0.1 %
Black American-owned	11	31,123	3.1 %
Asian Pacific American-owned	0	0	<0.1 %
Subcontinent Asian American-owned	1	674	<0.1 %
Hispanic American-owned	30	16,253	1.6 %
Native American-owned	215	N/A	N/A

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

Source: BBC Research & Consulting disparity analysis.

CHAPTER 8.

Further Explanation of Disparities

CHAPTER 8.

Further Exploration of Disparities

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

- A. Are there disparities for relevant contracting areas?
- B. Are there disparities for prime contracts and subcontracts?
- C. Are there disparities for different time periods?
- D. Are there disparities for large and small prime contracts?
- E. Are there Disparities for Geographical Areas?
- F. Are there disparities for NDOT and local assistance contracts?
- G. Do bid/proposal processes explain any disparities for prime contracts?

Answers to those questions may be relevant as NDOT considers how to refine its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. They may also help NDOT identify the specific racial/ethnic and gender groups, if any, that might be included in any future race- or gender-conscious program measures that the agency decides to use.

A. Are there Disparities for Relevant Contracting Areas?

BBC Research & Consulting (BBC) examined disparity analysis results separately for construction; professional service; and goods and support services contracts that NDOT awarded during the study period. That information might help NDOT refine its implementation of the Federal DBE Program for particular contracting areas. Figure 8-1 presents disparity indices for all relevant racial/ethnic and gender groups separately for each contracting area. Overall, minority- and woman-owned businesses exhibited substantial disparities for all types of contracts.

- Five groups exhibited substantial disparities on construction contracts—non-Hispanic white woman-owned businesses (disparity index of 60), Black American-owned businesses (disparity index of 11), Asian Pacific American-owned businesses (disparity index below 1), Subcontinent Asian American-owned businesses (disparity index of 1), and Hispanic American-owned businesses (disparity index of 23).
- Native American-owned businesses (disparity index of 200+) did not exhibit a disparity for construction contracts awarded during the study period.

- Five groups exhibited substantial disparities on professional services contracts—non-Hispanic white woman-owned businesses (disparity index of 18), Black American-owned businesses (disparity index of 11), Asian Pacific American-owned businesses (disparity index below 1), Subcontinent Asian American-owned businesses (disparity index below 1), and Native American-owned businesses (disparity index of 28).
- Hispanic American-owned businesses (disparity index of 200+) did not exhibit a disparity on professional services contracts.
- Four groups exhibited substantial disparities on goods and support services contracts—non-Hispanic white woman-owned businesses (disparity index below 1), Black American-owned businesses (disparity index of 13), Asian Pacific American-owned businesses (disparity index below 1), and Hispanic American-owned businesses (disparity index below 1).
- Subcontinent Asian American-owned businesses (disparity index of 100) and Native American-owned businesses (disparity index of 100) did not exhibit disparities on goods and support services contracts.

Figure 8-1.
Disparity indices for
construction; professional
services; and goods and
support services

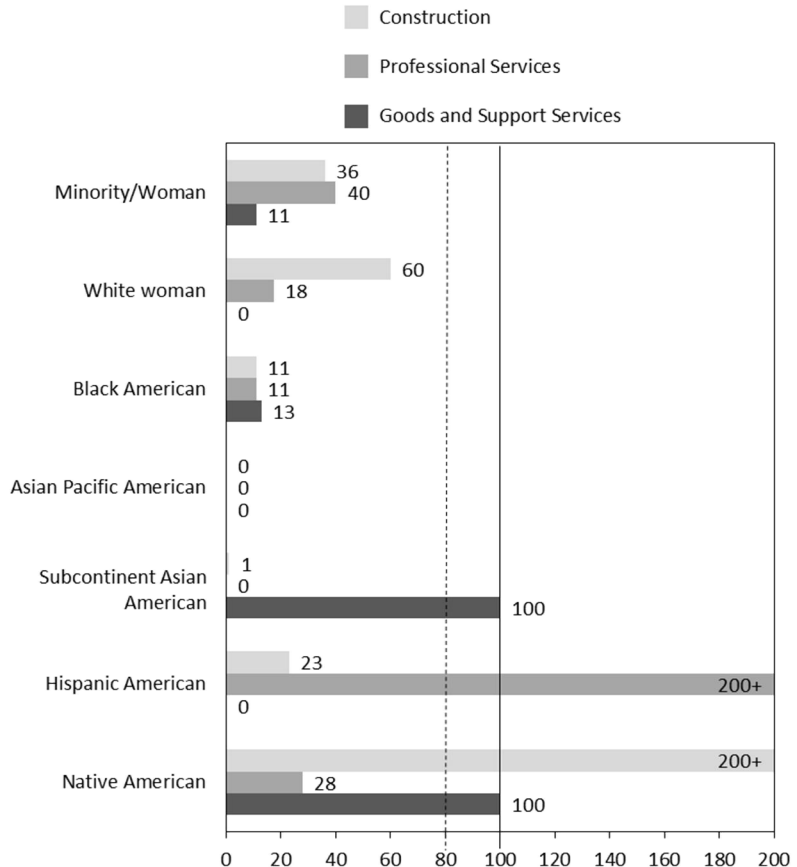
Note:

The study team analyzed 1,316 construction contracts; 323 professional services contracts; and 40 goods and support services contracts.

For more detail, see Figures F-3, F-4, and F-5 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



B. Are there Disparities for Prime Contracts and Subcontracts?

BBC examined disparity analysis results separately for prime contracts and subcontracts to assess whether minority- and woman-owned businesses exhibited different outcomes based on their roles as either prime contractors or subcontractors during the study period. Figure 8-2

presents disparity indices for all relevant racial/ethnic and gender groups separately for prime contracts and subcontracts. Overall, minority- and woman-owned business exhibited substantial disparities for prime contracts. For subcontracts, minority- and woman-owned businesses exhibited disparities.

- Five groups exhibited substantial disparities on prime contracts—non-Hispanic white woman-owned businesses (disparity index of 11), Black American-owned businesses (disparity index below 1), Asian Pacific American-owned businesses (disparity index below 1), Hispanic American-owned businesses (disparity index of 9), and Native American-owned businesses (disparity index of 8).
- Subcontinent Asian American-owned businesses (disparity index of 100) did not exhibit a disparity for prime contracts awarded during the study period.
- Three minority groups exhibited substantial disparities on subcontracts—Asian Pacific American-owned businesses (disparity index below 1), Subcontinent Asian American-owned businesses (disparity index below 1), and Hispanic American-owned businesses (disparity index of 65).
- Black American-owned businesses (disparity index of 81) exhibited a disparity on subcontracts awarded during the study period.
- Native American-owned businesses (disparity index of 200+) and non-Hispanic white woman-owned businesses (disparity index of 127) did not exhibit disparities on subcontracts.

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

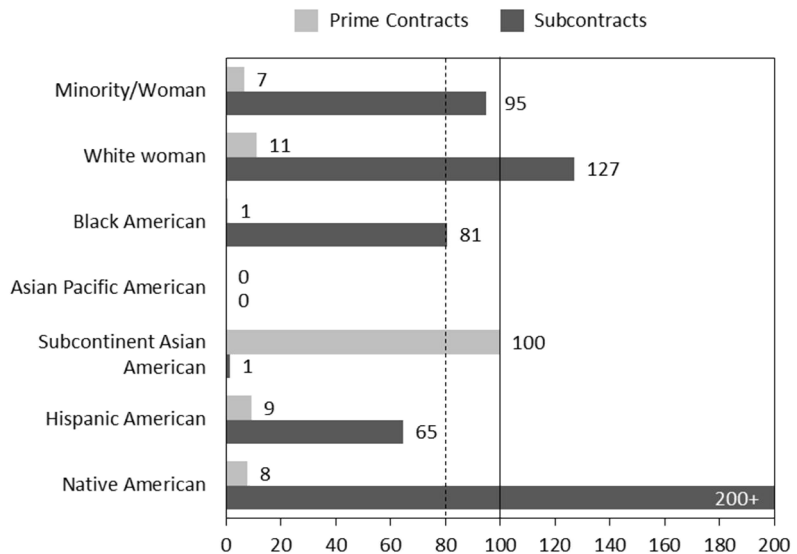
Note:

The study team analyzed 541 prime contracts and 1,138 subcontracts.

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

Source:

BBC Research & Consulting disparity analysis.



C. Are there Disparities for Different Time Periods?

BBC examined disparity analysis results separately for two separate time periods—January 1, 2012 through December 31, 2013 (*early* study period) and January 1, 2014 through December 31, 2015 (*late* study period). That information might help NDOT determine whether there were different outcomes for minority- and woman-owned businesses as the country moved further from the economic downturn that began in 2008. Figure 8-3 presents disparity indices for all

relevant racial/ethnic and gender groups separately for the early and late study periods. Overall, minority- and woman-owned businesses exhibited substantial disparities for contracts awarded during both early and late study periods.

- Five groups exhibited substantial disparities on contracts awarded during the early study period—non-Hispanic white woman-owned businesses (disparity index of 72), Black American-owned businesses (disparity index of 22), Asian Pacific American-owned businesses (disparity index below 1), Subcontinent Asian American-owned (disparity index of 2), and Hispanic American-owned businesses (disparity index of 47).
- Native American-owned businesses (disparity index of 119) did not exhibit a disparity on contracts awarded during the early study period.
- Five groups exhibited substantial disparities on contracts awarded during the late study period—non-Hispanic white woman-owned businesses (disparity index of 48), Black American-owned businesses (disparity index of 3), Asian Pacific American-owned businesses (disparity index below 1), Subcontinent Asian American-owned (disparity index below 1), and Hispanic American-owned businesses (disparity index of 21).
- Native American-owned businesses (disparity index of 200+) did not exhibit a disparity on contracts awarded during the late study period.

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

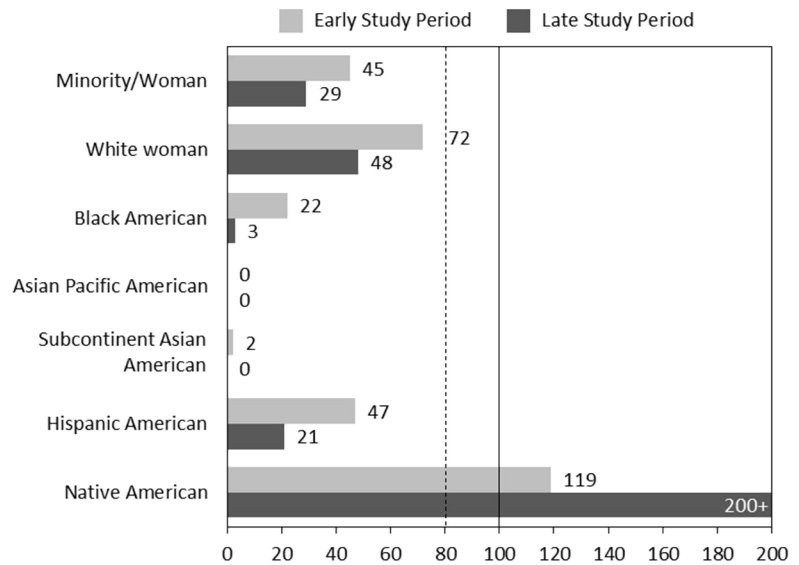
Note:

The study team analyzed 700 contracts in the early study period and 979 contracts in the late study period.

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

Source:

Availability and utilization analyses.



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

BBC compared disparity analysis results for “large” prime contracts and “small” prime contracts that NDOT awarded during the study period to assess whether contract size affected disparity analysis results for prime contracts. “Large” prime contracts were defined as construction contracts worth more than \$2 million and engineering contracts worth more than \$500,000. “Small” prime contracts were defined as construction contracts worth \$2 million or less and engineering worth \$500,000 or less. Figure 8-4 presents disparity indices for all relevant racial/ethnic and gender groups separately for large and small prime contracts. Overall,

minority- and woman-owned businesses exhibited substantial disparities for both large and small prime contracts.

- Four minority groups exhibited substantial disparities on large prime contracts awarded during the study period—non-Hispanic white woman-owned businesses (disparity index of 4), Black American-owned businesses (disparity index below 1), Asian Pacific American-owned businesses (disparity index below 1), Hispanic American-owned (disparity index of 8), and Native American-owned businesses (disparity index below 1).
- Subcontinent Asian American-owned businesses (disparity index of 100) did not exhibit a disparity on large prime contracts awarded during the study period.
- Four minority groups exhibited substantial disparities on small prime contracts awarded during the study period—non-Hispanic white woman-owned businesses (disparity index of 33), Black American-owned businesses (disparity index of 4), Asian Pacific American-owned businesses (disparity index below 1), Hispanic American-owned (disparity index of 15), and Native American-owned businesses (disparity index of 10).
- Subcontinent Asian American-owned businesses (disparity index of 100) did not exhibit a disparity on small prime contracts awarded during the study period.

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

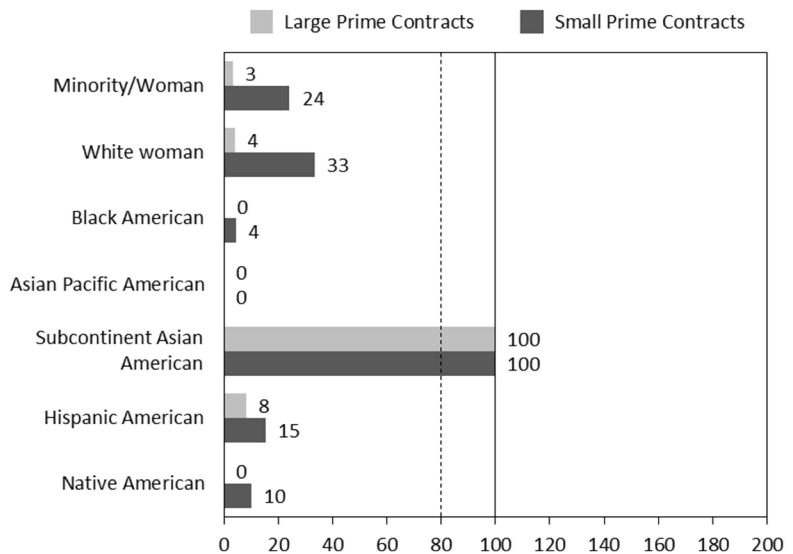
Note:

The study team analyzed 112 large prime contracts and 429 small prime contracts.

For more detail, see Figures F-21 and F-22 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



E. Are there Disparities for Geographical Areas?

BBC compared disparity analysis results for District 1, District 2, and District 3 contracts that were awarded during the study period to assess whether geographical area affected disparity analysis results for contracts. Figure 8-5 presents disparity indices for all relevant racial/ethnic and gender groups separately for contracts. The total contracts analyzed include all related prime and subcontractors for each contract. Overall, minority- and woman-owned businesses exhibited substantial disparities for contracts awarded in all districts.

- Five groups exhibited substantial disparities on District 1 contracts awarded during the study period—Black American-owned businesses (disparity index of 1), Asian Pacific American-owned businesses (disparity index below 1), Subcontinent Asian American-

owned businesses (disparity index below 1), Hispanic American-owned (disparity index of 42), and Native American-owned businesses (disparity index below 1).

- Non-Hispanic white woman-owned businesses (disparity index of 99) exhibited a disparity on District 1 contracts awarded during the study period.
- Five groups exhibited substantial disparities on District 2 contracts awarded during the study period—non-Hispanic white woman-owned businesses exhibited (disparity index of 20), Black American-owned businesses (disparity index of 24), Asian Pacific American-owned businesses (disparity index below 1), Subcontinent Asian American-owned businesses (disparity index below 1), and Hispanic American-owned (disparity index of 23).
- Native American-owned businesses (disparity index of 200+) did not exhibit a disparity on District 2 contracts awarded during the study period.
- Four groups exhibited substantial disparities on District 3 contracts awarded during the study period—non-Hispanic white woman-owned businesses (disparity index of 75), Asian Pacific American-owned businesses (disparity index below 1), Subcontinent Asian American-owned (disparity index of 2), and Hispanic American-owned (disparity index of 7).
- Black American-owned businesses (disparity index of 200+) and Native American-owned businesses (disparity index of 200+) did not exhibit disparities on District 3 contracts awarded during the study period.

Figure 8-5.
Disparity indices for
geographical areas

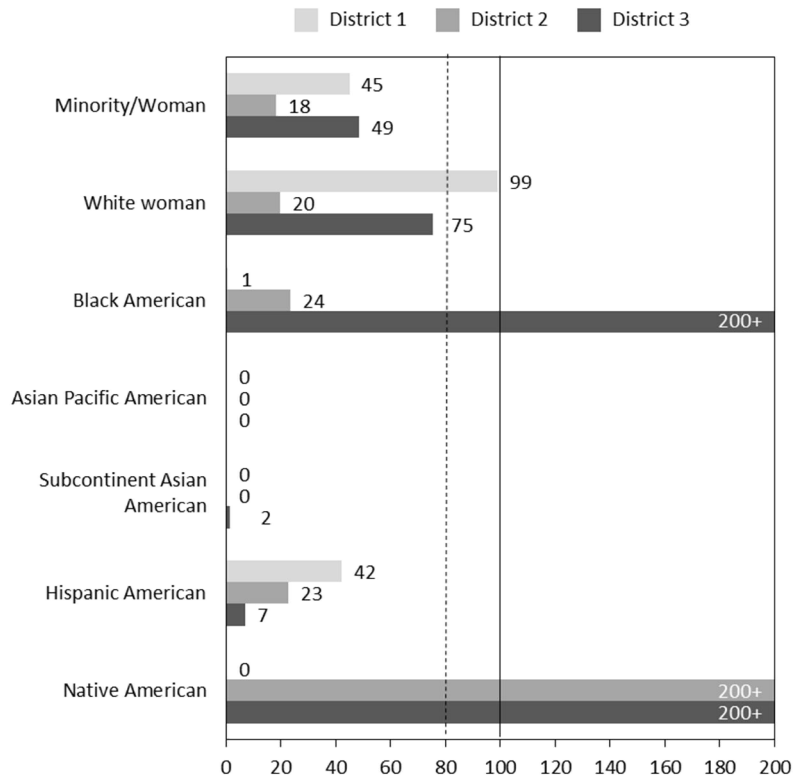
Note:

The study team analyzed 481 District 1 contracts, 930 District 2 contracts, and 268 District 3 contracts.

For more detail, see Figures F-18, F-19, and F-20 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



F. Are there Disparities for NDOT and Local Assistance Contracts?

BBC compared disparity analysis results for NDOT contracts and local assistance contracts that were awarded during the study period. Figure 8-6 presents disparity indices for all relevant racial/ethnic and gender groups separately for NDOT and local contracts. The total contracts analyzed include all related prime and subcontractors for each contract. Overall, minority- and woman-owned businesses exhibited substantial disparities for both NDOT and local assistance contracts.

- Five groups exhibited substantial disparity indices below parity on NDOT contracts awarded during the study period—non-Hispanic white woman-owned businesses (disparity index of 60), Black American-owned businesses (disparity index of 14), Asian Pacific American-owned businesses (disparity index below 1), Subcontinent Asian American-owned businesses (disparity index of 1), and Hispanic American-owned (disparity index of 26).
- Native American-owned businesses (disparity index of 87) exhibited a disparity on NDOT contracts awarded during the study period.
- Five groups exhibited substantial disparities on local assistance contracts awarded during the study period—non-Hispanic white woman-owned businesses (disparity index of 34), Black American-owned businesses (disparity index below 1), Asian Pacific American-owned businesses (disparity index below 1), Subcontinent Asian American-owned businesses (disparity index below 1), and Hispanic American-owned (disparity index of 60).

- Native American-owned businesses (disparity index of 200+) did not exhibit a disparity on local assistance contracts awarded during the study period.

Figure 8-6.
Disparity indices for NDOT and local assistance contracts

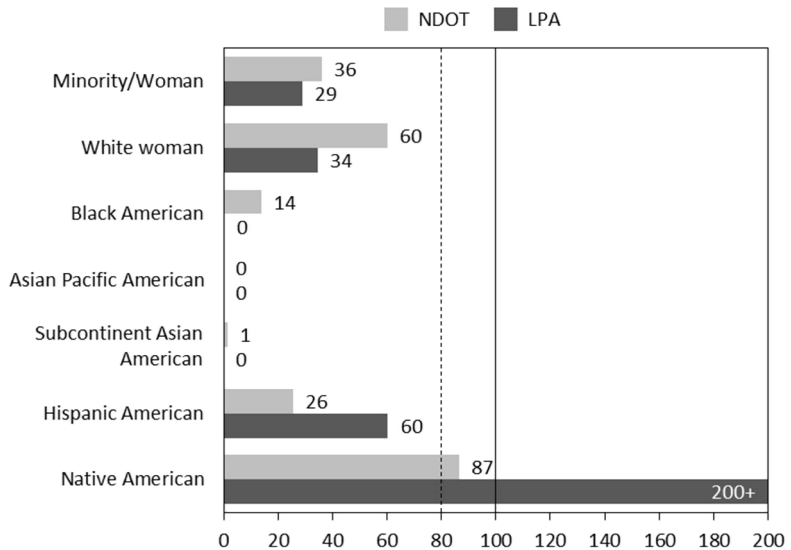
Note:

The study team analyzed 1,551 NDOT contracts and 128 local assistance contracts.

For more detail, see Figures F-16 and F-17 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



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

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

Construction. The study team examined bid information for a sample of 167 construction contracts that NDOT awarded during the study period.¹ In total, NDOT received 645 bids for those contracts.

Number of bids from minority- and woman-owned businesses. Minority- and woman-owned businesses submitted 41 of the 645 bids (6%) that the study team examined:

- 16 bids (2% of all bids) came from minority-owned businesses (7 different businesses); and
- 25 bids (4% of all bids) came from non-Hispanic white woman-owned businesses (10 different businesses).

As part of availability surveys, the study team asked construction business owners and managers to indicate whether their companies compete as prime contractors on public contracts. Of the business owners and managers that indicated that their companies compete as prime contractors, 7.3 percent represented minority-owned businesses and 5.3 percent

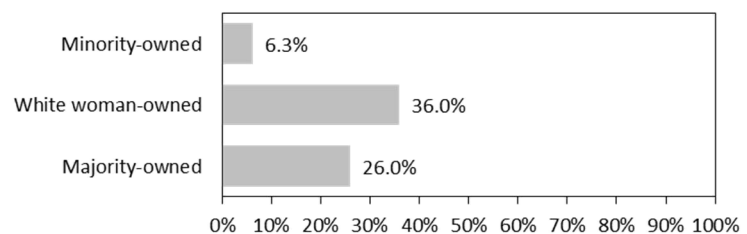
¹ NDOT provided data on 262 bid contracts. Of the 262 contracts, 170 were classified as construction and 92 were professional services contracts. However, 14 contracts were excluded from analysis, as the bid data did not indicate a winning firm. Three of the excluded contracts were construction contracts and 11 were professional service contracts.

represented woman-owned businesses. The percentage of available minority- and woman-owned businesses that reported bidding on construction prime contracts was higher than the percentage of minority- and woman-owned businesses that submitted bids on NDOT construction contracts during the study period.

Success of bids. The study team also examined the percentage of bids that minority- and woman-owned businesses submitted that resulted in contract awards. As shown in Figure 8-7, 6 percent of the bids that minority-owned businesses submitted resulted in contract awards, which was much lower than the percent of bids that majority-owned businesses submitted that resulted in contract awards. Of the bids that woman-owned businesses submitted, 36 percent resulted in contract awards, higher than the percent of bids that majority-owned businesses submitted that resulted in contract awards.

Figure 8-7.
Percentage of bids on construction contracts that resulted in contract awards

Note:
Based on an analysis of 645 bids on 167 contracts..
Source:
NDOT contracting data.



Professional services. The study team examined bid information for a sample of 81 professional services contracts that NDOT awarded during the study period. In total, NDOT received 312 bids for those contracts.

Number of bids from minority- and woman-owned businesses. Minority- and woman-owned businesses submitted 23 of the 312 bids (7%) that the study team examined:

- 9 bids (3% of all bids) came from minority-owned businesses (6 different businesses); and
- 14 bids (4% of all bids) came from non-Hispanic white woman-owned businesses (14 different businesses).

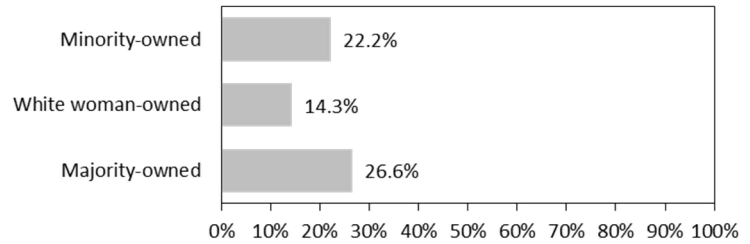
As part of availability surveys, the study team asked professional services business owners and managers to indicate whether their companies compete as prime contractors on public contracts. Of the business owners and managers that indicated that their companies compete as prime contractors, 3.4 percent represented minority-owned businesses and 6.1 percent represented woman-owned businesses. The percentage of available minority-owned firms that reported bidding on professional services prime contracts was about the same as the percentage of available firms. For woman-owned businesses, the percentage of available firms that reported bidding on professional services prime contracts was higher than the percentage of woman-owned businesses that submitted bids on NDOT professional services contracts during the study period.

Success of bids. The study team also examined the percentage of bids that minority- and woman-owned businesses submitted that resulted in contract awards. As shown in Figure 8-8, 22 percent of the bids that minority-owned businesses submitted resulted in contract awards,

which was slightly lower than the percent of bids that majority-owned businesses submitted that resulted in contract awards. Of the bids that woman-owned businesses submitted, 14 percent resulted in contract awards, lower than the percent of bids that majority-owned businesses submitted that resulted in contract awards.

Figure 8-8.
Percentage of bids on
professional services contracts
that resulted in contract awards

Note:
Based on an analysis of 312 bids on 81 contracts.
Source:
NDOT contracting data.



CHAPTER 9.

Overall DBE Goal

CHAPTER 9.

Overall DBE Goal

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

NDOT must prepare and submit a Goal and Methodology document to FHWA that presents its overall DBE goal that is supported by information about the steps that the agency took to develop the goal. NDOT last developed an overall DBE goal for FHWA-funded contracts for federal fiscal years (FFYs) 2014 through 2016. At that time, the agency established an overall DBE goal of 7.0% percent. NDOT indicated to FHWA that it planned to meet the goal through the use of a combination of race- and gender-neutral and race- and gender-conscious program measures.

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

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

A. Establishing a Base Figure

Establishing a base figure is the first step in calculating an overall goal for DBE participation in NDOT's FHWA-funded contracts. As presented in Chapter 5, potential DBEs—that is, minority- and woman-owned businesses that are DBE-certified or appear that they could be DBE-certified based on their ownership and the annual revenue limits described in 13 CFR Part 121 and 49 CFR Part 26—might be expected to receive 12.8 percent of NDOT's FHWA-funded prime contract and subcontract dollars based on their availability for that work. NDOT might consider 12.8 percent as the base figure for its overall DBE goal if it anticipates that the types, sizes, and locations of FHWA-funded contracts that the agency awards in the future will be similar to the FHWA-funded contracts that it awarded during the study period (January 1, 2012 through December 31, 2015).

Figure 9-1 presents the construction; professional services; and good and support services components of the base figure for NDOT’s overall DBE goal. The availability estimates presented in Figure 9-1 are based on the availability of potential DBEs for FHWA-funded prime contracts and subcontracts. The overall base figure reflects a weight of 0.93 for construction contracts, 0.06 for professional service contracts, and 0.01 for goods and support services contracts based on the volume of dollars of FHWA-funded contracts that NDOT awarded during the study period. If NDOT expects that the relative distributions of FHWA-funded construction and engineering contract dollars will change substantially in the future, the agency might consider applying different weights to the corresponding base figure components. NDOT might also consider evaluating whether the types, sizes, and locations of the FHWA-funded contracts that it awards will change substantially in the future.

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

Potential DBEs	Availability Percentage			Weighted Average
	Construction	Professional Services	Goods and Support Services	
Black American-owned	1.0 %	1.3 %	26.5 %	1.2 %
Asian Pacific American-owned	2.6	0.8	2.5	2.5
Subcontinent Asian American-owned	0.1	0.1	0.0	0.1
Hispanic American-owned	2.9	1.0	0.8	2.8
Native American-owned	0.0	0.1	0.0	0.0
White woman-owned	6.1	7.2	1.7	6.2
Total potential DBEs	12.8 %	10.6 %	31.5 %	12.8 %
Industry weight	93.0 %	6.1 %	0.9 %	

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

See Figures F-24, F-25, and F-26 in Appendix F for corresponding disparity results tables.

Source: BBC Research & Consulting availability analysis.

B. Considering a Step-2 Adjustment

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

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

¹ 49 CFR Section 26.45.

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

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

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

Figure 9-2 presents past DBE participation based on NDOT’s Uniform Reports of DBE Awards or Commitments and Payments as reported to FHWA. According to NDOT’s Uniform Reports, median DBE participation in FHWA-funded contracts from FFYs 2011 through 2015 was 8.5 percent.

Figure 9-2.
Past certified DBE participation in FHWA-funded contracts, FFY 2011-2015

FFY	DBE Attainment	Annual DBE Goal	Difference
2011	3.5 %	10.48 %	-7.0 %
2012	7.2	10.48	-3.3
2013	8.5	10.48	-2.0
2014	9.9	7.0	2.9
2015	8.8	7.0	1.8

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

The information about past DBE participation supports a downward adjustment to NDOT’s base figure. If NDOT were to use the approach that USDOT outlined in “Tips for Goals Setting” based on Uniform Reports of DBE Awards/Commitments and Payments, the overall goal would be the average of the 12.8 percent base figure and the 8.5 percent median past DBE participation, yielding a potential overall DBE goal of 10.7 percent. BBC’s analysis of DBE participation in NDOT’s FHWA-funded contracts indicates DBE participation (1.6%) that is also lower than the base figure. If NDOT were to adjust its base figure based on DBE participation information from the disparity study, it might consider taking the average of the 12.8 percent base figure and the 1.6 percent DBE participation, yielding a potential overall DBE goal of 7.2 percent.

2. Information related to employment, self-employment, education, training, and unions. Chapter 3 summarizes information about conditions in the local contracting industry for minorities, women, and minority- and woman-owned businesses. Additional information about quantitative and qualitative analyses of conditions in the local marketplace are presented in Appendices C and D, respectively. BBC’s analyses indicate that there are barriers that certain

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

minority groups and women face related to human capital, financial capital, business ownership, and business success in the Nevada contracting industry. Such barriers may decrease the availability of minority- and woman-owned businesses to obtain and perform the FHWA-funded contracts that NDOT awards, which supports an upward step-2 adjustment to NDOT's base figure.

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

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

BBC analyzed the impact that barriers in business ownership would have on the base figure if the groups of minorities and women that exhibited statistically significant disparities in rates of business ownership owned businesses at the same rate as comparable non-Hispanic white men. The results of that analysis—sometimes referred to as a *but for* analysis, because it estimates the availability of minority- and woman-owned businesses *but for* the effects of race- and gender-based discrimination—are presented in Figure 9-3.

The *but for* analysis included the same contracts that the study team analyzed to determine the base figure (i.e., FHWA-funded construction; professional services; and goods and support services prime contracts and subcontracts that NDOT awarded during the study period). The weights for each industry were based on the proportion of FHWA-funded contract dollars that NDOT awarded in each industry during the study period (i.e., 0.93 weight for construction; a 0.06 weight for professional services; and a 0.01 weight for goods and support services). In that way, BBC determined a potential adjustment to NDOT's base figure that attempted to account for race- and gender-based barriers in business ownership in the local contracting industry.

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

- a. **Current availability.** Column (a) presents the current availability of potential DBEs by racial/ethnic and gender group and by industry, as also presented in Figure 9-1. Each row presents the percentage availability for each racial/ethnic and gender group. Combined, the current availability of potential DBEs for NDOT's FHWA-funded contracts is 12.8 percent, as shown in row (28) of column (a).
- b. **Disparity indices for business ownership.** For each group that is significantly less likely than similarly-situated non-Hispanic white men to own construction and engineering businesses, BBC simulated business ownership rates if those groups owned businesses at the same rate as non-Hispanic white men who share similar race- and gender-neutral personal characteristics.

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

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

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

Figure 9-3.
Potential step-2 adjustment considering disparities in the rates of business ownership

Industry and group	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of base figure**
Construction					
(1) Black American	1.0 %	n/a	1.0 %	0.9 %	
(2) Asian Pacific American	2.6	n/a	2.6	2.5	
(3) Subcontinent Asian American	0.1	n/a	0.1	0.1	
(4) Hispanic American	2.9	n/a	2.9	2.8	
(5) Native American	0.0	51	0.1	0.1	
(6) White woman	<u>6.1</u>	<u>55</u>	<u>11.2</u>	<u>10.6</u>	
(7) Potential DBEs	12.8 %	n/a	17.9 %	17.0 %	15.8 %
(8) All other businesses ***	<u>87.2</u>	<u>n/a</u>	<u>87.2</u>	<u>83.0</u>	
(9) Total firms	100.0 %	n/a	105.1 %	100.0 %	
Professional Services					
(10) Black American	1.3 %	n/a	1.3 %	1.3 %	
(11) Asian Pacific American	0.8	36	2.3	2.3	
(12) Subcontinent Asian American	0.1	n/a	0.1	0.1	
(13) Hispanic American	1.0	n/a	1.0	1.0	
(14) Native American	0.1	n/a	0.1	0.1	
(15) White woman	<u>7.2</u>	<u>n/a</u>	<u>7.2</u>	<u>7.1</u>	
(16) Potential DBEs	10.6 %	n/a	12.1 %	11.9 %	0.7 %
(17) All other businesses	<u>89.4</u>	<u>n/a</u>	<u>89.4</u>	<u>88.1</u>	
(18) Total firms	100.0 %	n/a	101.5 %	100.0 %	
Goods and Support Services					
(19) Black American	26.5 %	40	66.4 %	46.3 %	
(20) Asian Pacific American	2.5	47	5.2	3.6	
(21) Subcontinent Asian American	0.0	n/a	0.0	0.0	
(22) Hispanic American	0.8	71	1.1	0.8	
(23) Native American	0.0	n/a	0.0	0.0	
(24) White woman	<u>1.7</u>	<u>83</u>	<u>2.0</u>	<u>1.4</u>	
(25) Potential DBEs	31.5 %	n/a	74.8 %	52.2 %	0.5 %
(26) All other businesses	<u>68.5</u>	<u>n/a</u>	<u>68.5</u>	<u>47.8</u>	
(27) Total firms	100.0 %	n/a	143.3 %	100.0 %	
(28) Total	12.8 %	n/a	n/a		17.0 %

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

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

** Components of the base figure were calculated as the value after adjustment and scaling to 100 percent, multiplied by the percentage of total FHWA-funded contract dollars in each industry (construction = 0.93; professional services= 0.06; goods and support services=0.01).

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

Source: BBC Research & Consulting.

- d. **Availability after scaling to 100 percent.** Column (d) shows adjusted availability estimates that the study team re-scaled so that the sum of the availability estimates equaled 100 percent for each industry. BBC re-scaled the adjusted availability estimates by taking each group’s adjusted availability estimate in column (c) and dividing it by the sum of availability estimates shown under “Total” in column (c)—in row (9) for construction; row (18) for professional services; and row (27) for goods and support services. For example, the scaled availability estimate for non-Hispanic white woman-owned construction businesses shown in row (6) of column (d) was calculated in the following way: $(11.2\% \div 105.1\%) \times 100 = 10.6$ percent.
- e. **Components of goal.** Column (e) shows the component of the total base figure attributed to the adjusted availability of minority- and woman-owned businesses for each industry. BBC calculated each component by taking the total availability estimate shown under “Potential DBEs” in column (d)—in row (7) for construction; row (16) for professional services; and row (25) for goods and support services—and multiplying it by the proportion of total FHWA-funded contract dollars for which each industry accounts (i.e., 0.93 for construction; 0.06 for professional services; and 0.01 for goods and support services). For example, BBC used the 17.0 percent shown in row (7) of column (d) for construction and multiplied it by 0.93 for a result of 15.8 percent (see row (7) of column (e)). The values in column (e) were then summed to equal the overall base figure adjusted for barriers in business ownership—17.0 percent, as shown in the bottom row of column (e).

Based on information related to business ownership alone, NDOT might consider adjusting the base figure upward to 17.0 percent.

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

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

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

Success of businesses. There is quantitative evidence that certain groups of minority- and woman-owned businesses are less successful than businesses owned by non-Hispanic white men and face greater barriers in the marketplace, even after accounting for race- and gender-neutral factors. Chapter 3 summarizes that evidence and Appendix C presents corresponding

³ 49 CFR Section 26.45.

quantitative analyses. There is also qualitative evidence of barriers to the success of minority- and woman-owned businesses, as presented in Appendix D. Some of that information suggests that discrimination based on race/ethnicity and gender adversely affects minority- and woman-owned businesses in the local contracting industry. Thus, information about the success of businesses also supports an upward step-2 adjustment to NDOT's base figure.

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

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

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

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

- NDOT might adjust its base figure upward to account for barriers that minorities and women face in human capital and owning businesses in the local contracting industry. Such an adjustment would correspond to a "determination of the level of DBE participation you would expect absent the effects of discrimination."⁵
- Evidence of barriers that affect minorities, women, and minority- and woman-owned businesses in obtaining financing, bonding, and insurance, and evidence that certain groups of minority- and woman-owned businesses are less successful than comparable businesses owned by non-Hispanic white men also supports an upward adjustment to NDOT's base figure.
- NDOT must consider the volume of work DBEs have performed in recent years when determining whether to make a step-2 adjustment to its base figure. NDOT's utilization reports for FFYs 2011 through 2015 indicated median annual DBE participation of 8.5 percent for those years, which is lower than its base figure. USDOT's "Tips for Goal-Setting" suggests that an agency can make a step-2 adjustment by averaging the base figure with past median DBE participation. BBC's analysis of DBE participation in NDOT's FHWA-funded contracts also indicates DBE participation (1.6%) that is lower than the base figure.

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

⁵ 49 CFR Section 26.45 (b).

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

CHAPTER 10.

Program Measures

CHAPTER 10.

Program Measures

As part of implementing the Federal Disadvantaged Business Enterprise (DBE) Program, the Nevada Department of Transportation (NDOT) uses a combination of *race- and gender-neutral measures* and *race- and gender-conscious measures* to encourage the participation of minority- and woman-owned businesses in its contracting. Race- and gender-neutral measures are measures that are designed to encourage the participation of all businesses—or, all small businesses—in an agency’s contracting. Participation in such measures is not limited to minority- or woman-owned businesses or to certified DBEs. In contrast, race- and gender-conscious measures are measures that are designed to specifically encourage the participation of minority- and woman-owned businesses in an agency’s contracting (e.g., using DBE goals on individual contracts).

To meet the *narrow tailoring* requirement of the strict scrutiny standard of constitutional review, agencies that implement the Federal DBE Program must meet the maximum feasible portion of their overall DBE goals through the use of race- and gender-neutral measures.¹ If an agency cannot meet its overall DBE goal through the use of race- and gender-neutral measures alone, then it must consider also using race- and gender-conscious measures. When submitting its overall DBE goal to the United States Department of Transportation (USDOT), an agency must project the portion of its overall DBE goal that it expects to meet through race- and gender-neutral measures and what portion it expects to meet through race- and gender-conscious measures. USDOT offers guidance concerning how a transportation agency should project the portion of its overall DBE goal that it will meet through race- and gender-neutral and race- and gender-conscious measures including the following:

- USDOT’s “Official Questions and Answers (Q&A’s) Disadvantaged Business Enterprise Program Regulation (49 CFR Part 26),” which addresses factors for federal-aid recipients to consider when projecting the portions of their overall DBE goals that they will meet through the use of race- and gender-neutral measures;² and
- USDOT’s “Tips for Goal-Setting,” which suggests factors for federal-aid recipients to consider when making such projections.³

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

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

¹ 49 CFR Section 26.51.

² https://www.civilrights.dot.gov/sites/default/files/DBE/Guidance/Official%20Questions%20and%20Answers%2049%20CFR%20Part%2026_0.pdf

³ <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

- B. What has been the agency’s past experience in meeting its overall DBE goal?
- C. What has DBE participation been when the agency did not use race- or gender-conscious measures?⁴
- D. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?

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

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

As presented in Chapter 2, Appendix C, and Appendix D, BBC Research & Consulting (BBC) examined conditions in the Nevada marketplace related to human capital, financial capital, business ownership, and the success of businesses. There is substantial quantitative evidence of barriers for minority- and woman-owned businesses overall and for specific groups concerning the above business inputs and outcomes. Qualitative information also indicated evidence of discrimination affecting the local marketplace. NDOT should review the information about marketplace conditions presented in this report as well as other information it may have when considering the extent to which it can meet its overall DBE goal through race- and gender-neutral measures alone.

In addition, disparity analysis results for Federal Highway Administration (FHWA)-funded contracts that NDOT awarded during the study period indicate substantial disparities for most of the relevant individual minority- and woman-owned business groups. (The only exception was Native American-owned businesses.) Such disparities are often taken by the courts as inferences of discrimination against those groups in the local contracting marketplace.

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

Figure 10-1 presents the participation of certified DBEs in NDOT’s federally funded transportation contracts in recent years, as presented in NDOT reports to FHWA. Based on information about awards and commitments to DBE-certified businesses, NDOT did not meet its overall DBE goal during FY 2011-2013. Following a goal adjustment, NDOT has exceeded its overall DBE goal since FY 2014. NDOT applied race- and gender-conscious DBE contract goals to many FHWA-funded transportation contracts during FY 2011-2015.

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

Figure 10-1.
Past certified DBE participation on FHWA-funded contracts, FFY 2011-2015

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

FFY	DBE Attainment	Annual DBE Goal	Difference
2011	3.5 %	10.48 %	-7.0 %
2012	7.2	10.48	-3.3
2013	8.5	10.48	-2.0
2014	9.9	7.0	2.9
2015	8.8	7.0	1.8

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

NDOT applied race- and gender-conscious measures to most FHWA-funded transportation contracts the study period (January 1, 2011 through December 31, 2015). However, NDOT did not apply race- or gender-conscious measures to any state-funded contracts during that period. BBC calculated DBE participation of 1.5 percent in the state-funded contracts that NDOT awarded during the study period, which was lower than in the set of contracts of which race- and gender-based measures applied.

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

When determining the extent to which NDOT could meet its overall DBE goal through the use of race- and gender- neutral measures, the department should review the neutral measures that it already has in place. BBC reviewed race- and gender-neutral measures that NDOT currently uses to encourage the participation of minority- and woman-owned businesses in its contracting. In addition, BBC reviewed race- and gender-neutral measures that other agencies in Nevada use.

NDOT’s race- and gender-neutral measures. NDOT uses myriad race- and gender-neutral measures to encourage the participation of small businesses—including many minority- and woman-owned small businesses—in its contracting. NDOT uses the following types of race- and gender-neutral measures as part of its efforts to comply with the Federal DBE Program:

- Business outreach and communication;
- Technical assistance;
- Finance and bonding programs;
- Mentor-protégé program;
- Small business program; and
- Unified Nevada DBE website.

Business outreach and communication. NDOT conducts several outreach and communication efforts across the state of Nevada to encourage the participation and growth of small businesses and minority- and woman-owned businesses. NDOT engages in the following activities:

- Meetings, outreach, and workshops; and
- Advertisements of contract opportunities.

Meetings, outreach, and workshops. NDOT participates in public outreach meetings, public hearings, and several workshops.

Public outreach meetings. As part of NDOT's Public Involvement Plan, outreach and involvement activities are regularly scheduled. These include: Public information meetings (for community stakeholders throughout planning and construction processes), public hearings (for updates and comments regarding recent items in need of decision-making), and several other outreach efforts (e.g., tribal communication outreach, multi-cultural communication outreach, and citizen advisory groups). Meeting agendas are available online. Select live meeting videos are available for streaming. Public hearings and informational meetings are used to alert agencies, political leaders, special interest groups, and concerned/affected citizens about proposed projects. NDOT looks to public outreach meetings as a way to specifically engage minority and low-income publications. Sign-in sheets are present at each meeting. The list of names from each sign-in sheet is sent to NDOT Central Records as a record of the public meeting.

Capabilities workshop. A workshop, including one-on-one meetings between DBEs and proposed project NEON teams, was held in the spring of 2015 to allow DBEs to present their business capabilities.

Certification workshops. NDOT provides training workshops on DBE certification and a range of other topics. These workshops use step-by-step guides to help firms that are starting the process of a certification application. Additional information is also given about requirements for ownership, financial capacity, bond capacity, site visits, and personal interviews. Workshops are held in conjunction with members of the Nevada Unified Certification Program.

Contracting workshop. The Nevada Small Business Development Center (SBDC) holds "Where's the Contract?" workshops on a monthly basis. Participants are encouraged to register for workshops through the SBDC website. The workshops cover a range of subjects including working with the University of Nevada, opportunities for veteran-owned businesses, new Federal laws that affect a small business' experience with certification, contracting requirements, and joint ventures. A purpose of these workshops is to assist small businesses in identifying relevant NDOT contracting opportunities.

Advertisements of contract opportunities. In addition to attending meetings or events, there are several other ways for small businesses, including minority- and woman-owned businesses, to find out about contract opportunities with NDOT.

Contractor Bulletin. NDOT sends out public notices through their Contractor Bulletins, which can be received via e-mail as new postings are added. Subscribers can indicate which types of notices are of interest. In a recent internal review of subscribers, 3,121 companies and individuals are represented. For example, a recent notice was available for a DBE workshop that helps connect potential DBEs with information on program eligibility. The workshop discussed potential DBE opportunities through Project NEON.

Available contracts. For contracting, NDOT uses an e-bidding online format that provides potential bidders with access to contract documents; bidders' lists; contract question and answer guides; and a full e-plan (an online document detailing the descriptive aspects of the

proposed project). NDOT's website also includes a list of current and upcoming procurement opportunities. These are arranged by calendar date. Information about current opportunities is also available via email through subscribing to the Contractor Bulletin.

Relevant publications. NDOT's Title VI Permanent Program Plan (September 2012) includes provisions for biannual review of efforts to engage minority and low income populations in the public outreach effort and whether the public outreach effort utilizes media specifically targeted to minority and low-income populations. NDOT advertises upcoming contracting opportunities in *El Mundo*, *Black Image*, and *El Tempo* publications.

Technical assistance. NDOT provides several technical assistance services including events and training workshops. Events include Introduction to the System; Vendor Registration and Questionnaire; Online Certification Application; and Contract Compliance Reporting. NDOT also advertises the Procurement Technical Assistance Center Procurement Outreach Program, which offers assistance to local businesses competing in the government marketplace.

DBE training partnerships. NDOT partnered with the Association of General Contractors (AGC) and the Nevada Contractor's Board to provide training to DBEs. The partnership allows for greater training opportunities through on-the-job training or apprenticeships. The AGC provides regular training sessions as part of its own programs.

DBE Supportive Services Program. NDOT receives funding from the Federal Highway Administration (FHWA) to administer a DBE Supportive Services Program. The program is designed to assist DBEs and other small businesses in areas such as business plan preparation and construction contracting. Based on the need areas of firms, DBEs are targeted for specific training related to obtaining bonding and financing; improving business management; recordkeeping; and financial and accounting capabilities.

Finance and bonding programs. NDOT's Contractor Bulletin advertises upcoming Small Business Education Programs and includes PDF links to bonding or access to capital programs offered by USDOT's Office of Small and Disadvantaged Business Utilization or the Southwest Small Business Transportation Resource Center (SBTRC-SW).

Bonding education program. In partnership with USDOT and the Surety and Fidelity Association of America, NDOT participates in the USDOT Bonding Education Program (BEP). The BEP program assists participants in obtaining surety bonds and increasing bond capacity. Workshops are held to provide instructions on bond readiness, bonding goals, and how to bid on USDOT funded projects. In 2015, NDOT held a series of five workshops in both northern and southern Nevada.

Surety bond information. NDOT references the U.S. Small Business Association Surety Bond program in its annual reports. This program is provided through the U.S. Small Business Administration and ensures contract completion in the event of a contractor default. If a contractor defaults, the surety company must obtain another contractor to complete the contract or provide compensation to the project owner for the financial loss incurred.

Contract unbundling. NDOT reviews and identifies projects that can be unbundled in order to promote small business participation including the ability for DBEs to perform as a prime. Unbundling is based on thresholds and needs assessments for bonding capacity. For example, a landscaping portion of a contract can be unbundled so that DBEs can perform the work with an attainable bond size. Other projects may also be better suited for segmentation, such as a highway construction project in which segments of roadway were set so that projects could be approximately \$1.5 million, as opposed to \$5 million. NDOT claims this increases the likelihood for a small DBE to participate.

Mentor-protégé program. NDOT recently drafted a mentor-protégé program and is waiting for FHWA approval before implementing the program. NDOT designed its program based on an evaluation of other departments of transportation mentor-protégé programs. Once NDOT's program is approved, NDOT's goal is to approve the mentor-mentee relationship before an RFP is undertaken in order to ascertain that the mentorship is developmental, as opposed to opportunistic.

Small business program. NDOT recently implemented a Small Business Enterprise (SBE) Program in order to add SBE goals on federally-assisted contracts without DBE goals. As part of the program, NDOT contracts for and implements supportive service programs for DBEs and other small businesses to develop record-keeping, financial, accounting, and other business management training. In particular, the program is designed to help small businesses with technical skills to do the job and to train them on good financial and accounting practices. NDOT described this as "construction contracts 101" and would include information about legal issues and change orders, for example.

Unified Nevada DBE website. NDOT has partnered with the other Nevada Unified Certification Program (UCP) board members to create a single website where DBE information from all six Nevada UCP members' web sites will be located. Though the website is not yet finalized, NDOT has completed over a year of work on how to link each of the UCP member organizations. NDOT expects that it will refine details on possible information to include in the DBE site and engage in more workshops to notify contractors of the resource.

Other agencies' race- and gender-neutral measures. In addition to the race- and gender-neutral program measures that NDOT currently uses, there are a number of race- and gender-neutral measures that other agencies in Nevada use to encourage the participation of minority- and woman-owned businesses. While NDOT offers some similar measures, NDOT may still find value in reviewing other examples of such neutral measures. Figure 10-2 provides examples of those measures.

Figure 10-2.
Examples of race- and gender-neutral measures that other agencies in Nevada use

Neutral remedies	
Technical assistance	<p>Technical assistance including small business training is widely available throughout Nevada. Programs primarily provide general information and assistance for newly formed businesses and growing businesses but also include industry-specific training. Examples range from general support providers such as SCORE or the Nevada Governor's Office of Economic Development Procurement Outreach program to industry-specific training opportunities such as Leadership for Construction Industry Professionals, provided through the Associated General Contractors of America, or Nevada Industry Excellence - specific to manufacturing, construction, and mining industries in Northern and Southern Nevada.</p> <p>Other programs focus on market development assistance and use of electronic media and technology. Those assistance programs are available through organizations such as Global Business Network (for international market expansion) and The Procurement Technical Assistance Center (for contracting specific training). More educationally focused programs include college-level classes provided by the University of Nevada - Las Vegas, College of Southern Nevada, and Nevada State College.</p>
Small business finance	<p>Small business financing is available through several local agencies within Nevada. For example, VDEC, as part of the Nevada Business Opportunity Fund, provides small business loans from \$1,000 to \$250,000. Nevada State Bank is the preferred Small Business Administration (SBA) Lender and also provides equipment leasing. The Nevada Microenterprise Initiative Program provides financial investments to small business entrepreneurs, with less than five employees, through the SBA micro-loan program. The Nevada Silver State Opportunities Fund (funded through Nevada Capital Investment Corporation), manages \$50 million of capital dedicated to investing in Nevada businesses. Other local organizations, including minority and regional chambers, provide training and support on how to obtain financing and prepare funding documents.</p>
Bonding programs	<p>Bonding programs offering bonding and finance assistance and training have become more popular. Programs such as the SBA Bond Guarantee Program provide bid, performance, and payment bond guarantees for individual contracts. The USDOT Bonding Assistance Program also provides bonding assistance in the form of bonding fee cost reimbursements for DBEs performing transportation work.</p> <p>Training on how to obtain a bond is also provided by a number of different agencies including Lance Surety Bond Associates, Inc and the Nevada State Contractors Board.</p>
Mentor-protégé programs	<p>The Associated General Contractors of America (AGC) provides mentorship for members interested in the construction industry. The ACE Mentor Program of Nevada partners with local agencies for a mentor-protégé program to help high school students learn about careers in architectural, engineering, and construction fields. Penhall Company, located in Las Vegas and Reno, places established trainees with an established mentor as they learn the competencies of a job site.</p> <p>SBA 8(a) Business Development Mentor-Protégé Program is an example of a mentor-protégé program that pairs subcontractors with prime contractors to assist in management, financial, and technical assistance; and, the exploration of joint venture and subcontractor opportunities for federal contracts.</p>

Source: BBC Research & Consulting.

CHAPTER 11.

Federal DBE Program

CHAPTER 11.

Program Implementation

Chapter 11 reviews information relevant to the Nevada Department of Transportation (NDOT's) implementation of specific components of the Federal Disadvantaged Business Enterprise (DBE) Program for Federal Highway Administration (FHWA)-funded contracts. In addition, Chapter 11 presents considerations that the agency should make as it works to refine its implementation of the Federal DBE Program.

A. Federal DBE Program

Regulations presented in 49 Code of Federal regulations (CFR) Part 26 and associated documents offer agencies guidance related to implementing the Federal DBE Program. Key requirements of the program are described below in the order that they are presented in 49 CFR Part 26.¹

Reporting to DOT – 49 CFR Part 26.11 (b). NDOT must periodically report DBE participation in its FHWA-funded contracts to the United States Department of Transportation (USDOT). NDOT tracks DBE participation using lists of subcontractors that prime contractors submit on NDOT projects, as required by Nevada Revised Statutes (NRS) 338.14. Depending on the project specifications, prime contractors are required to list any subcontractor that will complete at least 5 percent, 3 percent, or 1 percent or more of a given public works project. Throughout the project, NDOT also tracks payments to DBEs using data from invoices submitted by the prime contractors. NDOT uses these data to prepare Uniform Reports of DBE Awards or Commitments and Payments for submission to USDOT. NDOT plans to use the same approach for future DBE data collection.

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

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

NDOT currently uses a bidders database that includes all of the information above. For each contract opportunity posted on the e-bidding online portal, the bidder's list is available as a PDF

¹ Because only certain portions of the Federal DBE Program are discussed in Chapter 11, NDOT should refer to the complete federal regulations when considering its implementation of the program.

download. Additional information about DBE status, age of firm, and annual gross receipts is not included on the e-bidding online portal.

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

Prompt payment mechanisms – 49 CFR Part 26.29. Federal regulations require agencies to have contract clauses in place to ensure that prime contractors pay subcontractors within 30 days of prime contractors receiving agency payments. NDOT has such policies in place as required by NRS 338.550, which requires prime contractors to make payments to subcontractors within 10 days of receiving agency payment. Qualitative information that the study team collected through in-depth interviews and public meetings revealed that some businesses are dissatisfied with how promptly they receive payments from prime contractors. Some business representatives recommended additional follow-up by public agencies to ensure that subcontractors are aware of prompt payment requirements and that prime contractors are complying with those policies.

DBE directory – 49 CFR Part 26.31. McCarran International Airport (McCarran), Reno Tahoe Airport Authority (RTAA) and the Nevada Department of Transportation (NDOT) make up the Nevada Unified Certification Program (NUCP); accept applications for DBE certification; and conduct certification reviews and site visits of applicant firms. Once application reviews are completed, the NUCP holds monthly meetings to certify eligible businesses. NDOT maintains all of the DBE certification records for the state of Nevada including a directory of all DBEs in the state searchable by business name, industry code, industry type, and geographical location. NDOT offers a link to the directory on its website.

NDOT might consider working with members of the NUCP to increase awareness of the DBE directory so that prime contractors are better aware of qualified DBEs. In addition, NDOT currently publicizes bid and solicitation information on its website. NDOT should also consider working with NUCP members to link its bid and solicitation information to information about qualified DBEs. That way, when prime contractors become aware of contracts in which they might be interested, they are also notified of qualified DBEs who might be interested in participating in those contracts as subcontractors.

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

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

BBC investigated potential overconcentration on NDOT contracts and identified only one subindustry in which certified DBEs accounted for 50 percent or more of total dollars for

contracts awarded during the study period. The petroleum and petroleum products subindustry received NDOT and local agency contracts worth approximately \$450,000, of which about \$358,000 was awarded to a DBE certified firm on two contracts. NDOT should closely monitor the utilization of DBEs on future petroleum and petroleum products contracts for potential indications of overconcentration.

NDOT does not have any current policies related to overconcentration. NDOT should consider adopting a policy for addressing overconcentration if it occurs in the future. Overconcentration policies typically include steps that the agency will take in the case of overconcentration including obtaining approval from USDOT to develop appropriate measures to address it. Once measures are approved by USDOT, the corrective measures will then become part of NDOT's implementation of the Federal DBE program.

Business development programs – 49 CFR Part 26.35 and mentor-protégé programs – 49 CFR Appendix D to Part 26. Business Development Programs (BDPs) are programs that are designed to assist DBE-certified businesses in developing the capabilities to compete for work independent of the DBE Program. As part of a BDP, or separately, agencies may establish a mentor-protégé program, in which a non-DBE or another DBE serves as a mentor and principal source of business development assistance to a protégé DBE. NDOT is currently drafting a mentor-protégé program and is waiting for FHWA approval. Under the program, NDOT will approve mentor-mentee relationships before an RFP is undertaken as a way to encourage developmental mentorship. NDOT should further consider exploring partnerships with other local agencies. NDOT has already established several relationships through business council meetings and event participation in conferences or roundtables. Further pursuit of such partnerships could provide specialized assistance that would be tailored to the needs of developing businesses.

Responsibilities for monitoring the performance of program participants – 49 CFR Part 26.37 and 49 CFR Part 26.55. The Final Rule effective February 28, 2011, revised requirements for monitoring the work that prime contractors commit to DBE subcontractors at the time of contract award (or through contract modifications) and enforcing that it is actually performed by those DBEs. USDOT describes the requirements in 49 CFR Part 26.37(b). The Final Rule states that prime contractors can only terminate DBEs for “good cause” and with written consent from the awarding agency. In addition, 49 CFR Part 26.55 requires agencies to only count the participation of DBEs that are performing commercially useful functions (CUFs) on contracts toward meeting DBE contract goals and overall DBE goals. NDOT monitors the participation of DBE subcontractors through monthly prime contractor invoices. NDOT Resident Engineers review invoices for accuracy and consistency. The Resident Engineer will log contractor progress payments. Prime contractors report payments that they make to DBEs on each invoice, and NDOT records those payments in preparation for submitting Uniform Reports of DBE Awards or Commitments and Payments. NDOT should consider reviewing the requirements set forth in 49 CFR Part 26.37(b), 49 CFR Part 26.55, and in The Final Rule to ensure that its monitoring and enforcement mechanisms are appropriately implemented and consistent with federal regulations and best practices.

Fostering small business participation – 49 CFR Part 26.39. When implementing the Federal DBE Program, NDOT must include measures to structure contracting requirements to

facilitate competition by small businesses, “taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.”² The Final Rule effective February 28, 2011 added a requirement for agencies to foster small business participation in their contracting. It required agencies to submit a small business to USDOT in early 2012. USDOT identifies the following potential strategies for fostering small business participation:

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

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

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

Setting overall DBE goals – 49 CFR Part 26.45. In the Final Rule effective February 28, 2011, USDOT changed how often agencies that implement the Federal DBE Program are required to submit overall DBE goals. As discussed in Chapter 1, agencies such as NDOT now need to develop and submit overall DBE goals every three years. Chapter 9 uses data and results from the disparity study to provide NDOT with information that could be useful in developing its next overall DBE goal submission.

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

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

² 49 CFR Part 26.39(a).

Based on information about awards and commitments to DBE-certified businesses, NDOT has met its DBE goal in recent years; however, NDOT did not meet its DBE goal in earlier years. In federal fiscal years 2011 through 2013, DBE awards and commitments that NDOT made on FHWA-funded contracts were below its overall DBE goal by an average of 4.1 percentage points. Following a revised goal for federal fiscal years 2014-2015, DBE awards and commitments that NDOT made on FHWA-funded contracts were above its overall DBE goal by an average of 2.3 percentage points

Need for separate accounting for participation of potential DBEs. In accordance with guidance in the Federal DBE Program, BBC's analysis of the overall DBE goal in the disparity study includes DBEs that are currently certified and minority- and woman-owned businesses that could *potentially* be DBE-certified based on revenue standards (i.e., potential DBEs).³ Agencies can explore whether one reason why they have not met their overall DBE goals is because they are not counting the participation of potential DBEs. USDOT might then expect an agency to explore ways to further encourage potential DBEs to become DBE-certified as one way of closing the gap between reported DBE participation and its overall DBE goal. In order to have the information to explore that possibility, NDOT should consider:

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

Maximum feasible portion of goal met through neutral program measures – 49 CFR Part 26.51(a). As discussed in Chapter 10, NDOT must meet the maximum feasible portion of its overall DBE goal through the use of race- and gender-neutral program measures. NDOT must project the portion of its overall DBE goal that could be achieved through such measures. The agency should consider the information presented in Chapter 10 when making such projections.

Use of DBE contract goals – 49 CFR Part 26.51(d). The Federal DBE Program requires agencies to use race- and gender-conscious measures—such as DBE contract goals—to meet any portion of their overall DBE goals that they do not project being able to meet using race- and gender-neutral measures. Based on information from the disparity study and other available information, NDOT should assess whether the continued use of DBE contract goals is necessary in the future to meet any portion of its overall DBE goal. USDOT guidelines on the use of DBE contract goals, which are presented in 49 CFR Part 26.51(e), include the following guidance:

³ Note that minority- and woman-owned businesses that could be DBE-certified but that are not currently certified are counted as part of calculating the overall DBE goal. However, the participation of those businesses is not counted as part of NDOT's DBE participation reports.

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

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

NDOT's disparity results indicated that most racial/ethnic and gender groups showed disparities on FHWA-funded contracts that NDOT awarded—many of which used contract goals, and all racial/ethnic and gender groups showed substantial disparities on state-funded contracts. NDOT should continue its use of race-conscious DBE contract goals in the near term and find additional race-neutral ways to encourage DBE participation. The agency will need to ensure that the use of those goals is narrowly tailored and consistent with other relevant legal standards (for details, see Chapter 2 and Appendix B).

BBC also conducted a disparity study for other Nevada transit-related agencies in the Nevada Consortium. A review of these other agency's disparity results may not be as relevant, given their reliance on different funding sources (including the Federal Aviation Administration and Federal Transit Authority).

Flexible use of any race- and gender-conscious measures – 49 CFR Part 26.51(f).

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

Good faith efforts procedures – 49 CFR Part 26.53. USDOT has provided guidance for agencies to review good faith efforts including materials in Appendix A of 49 CFR Part 26. The Final Rule effective February 28, 2011 updated requirements for good faith efforts when

agencies use DBE contract goals. NDOT should review 49 CFR Part 26.53 and The Final Rule to ensure that its good faith efforts procedures are consistent with federal regulations.

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

Several individuals participating in in-depth interviews and public meetings made comments related to good faith efforts. In general, many minority- and woman-owned businesses indicated that prime contractors often fail to make genuine efforts to use minority- and woman-owned businesses.

- Several participants indicated that the current race- and gender-conscious measures do not have incentives for prime contractors to make anything more than perfunctory good faith efforts to comply with the program.
- Some minority- and woman-owned businesses indicated they would like to see more agency involvement to promote DBE participation in contracting.

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

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

- Databases that BBC developed as part of the disparity study;
- Contractor/consultant registration documents from businesses working with NDOT as prime contractors or subcontractors including information about the race/ethnicity and gender of their owners;
- Prime contractor and subcontractor participation on agency contracts;

- Reports on the participation of certified DBEs in FHWA-funded contracts as required by the Federal DBE Program;
- Subcontractor participation data (for all tiers and suppliers) for all businesses regardless of race/ethnicity, gender, or certification status;
- Invoices for prime contractors and subcontractors;
- Descriptions of the areas of contracts on which subcontractors worked; and
- Subcontractors' contact information and committed dollar amounts from prime contractors at the time of contract award.

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

DBE certification – 49 CFR Part 26 Subpart D. The NUCP is responsible for all DBE certifications in the state of Nevada and is made up of McCarran, RTAA, and NDOT. NDOT maintains all of the DBE certification records for the state of Nevada. The NUCP certification process is designed to comply with 49 CFR Part 26 Subpart D. As NDOT continues to work with DBE-certified businesses, the agency should consider working closely with NUCP members to ensure that the program continues to certify all groups that the Federal DBE Program presumes to be socially and economically disadvantaged in a manner that is consistent with federal regulations.

Several business owners and managers participating in in-depth interviews and public meetings commented on the DBE certification process. Some business owners felt that the certification process was relatively easy. However, other business owners were critical of the certification process. A number of business owners reported that the process was somewhat burdensome with the required paperwork and amount of time required. Those businesses suggested DBE certification assistance that would involve more one-on-one help. Appendix D provides other perceptions of business owners that have considered DBE certification or that have gone through the certification process. The NUCP appears to follow federal regulations concerning DBE certification, which requires collecting and reviewing considerable information from program applicants. However, the agency might research other ways to make the certification process easier for potential DBEs.

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

B. Additional Considerations

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

Networking and outreach. NDOT hosts and participates in many networking and outreach events that include information about marketing, DBE certification process, doing business with the agency, and available bid opportunities. Several individuals participating in in-depth interviews and public meetings made comments related to networking and outreach efforts. In general, many minority- and woman-owned businesses indicated that they would like small business advocates from Nevada agencies to be more visible in the community.

- Several participants wished that agency representatives would get to know more small businesses personally and become more involved in associations, chambers of commerce, and other organizations that support small businesses as well as minority- and woman-owned businesses.
- Some minority- and woman-owned businesses asked that agencies provide assistance in different languages and be trained in cultural sensitivity in order to address diverse needs.

NDOT has already established a large outreach effort and should continue those efforts. NDOT might also consider broadening its efforts to include more introduction and sponsored partnerships between prime contractors and subcontractors. NDOT might also consider creating a consortium of local organizations and public agencies that would jointly host quarterly outreach and networking events and training sessions for businesses seeking public sector contracts.

Interview participants also mentioned the desire to have more business assistance in the areas of bonding, insurance, and financing. Other Nevada agencies give referrals to banking institutions that offered micro-loans for small businesses. Examples of such institutions include Bank of Nevada, Wells Fargo, East West Bank, and alternative lenders such as Accion International Bank and Axiom Nevada. Many contractors needing the assistance may not be aware that agencies may be able to refer firms to relevant financial institutions. NDOT should consider expanding their technical program to include financial referrals.

Subcontract data. NDOT only maintains data on construction subcontracts. NDOT should consider collecting comprehensive data on *all* subcontracts, regardless of the work type. Collecting data on all subcontracts will help ensure that NDOT monitors the participation of minority- and woman-owned businesses as accurately as possible. Collecting the following data on all subcontracts would be appropriate:

- Subcontractor name, address, and phone number;
- Type of associated work;

- Subcontract award amount; and
- Subcontract paid amount.

NDOT should also consider requiring prime contractors to submit data on all subcontracts as part of the invoicing process and as a condition of receiving payment.

Prime contract opportunities. Disparity analysis results indicated disparities for most racial/ethnic and gender groups on the prime contracts that NDOT awarded during the study period. NDOT might consider setting aside small prime contracts for small business bidding to encourage the participation of minority- and woman-owned businesses as prime contractors. NDOT could use the Nevada Emerging Small Business certification economic eligibility requirements to develop their own small business certification program as a component of their Small Business Enterprise (SBE) Program in order to determine which businesses would be eligible for small business set asides.

Another consideration that emerged from in-depth interviews is the need for more small prime opportunities in architectural and engineering work. NDOT might consider further encouraging small, minority-, and woman-owned businesses to participate in small prime contract opportunities in architecture and engineering.

Subcontract opportunities. Minority- and woman-owned businesses showed disparities on the subcontracts that were associated with the prime contracts that NDOT awarded during the study period. Subcontracting accounted for approximately half of the total NDOT contracting dollars awarded during the study period. NDOT could consider implementing a program that requires prime contractors to include certain levels of subcontracting as part of their bids and proposals. For each contract to which the program applies, NDOT would set a minimum subcontracting percentage based on the type of work involved, the size of the project, and other factors. Prime contractors bidding on the contract would be required to subcontract a percentage of the work equal to or exceeding the minimum for their bids to be responsive. If NDOT were to implement such a program, the agency should include flexibility provisions such as a good faith efforts process.

Contracting and bid processes. NDOT sends out public notices through their Contractor Bulletins. Interested parties can receive this information via e-mail as new postings are added. NDOT currently provides 3,121 subscribers with emails containing information about upcoming projects and business events. Business managers and owners that participated in in-depth interviews expressed the desire to have proper notification of contract opportunities well in advance of submission due dates. Business managers and owners indicated that they would like to have a good amount of lead time in advance of due dates to submit thoughtful and complete bids. Small businesses often do not have assigned staff to respond to bid requests, and therefore, have to find time above and beyond their daily responsibilities to put together bids or proposals. Although interviewees did not specify the amount of lead time they would like to have, some indicated that one week is not enough time to properly prepare bid responses. In addition, it might also benefit small businesses to have assistance available from the agency for questions regarding the bid process. NDOT could look to the practices of the Regional Transportation

Commission – Southern Nevada, which offers workshops, sample bid documents, and will walk contractors through the bid process at pre-bid conferences.

Interviewees also indicated interest in a consistent bid process across all Nevada agencies. Each Nevada agency has its own requirements and systems which make it difficult to make the bid process identical across all agencies but having as many similarities as possible will help contractors devote more time to preparing bids and less time to learning different contracting processes.

APPENDIX A.

Definition of Terms

APPENDIX A.

Definitions of Terms

Appendix A defines terms that are useful to understanding the 2017 Nevada Department of Transportation Disparity Study report. The following definitions are only relevant in the context of this report.

49 Code of Federal Regulations (CFR) Part 26

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

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

Anecdotal Information

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

Availability Analysis

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

Business

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

Business Listing

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

Business Establishment

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

Compelling Governmental Interest

As part of the strict scrutiny legal standard, an agency that uses race- or gender-conscious measures as part of a minority- or woman-owned business program has the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. Agencies cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.

Consultant

A consultant is a business performing a professional services contract.

Contract

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

Contract Element

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

Contractor

A contractor is a business performing a construction contract.

Control

Control means exercising management and executive authority of a business.

Custom Census

A custom census availability analysis is one in which researchers attempt extensive surveys with all potentially available businesses working in the local marketplace to collect information about key business characteristics. Researchers then take survey information about potentially available businesses and match them to the characteristics of prime contracts and subcontracts that an agency actually awarded during the study period. A custom census availability approach is accepted in the industry as the platinum standard for conducting availability analyses,

because it takes several different factors into account including businesses' primary lines of work and their capacity to perform on an agency's contracts.

Disadvantaged Business Enterprise (DBE)

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

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

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

DBE Contract Goals

DBE contract goals are race- and gender-conscious measures that some agencies use as part of their implementations of the Federal DBE Program. The use of such goals typically involves setting numerical goals for DBE participation on individual United States Department of Transportation-funded contracts. Prime contractors can meet those goals at the time of bid by either making subcontracting commitments with certified DBE subcontractors or by showing that they made all reasonable good faith efforts to fulfill the goals but were unable to do so. If prime contractors fail to meet DBE contract goals through subcontracting commitments or by showing good faith efforts, the agency may deem their bids unresponsive and may reject them. Because DBE contract goals are race-and gender-conscious measures, their use must meet the strict scrutiny standard of constitutional review.

Disparity

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

Disparity Analysis

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

Disparity Index

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

Dun & Bradstreet (D&B)

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

Enterprise

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

Federal DBE Program

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

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.

Federally-funded Contract

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

Firm

See “business.”

Good Faith Efforts

As part of using DBE contract goals, agencies must accept valid showings of bidders making good faith efforts to meet DBE contract goals even if they are unable to do so. Good faith efforts mean that the bidder takes all necessary and reasonable steps to meet the goal as assessed by the scope, intensity, and appropriateness of their efforts. Good faith efforts might include:

- Soliciting interest of certified DBEs who have the capability to perform relevant work;
- Selecting or breaking out portions of the work that DBEs could perform;
- Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract;
- Negotiating in good faith with interested DBEs;
- Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities;
- Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance;
- Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, or materials; and
- Effectively using the services of appropriate community organizations; contracting groups; business assistance offices; and other organizations.

Industry

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

Majority-owned Business

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

McCarran International Airport (McCarran)

McCarran is the primary commercial airport for the Las Vegas Valley and Clark County, Nevada. Along with the Reno-Tahoe Airport Authority and the Nevada Department of Transportation, it operates the Unified Certification Program and is responsible for DBE certification throughout Nevada.

Minority

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

Minority-owned Business

A minority-owned business is a business with at least 51 percent ownership and control by individuals who identify themselves with one of the racial/ethnic groups that the Federal DBE Program presumes to be disadvantaged: Asian Pacific Americans, Black Americans, Hispanic

Americans, Native Americans, or Subcontinent Asian Americans. A business does not have to be certified as a DBE to be considered a minority-owned business. The study team considers businesses owned by minority women as minority-owned businesses.

Narrow Tailoring

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

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

Nevada Department of Transportation (NDOT)

NDOT is responsible for the planning, construction, operation, and maintenance of 5,400 miles of highway and more than 1,000 bridges throughout the entire state of Nevada. Along with the Reno-Tahoe Airport Authority and McCarran, it operates the Unified Certification Program and is responsible for DBE certification throughout Nevada.

Non-DBE

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

Non-response Bias

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

Participation

See "utilization."

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

Potential DBE

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

Prime Consultant

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

Prime Contract

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

Prime Contractor

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

Project

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

Race- and Gender-conscious Measures

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

Race- and Gender-neutral Measures

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

Relevant Geographic Market Area

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

“relevant geographic market area.” The relevant geographic market area for NDOT is the state of Nevada.

Reno-Tahoe Airport Authority (RTA)

RTA is the owner and operator of the Reno-Tahoe International and Reno-Stead Airports. The Reno-Tahoe International Airport is a commercial airport located in Reno serving approximately 4 million passengers per year. Reno-Stead Airport is a general aviation facility located 15 miles north of Reno in Stead, Nevada. Along with NDOT and McCarran, it operates the Unified Certification Program and is responsible for DBE certification throughout Nevada.

State-funded Contract

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

Statistically Significant Difference

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

Subconsultant

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

Subcontract

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

Subcontractor

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

Subindustry

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

United States Departments of Transportation (USDOT)

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

Utilization

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

Vendor

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

Woman-owned Business

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

APPENDIX B.

Legal Framework and Analysis for Nevada

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APPENDIX B.

Legal Framework and Analysis

EXECUTIVE SUMMARY

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases regarding the Transportation Equity Act for the 21st Century (TEA-21) as amended and reauthorized (“MAP-21,” “SAFETEA” and “SAFETEA-LU”),¹ 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,² which DBE Program was continued and reauthorized by the Fixing America’s Surface Transportation Act (FAST Act).³ The appendix also reviews recent cases involving local minority and women-owned business enterprise (“MBE/WBE”) programs. The appendix provides a summary of the legal framework for the disparity study as applicable to the Nevada Department of Transportation (NDOT), Reno-Tahoe Airport Authority (Reno-Tahoe International Airport) (RTAA), Regional Transportation Commission of Southern Nevada (RTCNSN), McCarran International Airport (MIA), and Regional Transportation Commission of Washoe County, Nevada (RTCWC) (hereinafter collectively referred to as “Nevada Transportation Consortium”).

Appendix B begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.⁴ *Croson* sets forth the strict scrutiny constitutional analysis applicable in the legal framework for conducting a disparity study. This section also notes the United States Supreme Court decision in *Adarand Constructors, Inc. v. Peña*,⁵ (“*Adarand I*”), which applied the strict scrutiny analysis set forth in *Croson* to federal programs that provide federal assistance to a recipient of federal funds. The Supreme Court’s decisions in *Adarand I* and *Croson*, and subsequent cases and authorities provide the basis for the legal analysis in connection with MDT’s participation in the Federal DBE Program.

The legal framework then 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 and the strict scrutiny analysis. In particular, this analysis reviews the Ninth Circuit decisions in *Associated General Contractors of America, San Diego Chapter, Inc. v.*

¹ Moving Ahead for Progress in the 21st Century Act (“MAP-21”), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat. 405.; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107.

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

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

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

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

*California Department of Transportation (“Caltrans”), et al.*⁶ and *Western States Paving Co. v. Washington State DOT*,⁷. and the recent U.S. District Court decisions in the Ninth Circuit in *Mountain West Holding Co. v. Montana, Montana DOT, et al.*⁸, and *M.K. Weeden Construction v. Montana, Montana DOT, et al.*⁹

In *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (“Caltrans”), et al.*, (“AGC, SDC v. Cal. DOT” or “Caltrans”), the Ninth Circuit in 2013 upheld the validity of California DOT’s DBE Program implementing the Federal DBE Program. In *Western States Paving*, the Ninth Circuit upheld the validity of the Federal DBE Program, but the Court held invalid Washington State DOT’s DBE Program implementing the DBE Federal Program. The Court held that mere compliance with the Federal DBE Program by state recipients of federal funds, absent independent and sufficient state-specific evidence of discrimination in the state’s transportation contracting industry marketplace, did not satisfy the strict scrutiny analysis.

In *Mountain West Holding* and *M.K. Weeden*, two U.S. District Courts in Montana upheld the validity of the Montana Department of Transportation’s implementation of the Federal DBE Program. The *Mountain West Holding* decision, at the time of this report, has been appealed to the U.S. Court of Appeals for the Ninth Circuit.¹⁰

In addition, the analysis reviews other recent federal cases that have considered the validity of the Federal DBE Program and a state government agency’s or recipient’s implementation of the DBE program, including: *Dunnet Bay Construction Co. v. Illinois DOT*,¹¹ *Northern Contracting, Inc. v. Illinois DOT*,¹² *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads*,¹³ *Adarand Construction, Inc. v. Slater*¹⁴ (“*Adarand VII*”), *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,¹⁵ *Geyer Signal, Inc. v. Minnesota DOT*,¹⁶ *Geod Corporation v. New Jersey Transit Corporation*,¹⁷ and *South Florida Chapter of the*

⁶ *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); U.S.D.C., E.D. Cal, Civil Action No. S-09-1622, Slip Opinion Transcript (E.D. Cal. April 20, 2011), *appeal dismissed based on standing, on other grounds Ninth Circuit held Caltrans’ DBE Program constitutional, Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. April 16, 2013)

⁷ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

⁸ *Mountain West Holding Co., Inc. v. Montana*, 2014 WL 6686734 (D. Mont. 2014), *appeal pending* in the U.S. Court of Appeals for the Ninth Circuit.

⁹ *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013).

¹⁰ *Mountain West Holding v. Montana*, 2014 WL 6686734 (D. Mont. 2014), *appeal pending* in the U.S. Court of Appeals for the Ninth Circuit, Docket Numbers 14-36097 and 15-35003.

¹¹ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. August 19, 2015), *Petition for a Writ of Certiorari to the U.S. Supreme Court, pending*, Docket No. 15-906; *Dunnet Bay Construction Co. v. Illinois DOT, et. al.* 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay*, 2015 WL 4934560 (7th Cir. August 19, 2015).

¹² *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

¹³ *Sherbrooke Turf, Inc. v. Minn. DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

¹⁴ 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”).

¹⁵ 2015 WL 1396376 (N.D. Ill. March 24, 2015), *appeal pending* in the U.S. Court of Appeals for the Seventh Circuit, Docket No. 15-1827.

¹⁶ *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

A.G.C. v. Broward County, Florida.¹⁸ The analysis also reviews recent cases involving challenges to MBE/WBE programs.

The analyses of *AGC, SDC v. Cal. DOT, Western States Paving, Mountain West Holding, Inc., M.K. Weeden*, and these other recent cases 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 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 NDOT, RTAA, RTCSN, MIA and RTCWC (“Nevada Transportation Consortium”) submitted in compliance with the Federal DBE regulations.

Following *Western States Paving*, the USDOT, in particular for agencies, transportation authorities, airports and other governmental entities implementing the Federal DBE Program in states in the Ninth Circuit Court of Appeals, recommended the use of disparity studies by recipients of federal financial assistance to examine whether or not there is evidence of discrimination and its effects, and how remedies might be narrowly tailored in developing their DBE Program to comply with the Federal DBE Program.¹⁹ 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 26.²⁰ The USDOT’s Guidance provides that recipients should consider evidence of discrimination and its effects.²¹

The USDOT’s Guidance is recognized by the federal regulations as “valid, and express the official positions and views of the Department of Transportation”²² 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.”²³ Accordingly, the USDOT has 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.²⁴

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’ current

¹⁷ 766 F. Supp.2d. 642 (D. N.J. 2010).

¹⁸ 544 F. Supp.2d 1336 (S.D. Fla. 2008).

¹⁹ 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; see 49 CFR § 26.9; see also 49 CFR Section 26.45.

²⁰ USDOT Guidance, available at http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006)

²¹ *Id.*

²² *Id.*, 49 CFR § 26.9.

²³ *Western States Paving*, 407 F.3d at 996; see also Br. for the United States, at 28 (April 19, 2004).

²⁴ DOT Guidance, available at 71 Fed. Reg. 14,775 and http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006).

implementation of the Federal DBE Program is constitutional.²⁵ The Ninth Circuit held that Caltrans' DBE Program implementing the Federal DBE Program was constitutional and survived strict scrutiny by: (1) having a strong basis in evidence of discrimination within the California transportation contracting industry based in substantial part on the evidence from the Disparity Study conducted for Caltrans; and (2) being "narrowly tailored" to benefit only those groups that have actually suffered discrimination.

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.²⁶

The two recent District Court decisions in Montana in *Mountain West Holding*²⁷ and *M.K. Weeden*²⁸ 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.

Also, recently the Seventh Circuit Court of Appeals in Illinois in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, upheld the implementation of the Federal DBE Program by the Illinois DOT.²⁹ The court held Dunnet Bay lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting* decision because there was no evidence IDOT exceeded its authority under federal law.³⁰

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.³¹ 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.

²⁵ *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).

²⁶ *Id.*, *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, Slip Opinion Transcript of U.S. District Court at 42-56.

²⁷ *Mountain West Holding*, 2014 WL 6686734, *appeal pending*.

²⁸ *M.K. Weeden*, 2013 WL 4774517.

²⁹ 799 F. 3d 676, 2015 WL 4934560 (7th Cir. 2015).

³⁰ *Id.*

³¹ 488 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.”³² 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.³³ 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.³⁴

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.³⁵ 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.”³⁶

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.”³⁷ “Nor does the city know what percentage of total city

³² 488 U.S. at 500, 510.

³³ 488 U.S. at 480, 505.

³⁴ 488 U.S. at 507-510.

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

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

³⁷ 488 U.S. at 502.

construction dollars minority firms now receive as subcontractors on prime contracts let by the city.”³⁸

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.”³⁹ 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.”⁴⁰

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.”⁴¹ “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.”⁴²

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.”⁴³

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 *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.

³⁸ *Id.*

³⁹ 488 U.S. at 509.

⁴⁰ *Id.*

⁴¹ 488 U.S. at 509.

⁴² *Id.*

⁴³ 488 U.S. at 492.

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

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

1. The Federal DBE Program

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.⁴⁴ 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”).⁴⁵ In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).⁴⁶

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.⁴⁷

The Federal DBE Program established responsibility for implementing the DBE Program to state and local government recipients of federal funds. A recipient of federal financial assistance must

⁴⁴ *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*.

⁴⁵ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁴⁶ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

⁴⁷ 49 CFR § 26.51.

set an annual DBE goal specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The Federal DBE Program outlines certain steps a state or local government recipient can follow in establishing a goal, and USDOT considers and must approve the goal and the recipient's DBE program. The implementation of the Federal DBE Program is substantially in the hands of the state or local government recipient and is set forth in detail in the federal regulations, including 49 CFR § 26.45.

Provided in 49 CFR § 26.45 are instructions as to how recipients of federal funds should set the overall goals for their DBE programs. In summary, the recipient establishes a base figure for relative availability of DBEs.⁴⁸ This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient's market.⁴⁹ Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.⁵⁰ There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d). These include, among other types, the current capacity of DBEs to perform work on the recipient's contracts as measured by the volume of work DBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and training.⁵¹ This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE participation one would expect absent the effects of discrimination.⁵²

Further, the Federal DBE Program requires state and local government recipients of federal funds to assess how much of the DBE goal can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.⁵³

A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.⁵⁴ A recipient of federal funds must establish a contract clause requiring prime contractors to promptly pay subcontractors in the Federal DBE Program (42 CFR § 26.29). The Federal DBE Program also established certain record-keeping requirements, including maintaining a bidders list containing data on contractors and subcontractors seeking federally-assisted contracts from the agency (42 CFR § 26.11). There are multiple administrative requirements that recipients must comply with in accordance with the regulations.⁵⁵

⁴⁸ 49 CFR § 26.45(a), (b), (c).

⁴⁹ *Id.*

⁵⁰ *Id.* at § 26.45(d).

⁵¹ *Id.*

⁵² 49 CFR § 26.45(b)-(d).

⁵³ 49 CFR § 26.51.

⁵⁴ 49 CFR § 26.51(b).

⁵⁵ 49 CFR §§ 26.21-26.37.

Federal aid recipients are to certify DBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.

Fixing America's Surface Transportation Act" or the "FAST Act" (December 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 inflation⁵⁶

Therefore, Congress in the FAST Act passed on December 3, 2015, has again found based on testimony, evidence and documentation updated since MAP-21 was adopted in 2012 as follows: (1) discrimination and related barriers continue to pose significant obstacles for minority- and 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.⁵⁷

US DOT Final Rule, 79 Fed. Reg. 59566 (October 2, 2014)

DBE: Program Implementation Modifications for 49 CFR Part 26 (Effective Nov. 3, 2014).⁵⁸

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.⁵⁹

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.⁶⁰

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

- (1) The Rule revises the Uniform Certification Application and reporting forms, establishes a uniform personal net worth form as part of the Uniform Certification Application, and provides for data collection required by the U.S. DOT statutory reauthorization, MAP-21;
- (2) The Rule revises the certification-related program provisions and standards; and
- (3) The Rule amends and modifies several program provisions, including: overall goal setting by recipients of federal funds, good faith efforts, guidance and submissions,

⁵⁶ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

⁵⁷ *Id.*

⁵⁸ 79 F.R. 59566-59122 (October 2, 2014).

⁵⁹ 77 F.R. 54952-55024 (September 6, 2012).

⁶⁰ 77 F.R. 54952.

transit vehicle manufacturers, counting for trucking companies, and program administration.⁶¹

The new and revised forms include the U.S. DOT personal net worth form, a revised uniform application form and checklist, and a revised uniform report of awards or commitments, and payments. The new provisions include reporting requirements under MAP-21, adding a new provision authorizing summary suspensions of DBEs under certain circumstances, and new record retention requirements.⁶²

Several of the areas revised include:

- the size standard on statutory gross receipts has been increased for inflation;
- the ownership and control provisions have been amended, including a new rule examining whether there are any agreements or practices that give a non-disadvantaged 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;
- 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.⁶³

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

⁶¹ 79 F.R. 59566-59622 (October 2, 2014).

⁶² *Id.*

⁶³ 79 F.R. 59566-59622.

a new submission required by MAP-21 on the percentage of DBEs in the state owned by non-minority women, and men.⁶⁴

The new Rule makes certain changes in connection with program administration, including: adding to the definitions of “immediate family members” and “spouse” domestic partnerships and civil unions; the retention of all records documenting a DBE’s compliance with the eligibility requirements, including the complete application package and subsequent reports; and adding to the provisions relating to the contract clause included in each DOT-assisted contract that obligates the contractor to comply with the DBE Program regulations in the administration of the contract, and specifying that failure to do so may result in termination of the contract or other remedies.⁶⁵

The Rule also provides changes to the definitions in the federal regulations, including for the following terms: assets, business, business concern, business enterprise, contingent liability, liabilities, primary industry classification, principal place of business, and social and economically disadvantaged individual.⁶⁶

USDOT Order 4220.1 (February 5, 2014).

USDOT Order 4220.1 is the USDOT’s Order on the Coordination and Oversight of the DBE Program. According to the USDOT, this Order clarifies the leadership roles and responsibilities of the various offices and Operating Administrations within the USDOT responsible for supporting and overseeing the implementation of the Federal DBE Program. The Order further establishes a framework for coordination, overall policy development, and program oversight among these offices. The Order provides that the Departmental Office of Civil Rights will act as the lead office in the Office of Secretary for the DBE program. The Operating Administrations will continue to be the first points of contacts regarding, and primarily responsible for overseeing and enforcing, the day-to-day administration of the program by recipients.

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

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

The USDOT Order also establishes the DBE Oversight and Compliance Council that will facilitate collaboration, communication, and accountability among the DOT components responsible for

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

the DBE program oversight, and assist in the formulation of policy regarding DBE program management and operation. The Order provides that the Office of the General Counsel established DBE Working Group, which generates rules changes and official DOT guidance, will continue to coordinate the development of formal and informal guidance and interpretations, and to ensure consistent and clear communications regarding the application and interpretation of DBE program requirements.

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

MAP-21 (July 2012).

In the 2012 Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress provides “Findings” that “discrimination and related barriers” “merit the continuation of the” Federal DBE Program.⁶⁷ In MAP-21, Congress specifically finds 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.”⁶⁸

⁶⁷ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁶⁸ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

Thus, Congress in MAP-21 determined based on testimony and documentation of race and gender discrimination that there is “a compelling need for the continuation of the” Federal DBE Program.⁶⁹

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. According to the United States DOT, the Rule increased accountability for recipients with respect to meeting overall goals, modified and updated certification requirements, adjusted the personal net worth threshold for inflation to \$1.32 million dollars, provided for expedited interstate certification, added provisions to foster small business participation, provided for additional post-award oversight and monitoring, and addressed other matters.⁷⁰

In particular, the 2011 Final Rule provided that a recipient’s DBE Program must include a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently is actually performed by the DBEs to which the work was committed and that this mechanism must include a written certification that the recipient has reviewed contracting records and monitored work sites for this purpose.⁷¹

In addition, the 2011 Final Rule added a Section 26.39 to Subpart B to provide for fostering small business participation.⁷² The recipient’s DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, which must be submitted to the appropriate DOT operating administration for approval.⁷³ The new 2011 Final Rule provided a list of “strategies” that may be included as part of the small business program, including establishing a race-neutral small business set-aside for prime contracts under a stated amount; requiring bidders on prime contracts to specify elements or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform; requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform; and to meet the portion of the recipient’s overall goal it projects to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform and other strategies.⁷⁴ The 2011 Final Rule provided that actively implementing program elements to foster small business participation is a requirement of good faith implementation of the recipient’s DBE program.⁷⁵

⁶⁹ *Id.*

⁷⁰ 76 F.R. 5083-5101.

⁷¹ *See* 49 CFR § 26.37, 76 F.R. at 5097.

⁷² 76 F.R. at 5097, January 28, 2011.

⁷³ *Id.*

⁷⁴ *Id.* at 5097, amending 49 CFR § 26.39(b)(1)-(5).

⁷⁵ *Id.* at 5097, amending 49 CFR § 26.39(c).

The 2011 Final Rule also provided that recipients must take certain specific actions if the awards and commitments shown on its Uniform Report of Awards or Commitments and Payments, at the end of any fiscal year, are less than the overall goal applicable to that fiscal year, in order to be regarded by the DOT as implementing its DBE program in good faith.⁷⁶ The 2011 Final Rule set out what action the recipient must take in order to be regarded as implementing its DBE program in good faith, including analyzing the reasons for the difference between the overall goal and its awards and commitments, establishing specific steps and milestones to correct the problems identified, and submitting at the end of the fiscal year a timely analysis and corrective actions to the appropriate operating administration for approval, and additional actions.⁷⁷ The 2011 Final Rule provided a list of acts or omissions that DOT will regard the recipient as being in non-compliance for failing to implement its DBE program in good faith, including not submitting its analysis and corrective actions, disapproval of its analysis or corrective actions, or if it does not fully implement the corrective actions.⁷⁸

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.”⁷⁹

The United States DOT in the 2011 Final Rule stated that there is a continuing compelling need for the DBE program.⁸⁰ 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.”⁸¹ 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.”⁸² This information, the DOT stated, “confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.”⁸³

⁷⁶ 76 F.R. at 5098, amending 49 CFR § 26.47(c).

⁷⁷ *Id.*, amending 49 CFR § 26.47(c)(1)-(5).

⁷⁸ *Id.*, amending 49 CFR § 26.47(c)(5).

⁷⁹ 76 F.R. at 5092.

⁸⁰ 76 F.R. at 5095.

⁸¹ 76 F.R. at 5095.

⁸² *Id.*

⁸³ *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.⁸⁴ The implementation of the Federal DBE Program by recipients of federal funds, such as the Nevada Transportation Consortium, also are subject to and must follow the strict scrutiny analysis if they utilize race- and ethnicity-based measures.⁸⁵ 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.⁸⁶

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.⁸⁷ 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.⁸⁸ 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.⁸⁹

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.⁹⁰ The federal courts also have held that Congress had ample evidence of discrimination in the transportation contracting industry to justify the Federal DBE Program (TEA-21), and the federal regulations implementing the program (49 CFR Part 26).⁹¹

⁸⁴ *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.

⁸⁵ *Adarand I*, 515 U.S. 200, 227 (1995); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *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).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*; see e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

⁸⁹ See, e.g., *Concrete Works I*, 36 F.3d at 1520.

⁹⁰ *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*, 84 F. Supp. 3d 705, 2015 WL 1396376, *appeal pending*; *Mountain West Holding*, 2014 WL 666734, *appeal pending*.

⁹¹ *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

Specifically, the federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”⁹² 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).⁹³ 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.⁹⁴
- **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

remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense (“DOD”) regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe’s* Motion for Summary Judgment and granting Defendant United States Department of Defense’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study – relied upon in part by the courts in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program – was “stale” as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision below in Section G. See also the discussion below in Section G of the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al*, 885 F.Supp.2d 237, (D.D.C.). Recently, the district court in *Rothe Development, Inc. v. U.S. Dept. of Defense and U.S. S.B.A.*, 107 F.Supp. 3d 183, 2015 WL 3536271 (D. D.C. June 5, 2015), *appeal pending* in the United States Court of Appeals, District of Columbia Circuit, Docket Number 15-5176, upheld the constitutionality of the Section 8(a) Program on its face, finding the federal government’s evidence of discrimination provided a sufficient basis for the Section 8(a) Program. See the discussion of the 2015 decision in *Rothe* in Section G below.

⁹² *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.

⁹³ *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”).

⁹⁴ *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.

exclusionary business networks dominate the subcontracting construction industry.⁹⁵

- **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.⁹⁶
- **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.⁹⁷
- **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.⁹⁸ 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.⁹⁹

Burden of proof. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.¹⁰⁰ If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.¹⁰¹ The challenger bears the

⁹⁵ *Adarand VII*, at 1170-72; see *DynaLantic*, 885 F.Supp.2d 237.

⁹⁶ *Id.* at 1172-74; see *DynaLantic*, 885 F.Supp.2d 237.

⁹⁷ *Adarand VII*, 228 F.3d at 1174-75.

⁹⁸ 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.

⁹⁹ *Id.* at § 1101(b)(1).

¹⁰⁰ See *AGC, SDC v. Caltrans*, 713 F.3rd at 1195; *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater* ("Adarand VII"), 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng'g Contractors Ass'n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

¹⁰¹ *Adarand VII*, 228 F.3d at 1166; *Eng'g Contractors Ass'n*, 122 F.3d at 916.

ultimate burden of showing that the governmental entity's evidence "did not support an inference of prior discrimination."¹⁰²

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.¹⁰³ It is well established that "remediating the effects of past or present racial discrimination" is a compelling interest.¹⁰⁴ In addition, the government must also demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary."¹⁰⁵

Since the decision by the Supreme Court in *Croson*, "numerous courts have recognized that disparity studies provide probative evidence of discrimination."¹⁰⁶ "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.'"¹⁰⁷ Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.¹⁰⁸

In addition to providing "hard proof" to support its compelling interest, the government must also show that the challenged program is narrowly tailored.¹⁰⁹ Once the governmental entity has shown acceptable proof of a compelling interest and remediating 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.¹¹⁰ Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE or MBE/WBE Program to demonstrate the unconstitutionality of an affirmative-action type program.¹¹¹

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.¹¹² 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

¹⁰² See, e.g., *Adarand VII*, 228 F.3d at 1166; *Eng'g Contractors Ass'n*, 122 F.3d at 916; see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721.

¹⁰³ *Id.*; *Western States Paving*, 407 F.3d at 990; See also *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000).

¹⁰⁴ *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989).

¹⁰⁵ *Croson*, 488 U.S. at 500.

¹⁰⁶ *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), appeal pending; see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994).

¹⁰⁷ *Midwest Fence*, 2015 W.L. 1396376 at *7, quoting *Concrete Works*; 36 F.3d 1513, 1522 (quoting *Croson*, 488 U.S. at 509).

¹⁰⁸ *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, appeal pending.

¹⁰⁹ *Adarand Constructors, Inc. v. Pena*, ("Adarand III"), 515 U.S. 200 at 235 (1995); see, e.g., *Majeske v. City of Chicago*, 218 F.3d at 820.

¹¹⁰ *Majeske*, 218 F.3d at 820; see, e.g. *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 2015 WL 1396376 *7.

¹¹¹ *Id.*; *Adarand VII*, 228 F.3d at 1166.

¹¹² See e.g., *H.B. Rowe v. North Carolina DOT* (4th Cir. 2010), 615 F.3d 233, at 241-242; *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Midwest Fence*, 2015 W.L. 1396376 at *7, appeal pending.

presenting contrasting statistical data.¹¹³ Conjecture and unsupported criticisms of the government’s methodology are insufficient.¹¹⁴ 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.¹¹⁵

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.”¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹

Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state recipient level.¹²⁰ “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.”¹²¹

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.¹²² 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.¹²³

¹¹³ *Id.*; See e.g., *Engineering Contractors*, 122 F.3d at 916; *Contractors Association of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1007 (3d Cir. 1993); *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

¹¹⁴ *Id.*

¹¹⁵ *H.B. Rowe*, 615 F.3d 233, at 242; see *Concrete Works*, 321 F.3d at 991.

¹¹⁶ *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)).

¹¹⁷ *H.B. Rowe Co.*, 615 F.3d at 241; see e.g., *Concrete Works*, 321 F.3d at 958.

¹¹⁸ *Croson*, 488 U.S. 509, see e.g., *H.B. Rowe*, 615 F.3d at 241.

¹¹⁹ *H.B. Rowe*, 615 F.3d at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see e.g., *AGC, San Diego v. Caltrans*, 713 F.3d at 1196.

¹²⁰ See, e.g., *Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Adarand VII*, 228 F.3d at 1166.

¹²¹ *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); See *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197.

¹²² *Croson*, 488 U.S. at 509; see *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver (“Concrete Works II”)*, 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736.

¹²³ See, e.g., *Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; see also *Western States Paving*, 407 F.3d at 1001.

However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.¹²⁴

Other considerations regarding statistical evidence include:

- **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE availability measures the relative number of MBE/WBEs and DBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.¹²⁵ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,¹²⁶ “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”¹²⁷
- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.¹²⁸
- **Disparity index.** An important component of statistical evidence is the “disparity index.”¹²⁹ 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.”¹³⁰
- **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.¹³¹

¹²⁴ *Western States Paving*, 407 F.3d at 1001.

¹²⁵ 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.

¹²⁶ *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.”).

¹²⁷ *Id.*

¹²⁸ See *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

¹²⁹ *Eng’g Contractors Ass’n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

¹³⁰ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *H.B. Rowe Co.*, 615 F.3d 233, 243-244; *Rothe*, 545 F.3d at 1041; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

¹³¹ *Eng’g Contractors Ass’n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct; *Peightal v. Metropolitan Eng’g Contractors Ass’n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

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.¹³² But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.¹³³ 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.¹³⁴

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.¹³⁵

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.¹³⁶

b. The Narrow Tailoring Requirement.

The second prong of the strict scrutiny analysis requires that a race- or ethnicity-based program or legislation implemented to remedy past identified discrimination in the relevant market be "narrowly tailored" to reach that objective.

The narrow tailoring requirement has several components and the courts analyze several criteria or factors in determining whether a program or legislation satisfies this requirement including:

¹³² See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

¹³³ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520; *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

¹³⁴ *Concrete Works I*, 36 F.3d at 1520.

¹³⁵ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); e.g., *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, see *Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

¹³⁶ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Mountain West Holding*, 2014 WL 668734, *appeal pending*; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

- 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.¹³⁷

The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular recipient’s contracting and procurement market.¹³⁸ The narrow tailoring requirement has several components.

It should be pointed out that in the *Northern Contracting* decision (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold “that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT’s program.”¹³⁹ 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.¹⁴⁰ The Seventh Circuit Court of Appeals analyzed IDOT’s compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth in the federal regulations.¹⁴¹ The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).¹⁴² Accordingly, the Seventh Circuit Court of Appeals affirmed the district court’s decision upholding the validity of IDOT’s DBE program.¹⁴³

The recent (August 19, 2015) Seventh Circuit Court of Appeals decision in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al* followed the ruling in *Northern Contracting*

¹³⁷ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted).

¹³⁸ *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71.

¹³⁹ 473 F.3d at 722.

¹⁴⁰ *Id.* at 722.

¹⁴¹ *Id.* at 723-24.

¹⁴² *Id.*

¹⁴³ See, e.g., *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), appeal pending; *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).

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.¹⁴⁴ 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.¹⁴⁵ The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.¹⁴⁶

In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient's own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action.¹⁴⁷ Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.¹⁴⁸

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.¹⁴⁹

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

- 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

¹⁴⁴ *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 at **18-22 (7th Cir. August 19, 2015)

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁴⁸ *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.

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

- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.¹⁵⁰

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.”¹⁵¹ Courts have found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.”¹⁵²

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.’”¹⁵³

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*¹⁵⁴ 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.”¹⁵⁵ The Court found that the District failed to show it seriously considered race-neutral measures.

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

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

¹⁵⁰ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248.

¹⁵¹ *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).

¹⁵² 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; see also *Adarand I*, 515 U.S. at 237-38.

¹⁵³ *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730, 738 (6th Cir. 2000).

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

¹⁵⁵ 551 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).

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.¹⁵⁶ 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.¹⁵⁷

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.”¹⁵⁸

The federal regulations and the courts require that recipients of federal financial assistance governed by 49 CFR Part 26 implement or seriously consider race-, ethnicity-, and gender-neutral remedies prior to the implementation of race-, ethnicity-, and gender-conscious remedies.¹⁵⁹ The courts have also found “the regulations require a state to ‘meet the maximum feasible portion of [its] overall goal by using race neutral means.’¹⁶⁰

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;

¹⁵⁶ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Coral Constr.*, 941 F.2d at 923.

¹⁵⁷ See *Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); see also *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Virdi*, 135 Fed. Appx. At 268.

¹⁵⁸ *Croson*, 488 U.S. at 509-510.

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

¹⁶⁰ 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)).

- 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.¹⁶¹

49 CFR § 26.51(b) provides examples of race-, ethnicity-, and gender-neutral measures that should be seriously considered and utilized. The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives.”¹⁶²

In *AGC, SDC v. Caltrans*, the Ninth Circuit rejected the assertion that the state DOT’s DBE program was not narrowly tailored because it failed to evaluate race-neutral measures before implementing race conscious goals, and said the law imposes no such requirement.¹⁶³ The court held states are not required to independently meet this aspect of narrow tailoring, and instead concluded *Western States Paving* focused on whether the federal statute sufficiently considered race-neutral alternatives.¹⁶⁴ In *AGC, SDC v. Caltrans*, the court found that narrow tailoring only requires “serious, good faith consideration of workable race-neutral alternatives.”¹⁶⁵

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.¹⁶⁶ For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;¹⁶⁷ (2) good faith efforts provisions;¹⁶⁸ (3) waiver provisions;¹⁶⁹ (4)

¹⁶¹ See 49 CFR § 26.51(b); see, e.g., *Croson*, 488 U.S. at 509-510; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 CFR § 26.51(b); *Eng’g Contractors Ass’n*, 122 F.3d at 927-29.

¹⁶² *Western States Paving*, 407 F.3d at 993.

¹⁶³ *AGC, SDC v. Caltrans*, 713 F.3d at 1199.

¹⁶⁴ *AGC, SDC v. Caltrans*, 713 F.3d at 1199.

¹⁶⁵ *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

¹⁶⁶ *Eng’g Contractors Ass’n*, 122 F.3d at 927.

¹⁶⁷ *CAEPI*, 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).

¹⁶⁸ *CAEPI*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

¹⁶⁹ *CAEPI*, 6 F.3d at 1009; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917.

a rational basis for goals;¹⁷⁰(5) graduation provisions;¹⁷¹ (6) remedies only for groups for which there were findings of discrimination;¹⁷² (7) sunset provisions;¹⁷³ and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.¹⁷⁴

3. Intermediate scrutiny analysis

Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.¹⁷⁵ The Ninth Circuit and other courts have interpreted this standard to require that gender-based classifications be:

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.¹⁷⁶

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.¹⁷⁷

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. 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.¹⁷⁸

The Eleventh Circuit has held that “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417.

¹⁷³ *Peightal*, 26 F.3d at 1559.

¹⁷⁴ *Coral Constr.*, 941 F.2d at 925.

¹⁷⁵ See generally, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *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.”)

¹⁷⁶ *Id.*

¹⁷⁷ *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*.

¹⁷⁸ *Coral Constr. Co.*, 941 F.2d at 931-932; See *Eng’g Contractors Ass’n*, 122 F.3d at 910.

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.”¹⁷⁹

4. Pending Cases (at the time of this report)

Pending cases on appeal at the time of this report, which may potentially impact and be instructive to the Nevada Transportation Consortium and study, include:

Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al. 2014 WL 6686734 (D. Mont. Nov. 26, 2014) *appeal pending* in the U.S. Court of Appeals, Ninth Circuit, Docket Numbers 14-36097 and 15-35003. (See Section E below.)

Dunnet Bay Construction Co. V. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. August 19, 2015). Dunnet Bay submitted a Petition for a Writ of Certiorari in January 2016 to the U.S. Supreme Court, which is pending. Docket No. 15-906 (See Section E below).

Midwest Fence Corporation v. United States Department of Transportation and Federal Highway Administration, the Illinois Department of Transportation, the Illinois State Toll Highway Authority, et al., 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, March 24, 2015), *appeal pending* in the U.S. Court of Appeals, Seventh Circuit, Docket Number 15-1827. (See Section E below.)

Rothe Development Inc. v. Department of Defense, et al., 107 F. Supp. 3d 183, 2015 WL 3536271 (D. D.C. June 5, 2015), *appeal pending* in the U.S. Court of Appeals, District of Columbia Circuit, Docket Number 15-5176. (see Section G below).

Although not involving the Federal DBE Program, it is instructive to note the recent decision in *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), *appeal pending* in the United States Court of Appeals, District of Columbia Circuit, Docket Number 15-5176.

Plaintiff *Rothe Development, Inc.* filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) challenging the constitutionality of the Section 8(a) Program on its face. The Constitutional challenge 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). *DynaLantic’s* court disagreed with the plaintiff’s facial attack and held the Section 8(a) Program as facially constitutional.

Plaintiff *Rothe* relies on substantially the same record evidence and nearly identical legal arguments as in *DynaLantic*, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face. The court in *Rothe* agrees with the court’s findings, holdings and reasoning in *DynaLantic*, and thus concludes that Section 8(a) is constitutional on its face.

The court concluded that plaintiff’s facial constitutional challenge to the Section 8(a) Program failed, that the government demonstrated a compelling interest for the racial classification, the

¹⁷⁹ 122 F.3d at 929 (internal citations omitted.)

need for remedial action is supported by strong and un rebutted evidence, and the Section 8(a) program is narrowly tailored.

Rothe has appealed the decision to the United States Court of Appeals for the District of Columbia Circuit, which appeal is pending at the time of this report.

This list of pending cases is not exhaustive, but is illustrative of current pending cases that may impact recipients of federal funds implementing the Federal DBE Program.

Ongoing review. The above represents a brief summary of the legal framework pertinent to implementation of DBE, MBE/WBE, or race-, ethnicity-, or gender-neutral programs. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

SUMMARIES OF RECENT DECISIONS

A. Recent Decisions Involving the Federal DBE Program and State or Local Government MBE/WBE Programs in the Ninth Circuit Court of Appeals

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

The Associated General Contractors of America, Inc., San Diego Chapter, Inc. , (“AGC”) sought declaratory and injunctive relief against the California Department of Transportation (“Caltrans”) and its officers on the grounds that Caltrans’ Disadvantaged Business Enterprise (“DBE”) program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans’ DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans’ DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans’ substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans’ program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans’ DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

Court Applies *Western States Paving Co. v. Washington State DOT* decision. In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT’s program because it was not narrowly tailored. *Id.*, citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for “narrow tailoring”:

“(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination.” *Id.* 1191, citing *Western States Paving Co.*, 407 F.3d at 997-998.

Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id.* at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California’s transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a “disparity index.” *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id.* at 1191. The Court stated: “Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and women-owned businesses should be expected to receive 13.5 percent of contact dollars from Caltrans administered federally assisted contracts.” *Id.* at 1191-1192.

The Court said the research firm “examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction).” *Id.* at 1192.

The Court pointed out a key difference between federally funded and state funded contracts is that race-conscious goals were in place for the federally funded contracts during the 2002–2006 period, but not for the state funded contracts. *Id.* at 1192. Thus, the Court stated: “state funded contracts functioned as a control group to help determine whether previous affirmative action programs skewed the data.” *Id.*

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans’ administrative districts, and computed aggregate disparities based on statewide data. *Id.* at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian–Pacific, and Native American firms. *Id.* However, the research firm found that there were not substantial disparities for these minorities in *every* subcategory of contract. *Id.* The Court noted that the disparity study also found substantial disparities in utilization of women-owned firms for some categories of contracts. *Id.* After publication of the disparity study, the Court pointed out the research firm calculated disparity

indices for all women-owned firms, including female minorities, showing substantial disparities in the utilization of all women-owned firms similar to those measured for white women. *Id.*

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm's findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id.*

Caltrans' DBE Program. Caltrans concluded that the evidence from the disparity study supported an inference of discrimination in the California transportation contracting industry. *Id.* at 1192-1193. Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian-Pacific American-, Native American-, and women-owned firms. *Id.* The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. *Id.*

Caltrans submitted its proposed DBE program to the USDOT for approval, including a request for a waiver to implement the program only for the four identified groups. *Id.* at 1193. The Caltrans' DBE program included 66 race-neutral measures that Caltrans already operated or planned to implement, and subsequent proposals increased the number of race-neutral measures to 150. *Id.* The USDOT granted the waiver, but initially did not approve Caltrans' DBE program until in 2009, the DOT approved Caltrans' DBE program for fiscal year 2009.

District Court proceedings. AGC then filed a complaint alleging that Caltrans' implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans' DBE program. The district court on motions of summary judgment held that Caltrans' program was "clearly constitutional," as it "was supported by a strong basis in evidence of discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. *Id.* at 1193.

Subsequent Caltrans study and program. While the appeal by the AGC was pending, Caltrans commissioned a new disparity study from BBC to update its DBE program as required by the federal regulations. *Id.* at 1193. In August 2012, BBC published its second disparity report, and Caltrans concluded that the updated study provided evidence of continuing discrimination in the California transportation contracting industry against the same four groups and Hispanic Americans. *Id.* Caltrans submitted a modified DBE program that is nearly identical to the program approved in 2009, except that it now includes Hispanic Americans and sets an overall goal of 12.5 percent, of which 9.5 percent will be achieved through race- and gender-conscious measures. *Id.* The USDOT approved Caltrans' updated program in November 2012. *Id.*

Jurisdiction issue. Initially, the Ninth Circuit Court of Appeals considered whether it had jurisdiction over the AGC's appeal based on the doctrines of mootness and standing. The Court held that the appeal is not moot because Caltrans' new DBE program is substantially similar to

the prior program and is alleged to disadvantage AGC's members "in the same fundamental way" as the previous program. *Id.* at 1194.

The Court, however, held that the AGC did not establish associational standing. *Id.* at 1194-1195: The Court found that the AGC did not identify any affected members by name nor has it submitted declarations by any of its members attesting to harm they have suffered or will suffer under Caltrans' program. *Id.* at 1194-1195. Because AGC failed to establish standing, the Court held it must dismiss the appeal due to lack of jurisdiction. *Id.* at 1195.

Caltrans' DBE Program held constitutional on the merits. The Court then held that even if AGC could establish standing, its appeal would fail. *Id.* at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id.* at 1195-1200.

The Court stated that race-conscious remedial programs must satisfy strict scrutiny and that although strict scrutiny is stringent, it is not "fatal in fact." *Id.* at 1194-1195 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (*Adarand III*)). The Court quoted *Adarand III*: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* (quoting *Adarand III*, 515 U.S. at 237.)

The Court pointed out that gender-conscious programs must satisfy intermediate scrutiny which requires that gender-conscious programs be supported by an 'exceedingly persuasive justification' and be substantially related to the achievement of that underlying objective. *Id.* at 1195 (citing *Western States Paving*, 407 F.3d at 990 n. 6.).

The Court held that Caltrans' DBE program contains both race- and gender-conscious measures, and that the "entire program passes strict scrutiny." *Id.* at 1195.

Application of strict scrutiny standard articulated in *Western States Paving*. The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving*. The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (quoting *Western States Paving*, 407 F.3d at 997-99).

Evidence of discrimination in California contracting industry. The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id.* at 1196. The U.S. Supreme Court has suggested that a "significant statistical disparity" could be sufficient to justify race-conscious remedial programs. *Id.* at *7 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring "the cold numbers convincingly to life." *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT's DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington's data "did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state." *Id.* (quoting *Western States Paving*, 407 F.3d at 999-1001). The Court said that it struck down Washington's program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry." *Id.*

Significantly, the Court held in this case as follows: "In contrast, Caltrans' affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry." *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. *Id.* The Court found the disparity study "accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs." *Id.* (citing *Western States*, 407 F.3d at 1000).

The Court also held: "Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, *see Croson*, 488 U.S. at 509, and certainly Caltrans' statistical evidence combined with anecdotal evidence passes constitutional muster." *Id.* at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of "specific acts" of "deliberate" discrimination by Caltrans employees or prime contractors. *Id.* at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that "[t]he degree of specificity required in the findings of discrimination ... may vary." *Id.* at 1197 (quoting *Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (citing *Croson*, 488 U.S. at 509). The Court rejected AGC's argument that Caltrans' program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.* The Court found that AGC's argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out "patterns of discrimination." *Id.* quoting *Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into “a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1197 quoting *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.*

2. *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.*

3. *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.

4. *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.

5. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014) appeal pending in the U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003

Factual and procedural background. *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. ("Mountain West"), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation ("MDT") and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit's decision in *Western States*, MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Mountain West alleged that the disparity study was flawed, and the State did not have a strong basis in evidence. The State of Montana commissioned a disparity study, which was completed in 2009. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all "relevant" minority groups were underutilized in "professional services" and Asian Pacific Americans and Hispanic Americans

were underutilized in “business categories combined,” but it also concluded that all “relevant” minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are “significantly overrepresented” in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserted that there was no evidence that all relevant minority groups had suffered discrimination in Montana’s transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

Western States Paving Co. v. Washington DOT. The Court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 71 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The Court noted that in *Western States*, the Ninth Circuit held that a state’s implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Court stated the Ninth Circuit held that whether a state’s implementation of the DBE Program “is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.” *Id.* at *2, quoting *Western States*, at 997-998. The Court in *Mountain West* also pointed out the Ninth Circuit held that “even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.” *Mountain West*, 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 998.

MDT study. The MDT obtained a firm to conduct a disparity study, which was completed in 2009. The Court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in “professional services” contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in “business categories combined,” slight underutilization of nonminority women in “business categories combined,” and overutilization of all groups in subcontractor “construction” contracts. *Mountain West*, 2014 WL 6686734 at *2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The Court stated the anecdotal evidence suggested various forms of discrimination existed within Montana's transportation contracting industry, including evidence of an exclusive "good ole boy network" that made it difficult for DBEs to break into the market. *Id.* at *3. The Court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

Montana's DBE utilization after ceasing the use of contract goals. The Court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at *3. The utilization rate dropped, according to the Court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent *Id.* In response to this decline, for fiscal years 2011-2014, the Court said MDT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana's overall goal of 5.83 percent DBE utilization.

MDT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

Mountain West's claims for relief. Mountain West seeks declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at *3. Mountain West's claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana's DBE program. *Id.*

The two-prong test to demonstrate that a DBE program is narrowly tailored. The Court, citing AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West*, at *5.

The Court said that a state implementing the facially valid Federal DBE Program need not demonstrate an independent compelling interest for its implementation of the DBE Program because when Congress passed the relevant legislation it identified a compelling nationwide

interest in remedying discrimination in the transportation contracting industry. *Id.* at *4. In order to pass such scrutiny, the Court found a state need only demonstrate that its program is narrowly tailored. *Id.* at *3, citing *Western States*, 407 F.3d 997.

The Court held that states can meet the evidentiary standard required by *Western States* if, looking at the evidence in its entirety, “the data shows substantial disparities in utilization of minority firms suggesting that public dollars are being poured into ‘a system of racial exclusion practiced by elements of the local construction industry.’” *Mountain West*, at *5, quoting *AGC, San Diego v. California DOT*, 713 F.3d at 1197. The Court in *Mountain West* said that the federal guidelines provide that narrow tailoring does not require a state to parse its DBE Program to distinguish between certain types of contracts within the transportation contracting industry. *Mountain West*, at *5, citing *AGC, San Diego*, 713 F.3d at 1199.

The Court in *Mountain West*, following *AGC, San Diego*, concluded that a state’s implementation of the DBE Program need not require minority firms to attest to the fact that they have been discriminated against in the relevant jurisdiction because such a requirement is contrary to federal regulation, and thus would constitute “an impermissible collateral attack on the facial validity of the federal Act and regulations.” *Mountain West*, at *5, quoting *AGC, San Diego*, at 1200.

Statistical evidence. The Court held that Montana’s DBE program passes strict scrutiny. The Court found that *Mountain West* could not create a genuine dispute about the fact that the 2009 disparity study indicated significant underutilization of all minority groups in the award of professional services contracts in Montana’s transportation contracting market. *Mountain West*, at *5. In addition, the Court found that *Mountain West* could not dispute that the study indicated significant underutilization of Asian Pacific Americans and Hispanic Americans in the award of contracts in business categories combined in Montana’s transportation contracting market. *Id.* Also, the Court found that *Mountain West* could not dispute that the study indicated underutilization of nonminority women and business categories combined, and that the study documented, through surveys and otherwise, significant anecdotal evidence of various forms of discrimination in Montana’s transportation contracting industry. *Id.*

The Court noted that *Mountain West* merely disputed the validity of the findings in the study and argued that the methods the study used in gathering statistical and anecdotal evidence were flawed. *Id.* at *6. The Court found that in mounting this attack on the study, *Mountain West* relied entirely on the expert report of Dr. George “Lanoue” (sic), and that *Mountain West* only cited to two pages in the report in which Dr. LaNoue opined that the table showing DBE utilization and business categories combined was improperly calculated. *Id.*

Mountain West, the Court stated, provided no evidence indicating that the data showing significant underutilization of all minority groups and professional services was invalid. *Id.* at *6. In addition, the Court found contrary to the allegation by *Mountain West*, that the study controlled for factors other than discrimination in calculating DBE utilization and adjusted its calculation of the availability of DBE firms based on its control for factors other than discrimination *Id.*

Anecdotal evidence. The Court said that the attack on the study did not diminish the fact the study uncovered substantial anecdotal evidence of discrimination in Montana’s transportation contracting market, including evidence of a “good ole boy network.” *Id.* at *6. The Court said that in *AGC, San Diego*, the Ninth Circuit noted “federal courts and regulations have identified precisely [the factors associated with good ole boy networks] as barriers that disadvantage minority firms because of the lingering effects of discrimination.” *Mountain West*, at *6, quoting *AGC, San Diego*, at 1197-98.

In connection with the anecdotal evidence, the Court stated that Dr. LaNoue’s report merely criticized the sample size of the responses obtained, and that Mountain West also contended the anecdotal evidence is unreliable because Montana did not present affidavits in support of the anecdotal evidence gathered. *Id.* at *6. Contrary to Mountain West’s assertions, the Court held that nothing in *Western States* requires that anecdotal survey evidence gathered by a private firm assisting a state in preparing its goal methodology to the state’s DBE program must be supported by affidavits. *Mountain West*, at *6.

The Court concluded that Mountain West failed to create a genuine dispute that anecdotal evidence indicates the existence of discrimination in Montana’s transportation contracting industry. *Id.* at *6. The Court pointed out the Ninth Circuit held in *AGC, San Diego* that “substantial statistical disparities alone would give rise to an inference of discrimination, and certainly... statistical evidence combined with anecdotal evidence passes constitutional muster.” *Mountain West* at *6, quoting *AGC, San Diego*, 713 F.3d at 1196.

Precipitous drop in utilization. The Court in *Mountain West* also found that neither Dr. LaNoue’s report nor any other evidence presented by Mountain West created a genuine dispute about the fact DBE utilization in Montana’s transportation contracting industry dropped precipitously after 2006 when Montana ceased using contract goals. *Mountain West* at *6. The Court found that while the study indicated Montana should utilize DBEs at a rate of 5.83 percent, by 2010, DBE utilization in Montana had fallen “dramatically” to 0.8 percent. *Id.* at *6. The Court held that this undisputed fact “strongly supports [Defendants’] claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.” *Mountain West*, at *6, quoting *Adarand Contractors, Inc. v. Slater*, 228 F.3d 1147, 1174 (10th Cir. 2000).

Conclusion and holding. In sum, the Court held that MDT presented sufficient evidence to demonstrate evidence of discrimination in Montana’s transportation contracting industry. *Id.* at *7. The Court concluded that Montana’s DBE program is sufficiently narrowly tailored to address discrimination against only those groups that have actually suffered discrimination in the state’s transportation contracting industry based on the facts that (1) statistical evidence suggests that all minority groups in professional services are significantly underutilized, (2) there is evidence of an exclusive “good ole boy network” within the state contracting industry, and (3) DBE underutilization dramatically increased after 2006 when the State ceased using contract goals. *Id.* at *7.

Therefore, the Court held Montana’s DBE program survives such scrutiny by: (1) having a strong basis in evidence of discrimination within Montana’s transportation contracting industry; and

(2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at *7.

The Court also held that Mountain West failed to create a genuine dispute relative to its claims regarding Montana's DBE program during 2012-2014 when Montana and MDT utilized contract goals. *Id.* It follows then, according to the Court, that Mountain West's claims for prospective, injunctive and declaratory relief also failed because Montana has currently ceased using contract goals and any potential utilization of contract goals will be based on a not-yet conducted disparity study. *Id.* Therefore, the Court ordered that Montana and MDT are entitled to summary judgment on all claims.

The decision of the District Court has been appealed by Mountain West to the U.S. Court of Appeals for the Ninth Circuit, Docket No. 14-36097. The decision was cross appealed by Montana to the Ninth Circuit, Docket No. 15-35003.

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

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. ("Weeden") against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only .81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount.

Id. at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

No proof of irreparable harm and balance of equities favor MDT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

Court applies *AGC v. California DOT* case; evidence supports narrowly tailored DBE program. Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at *4.

Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013)(holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id.* at 4, citing *Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry." 2013 WL 4774517 at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court concluded that given the similarities between Weeden's claim and AGC's equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at *4.

Due Process claim. The Court also rejected Weeden's bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at *5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT's decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at *5.

Holding and Voluntary Dismissal. The Court denied plaintiff Weeden's application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

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

Braunstein is an engineering contractor that provided subsurface utility location services for ADOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona's former affirmative action program, or race- and gender- conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause.

Factual background. ADOT solicited bids for a new engineering and design contract. Six firms bid on the prime contract, but Braunstein did not bid because he could not satisfy a requirement that prime contractors complete 50 percent of the contract work themselves. Instead, Braunstein contacted the bidding firms to ask about subcontracting for the utility location work. 683 F.3d at 1181. All six firms rejected Braunstein's overtures, and Braunstein did not submit a quote or subcontracting bid to any of them. *Id.*

As part of the bid, the prime contractors were required to comply with federal regulations that provide states receiving federal highway funds maintain a DBE program. 683 F.3d at 1182. Under this contract, the prime contractor would receive a maximum of 5 points for DBE participation. *Id. at 1182.* All six firms that bid on the prime contract received the maximum 5 points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least 6 percent of the work. Only one of the six bidding firms selected a DBE as its desired utility location subcontractor. Three of the bidding firms selected another company other than Braunstein to perform the utility location work. *Id.* DMJM won the bid for the 2005 contract using Aztec to perform the utility location work. Aztec was not a DBE. *Id. at 1182.*

District Court rulings. Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein's claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (9th Cir. 2005). This left only Braunstein's damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id. at 1183.*

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally. The court noted that "Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract." *Id. at 1183.* The district court found that Braunstein's inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

Lack of standing. The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT's DBE program affected him personally or that it impeded his ability to compete for

utility location work on an equal basis. *Id.* at 1185. The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id.*

The Court also pointed out that Braunstein did not seek prospective relief against the government “affirmative action” program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id.* at 1186. Thus, Braunstein’s surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is “able and ready” to seek subcontracting work. *Id.*

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id.* at 1186. The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded Braunstein’s ability to compete for work as a subcontractor. *Id.* at 1187. The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff’s showing that he has been subjected to such a barrier. *Id.* at 1186.

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id.* at 1186. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id.* at 1187.

Summary judgment granted to ADOT. The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id.* The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

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

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term “goals” as opposed to “quotas,” the Ninth Circuit rejected such a distinction, holding “[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” The case also is instructive because it found the use of “goals” and the application of “good faith efforts” in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the “plaintiff”) submitted the low bid for a construction project for the California Polytechnic State University (the “University”). 125 F.3d 702, 704 (9th Cir. 1994). The University rejected the plaintiff’s bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the

awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

Importantly, the University did not conduct a disparity study, and instead argued that because “the ‘goal requirements’ of the scheme ‘[did] not involve racial or gender quotas, set-asides or preferences,’” the University did not need a disparity study. *Id.* at 705. The plaintiff protested the contract award and sued the University’s trustees, and a number of other individuals (collectively the “defendants”) alleging the state law was violative of the Equal Protection Clause. *Id.* The district court denied the plaintiff’s motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. *Id.* at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. *Id.* at 709. The court held that contrary to the district court’s finding, such a difference was not *de minimis*. *Id.*

The defendant’s also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id.* at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, “they are rigid in requiring precisely described and monitored efforts to attain those goals.” *Id.* The court cited its own earlier precedent to hold that “the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas ... [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” *Id.* at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited *Concrete Works of Colorado v. Denver*, 36 F.3d 1512 (10th Cir. 1994), as analogous support for the proposition. *Id.* at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although “worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness.” *Id.* The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (*e.g.*, advertising) to MBE/WBE firms. *Id.* at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id.* at 712-13. The court found the University presented “no evidence” to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id.* at 713. The court found that the statute was not narrowly tailored because the definition of “minority” was overbroad (*e.g.*, inclusion of Aleuts). *Id.* at 714, citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found “[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny.” *Id.* at 714, citing *Hopwood v. State of Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

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

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”)*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city’s bid preference program. 950 F.2d 1401 (9th Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the five percent preference given Local Business Enterprises (“LBEs”) and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined “MBE” as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. “WBE” was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC’s constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities’ legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, “the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review.” *Id.* at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong.” *Id.* at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the “old boy network” in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed

between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found “discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City’s procurement practices.” *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the “relevant market,” the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are “an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, citing to *Coral Construction*, 941 F.2d at 918 and *Crososon*, 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.

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

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington's minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a prima facie case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where "gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics "convincingly to life." *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial

classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, *citing Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, *citing Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, *citing Croson*, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court

required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at five percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id.* Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

B. 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. *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F. 3d 676, 2015 WL 4934560 (7th Cir. August 19, 2015), Petition for a Writ of Certiorari to the United States Supreme Court (January 2016), Docket No. 15-906.

Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT's DBE Program discriminates on the basis of race. The district court granted summary judgment to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 2015 WL 4934560 at *1. (*See* 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (*See* summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 2015 WL 4934560 at *1. 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%. *Id.* at *2. Under IDOT's DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at *3. These requests for modification are also known as "waivers." *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at *3. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id.* at *3-1. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77%. *Id.* at *5. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id.* Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at *5. Dunnet Bay did not achieve the goal of 22%, but three other bidders each met the DBE goal. *Id.* Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at *6. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at *6-9.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at *8, *17. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at *9, *17. Dunnet Bay did meet the 22.77% contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

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

The district court granted the IDOT Defendants' motion for summary judgement and denied Dunnet Bay's motion. *Id.* at *9. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id. Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at *31. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at *10. (See discussion of the district court decision in *Dunnet Bay* below in Section E).

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

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at *10. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* at *13. IDOT's DBE Program is not a "set aside program," in which non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.*

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 non-minority-owned small business. *Id.* at *17-18.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at *18. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.* at *19, quoting *Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id.* quoting *Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating

waivers. *Id.* at *19. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22% without the required analysis; (2) implementing a "no-waiver" policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22% goal was "arbitrary" and that IDOT manipulated the process to justify a preordained goal. *Id.* at *20. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT's methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at *20. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court's conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 20.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at *20. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60% of the waiver requests. *Id.* The court stated that IDOT's record of granting waivers refutes any suggestion of a no-waiver policy. *Id.*

The court did not agree with Dunnet Bay's challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at *21. The court found IDOT's determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id.* The court noted the reasons provided by IDOT, 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 January 2016. The Petition is pending at the time of this report. *See* Docket No. 15-609.

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

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation’s (“IDOT”) DBE Program. Plaintiff Northern Contracting Inc. (“NCI”) was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id.* at 719. The district court granted the USDOT’s Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id.* at 720. NCI also forfeited the argument that IDOT’s DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT’s program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet’s Marketplace data. *Id.* This initial list was corrected for errors in the data by surveying the D&B list. *Id.* In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along with other data, including DBE utilization on IDOTs “zero goal” experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id.* at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id.*

Despite the fact the NCI forfeited the argument that IDOT’s DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id.* at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government’s compelling interest in implementing a local DBE plan. *Id.* at 720-21, *citing Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any

reason to break ranks from the other circuits and explained that “[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution.” *Id.* at 721, quoting *Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT’s DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. 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.*

3. *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*.)

4. *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

5. *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), appeal pending in U.S. Court of Appeals, Seventh Circuit, Docket No. 15-1827.

In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise ("DBE") Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation's ("IDOT") implementation of the Federal DBE Program for federally-funded projects, IDOT's implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority's ("Tollway") separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants' Motion to Dismiss for lack of standing, denying the Federal Defendants' Motion to Dismiss certain

Counts of the Complaint as a matter of law, granting IDOT Defendants' Motion to Dismiss certain Counts and granting the Tollway Defendants' Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT's implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT's DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway's DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants' Motion to Dismiss Midwest Fence's request for punitive damages.

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 2015 WL 1396376 at *7. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *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, which 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 non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants’ evidence. *Id.* at *14. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at *14. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

As-applied challenge to IDOT’s implementation of the Federal DBE Program. In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT’s implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit’s decision in *Northern Contracting v. Illinois DOT*, the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at *14, citing *Northern Contracting, Inc. v. Illinois*, 473 F.3d

715 at 722 (7th Cir. 2007). The court, *quoting Northern Contracting*, held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id. at *14.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id. at *14.* The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id. at *14.* Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

IDOT's evidence of discrimination and DBE availability in Illinois. The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id. at *15.* The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id. at *15.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id. at *15.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id. at *15.* The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under \$500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at *15. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at *15. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and 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.

Notice of Appeal. At the time of this report, Midwest Fence Corporation has filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is pending.

6. *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 accessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at *13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id.*

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id.* at *13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id.* *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at *14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at *6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* *6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at *5.

The Court concluded that neither of the plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id.* at *14. The Court rejected plaintiffs' argument that because Congress found multiple forms of discrimination against minority- and women-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand*, the Court found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at *14.

The Court, citing again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at *14, quoting, *Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination. *Id.* Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id.*

Accordingly, the Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the Federal DBE Program. *Id.* at *14.

Court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof.

The Court held that plaintiffs' general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at *14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at *14.

Finally, the Court pointed out that plaintiffs have failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. *Id.* at *15. Thus, the Court concluded that plaintiffs failed to meet their ultimate burden to prove that the Federal DBE Program is unconstitutional on this ground. *Id.* at *15, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 971-73.

Therefore, the Court held that plaintiffs did not meet their burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the DBE

Federal Program, and granted summary judgment in favor of the Federal Defendants with respect to the government's compelling interest. *Id.* at *15.

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.*

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 *Sherbrook Turf, Inc.* at 973.

Plaintiffs’ expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at *18. Plaintiffs’ expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

Plaintiffs present no affirmative evidence that discrimination does not exist. The Court held that plaintiffs’ disputes with MnDOT’s conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT’s implementation of the Federal DBE Program is not narrowly tailored. *Id.* at *18. First, the Court found that it is insufficient to show that “data was susceptible to multiple interpretations,” instead, plaintiffs must “present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.” *Id.* at *18, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs’ expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota’s public contracting. *Id.* at *18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at *18. The Court found that it would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient’s calculation of success in meeting the overall goal. *Id.* at *18, quoting *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT’s compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at *18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at *18. Accordingly, the Court granted the State defendants’ motion for summary judgment with respect to this claim.

Alleged inappropriate goal setting. Plaintiff’s 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.

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.

7. *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. 2014), affirmed Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al., 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015).*

In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten "no waiver" policy, and claiming that the IDOT's program is not narrowly tailored.

Motion to Dismiss certain claims granted. IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT's DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

Motions for Summary Judgment. Subsequent to the Court's Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT's implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at * 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT's DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project, was based upon Dunnet Bay's race. IDOT also asserted that, because Dunnet Bay was

relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

Factual background. Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at *9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at *23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at *23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely “on the federal government’s compelling interest in remedying the effects of 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.

Appeal. At the time of this report, Dunnet Bay Construction Company filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed the district court decision in August 2019. See above at E1. Dunnet Bay submitted a Petition for a Writ of Certiorari to the U.S. Supreme Court in January 2016, which is pending at the time of this report.

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

Plaintiffs, white male owners of Geod Corporation (“Geod”), brought this action against the New Jersey Transit Corporation (“NJT”) alleging discriminatory practices by *NJT* in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the *NJT*’s DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for *NJT* and concluded that a genuine issue material fact existed only as to whether the method used by *NJT* to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

New Jersey Transit Program and Disparity Study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, “conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the “three-step process pursuant to USDOT regulations to establish the NJT DBE goal.” *Id.* at 649. First, the consultant determined “the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn.” *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified “the relevant industries in which NJ Transit contracts,” and (3) calculated “the weighted availability measure.” *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at

650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, citing *Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 citing *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

Applying *Northern Contracting v. Illinois*. The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority."

Id. at 652 quoting Northern Contracting, 473 F.3d at 721. The district court in Geod followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id.* at 652, citing Northern Contracting, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id.* at 652-653, quoting Northern Contracting, 473 F.3d at 722 and citing also Tennessee Asphalt Co. v. Farris, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 citing *Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id.* at 653 quoting *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and citing *South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT's use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the “examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, *citing* 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT’s list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT’s division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only “when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal.” *Id.* at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT’s DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that

under *Western States Paving*, a Court must “undertake an as-applied inquiry into whether [the state’s] DBE program is narrowly tailored.” *Id.* at 656, quoting *Western States Paving*, 407 F.3d at 997.

Applying *Western States Paving*. The district court then analyzed whether the NJT program was narrowly tailored applying *Western States Paving*. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id.* at 656, citing *Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id.* at 656. However, the court found that the plaintiffs’ argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id.* at 656. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id.* In addition, plaintiff’s expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id.* at 656. The court held this was insufficient to overcome the consultant’s determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id.* at 656.

The district court rejected Plaintiffs’ argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT’s expert identified “prime contracting” as the area in which NJT procurements evidence discrimination. *Id.* at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative but it does require serious, good faith consideration of workable race-neutral alternatives. *Id.* at 656, citing *Sherbrook Turf*, 345 F.3d at 972 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id.* at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the “relationship of the numerical goals to the relevant labor market.” *Id.* at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id.* at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that

NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id.*

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* at 657.

9. *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.

10. *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.

11. *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.

12. 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.

13. *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.*

14. *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.

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.

C. 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 Tippett, NCDOT, et al.*, 615 F.3d 233 (4th Cir. 2010)

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

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

court in part, reversed it in part and remanded for further proceedings consistent with the opinion. *Id.*

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

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina’s highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

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

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

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

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

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

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

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

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

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

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

Intermediate scrutiny. The Court held that courts apply “intermediate scrutiny” to statutes that classify on the basis of gender. *Id.* at 242. The Court found that a defender of a statute that classifies on the basis of gender meets this intermediate scrutiny burden “by showing at least

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

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

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

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

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

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis

“describes the probability that the measured disparity is the result of mere chance.” 615 F.3d 233 at 244, quoting *Eng’g Contractors*, 122 F.3d at 914. The consultant considered the finding of two standard deviations to demonstrate “with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present.” *Id.*, citing *Eng’g Contractors*, 122 F.3d at 914.

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

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

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

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

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

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

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

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

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff’s expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than “vendor data.” 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id.* The Court found that the plaintiff’s expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study’s availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state’s evidence,” and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, citing *Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

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

firm capacity or experience. *Id.* The Court concluded plaintiff did not offer any contrary evidence. *Id.*

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

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

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

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire

minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id.* at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id.*

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

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

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

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

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression

analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id.*

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

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

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

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

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

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

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

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

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

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

Overinclusive. The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

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

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

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women subcontractors in the general construction industry statewide and in the 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 or any factual findings of discrimination. *Id.*

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a “how to” booklet to be made available to any business interested in doing business with the District.

Id. The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id.* The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id.*

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the “how to” booklet. *Id.* The Board also implemented the Minority Vendor Involvement Program (the “MVP”) which adopted the participation goals set forth in the Report. *Id.* at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id.* Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id.* Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id.* In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id.* In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the “District was only looking for ‘black-owned firms.’” *Id.* Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id.*

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id.* at 267. The court first questioned whether the identified government interest was compelling. *Id.* at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id.*

The court held the MVP was not narrowly tailored for two reasons. *Id.* First, because no evidence existed that the District considered race-neutral alternatives to “avoid unwitting discrimination.” The court found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral

alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id.* at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id.* at 268.

Second, the court held that the unlimited duration of the MVP's racial goals negated a finding of narrow tailoring. *Id.* "[R]ace conscious ... policies must be limited in time." *Id.*, citing *Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id.* at 268.

With respect to Virdi's claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. *Id.* Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court's grant of judgment on that issue. *Id.* at 269. Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Virdi. *Id.* at 270.

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 non-minority male-owned firms." *Id.* at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia*, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held

that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver's studies would decrease or disappear if the studies controlled for size and experience to CWC's satisfaction. Consequently, the court held CWC's rebuttal evidence was insufficient to meet its burden of discrediting Denver's disparity studies on the issue of size and experience. *Id.* at 982.

Specialization. The district court also faulted Denver's disparity studies because they did not control for firm specialization. The court noted the district court's criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id.* at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found relevant the testimony of the City's expert, that the data he reviewed showed that MBEs were represented "widely across the different [construction] specializations." *Id.* at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver's studies. *Id.* at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver's studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver's argument that firm specialization does not explain the disparities. *Id.* at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id.* at 983.

Utilization of MBE/WBEs on City projects. CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC's argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC's argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver's evidence. *Id.* at 984.

Consistent with the court's mandate in *Concrete Works II*, at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and "reflect[ed] the intended remedial effect on MBE and WBE utilization." *Id.* at 984, quoting *Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction

projects. *Id.* at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id.* at 985.

The court rejected CWC's argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver's burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. *Id.* at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver's position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

Anecdotal evidence. The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. *Id.* at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver's witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. *Id.*

The court held there was no merit to CWC's argument that the witnesses' accounts must be verified to provide support for Denver's burden. The court stated that anecdotal evidence is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions. *Id.*

After considering Denver's anecdotal evidence, the district court found that the evidence "shows that race, ethnicity and gender affect the construction industry and those who work in it" and that the egregious mistreatment of minority and women employees "had direct financial consequences" on construction firms. *Id.* at 989, quoting *Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court's findings regarding Denver's anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, un rebutted support for Denver's initial burden. *Id.* at 989-90, citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it "brought the cold [statistics] convincingly to life").

Summary. The court held the record contained extensive evidence supporting Denver's position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. *Id.* at 990.

The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

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

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

The court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found *Concrete Works* did not challenge the district court's conclusion with respect to the second prong of *Croson's* strict scrutiny standard — *i.e.*, that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id.* at 992, *citing Concrete Works II*, 36 F.3d at 1531, n. 24.

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

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

This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. *Id.* The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.

The district court had ruled that the City could not introduce a post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. *Id.* at 350-351. The Sixth Circuit denied

the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue. *Id.* at 350-351.

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id.* This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id.* The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (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 contacts discriminated against any of the groups "favored" by the Program. The court also found that the Program was not "narrowly tailored" to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* ("VMI"), 518 U.S. 515, 532 and n.6 (1996), held racial discrimination to a stricter standard than sex discrimination, although the court in *Cook County* stated the difference between the applicable standards has become "vanishingly small." *Id.* The court pointed out that the Supreme Court said in the *VMI* case, that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive' justification for that action ..." and, realistically, the law can ask no more of race-based remedies either." 256

F.3d at 644, *quoting in part VMI*, 518 U.S. at 533. The court indicated that the Eleventh Circuit Court of Appeals in the *Engineering Contract Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1997) decision created the “paradox that a public agency can provide stronger remedies for sex discrimination than for race discrimination; it is difficult to see what sense that makes.” 256 F.3d at 644. But, since Cook County did not argue for a different standard for the minority and women’s “set aside programs,” the women’s program the court determined must clear the same “hurdles” as the minority program.” 256 F.3d at 644-645.

The court found that since the ordinance requires prime contractors on public projects to reserve a substantial portion of the subcontracts for minority contractors, which is inapplicable to private projects, it is “to be expected that there would be more soliciting of these contractors on public than on private projects.” *Id.* Therefore, the court did not find persuasive that there was discrimination based on this difference alone. 256 F.3d at 645. The court pointed out the County “conceded that [it] had no specific evidence of pre-enactment discrimination to support the ordinance.” 256 F.3d at 645 quoting the district court decision, 123 F.Supp.2d at 1093. The court held that a “public agency must have a strong evidentiary basis for thinking a discriminatory remedy appropriate *before* it adopts the remedy.” 256 F.3d at 645 (emphasis in original).

The court stated that minority enterprises in the construction industry “tend to be subcontractors, moreover, because as the district court found not clearly erroneously, 123 F.Supp.2d at 1115, they tend to be new and therefore small and relatively untested — factors not shown to be attributable to discrimination by the County.” 256 F.3d at 645. The court held that there was no basis for attributing to the County any discrimination that prime contractors may have engaged in. *Id.* The court noted that “[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit ... to be entitled to take remedial action.” *Id.* But, the court found “of that there is no evidence either.” *Id.*

The court stated that if the County had been complicit in discrimination by prime contractors, it found “puzzling” to try to remedy that discrimination by requiring discrimination in favor of minority stockholders, as distinct from employees. 256 F.3d at 646. The court held that even if the record made a case for remedial action of the general sort found in the MWBE ordinance by the County, it would “flunk the constitutional test” by not being carefully designed to achieve the ostensible remedial aim and no more. 256 F.3d at 646. The court held that a state and local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian Americans and women. *Id.* Nor, the court stated, may it discriminate more than is necessary to cure the effects of the earlier discrimination. *Id.* “Nor may it continue the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against nonminority persons.” *Id.* The court, therefore, held that the ordinance was not “narrowly tailored” to the wrong that it seeks to correct. *Id.*

The court thus found that the County both failed to establish the premise for a racial remedy, and also that the remedy goes further than is necessary to eliminate the evil against which it is directed. 256 F.3d at 647. The court held that the list of “favored minorities” included groups that have never been subject to significant discrimination by Cook County. *Id.* The court found it unreasonable to “presume” discrimination against certain groups merely on the basis of having an ancestor who had been born in a particular country. *Id.* Therefore, the court held the ordinance was overinclusive.

The court found that the County did not make any effort to show that, were it not for a history of discrimination, minorities would have 30 percent, and women 10 percent, of County construction contracts. 256 F.3d at 647. The court also rejected the proposition advanced by the County in this case—“that a comparison of the fraction of minority subcontractors on public and private projects established discrimination against minorities by prime contractors on the latter type of project.” 256 F.3d at 647-648.

8. *Associated Gen. Contractors v. Drabik*, 214 F.3d 730 (6th Cir. 2000), affirming Case No. C2-98-943, 998 WL 812241 (S.D. Ohio 1998)

This case is instructive to the disparity study based on the analysis applied in finding the evidence insufficient to justify an MBE/WBE program, and the application of the narrowly tailored test. The Sixth Circuit Court of Appeals enjoined the enforcement of the state MBE program, and in so doing reversed state court precedent finding the program constitutional. This case affirmed a district court decision enjoining the award of a “set-aside” contract based on the State of Ohio’s MBE program with the award of construction contracts.

The court held, among other things, that the mere existence of societal discrimination was insufficient to support a racial classification. The court found that the economic data were insufficient and too outdated. The court concluded the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court said the statute failed the narrow tailoring test, including because there was no evidence that the State had considered race-neutral remedies.

This case involves a suit by the Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio, representing Ohio building contractors to stop the award of a construction contract for the Toledo Correctional Facility to a minority-owned business (“MBE”), in a bidding process from which non-minority-owned firms were statutorily excluded from participating under Ohio’s state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act (“MBEA”) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court’s Order. *Id.* at 733. The Sixth Circuit Court of Appeals affirmed the Order of the district court, holding unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. *Id.*

Ohio passed the MBEA in 1980. *Id.* at 733. This legislation “set aside” 5%, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id.* Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility’s Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

The Court pointed out the district court took note of the outdated character of any evidence that might have been marshaled in support of the MBEA, and added that even if such data had been

sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. *Id.* at 737-738. The MBEA, the Court noted, has remained in effect for twenty years and has no set expiration. *Id.* at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id.* at 737.

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

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

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id.* at 738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id.* at 739.

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

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. *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 *Crosan*, 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.

Recent District Court Decisions

11. *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 four percent of the value of a contract. *Id.* Kossman did not present evidence that he ever bid on more than four percent of a Houston contract. *Id.* In addition, the court stated the fact the MWBE program placed *some* burden on Kossman is insufficient to support the conclusion that the program is not nearly tailored. *Id.* The court concurred with the Magistrate Judge's observation that the proportional sharing of opportunities is, at the core, the point of a remedial program. *Id.* The district court agreed with the Magistrate Judge's conclusion that the MWBE program is nearly tailored.

Native-American-owned businesses. The study found that Native-American-owned businesses were utilized at a higher rate in Houston's construction contracts than would be anticipated based on their rate of availability in the relevant market area. *Id.* at *4. The court noted this finding would tend to negate the presence of discrimination against Native Americans in Houston's construction industry. *Id.*

This Houston disparity study consultant stated that the high utilization rate for Native Americans stems largely from the work of two Native-American-owned firms. *Id.* The Houston

consultant suggested that without these two firms, the utilization rate for Native Americans would decline significantly, yielding a statistically significant disparity ratio. *Id.*

The Magistrate Judge, according to the district court, correctly held and found that there was insufficient evidence to support including Native Americans in the MWBE program. *Id.* The court approved and adopted the Magistrate Judge explanation that the opinion of the disparity study consultant that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, is not evidence of the need for remedial action. *Id.* at *5. The district court found no equal-protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms. *Id.* Therefore, the utilization goal for businesses owned by Native Americans is not supported by a strong evidentiary basis. *Id.* at *5.

The district court agreed with the Magistrate Judge's recommendation that the district court grant summary judgment in favor of Kossman with respect to the utilization goal for Native-American-owned business. *Id.* The court found there was limited significance to the Houston consultant's opinion that utilization of Native-American-owned businesses would drop to statistically significant levels if two Native-American-owned businesses were ignored. *Id.* at *5.

The court stated the situation presented by the Houston disparity study consultant of a "hypothetical non-existence" of these firms is not evidence and cannot satisfy strict scrutiny. *Id.* at *5. Therefore, the district court adopted the Magistrate Judge's recommendation with respect to excluding the utilization goal for Native-American-owned businesses. *Id.* The court noted that a preference for Native-American-owned businesses could become constitutionally valid in the future if there were sufficient evidence of discrimination against Native-American-owned businesses in Houston's construction contracts. *Id.* at *5.

Conclusion. The district court held that the Memorandum & Recommendation of the Magistrate Judge is adopted in full; Houston's motion to exclude the Kossman's proposed expert witness is granted; Kossman's motion for summary judgment is granted with respect to excluding the utilization goal for Native-American-owned businesses and denied in all other respects; Houston's motion for summary judgment is denied with respect to including the utilization goal for Native-American-owned businesses and granted in all other respects as to the MWBE program for other minorities and women-owned firms. *Id.* at *5.

Memorandum and Recommendation by Magistrate Judge, dated February 17, 2016, S.D. Texas, Civil Action No. H-14-1203.

Kossman's proposed expert excluded and not admissible. Kossman in its motion for summary judgment solely relied on the testimony of its proposed expert, and submitted no other evidence in support of its motion. The Magistrate Judge (hereinafter "MJ") granted Houston's motion to exclude testimony of Kossman's proposed expert, which the district court adopted and approved, for multiple reasons. The MJ found that his experience does not include designing or conducting statistical studies, and he has no education or training in statistics or economics. *See*, MJ, Memorandum and Recommendation ("M&R") by MJ, dated February 17, 2016, at 31, S.D. Texas, Civil Action No. H-14-1203. The MJ found he was not qualified to collect, organize or interpret numerical data, has no experience extrapolating general conclusions about a subset of

the population by sampling it, has demonstrated no knowledge of sampling methods or understanding of the mathematical concepts used in the interpretation of raw data, and thus, is not qualified to challenge the methods and calculations of the disparity study. *Id.*

The MJ found that the proposed expert report is only a theoretical attack on the study with no basis and objective evidence, such as data or testimony of construction firms in the relative market area that support his assumptions regarding available MWBEs or comparative studies that control the factors about which he complained. *Id.* at 31. The MJ stated that the proposed expert is not an economist and thus is not qualified to challenge the disparity study explanation of its economic considerations. *Id.* at 31. The proposed expert failed to provide econometric support for the use of bidder data, which he argued was the better source for determining availability, cited no personal experience for the use of bidder data, and provided no proof that would more accurately reflect availability of MWBEs absent discriminatory influence. *Id.* Moreover, he acknowledged that no bidder data had been collected for the years covered by the study. *Id.*

The court found that the proposed expert articulated no method at all to do a disparity study, but merely provided untested hypotheses. *Id.* at 33. The proposed expert's criticisms of the study, according to the MJ, were not founded in cited professional social science or econometric standards. *Id.* at 33. The MJ concludes that the proposed expert is not qualified to offer the opinions contained in his report, and that his report is not relevant, not reliable, and, therefore, not admissible. *Id.* at 34.

Relevant geographic market area. The MJ found the market area of the disparity analysis was geographically confined to area codes in which the majority of the public contracting construction firms were located. *Id.* at 3-4, 51. The relevant market area, the MJ said, was weighted by industry, and therefore the study limited the relevant market area by geography and industry based on Houston's past years' records from prior construction contracts. *Id.* at 3-4, 51.

Availability of MWBEs. The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its public dollars do not finance racial discrimination. *Id.* at 52-53. Here, the study defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. *Id.* at 3-4, 53. Those parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and MWBEs that had been utilized in Houston's construction contracting over the last five and one-half years. *Id.* at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. *Id.* at 6, 53.

Kossmann 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 Kossmann's proposed expert presented no comparative evidence based on bidder

data, and the MJ found that bidder data may produce availability statistics that are skewed by active and passive discrimination in the market. *Id.*

In addition to being underinclusive due to discrimination, the MJ said bidder data may be overinclusive due to inaccurate self-evaluation by firms offering bids despite the inability to fulfill the contract. *Id.* at 54. It is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. *Id.* The MJ concluded that the law does not require an individualized approach that measures whether MWBEs are qualified on a contract-by-contract basis. *Id.* at 55.

Disparity analysis. The study indicated significant statistical adverse disparities as to businesses owned by African Americans and Asians, which the MJ found provided a *prima facie* case of a strong basis in evidence that justified the Program's utilization goals for businesses owned by African Americans, Asian-Pacific Americans, and subcontinent Asian Americans. *Id.* at 55.

The disparity analysis did not reflect significant statistical disparities as to businesses owned by Hispanic Americans, Native Americans or non-minority women. *Id.* at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id.* at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id.* at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by fifty percent when they no longer benefitted from remedial goals. *Id.* at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the period as a whole. *Id.* at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id.* at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id.*

The MJ rejected Plaintiff's argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not

required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that contracted with Houston by industry and those available in the relevant market by industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston's awarding of construction contracts and to reach constitutionally sound results. *Id.*

Anecdotal evidence. Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. *Id.* at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. *Id.* at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. *Id.* The court rejected any requirement that the anecdotal evidence be verified and investigated. *Id.* at 59.

Regression analyses. Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id.* The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60. Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id.* at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

Narrow Tailoring factors. The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston's race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for

MWBEs for up to four percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to meet contract goals or MWSBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*

The MJ concluded that the thirty-four percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on non-minorities. *Id.* at 62. The burden on non-minority SBEs, such as Kossman, is lessened by the four-percent substitution provision. *Id.* at 62. The MJ noted another district court's opinion that the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 62.

Holding. The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native-American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.

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

In *H.B. Rowe Company v. Tippett, North Carolina Department of Transportation, et al.* ("Rowe"), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina "affirmative action" program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

Background. In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff's bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate "good faith efforts" to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff's bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff's good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT's MWBE Program "largely mirrors" the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippet. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and

requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina's MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, et seq. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 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.

13. *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.

14. *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

racism, 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.

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

The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court’s finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). *See* discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the “plaintiffs”) brought suit against Engineering Contractors Association (the “County”), the former County Manager, and various current County Commissioners (the “Commissioners”) in their official and personal capacities (collectively the “defendants”), seeking to enjoin the same “participation goals” in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit’s decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise (“CSBE”) program for construction contracts, “but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services.” *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively “MBE/WBE”). *Id.* The MBE/WBE programs applied to A&E contracts in excess of \$25,000. *Id.* at 1312. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313. However, the district court found “the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994.” *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the “County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services.” The final report further stated “Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures.” *Id.* at 1315. The district court also found that the Commissioners were informed that “there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers than there was in contract construction.” *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present

“a strong basis of evidence” indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the “gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective.” *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present “sufficient probative evidence” of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a “last resort.” *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal’s report, most of which consisted of “post-enactment” evidence. *Id.* Dr. Carvajal’s analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County’s Department of Public Works to compile a list of the “universe” of firms competing in the market. *Id.* For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses “in order to determine the effect a firm owner’s gender or race had on certain dependent variables.” *Id.* Dr. Carvajal used the firm’s annual volume of business as a dependent variable and determined the disparities were due in each case to the firm’s gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms.” *Id.* Dr. Carvajal’s results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the “gross statistical disparities” in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he “did not find sufficient evidence of discrimination against blacks.” *Id.*

The court held that Dr. Carvajal’s study constituted neither a “strong basis in evidence” of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute “sufficient probative evidence” necessary to justify the gender-conscious measures. *Id.* The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated,

“[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace.” *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it “unreliable and inaccurate” for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the “Tenth Circuit’s decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari.” *Id.* at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County’s A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, “nearly all” of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal’s study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition “that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* (internal citations omitted). The court held that “[t]his is not one of those rare cases.” The district court concluded that the statistical evidence was “unreliable and fail[ed] to establish the existence of discrimination,” and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal’s report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to “identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished ... it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone.” *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.*

The court held that the County's failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, "not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry," leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id.* The court found this even "more problematic" because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences "must be limited in time." *Id.* at 1332, *citing Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that "the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination." *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known ... Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them 'fair warning' that their actions were unconstitutional." *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they "had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs ... were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*]." *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law was "clearly established" and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that

parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs \$100 each in nominal damages and reasonable attorneys' fees and costs, for which it held the County and the Commissioners jointly and severally liable.

16. *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.

17. *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).

18. *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.

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

Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act (“MBE Act”). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, citing *Adarand VII*, 228 F.3d 1147, 1174.

Compelling state interest. The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment’s Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id.* The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a “passive participant” in a system of racial exclusion practiced by private businesses. *Id.* at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

The district court stated that a “mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice.” *Id.* Rather, the court held that the “benchmark for judging the adequacy of a state’s factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state’s conclusion that remedial action was necessary.” *Id.* The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was “a passive participant” in private industry’s discriminatory practices. *Id.* at 1240, citing to *Associated General Contractors of Ohio, Inc. v.*

Drabik, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest “is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts.” *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act’s bid preference “is not based on past discrimination,” rather, it is based on a desire to “encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenors’ evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenors did not identify “a single qualified, minority-owned bidder who was excluded from a state contract.” *Id.* The district court, thus, held that broad allegations of “systematic” exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the “State’s admission here that the State’s governmental interest was not in remedying past discrimination in the state competitive bidding process, but in ‘encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.’” *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio’s statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with

the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 *citing Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, “and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act.” *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the “goal” of 10 percent of the state’s contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to “graduate” from preference eligibility. *Id.* The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act’s duration was not tied in any way to the eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the “questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable.” *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act’s minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of “numerical proportionality” between the MBE Act’s aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act’s 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id.* at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is “not necessarily an absolute cap” on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, citing *Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer “substantial evidence” that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act’s bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id.* The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state’s Central Purchasing Act with no time limitation. *Id.*

In terms of the “under- and over-inclusiveness” factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id.* at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id.*

Second, the district court found the MBE Act’s bidding preference extends to all contracts for goods and services awarded under the State’s Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id.*

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id.* The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id.*

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution's Fifth Amendment guarantee of equal protection and granted the plaintiffs' Motion for Summary Judgment.

20. *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.

21. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), *a'ffid 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).

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

The district court in this case pointed out that it had struck down Ohio's MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District*, 31 F.Supp.2d 571 (N.D. Ohio 1998). *Id.* at 741.

The state defendant's appealed this court's decision to the United States court of Appeals for the Sixth Circuit. *Id.* Thereafter, the Supreme Court of Ohio held in the case of *Ritchey Produce, Co., Inc. v. The State of Ohio, Department of Administrative*, 704 N.E. 2d 874 (1999), that the Ohio statute, which provided race-based preferences in the state's purchase of nonconstruction-related goods and services, was constitutional. *Id.* at 744.

While this court's decision related to construction contracts and the Ohio Supreme Court's decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id.* at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court's decision in *Ritchey Produce*. The district court took the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a "blatantly unconstitutional program of race-based benefits. *Id.* at 745.

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited to *F. Buddie Contracting v. Cuyahoga Community College*, 31 F. Supp.2d 571 (N.D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court's holding in *Ritchey Produce*, 707 N.E. 2d 871 (Ohio 1999), which held that the State of Ohio's MBE program as applied to the state's purchase of non-construction-related goods and services was

constitutional. The court found the evidence to be insufficient to justify the Ohio MBE program. The court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

Strict Scrutiny. The district court held that the Supreme Court of Ohio decision in *Ritchey Produce* was wrongly decided for the following reasons:

(1) Ohio's MBE program of race-based preferences in the award of state contracts was unconstitutional because it is unlimited in duration. *Id.* at 745.

(2) a program of race-based benefits cannot be supported by evidence of discrimination which is over 20 years old. *Id.*

(3) the state Supreme Court found that there was a severe numerical imbalance in the amount of business the State did with minority-owned enterprises, based on its uncritical acceptance of essentially "worthless calculations contained in a twenty-one year-old report, which miscalculated the percentage of minority-owned businesses in Ohio and misrepresented data on the percentage of state purchase contracts they had received, all of which was easily detectable by examining the data cited by the authors of the report." *Id.* at 745.

(4) The state Supreme Court failed to recognize that the incorrectly calculated percentage of minority-owned businesses in Ohio (6.7 percent) bears no relationship to the 15 percent set-aside goal of the Ohio Act. *Id.*

(5) the state Supreme Court applied an incorrect rule of law when it announced that Ohio's program must be upheld unless it is clearly unconstitutional beyond a reasonable doubt, whereas according to the district court in this case, the Supreme Court of the United States has said that all racial class classifications are highly suspect and must be subjected to strict judicial scrutiny. *Id.*

(6) the evidence of past discrimination that the Ohio General Assembly had in 1980 did not provide a firm basis in evidence for a race-based remedy. *Id.*

Thus, the district court determined the evidence could not support a compelling state-interest for race-based preferences for the state of Ohio MBE Act, in part based on the fact evidence of past discrimination was stale and twenty years old, and the statistical analysis was insufficient because the state did not know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts. *Id.* at 763-771. The statistical evidence was fatally flawed because the relevant universe of minority businesses is not all minority businesses in the state of Ohio, but only those willing and able to enter into contracts with the state of Ohio. *Id.* at 761. In the case of set-aside program in state construction, the relevant universe is minority-owned construction firms willing and able to enter into state construction contracts. *Id.*

Narrow Tailoring. The court addressed the second prong of the strict scrutiny analysis, and found that the Ohio MBE program at issue was not narrowly tailored. The court concluded that

the state could not satisfy the four factors to be considered in determining whether race-conscious remedies are appropriate. *Id.* at 763. First, the court stated that there was no consideration of race-neutral alternatives to increase minority participation in state contracting before resorting to “race-based quotas”. *Id.* at 763-764. The court held that failure to consider race-neutral means was fatal to the set-aside program in *Croson*, and the failure of the State of Ohio to consider race-neutral means before adopting the MBE Act in 1980 likewise “dooms Ohio’s program of race-based quotas”. *Id.* at 765.

Second, the court found the Ohio MBE Act was not flexible. The court stated that instead of allowing flexibility to ameliorate harmful effects of the program, the imprecision of the statutory goals has been used to justify bureaucratic decisions which increase its impact on non-minority business.” *Id.* at 765. The court said the waiver system for prime contracts focuses solely on the availability of MBEs. *Id.* at 766. The court noted the awarding agency may remove the contract from the set aside program and open it up for bidding by non-minority contractors if no certified MBE submits a bid, or if all bids submitted by MBEs are considered unacceptably high. *Id.* But, in either event, the court pointed out the agency is then required to set aside additional contracts to satisfy the numerical quota required by the statute. *Id.* The court concluded that there is no consideration given to whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors. *Id.*

Third, the court found the Ohio MBE Act was not appropriately limited such that it will not last longer than the discriminatory effects it was designed to eliminate. *Id.* at 766. The court stated the 1980 MBE Act is unlimited in duration, and there is no evidence the state has ever reconsidered whether a compelling state interest exists that would justify the continuation of a race-based remedy at any time during the two decades the Act has been in effect. *Id.*

Fourth, the court found the goals of the Ohio MBE Act were not related to the relevant market and that the Act failed this element of the “narrowly tailored” requirement of strict scrutiny. *Id.* at 767-768. The court said the goal of 15 percent far exceeds the percentage of available minority firms, and thus bears no relationship to the relevant market. *Id.*

Fifth, the court found the conclusion of the Ohio Supreme Court that the burdens imposed on non-MBEs by virtue of the set-aside requirements were relatively light was incorrect. *Id.* at 768. The court concluded non-minority contractors in various trades were effectively excluded from the opportunity to bid on any work from large state agencies, departments, and institutions solely because of their race. *Id.* at 678.

Sixth, the court found the Ohio MBE Act provided race-based benefits based on a random inclusion of minority groups. *Id.* at 770-771. The court stated there was no evidence about the number of each racial or ethnic group or the respective shares of the total capital improvement expenditures they received. *Id.* at 770. None of the statistical information, the court said, broke down the percentage of all firms that were owned by specific minority groups or the dollar amounts of contracts received by firms in specific minority groups. *Id.* The court, thus, concluded that the Ohio MBE Act included minority groups randomly without any specific evidence that any group suffered from discrimination in the construction industry in Ohio. *Id.* at 771.

Conclusion. The court thus denied the motion of the state defendants to stay the court’s prior order holding unconstitutional the Ohio MBE Act pending the appeal of the court’s order. *Id.* at 771. This opinion underscored that governments must show several factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

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

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation’s (“FDOT”) program of “setting aside” certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts “set aside” for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT’s claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities “supposedly willing and able to do road maintenance work,” and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in “somebody’s” discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

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

1. *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.

2. *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), appeal pending in the United States Court of Appeals, District of Columbia Circuit, Docket Number 15-5176.

Plaintiff Rothe Development, Inc. is a small business that filed this action against the U.S. Department of Defense ("DOD") and the U.S. Small Business Administration ("SBA") (collectively, "Defendants") challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. See *DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic's* court disagreed with the plaintiff's facial attack and held the Section 8(a) Program as facially constitutional. See *DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (See also discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic's* holding in the context of this case. 2015 WL 3536271 at *1. Both the plaintiff Rothe and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other's expert witnesses. The court concludes that Defendants' experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff Rothe's motion to exclude Defendants' expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff's experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants' motions to exclude plaintiff's expert testimony.

In addition, the court in *Rothe* agrees with the court's reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court

denies plaintiff's motion for summary judgment and grants Defendants' cross-motion for summary judgment.

DynaLantic Corp. v. Department of Defense. The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. See 2015 WL 3536271 at *4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at *5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id.* at *5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *5, citing *DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that DynaLantic had failed to present credible, particularized evidence that undermined the government's compelling interest or that demonstrated that the government's evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at *5, citing *DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

Defendants' expert evidence. One of Defendants' experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a "logit model" to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at *9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms. *Id.* In addition, the Defendants' expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0% of contract actions, 93.0% of dollars awarded, and in which 92.2% of non-8(a) minority-owned SDBs are registered. *Id.* Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe's contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at *10. The court found convincing the expert's response to Rothe's critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert's reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, citing *DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, citing *DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants' additional expert's testimony as admissible in connection with that expert's review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id.* at *11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at *12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id.* The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

Plaintiff's expert's testimony rejected. The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at *13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred

methodology for conducting disparity studies “appears to be well outside of the mainstream in this particular field.” *Id.* at *14. The expert’s methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

The Section 8(a) Program is constitutional on its face. The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe’s invitation to depart from the *DynaLantic* court’s conclusion that Section 8(a) is constitutional on its face. *Id.* at *15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at *17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at *17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government’s initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government’s asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action – specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at *17, *citing DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at *17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at *18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have

proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; citing *DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at *18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at *18, citing *DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at *18. The court concurred with the *DynaLantic* court's conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at *18, citing *DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe's argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id.* at *19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at *19. The court pointed out that any person may present credible evidence challenging an individual's status as socially or economically disadvantaged. *Id.* The court said that Rothe's argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the "narrowness" of the narrow-tailoring mandate relates to the relationship between the government's interest and the remedy it prescribes. *Id.*

Conclusion. The court concluded that plaintiff's facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government's racial classification, the purported need for remedial action is supported by strong and un rebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at *20.

Appeal pending at the time of this report. Plaintiff Rothe has appealed the decision of the district court to the United States Court of Appeals for the District of Columbia Circuit, which appeal is pending at the time of this report.

3. *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 five percent of procurements dollars government wide. See 15 U.S.C. § 644(g)(1). *DynaLantic*, at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. See *Id.* Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id.* DoD has established a goal of awarding approximately two percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at *3. The Section 8(a) program allows the SBA, "whenever it determines such action is necessary and appropriate," to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a "sole source" basis (i.e., reserved to one firm) or on a "competitive" basis (i.e., between two or more Section 8(a) firms). *DynaLantic*, at *3-4; 13 CFR 124.501(b).

Plaintiff's business and the simulation and training industry. *DynaLantic* performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic* at *5.

Compelling interest. The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *DynaLantic*, at *9. First, the government must "articulate a legislative goal that is properly considered a compelling government interest." *Id.* quoting *Sherbrooke Turf v. Minn. DOT.*, 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, "the government must demonstrate 'a strong basis in evidence' supporting its conclusion that race-based remedial action was necessary to further that interest." *DynaLantic*, at *9, quoting *Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to *DynaLantic* to present "credible, particularized evidence" to rebut the government's "initial showing of a compelling interest." *DynaLantic*, at *10 quoting *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, citing *Rothe Dev. Corp. v. U.S. Dep't of Def.* ("*Rothe III*"), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a "passive participant." *DynaLantic*, at *11. The Court rejected *DynaLantic's* argument that the

federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, citing *Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1995), and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of “discriminatory barriers” to “fair competition between minority and non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts.” *DynaLantic*, at *11, quoting *Adarand VII*, 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a “passive participant” in private discrimination in the relevant industries or markets. *DynaLantic*, at *11, citing *Concrete Works IV*, 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic*, at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic*, at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10th Circuit Court of Appeals’ approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or “old boy” business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and

submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) “require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination.” *DynaLantic*, at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at *29-37. The Court held that *DynaLantic* did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that *DynaLantic* could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at *31. The Court said Congress had spent decades compiling evidence of race

discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at *31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at *31, citing 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at *31, n. 13.

Rejection of DynaLantic’s rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government’s initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a “passive participant” when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at *35, citing *Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id*, citing *Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic’s claim that the government must independently verify the evidence presented to it is unavailing. *Id*. *DynaLantic*, at *35.

Also in terms of DynaLantic’s arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id*.

The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic*, at *35. In short, the Court found that DynaLantic's "general criticism" of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic*, at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different areas. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at *37. Second, it provided "forceful" evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

As-applied challenge. *DynaLantic* also challenged the SBA and DoD's use of the Section 8(a) program as applied: namely, the agencies' determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at *37. Significantly, the Court points out that the federal Defendants "concede that they do not have evidence of discrimination in this industry." *Id.* Moreover, the Court points out that the federal Defendants admitted that there "is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry." *DynaLantic*, at *38. The federal Defendants also admit that they are "unaware of any discrimination in the simulation and training industry." *Id.* In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at *38. The Court concludes that the federal Defendants' position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court's decision in *Croson*, as well as the Federal Circuit's decision in *O'Donnell Construction Company*, which adopted *Croson's* reasoning. *DynaLantic*, at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson's* evidentiary requirement to show an inference of discrimination. *DynaLantic*, at *39, citing *Croson*, 488 U.S. 501. The Court rejects the federal government's position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at *40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at *40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-

inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic*, at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than five percent of contract dollars, are facially constitutional. *DynaLantic*, at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at *48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such

status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and *DynaLantic*: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the sum of \$1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

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

DynaLantic Corp. involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id.* Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive

technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

APPENDIX C.

Quantitative Analyses of Marketplace Conditions

APPENDIX C.

Marketplace Analyses

Figure C-1.
Percentage of all workers
25 and older with at least a
four-year degree, Nevada
and the United States,
2010-2014

Note:

** , ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level for the United States as a whole and Nevada, respectively.

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

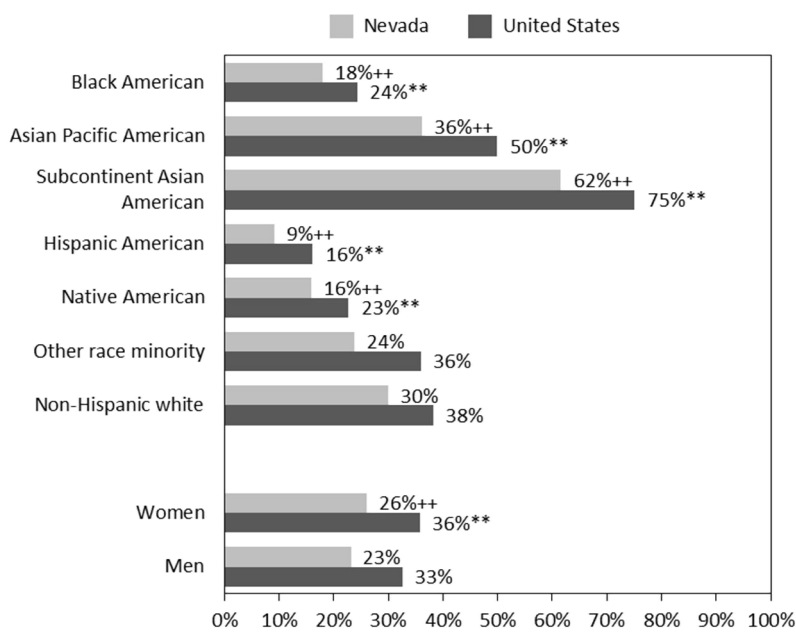
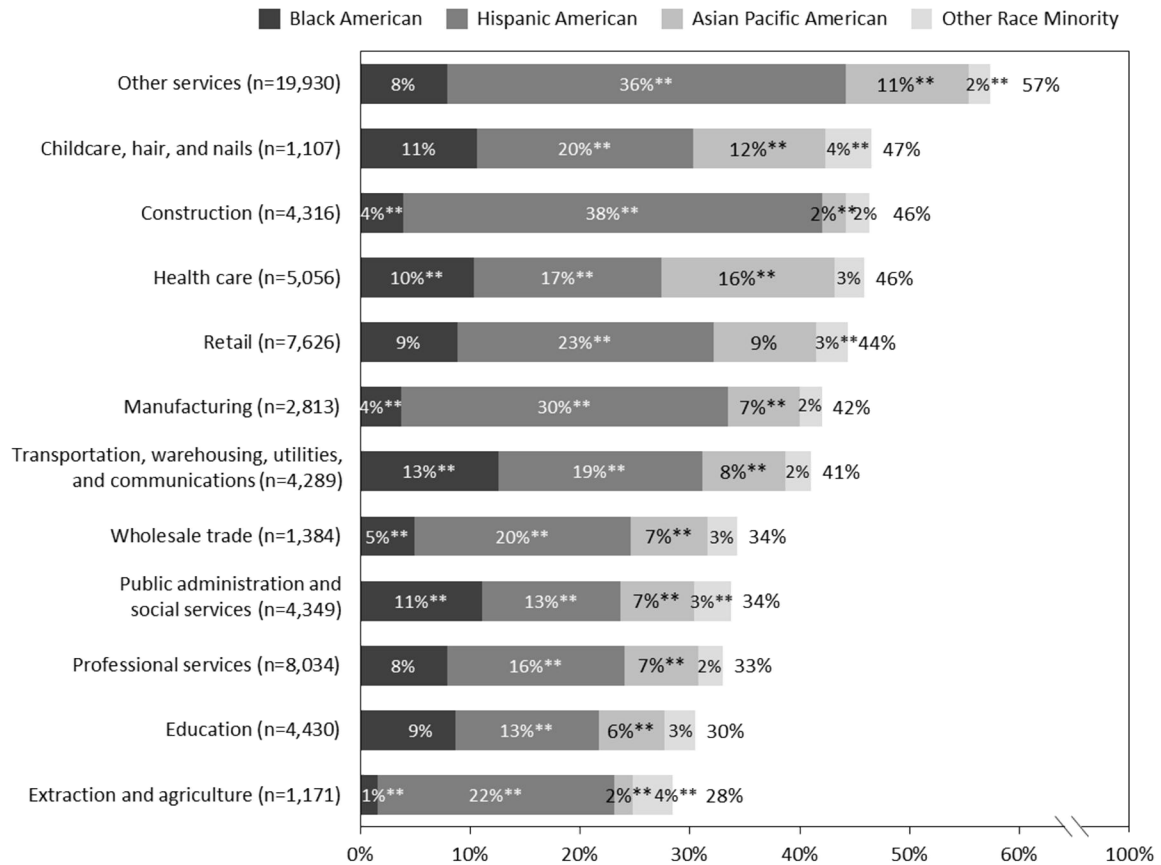


Figure C-1 indicates that, compared to Non-Hispanic white Americans working in Nevada, smaller percentages of Black Americans, Hispanic Americans, and Native Americans have four-year college degrees. In contrast, larger percentages of Asian Pacific Americans and Subcontinent Asian Americans have four-year college degrees. In addition, a larger percentage of women than men working in Nevada have four-year college degrees.

Figure C-2.
Percent representation of minorities in various industries in Nevada, 2010-2014



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

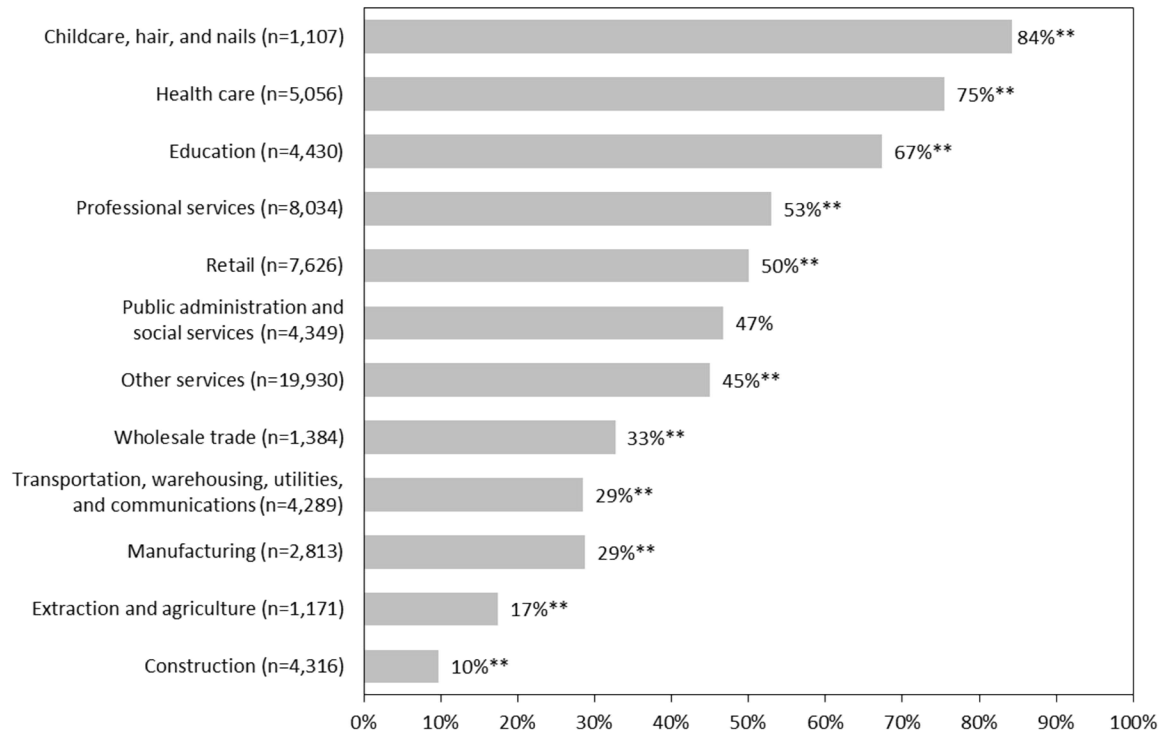
The representation of minorities among all Nevada workers is 8% for Black Americans, 8% for Asian Pacific Americans, 25% for Hispanic Americans, 2% for other race minorities, and 46% for all minorities considered together.

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

Source: BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>

Figure C-2 indicates that the Nevada industries with the highest representations of minority workers are other services; childcare, hair, and nails; and construction. The Nevada industries with the lowest representations of minority workers are professional services; education; and extraction and agriculture.

Figure C-3.
Percent representation of women in various industries in Nevada, 2010-2014



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

The representation of women among all Nevada workers is 46%.

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

Source: BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-3 indicates that the Nevada industries with the highest representations of women workers are childcare, hair, and nails; healthcare; and education. The Nevada industries with the lowest representations of women workers are manufacturing; extraction and agriculture; and construction.

Figure C-4.
Demographic characteristics of workers in study-related industries and all industries, Nevada and the United States, 2000

Nevada	All Industries (n= 49,469)	Construction (n= 4,695)	Professional Services (n= 822)	Goods & Services (n= 10,513)
Race/ethnicity				
Black American	6.5 %	3.3 % **	3.3 % **	6.5 %
Asian Pacific American	5.3	1.0 **	5.9	6.9 **
Subcontinent Asian American	0.3	0.0	0.7	0.3
Hispanic American	16.1	27.1 **	5.0 **	16.7
Native American	2.0	2.4	1.7	1.7
Other race minority	0.5	0.5	0.6	0.7
Total minority	30.6 %	34.4 %	17.0 %	32.8 %
Non-Hispanic white	69.4	65.6 **	83.0 **	67.2
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	44.8 %	11.3 % **	33.6 **	38.9 **
Men	55.2	88.7 **	66.4 **	61.1 **
Total	100.0 %	100.0 %	100.0 %	100.0 %
United States	All Industries (n= 6,832,970)	Construction (n= 480,280)	Professional Services (n= 126,584)	Goods & Services (n= 845,815)
Race/ethnicity				
Black American	10.9 %	6.2 % **	5.3 % **	9.7 % **
Asian Pacific American	3.4	1.2 **	5.0 **	3.4 **
Subcontinent Asian American	0.7	0.2 **	1.8 **	1.1 **
Hispanic American	10.7	15.0 **	5.0 **	11.3 **
Native American	1.2	1.6 **	0.7 **	1.2
Other race minority	0.4	0.4	0.4	0.5 **
Total minority	27.3 %	24.5 %	18.2 %	27.2 %
Non-Hispanic white	72.7	75.5 **	81.8 **	72.8
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	47.2 %	9.9 % **	35.2 **	34.6 **
Men	52.8	90.1 **	64.8 **	65.4 **
Total	100.0 %	100.0 %	100.0 %	100.0 %

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

Source: BBC Research & Consulting from 2000 U.S. Census 5% sample Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-4 indicates that in 2000 there were smaller percentages of Black Americans, Asian Pacific Americans, and women working in the Nevada construction industry than in all industries considered together. There were smaller percentages of Black Americans, Hispanic Americans, and women working in the Nevada professional services industry than in all industries considered together. There were smaller percentages of women working in the Nevada goods and services industry than in all industries considered together.

Figure C-5.
Demographic characteristics of workers in study-related industries and all industries, Nevada and the United States, 2010-2014

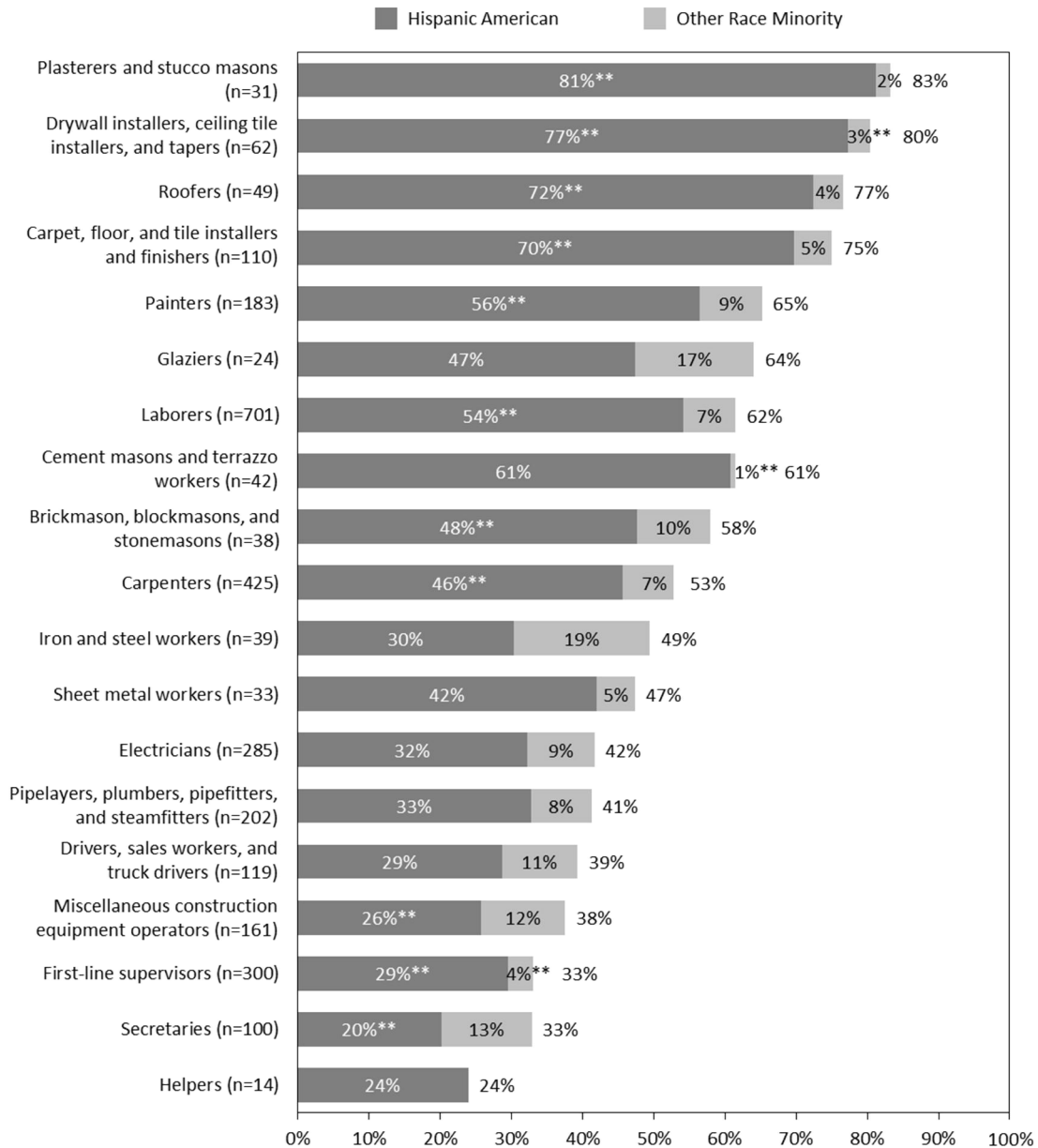
	All Industries (n= 66,141)	Construction (n= 4,316)	Professional Services (n= 1,285)	Goods & Services (n= 12,232)
Nevada				
Race/ethnicity				
Black American	8.2 %	3.9 % **	4.7 % **	8.0 %
Asian Pacific American	8.9	2.2 **	6.4 **	9.6 **
Subcontinent Asian American	0.5	0.1	0.7	0.5
Hispanic American	26.0	38.2 **	8.9 **	28.1 **
Native American	1.7	1.8	1.5	1.5
Other race minority	0.2	0.1	0.0	0.1
Total minority	45.5 %	46.3 %	22.2 %	47.8 %
Non-Hispanic white	54.5	53.7	77.8 **	52.2 **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	45.9 %	9.7 % **	36.7 % **	37.6 % **
Men	54.1	90.3 **	63.3 **	62.4 **
Total	100.0 %	100.0 %	100.0 %	100.0 %
United States				
Race/ethnicity				
Black American	12.1 %	5.9 % **	6.4 % **	10.9 % **
Asian Pacific American	4.5	1.6 **	6.6 **	4.6
Subcontinent Asian American	1.2	0.3 **	2.8 **	2.2 **
Hispanic American	15.8	24.7 **	7.6 **	16.7 **
Native American	1.1	1.3 **	0.7 **	1.1
Other race minority	0.2	0.2	0.2	0.2
Total minority	35.1 %	34.1 %	24.3 %	35.8 %
Non-Hispanic white	64.9	65.9 **	75.7 **	64.2 **
Total	100.0 %	100.0 %	100.0 %	100.0 %
Gender				
Women	47.2 %	8.9 % **	35.5 % **	34.8 % **
Men	52.8	91.1 **	64.5 **	65.2 **
Total	100.0 %	100.0 %	100.0 %	100.0 %

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

Source: BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-5 indicates that there are smaller percentages of Black Americans, Asian Pacific Americans, and women working in the Nevada construction industry than in all industries considered together. There are smaller percentages of Black Americans, Asian Pacific Americans, Hispanic Americans, other race minorities, and women working in the Nevada professional services industry than in all industries considered together. There are smaller percentages of women working in the Nevada goods and services industry than in all industries considered together.

Figure C-6.
Percent representation of minorities in selected construction occupations in Nevada, 2010-2014



Notes: ** Denotes that the difference in proportions between minority workers in the specified occupation and all construction occupations considered together is statistically significant at the 95% confidence level.

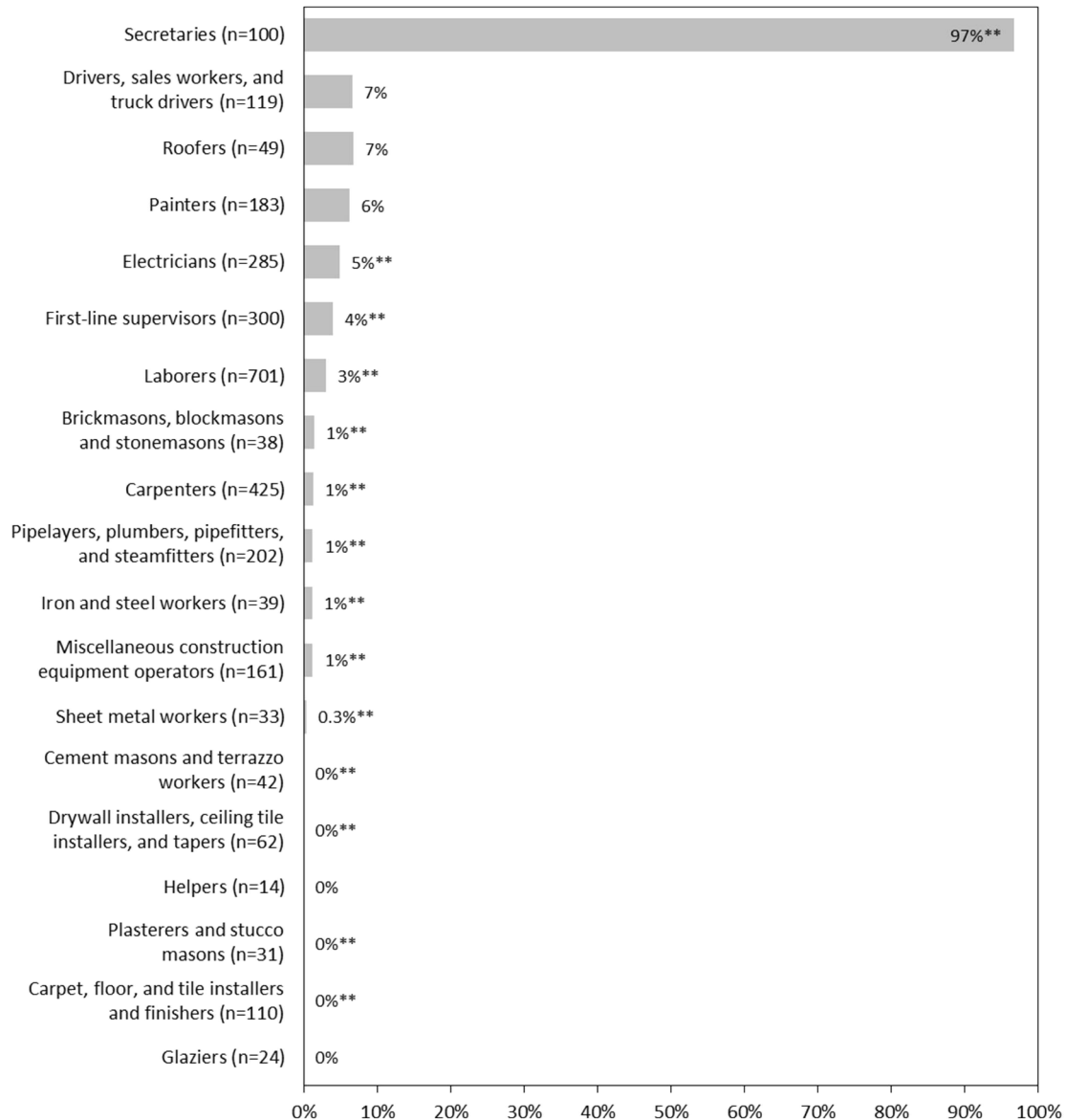
The representation of minorities among all Nevada construction workers is 38% for Hispanic Americans, 8% for other race minorities, and 46% for all minorities considered together.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2010-2014 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-6 indicates that the Nevada construction occupations with the highest representations of minority workers are plasterers and stucco masons; drywall installers, ceiling tile installers, and tapers; and roofers. The Nevada construction occupations with the lowest representations of minority workers are first line supervisors, secretaries, and helpers.

Figure D-7.
Percent representation of women in selected construction occupations in Nevada, 2010-2014



Notes: ** Denotes that the difference in proportions between women workers in the specified occupation and all construction occupations considered together is statistically significant at the 95% confidence level.

The representation of women among all Nevada construction workers is 10%.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2010-2014 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-7 indicates that the Nevada construction occupations with the highest representations of women workers are secretaries; drivers, sales workers, and truck drivers; and roofers. The Nevada construction occupations with the lowest representations of women workers are plasterers and stucco masons; carpet, floor, and tile installers and finishers; plasterers and stucco masons; and glaziers.

**Figure C-8.
Percentage of
workers who
worked as a
manager in each
study-related
industry, Nevada
and the United
States, 2010-2014**

Note:

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

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Nevada	Construction	Professional Services	Goods & Services
Race/ethnicity			
Black American	3.1 % **	1.6 %	1.6 % **
Asian Pacific American	2.6 **	3.6	2.9
Subcontinent Asian American	8.7	0.0	3.5
Hispanic American	2.4 **	2.9	1.4 **
Native American	12.9	5.3	2.6
Other race minority	8.5	0.0	0.0
Non-Hispanic white	10.1	2.8	3.7
Gender			
Women	7.0 %	1.5 %	2.2 % **
Men	6.8	3.6	3.2
All individuals	6.8 %	2.8 %	2.8 %
United States	Construction	Professional Services	Goods & Services
Race/ethnicity			
Black American	4.4 % **	2.8 % **	2.1 % **
Asian Pacific American	8.8	2.8 **	4.7 **
Subcontinent Asian American	14.8 **	3.9	7.6 **
Hispanic American	2.9 **	2.8 **	2.1 **
Native American	5.1 **	4.2	3.1 **
Other race minority	6.7 **	2.8	2.9 **
Non-Hispanic white	9.4	4.4	5.6
Gender			
Women	6.4 % **	2.6 % **	3.9 % **
Men	7.6	4.9	5.0
All individuals	7.5 %	4.1 %	4.6 %

Figure C-8 indicates that, compared to non-Hispanic white Americans, smaller percentages of Black Americans, Asian Pacific Americans, and Hispanic Americans work as managers in the Nevada construction industry. Finally, compared to non-Hispanic white Americans, smaller percentages of Black Americans and Hispanic Americans work as managers in the Nevada goods and services industry. In addition, compared to men, a smaller percentage of women work as managers in the Nevada goods and services industry.

Figure C-9.
Mean annual wages,
Nevada and the United
States, 2010-2014

Notes:

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

******, **++** Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level for the United States as a whole and Nevada, respectively.

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

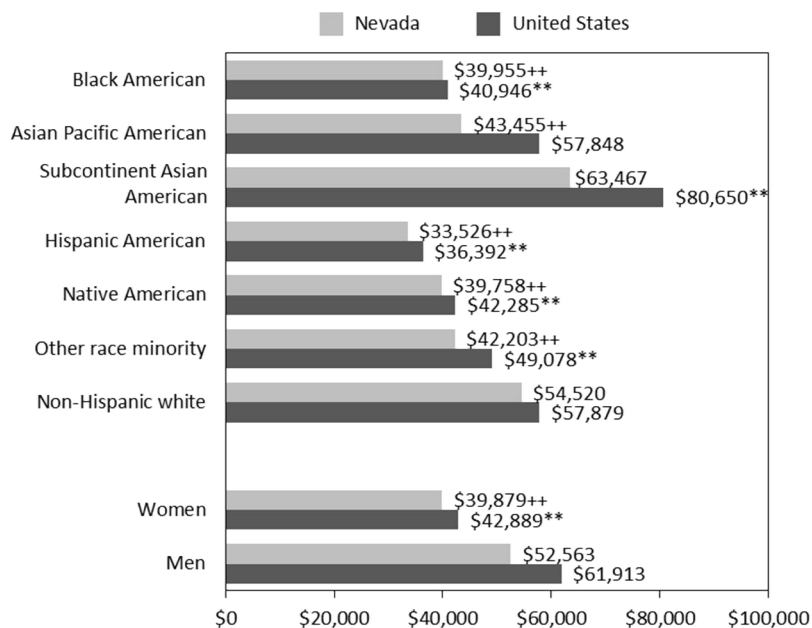


Figure C-9 indicates that, compared to non-Hispanic white Americans, Black Americans, Asian Pacific Americans, Hispanic Americans, Native Americans, and other race minorities in Nevada exhibit lower mean annual wages. In addition, women in Nevada exhibit lower mean annual wages than men.

**Figure C-10.
Predictors of annual wages
(regression), Nevada, 2010-2014**

Notes:

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

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

** Denotes statistical significance at the 95% confidence level.

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

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	8781.002 **
Black American	0.867 **
Asian Pacific American	0.898 **
Subcontinent Asian American	0.914
Hispanic American	0.881 **
Native American	0.848 **
Other minority group	0.935
Women	0.828 **
Less than high school education	0.880 **
Some college	1.122 **
Four-year degree	1.409 **
Advanced degree	1.948 **
Disabled	0.869 **
Military experience	1.013
Speaks English well	1.316 **
Age	1.053 **
Age-squared	0.999 **
Married	1.099 **
Children	1.008
Number of people over 65 in household	0.918 **
Public sector worker	1.235 **
Manager	1.356 **
Part time worker	0.417 **
Extraction and agriculture	1.342 **
Construction	1.001
Wholesale trade	0.983
Retail trade	0.768 **
Transportation, warehouse, & information	0.966
Professional services	0.963
Education	0.667 **
Health care	1.104 **
Other services	0.872 **
Public administration and social services	0.903 **

Figure C-10 indicates that, compared to being a non-Hispanic white American in Nevada, being Black American, Asian Pacific American, Hispanic American, and Native American is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately \$0.87 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man in Nevada, even after accounting for various other personal characteristics.

**Figure C-11.
Predictors of annual wages
(regression), United States, 2010-2014**

Notes:

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

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

** Denotes statistical significance at the 95% confidence level.

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

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	7846.998 **
Black American	0.865 **
Asian Pacific American	0.957 **
Subcontinent Asian American	0.960 **
Hispanic American	0.911 **
Native American	0.872 **
Other minority group	0.927 **
Women	0.786 **
Less than high school education	0.851 **
Some college	1.201 **
Four-year degree	1.667 **
Advanced degree	2.305 **
Disabled	0.795 **
Military experience	1.004 **
Speaks English well	1.335 **
Age	1.058 **
Age-squared	0.999 **
Married	1.113 **
Children	1.013 **
Number of people over 65 in household	0.910 **
Midwest	0.876 **
South	0.893 **
West	0.983 **
Public sector worker	1.120 **
Manager	1.312 **
Part time worker	0.368 **
Extraction and agriculture	0.931 **
Construction	0.919 **
Wholesale trade	0.963 **
Retail trade	0.754 **
Transportation, warehouse, & information	1.029 **
Professional services	1.056 **
Education	0.661 **
Health care	1.008 **
Other services	0.708 **
Public administration and social services	0.829 **

Figure C-11 indicates that, compared to being a non-Hispanic white American in the United States, being Black American, Asian Pacific American, Subcontinent Asian American, Hispanic American, Native American, or other race minority is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately \$0.87 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, being a woman is related to lower annual wages compared to being a man, even after accounting for various other personal characteristics.

Figure C-12.
Home Ownership Rates,
Nevada and the United
States, 2010-2014

Note:
 The sample universe is all households.
 **, ++ Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level for the United States as a whole and Nevada, respectively.

Source:
 BBC Research & Consulting from 2010-2014
 ACS 5% Public Use Microdata sample. The raw
 data extract was obtained through the IPUMS
 program of the MN Population Center:
<http://usa.ipums.org/usa/>.

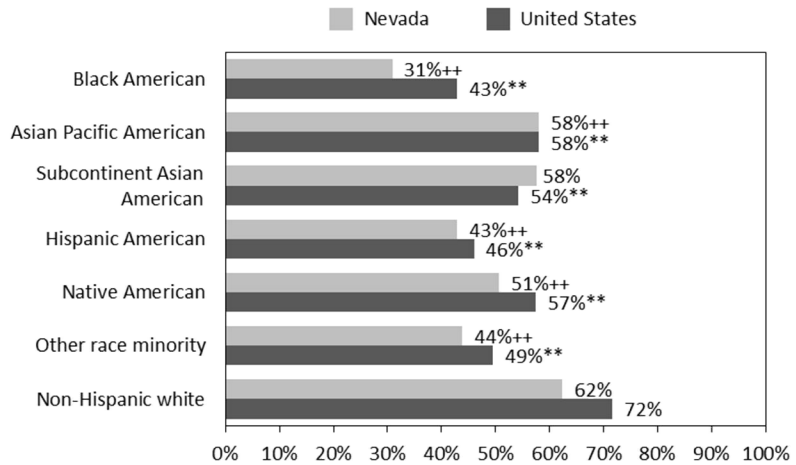


Figure C-12 indicates that, compared to non-Hispanic white Americans, smaller percentages of Black Americans, Asian Pacific Americans, Hispanic Americans, Native Americans, and other race minorities in Nevada own homes.

Figure C-13.
Median home values,
Nevada and the United
States, 2010-2014

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

Source:
 BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

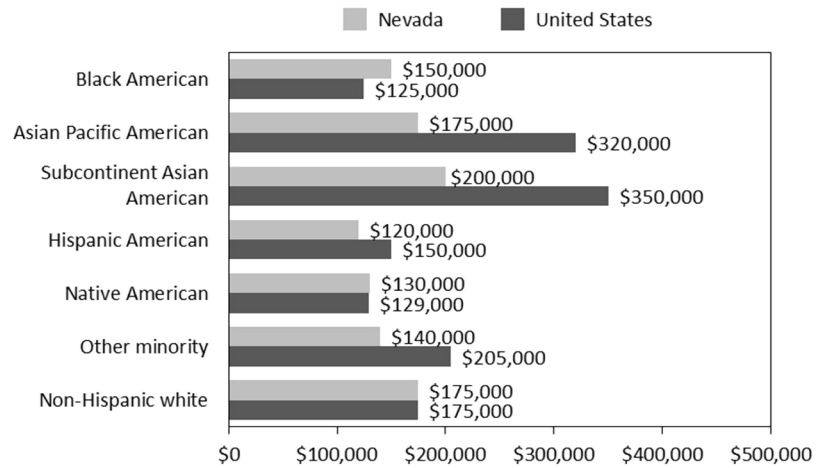


Figure C-13 indicates that Black American, Hispanic American, Native American, and other race minority homeowners in Nevada own homes of lower median values than non-Hispanic white American homeowners.

Figure C-14.
Denial rates of
conventional purchase
loans for high-income
households, Nevada and
the United States, 2007
and 2014

Note:

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

Source:

FFIEC HMDA data 2007 and 2014. The raw data extract was obtained from the Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explore>.

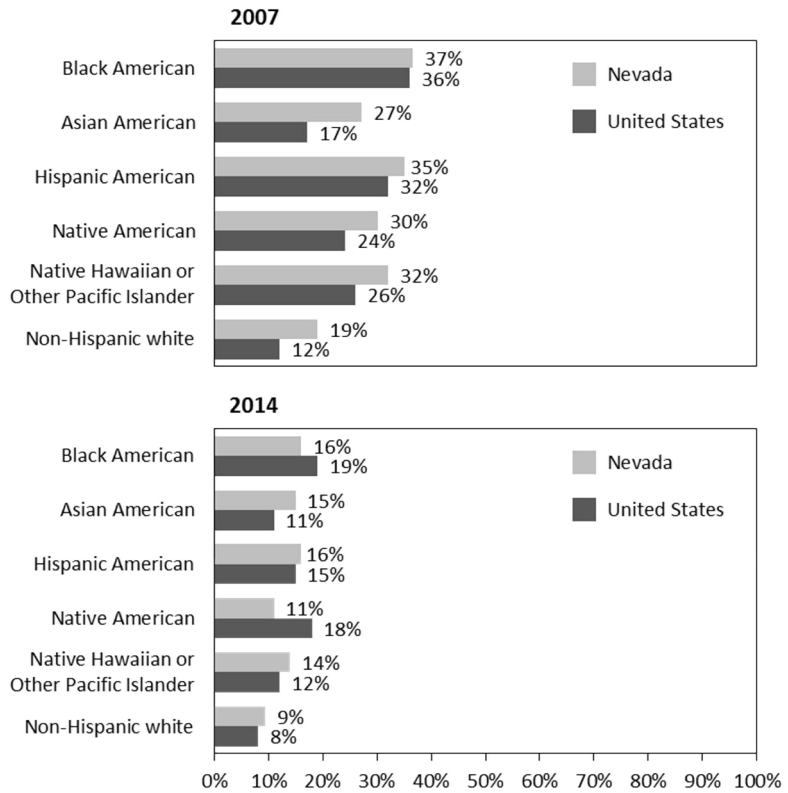


Figure C-14 indicates that in 2014 Black Americans, Asian Americans, Hispanic Americans, Native Americans, and Native Hawaiian or Other Pacific Islanders in Nevada were denied conventional home purchase loans at a greater rate than non-Hispanic white Americans.

Figure C-15.
Percent of conventional
home purchase loans that
were subprime, Nevada
and the United States,
2007 and 2014

Source:
 FFIEC HMDA data 2007 and 2014. The
 raw data extract was obtained from the
 Consumer Financial Protection Bureau
 HMDA data tool:
<http://www.consumerfinance.gov/hmda/explorer>.

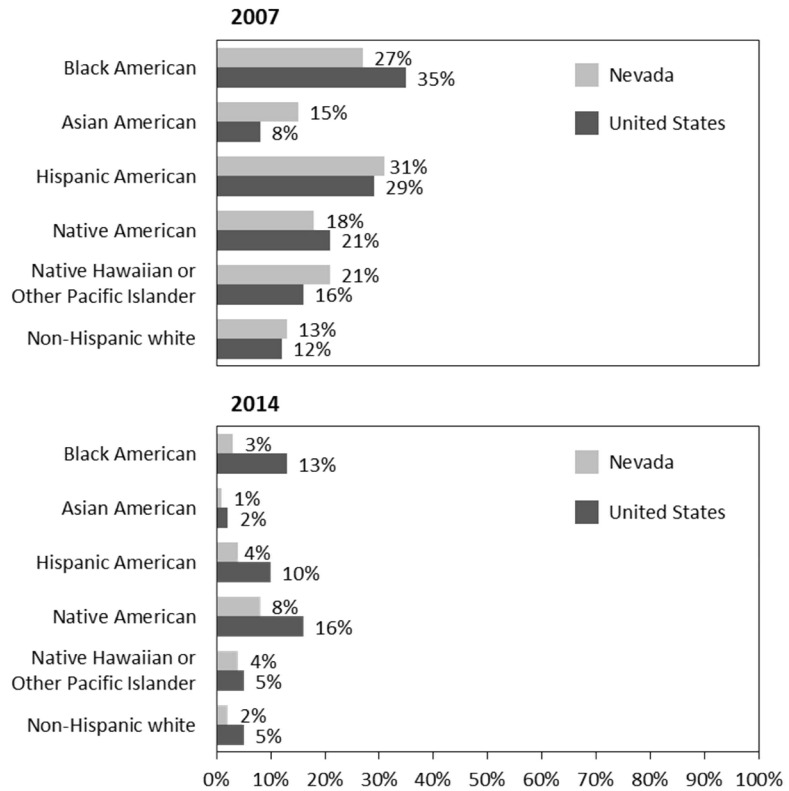


Figure C-15 indicates that in 2014 Black Americans, Hispanic Americans, Native Americans, and Native Hawaiian or Other Pacific Islanders in Nevada were awarded conventional home purchase loans that were subprime at a greater rate than non-Hispanic white Americans.

**Figure C-16.
Business loan denial
rates, Mountain
Region and the United
States, 2003**

Note:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Mountain Region consists of Montana, Wyoming, Idaho, Nevada, Utah, Colorado, Arizona, and New Mexico.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

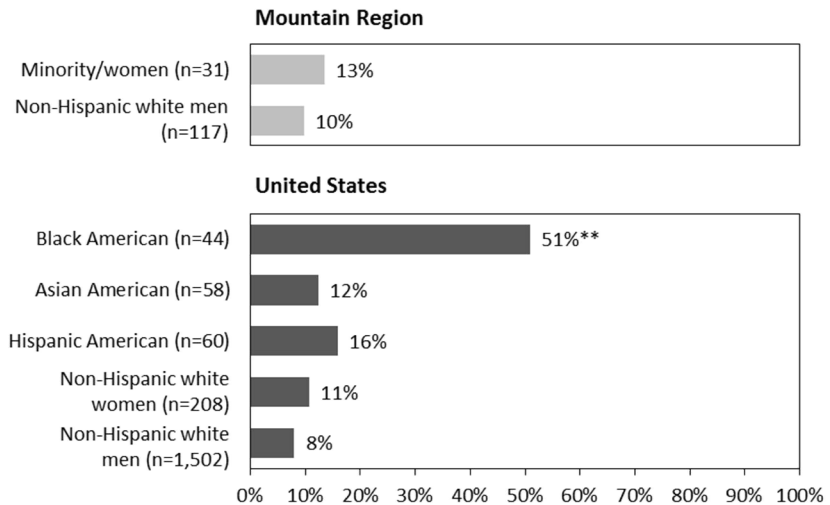


Figure C-16 indicates that in 2003 Black American-owned businesses in the United States were denied business loans at a greater rate than businesses owned by non-Hispanic white men.

Figure D-17.
Businesses that did not
apply for loans due to
fear of denial, Mountain
Region and the United
States, 2003

Note:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Mountain Region consists of Montana, Wyoming, Idaho, Nevada, Utah, Colorado, Arizona, and New Mexico.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

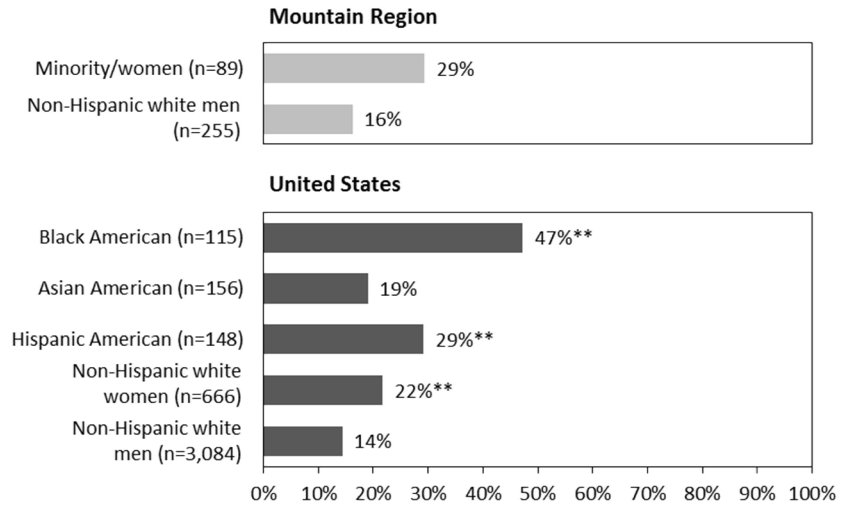


Figure D-17 indicates that in 2003 Black American-, Hispanic American-, and non-Hispanic white woman-owned businesses in the United States were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial.

Figure C-18.
Mean values of approved
business loans, Mountain
Region and the United
States, 2003

Note:

** , ++ Denotes statistically significant differences from non-Hispanic white men (for minority groups and women) at the 95% confidence level for the United States as a whole and the Mountain Region, respectively.

The Mountain Region consists of Montana, Wyoming, Idaho, Nevada, Utah, Colorado, Arizona, and New Mexico.

Source:

BBC Research & Consulting from 2003
 Survey of Small Business Finance.

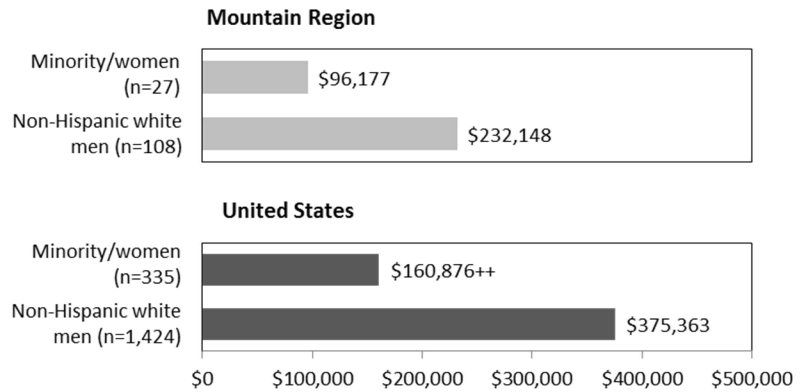


Figure C-18 indicates that in 2003 minority- and woman-owned businesses in the United States who received business loans were approved for loans that were worth less than those for which businesses owned by non-Hispanic white men were approved.

Figure C-19.
Self-employment rates in
study-related industries,
Nevada and the United
States, 2000

Notes:

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

Subcontinent Asian American and other race minority were combined into the single category of "Other minority group" due to small sample sizes.

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Nevada	Construction	Professional Services	Goods & Services
Race/ethnicity			
Black American	1.2 % **	8.6 %	4.3 % *
Asian Pacific American	9.6	9.3	4.0
Hispanic American	3.7 **	29.7	3.1 **
Native American	8.3	27.4	4.4
Other minority group	20.9	13.1	3.4
Non-Hispanic white	12.7	20.9	7.6
Gender			
Women	9.9 %	16.9 %	4.9 % **
Men	9.7	21.9	7.2
All individuals	9.8 %	20.2 %	6.3 %
United States	Construction	Professional Services	Goods & Services
Race/ethnicity			
Black American	15.2 % **	10.2 % **	6.7 % **
Asian Pacific American	21.3 **	9.0 **	12.6 **
Hispanic American	12.2 **	10.6 **	8.2 **
Native American	19.2 **	17.3	9.6 **
Other minority group	22.2 *	8.7 **	11.3 **
Non-Hispanic white	25.4	19.3	13.9
Gender			
Women	16.8 % **	14.0 % **	10.6 % **
Men	23.3	19.6	13.4
All individuals	22.6 %	17.6 %	12.4 %

Figure C-19 indicates that in 2000 Black Americans and Hispanic Americans working in the Nevada construction industry exhibited lower rates of self-employment (i.e., business ownership) than non-Hispanic white Americans. Black Americans and Hispanic Americans working in the Nevada goods and services industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Nevada goods and services industry exhibited lower rates of self-employment than men.

Figure C-20.
Self-employment rates
in study-related
industries, Nevada and
the United States,
2010-2014

Notes:

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

Subcontinent Asian American and other race minority were combined into the single category of "Other minority group" due to small sample sizes.

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Nevada	Construction	Professional Services	Goods & Services
Race/ethnicity			
Black American	10.7 %	13.4 %	3.9 % **
Asian Pacific American	10.3	5.8 **	5.3 **
Hispanic American	11.2 **	14.1 *	6.4 **
Native American	6.9 **	11.7	5.7 **
Other minority group	5.2	27.9	9.1
Non-Hispanic white	14.4	22.0	11.7
Gender			
Women	8.7 % **	17.7 %	7.6 % **
Men	13.3	20.9	9.6
All individuals	12.8 %	19.8 %	8.9 %
United States			
Race/ethnicity			
Black American	18.4 % **	13.2 % **	7.9 % **
Asian Pacific American	23.6 **	10.5 **	12.9 **
Hispanic American	17.8 **	12.8 **	9.9 **
Native American	18.5 **	21.5	10.0 **
Other minority group	24.1 **	11.3 **	11.5 **
Non-Hispanic white	26.8	19.7	14.6
Gender			
Women	16.3 % **	15.4 % **	11.9 % **
Men	24.6	19.3	13.4
All individuals	23.9 %	17.9 %	12.9 %

Figure C-20 indicates that Hispanic Americans and Native Americans working in the Nevada construction industry exhibited lower rates of self-employment (i.e., business ownership) than non-Hispanic white Americans. In addition, women working in the Nevada construction industry exhibited lower rates of self-employment than men. Asian Pacific Americans and Hispanic Americans working in the Nevada professional services industry exhibited lower rates of self-employment than non-Hispanic white Americans. Black Americans, Asian Pacific Americans, Hispanic Americans, and Native Americans working in the Nevada goods and services industry exhibited lower rates of self-employment than non-Hispanic white Americans. In addition, women working in the Nevada goods and services industry exhibited lower rates of self-employment than men.

**Figure C-21.
Predictors of business ownership in
construction (regression), Nevada, 2010-
2014**

Notes:

The regression included 3,956 observations.

*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.

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

Subcontinent Asian American and Other race minority were combined into the single category of Other minority group due to limited sample size.

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

Variable	Coefficient
Constant	-1.8988 **
Age	0.0097
Age-squared	0.0001
Married	-0.0690
Disabled	-0.0768
Number of children in household	0.0295
Number of people over 65 in household	-0.0623
Owns home	-0.2264 **
Home value (\$000s)	0.0009 **
Monthly mortgage payment (\$000s)	0.0934 **
Interest and dividend income (\$000s)	0.0004
Income of spouse or partner (\$000s)	0.0009
Speaks English well	0.0027
Less than high school education	0.0146
Some college	0.0446
Four-year degree	0.1053
Advanced degree	0.3937
Black American	-0.2057
Asian Pacific American	-0.1359
Hispanic American	0.0860
Native American	-0.4118 *
Other minority group	-0.4980
Women	-0.4117 **

Figure C-21 indicates that, compared to being a non-Hispanic white American in Nevada, being Native American is related to a significantly lower likelihood of owning a construction business, even after accounting for various other personal characteristics. In addition, compared to being a man in Nevada, being a woman is related to a lower likelihood of owning a construction business, even after accounting for various other personal characteristics.

Figure C-22.
Disparities in business ownership rates for Nevada construction workers, 2010-2014

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Native American	6.5%	12.7%	51
Non-Hispanic white women	10.3%	18.6%	55

Notes: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-22 indicates that Native Americans own construction businesses in Nevada at a rate that is 51 percent that of similarly-situated non-Hispanic white Americans (i.e., non-Hispanic white Americans who share the same personal characteristics). In addition, non-Hispanic white women own construction businesses in Nevada at a rate that is 55 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).

**Figure C-23.
Predictors of business ownership in
professional services (regression),
Nevada, 2010-2014**

Notes:

The regression included 1,187 observations.

*, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Subcontinent Asian American and Other race minority were combined into the single category of Other minority group due to limited sample size.

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

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.3824 **
Age	0.0306
Age-squared	-0.0001
Married	-0.0324
Disabled	-0.3523
Number of children in household	0.0780
Number of people over 65 in household	0.0617
Owns home	-0.4536 **
Home value (\$000s)	0.0005 **
Monthly mortgage payment (\$000s)	0.0867
Interest and dividend income (\$000s)	0.0008
Income of spouse or partner (\$000s)	0.0021 *
Speaks English well	0.2121
Less than high school education	0.3566
Some college	0.1033
Four-year degree	0.3274
Advanced degree	0.4340 *
Black American	-0.1215
Asian Pacific American	-0.6570 **
Hispanic American	-0.1156
Native American	-0.1784
Other minority group	-0.4740
Women	-0.0783

Figure C-23 indicates that, compared to being a non-Hispanic white American in Nevada, being Asian Pacific American is related to a lower likelihood of owning a professional services business, even after accounting for various other personal characteristics.

Figure C-24.
Disparities in business ownership rates for Nevada professional services workers, 2010-2014

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Asian Pacific American	6.3%	17.7%	36

Notes: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-24 indicates that Asian Pacific Americans own professional services businesses in Nevada at a rate that is 36 percent that of similarly-situated non-Hispanic white Americans (i.e., non-Hispanic white Americans who share the same personal characteristics).

**Figure C-25.
Predictors of business ownership in goods
& services (regression), Nevada, 2010-2014**

Notes:

The regression included 11,221 observations.

*, ** Denote statistical significance at the 90% and 95% confidence levels, respectively.

Subcontinent Asian American and Other race minority were combined into the single category of Other minority group due to limited sample size.

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

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-1.9906 **
Age	0.0227 **
Age-squared	-0.0001
Married	0.0128
Disabled	-0.1259
Number of children in household	0.0576 **
Number of people over 65 in household	-0.0500
Owns home	-0.1784 **
Home value (\$000s)	0.0008 **
Monthly mortgage payment (\$000s)	0.0196
Interest and dividend income (\$000s)	0.0015
Income of spouse or partner (\$000s)	0.0022 **
Speaks English well	-0.1268
Less than high school education	-0.0935
Some college	0.1358 **
Four-year degree	0.3048 **
Advanced degree	0.5505 **
Black American	-0.4983 **
Asian Pacific American	-0.4086 **
Hispanic American	-0.1525 **
Native American	-0.2800
Other minority group	-0.2271
Women	-0.1525 **

Figure C-25 indicates that, compared to being a non-Hispanic white American in Nevada, being Black American, Asian Pacific American, or Hispanic American is related to a lower likelihood of owning a goods and services business, even after accounting for various other personal characteristics. In addition, compared to being a man in Nevada, being a woman is related to a lower likelihood of owning a goods and services business, even after accounting for various other personal characteristics.

Figure C-26.
Disparities in business ownership rates for Nevada goods & services workers, 2010-2014

Group	Self-Employment Rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Black American	3.6%	8.9%	40
Asian Pacific American	5.5%	11.6%	47
Hispanic American	6.5%	9.1%	71
Non-Hispanic white women	10.4%	12.6%	83

Notes: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-26 indicates that Black Americans own goods and services businesses in Nevada at a rate that is 40 percent that of similarly-situated non-Hispanic white Americans (i.e., non-Hispanic white Americans who share the same personal characteristics). Asian Pacific Americans own goods and services businesses in Nevada at a rate that is 47 percent that of similarly-situated non-Hispanic white Americans. Hispanic Americans own goods and services businesses in Nevada at a rate that is 71 percent that of similarly-situated non-Hispanic white Americans. Finally, non-Hispanic white women own goods and services businesses in Nevada at a rate that is 83 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).

Figure C-27.
Rates of business closure, expansion, and contraction, Nevada and the United States, 2002-2006

Notes:

Data include only non-publicly held businesses.

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

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

Source:

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

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

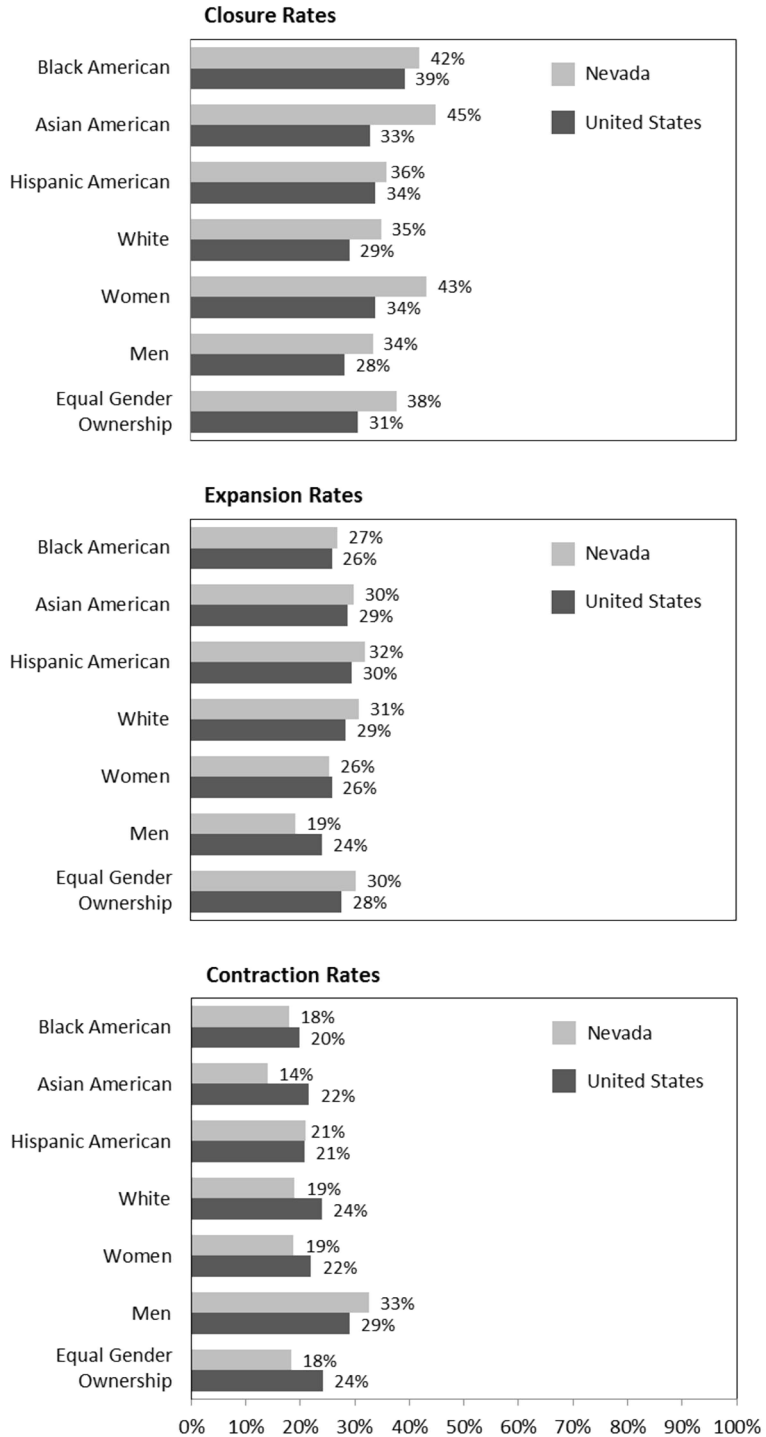


Figure C-27 indicates that Black American-, Asian American-, and Hispanic American-owned businesses in Nevada show higher closure rates than white American-owned businesses. Woman-owned businesses in Nevada show higher closure rates than businesses owned by men. Black American- and Asian American-owned businesses in Nevada show lower expansion rates than white American-owned businesses.

Figure C-28.
Mean annual business
receipts (in thousands),
Nevada and the United
States, 2012

Note:

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

Source:

2012 Survey of Business Owners, part of the U.S. Census Bureau's 2012 Economic Census.

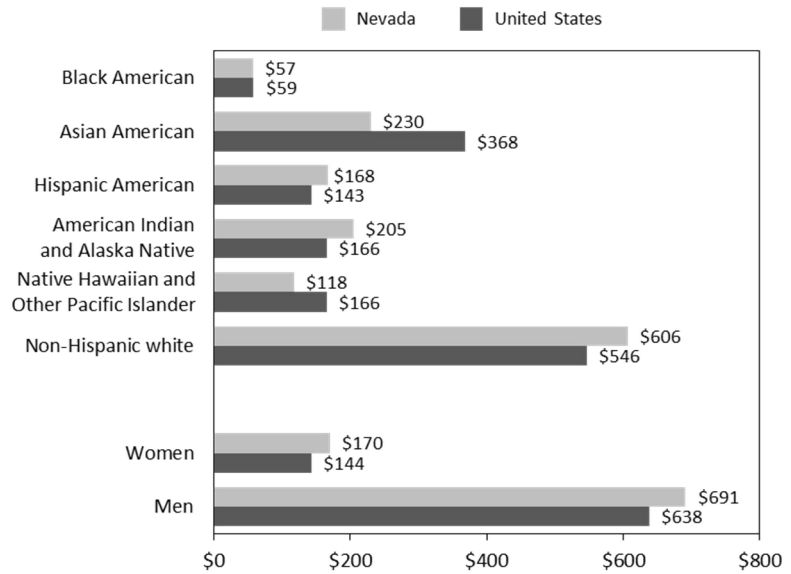


Figure C-28 indicates that in 2012 Black American-; Asian American-; Hispanic American-; American Indian and Alaskan Native-; and Native Hawaiian and Other Pacific Islander-owned businesses in Nevada showed lower mean annual business receipts than non-Hispanic white American-owned businesses. In addition, woman-owned businesses in Nevada showed lower mean annual business receipts than businesses owned by men.

Figure C-29.
Mean annual business
owner earnings, Nevada
and the United States,
2010-2014

Notes:

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2014 dollars.

** , ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 95% confidence level for the United States as a whole and Nevada, respectively.

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

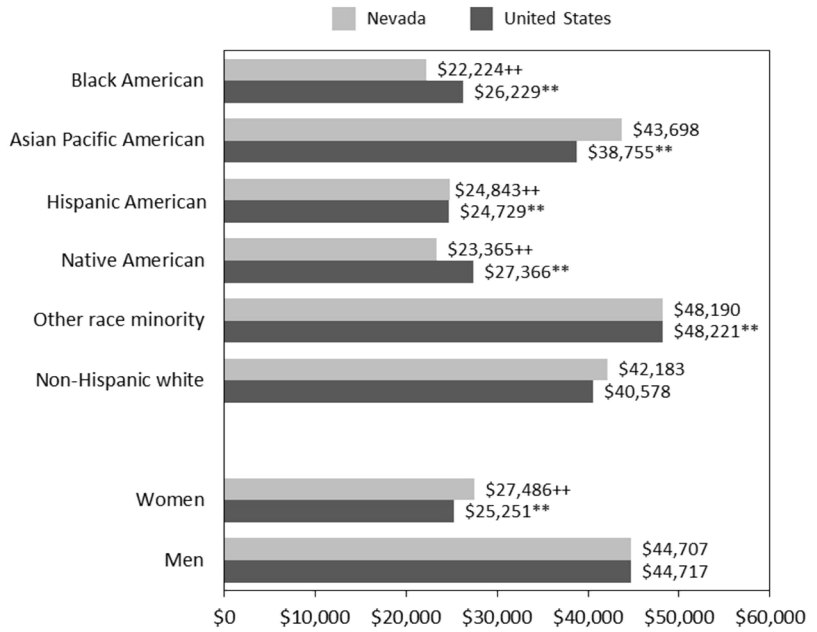


Figure C-29 indicates that the owners of Black American-, Hispanic American-, and Native American-owned businesses in Nevada earned less on average than the owners of non-Hispanic white American-owned businesses. In addition, the owners of woman-owned businesses in Nevada earn less on average than the owners of businesses owned by men.

**Figure C-30.
Predictors of business owner earnings
(regression), Nevada 2010-2014**

Notes:

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2014 dollars.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

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

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	1,079.882 **
Age	1.115 **
Age-squared	0.999 **
Married	1.181
Speaks English well	1.393 *
Disabled	0.585 **
Less than high school	0.855
Some college	1.108
Four-year degree	1.315
Advanced degree	2.260 **
Black American	0.904
Asian Pacific American	1.200
Hispanic American	0.876
Native American	0.428 **
Other race minority	0.361
Women	0.593 **

Figure C-30 indicates that, compared to being a non-Hispanic white American business owner in Nevada, being a Native American business owner is related to significantly lower earnings, even after accounting for various other business and personal characteristics. In addition, compared to being the owner of a business owned by men in Nevada, being an owner of a woman-owned business is related to lower earnings, even after accounting for various other business and personal characteristics.

**Figure C-31.
Predictors of business owner earnings
(regression), United States, 2010-2014**

Notes:

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2014 dollars.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

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

Source:

BBC Research & Consulting from 2010-2014 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	429.642 **
Age	1.156 **
Age-squared	0.999 **
Married	1.253 **
Speaks English well	1.172 **
Disabled	0.584 **
Less than high school	0.751 **
Some college	1.060 **
Four-year degree	1.327 **
Advanced degree	2.001 **
Black American	0.835 **
Asian Pacific American	1.119 **
Hispanic American	1.058 **
Native American	0.687 **
Other race minority	1.155 **
Women	0.533 **

Figure C-31 indicates that, compared to being the owner of a non-Hispanic white American-owned business in the United States, being an owner of a Black American- or Native American-owned business is related to lower earnings, even after accounting for various other business and personal characteristics. In addition, compared to being the owner of a business owned by men in the United States, being an owner of a woman-owned business is related to lower earnings, even after accounting for various other business and personal characteristics.

APPENDIX D.

Qualitative Analyses of Marketplace Conditions

APPENDIX D.

Qualitative Information from Personal Interviews, Public Hearings, and Other Meetings

Appendix D presents qualitative information from in-depth personal interviews, public hearings, written testimony, telephone surveys, and focus groups that the study team conducted with key stakeholders as part of the disparity study. Appendix D is presented in 12 parts:

- A. Introduction and Background** describes with whom the study team met to collect the information summarized in Appendix D and how the study team collected that information. *(page 2)*
- B. Background on the Organization and Transportation Industry in Nevada** summarizes information about how businesses become established and how companies change over time. Part B also presents information about the effects of the economic downturn and business owners' experiences pursuing public and private sector work. *(page 4)*
- C. Keys to Business Success** summarizes information about certain barriers to doing business and keys to success including access to financing, bonding, and insurance. *(page 9)*
- D. Doing Business as a Prime Contractor or as a Subcontractor** summarizes information about the mix of businesses' prime contract and subcontract work and how they obtain that work. *(page 24)*
- E. Potential Barriers to Doing Business with Nevada Public Agencies** presents information about potential barriers to doing work for public agencies including McCarran International Airport (McCarran), the Regional Transportation Commission of Southern Nevada (RTC – SN), the Regional Transportation Commission of Washoe County (RTC – WC), the Reno-Tahoe Airport Authority (RTA), and the Nevada Department of Transportation (NDOT). *(page 28)*
- F. Nevada State and Local Agencies** presents information about working with or attempting to work with public agencies in Nevada including McCarran, RTC – SN, RTC – WC, RTA, and NDOT. *(page 56)*
- G. Any Other Allegations of Unfair Treatment** presents information about experiences with unfair treatment including bid shopping, treatment during performance of work, and allegations of unfavorable work environment for minorities and women. *(page 75)*
- H. Additional Information Regarding any Racial/ethnic- or Gender-based Discrimination** includes additional information concerning potential racial/ethnic- or gender-based discrimination. Topics include stereotypical attitudes about minorities and women and allegations of a “good ol’ boy” network that adversely affects opportunities for minority- and woman-owned businesses. *(page 87)*

- I. **Insights Regarding Business Assistance Programs, Changes in Contracting Processes, or Any Other Neutral Measures** presents information about business assistance programs and efforts to open contracting processes. *(page 94)*
- J. **Insights Regarding the State ESB Program, Federal DBE Program or any other Race/Gender Conscious Program** presents information about the State Emerging Small Business (ESB) Program and Federal Disadvantaged Business Enterprise (DBE) Program. *(page 121)*
- K. **MBE and DBE Certification** presents information about certification processes. It also presents information about advantages and disadvantages that subcontractors experience because of their certifications as DBEs, minority-owned business enterprises (MBEs), woman-owned business enterprises (WBEs) and abuses of the program. *(page 129)*
- L. **Any Other Insights and Recommendations Concerning Nevada Contracting or MBE/DBE Programs** presents other comments and insights regarding contracting in Nevada and with Nevada public agencies. *(page 138)*

A. Introduction and Background

BBC Research & Consulting (BBC) conducted public hearings and in-depth personal interviews between October 2015- October 2016. During the interviews and hearings, participants had opportunities to discuss their experiences working in the local transportation contracting industry; experiences working for Nevada public agencies; experiences with potential barriers or discrimination based on race/ethnicity or gender; and other matters relevant to doing business in the Nevada marketplace. Throughout the study process, participating agencies and the BBC study team encouraged business owners to submit written testimony and comments concerning those matters. In addition, a Steering Committee made up of representatives of Nevada businesses and organizations—including representatives of NDOT, RTC – SN, RTC – WC, RTA, and McCarran—helped BBC identify individuals for in-depth personal interviews.

Information from round tables and public hearings. As part of the disparity study, the study team scheduled seven round tables and two public hearings throughout the state of Nevada. BBC conducted the round tables in coordination with:

- The National Association of Women in Construction and Associated Builders and Contractors (August 24, 2016, comments identified with the prefix “ABC”);
- The Women’s Business Enterprise Council (August 24, 2016, The National Association of Women in Construction and Associated Builders and Contractors (August 24, 2016, comments identified with the prefix “WBEC”);
- The Latin Chamber of Commerce (August 25, 2016; comments identified with the prefix “LCC”);
- The Nevada Chapter of the National Association of Minority Contractors (was scheduled for August 25, 2016, the meeting was canceled);
- The Urban Chamber of Commerce (August 25, 2016, comments identified with the prefix “UCC”);

- The Nevada Contractors Association’s diversity committee (September 16, 2016, comments identified with prefix “NCA”); and
- The Asian Community Development Council (August 24, 2016).

BBC conducted the public hearings in:

- Reno (October 21, 2016; comments identified with the prefix “REN”); and
- Las Vegas (October 22, 2016; comments identified with the prefix “LV”).

Public hearing participants represented businesses and organizations throughout the state. The numbering of comments from a particular public hearing (e.g., REN#1, REN#2) indicates the order in which participants gave oral testimony at the hearing. For simplicity, Appendix D refers to both public hearing participants as “interviewees.” For some of those individuals, their race/ethnicity or gender were not known.

Written testimony. BBC and participating agencies encouraged individuals who attended a hearing or were not able to attend a hearing to submit written testimony to the study team. Those comments appear throughout Appendix D and are identified by the prefix “WT.”

In-depth personal interviews. The study team conducted in-depth personal interviews with 55 Nevada-based businesses between October 2015 and July 2016. Most of the interviews were conducted with the owner, president, chief executive officer, or other officer of the business. Interviewees included individuals representing construction businesses, engineering businesses, suppliers, and support services businesses. The study team recruited interview participants primarily from participating agencies’ contractor, subcontractor, and vendor data.

The interviews included discussions about interviewees’ perceptions and experiences regarding the local transportation contracting industry; Nevada agencies’ contracting policies and practices; any allegations of unfair treatment of minorities and women; and experiences with certification programs (e.g., the DBE Program and the MBE Program).

Of the businesses that the study team interviewed, some work exclusively or primarily as prime contractors or subcontractors, and some work as both. Some businesses were minority-owned businesses, some were woman-owned businesses, and some were businesses owned by non-Hispanic white men. Some businesses were DBE-certified and/or ESB-certified. All of the businesses conducted work in Nevada. All interviewees are identified in Appendix D by random interviewee numbers (i.e., #1, #2, #3, etc.).

Because interviewees were often quite specific in their comments, the study team reports interviewee comments generally in many cases to minimize the chance that interviewees or other individuals or businesses mentioned during the interviews could be identified. The study team reports the race/ethnicity and gender of each business owner, and whether each interviewee represents a DBE-certified business, an MBE-certified business, or a business that did not report having any type of certification.

B. Background on the Organization and Transportation Industry in Nevada

Part B summarizes information related to:

- How businesses became established (*page 4*);
- Ability to perform different types and size of contracts (*page 5*);
- Economic conditions (*page 5*);
- Experiences pursuing public- and private-sector work (*page 8*); and
- Challenges to starting a business (*page 9*).

How businesses become established. Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

Many firm owners worked in the industry before starting their own businesses. [e.g. #1, #21, #41, #37, #29, #32] Examples from the in-depth interviews include the following:

- A Black American male owner of a DBE-certified general contracting firm founded his company in December 1998 and was licensed in 1999. He said he started his own construction business with the help of his former employer. He said, “The owner of the [construction] company I worked for was very generous and helped guide me through the process.” [#02]
- A non-Hispanic white female owner of an iron construction company when asked about a key to the success for her company stated that “I had the opportunity to work for another company in this industry for 10 years and was able to watch how the management of the day-to-day operations as well as [how] customer service was handled. [The previous company’s lack of] good management and customer service helped me establish expectations for my company.” [#47]
- A non-Hispanic white male owner of an architecture firm stated that he moved to Las Vegas in 1996 after working with a large, private architectural firm providing architectural services to McCarran Airport. He said, “During my time in the private sector I was able to gain much industry knowledge and experience working on many different types of projects.” [#43]
- A non-Hispanic white male owner of a construction firm stated that he has been in the construction industry since 1994. He said, “I did an internship [with a large firm] in 1994 and then they hired me out of college in 1995. I was a senior Estimator and a project manager for them, and then I took a job with [another large firm] as a chief estimator and senior project manager. At that time I decided it was time to start making money for ourselves.” [#30]

Some interviewees indicated that relationships among family members were instrumental in establishing their businesses. For example, a non-Hispanic white female owner of a DBE-certified architectural firm stated that her firm has been in the industry for over 50 years. The firm was started by her parents and she joined the firm 23 years ago. She said, “I really have been a part of the firm my whole life, having grown up working and helping my parents in the firm.” [#10]

Ability to perform different types and size of contracts. Interviewees discussed changes over time in the type of work their company has performed and the transitions to different types of contracts. For example:

- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company, indicated that the company has transitioned over other markets in the six years it has been in business. She said, “We started out mostly residential and transitioned to commercial a couple of years ago, and within the last two years we’ve actually transitioned into more government contracting.” [#23]
- A Black American male president of a minority-focused chamber said, “We as a chamber advocate for our members that work as a subcontractors with the prime contractors and try to get some short term solutions. But with a long-term goal in mind for our members to increase their capacity, go get their “A” contractor’s license so that they can call the shots.” [#06]
- An Asian Pacific American female owner of a DBE-certified environmental engineering firm stated, “Since our firm is an engineering firm, we are selected based upon qualifications and our rates are negotiated so we do not go through a typical bidding process.” In some instances, she stated that her firm will take a project even if it means just breaking even. She said, “If we are not able to negotiate a better rate, [we will take the project] to just keep our team working until the next project comes along.” [#09]
- A non-Hispanic white male representative of a trade association mentioned that member firms have their own preference when it comes to doing business. He stated, “Certain contractors perform federal works, federal construction projects. Others like to perform state construction projects, and there is another group that does private work. Very few of our members move through all three of the markets. They may be in two, but they won’t be in all three.” [#19]

Economic conditions. Interviewees discussed the impacts of the economic downturn and how the current economic conditions are affecting business in their industry.

Many interviewees indicated that business was difficult during the economic downturn. [e.g. #3, #5, #17, #50] For example:

- A non-Hispanic white female owner of a DBE-certified architectural firm stated that her firm was hit very hard during the recession. She said, “Our firm went from over \$9 million of opportunities taken out from underneath us and our firm went from 38 to 4 employees.” [#10]

- A Hispanic American male owner of a DBE certified surveying firm, mentioned that starting a business during the economic downturn was hard, but the firm was able to surpass that because of the DBE certification. He said, “In the very beginning it was very difficult. We started in 2009, right in the middle of the crisis, but I think that’s where the DBE certification really helped us get off the ground and be able to stay busy during the worst time. It gave us a lot of opportunities that I don’t think we would have had if we didn’t have that certification.” [#42]
- A non-Hispanic white male representative of an engineering firm, when asked about potential barriers in learning about subcontract opportunities, stated that he faced hardship when opening the Las Vegas firm. He explained that during the recession, many engineering and architectural firms were no longer in business and those that remained had developed strong relationships. He said, “I was told that established relationships were already made with those that sustained during the recession and they would continue to work with those firms.” [#39]
- A Black American male president of a minority-focused chamber stated that the recession impacted all business owners. He said, “Small business owners had challenges [and] so did the larger firms. [It] wasn’t related to a specific race or gender or a business.” [#06]

Some businesses reported that the economic downturn did not directly affect their business, or that other factors have been more detrimental. For example:

- A non-Hispanic white male owner of a construction firm mentioned that his company has steadily grown every year even through the country's economic crisis. He said, “We've grown every year...we even grew through [the financial crisis].” [#46]
- A non-Hispanic white male owner of an engineering firm indicated that the recent economic downturn did not affect his firm in a substantial way. He said, “We focused on energy projects. We are a lead sustainability contractor or engineer, and so we ended up working in areas where the market didn’t really drop off, during that time we held a lot of good projects.” [#36]
- A non-Hispanic white male representative of a construction firm mentioned that the firm has been in business in Nevada since 1997. He went on to mention that during their time in Nevada, the economic downturn did not pose as many problems to them as compared to other factors. He said, “We are a niche business. Things did get tighter as far bidding, not many projects were available. We saw a drop in revenue; however; we have seen more of a drop in revenue due to oil prices here recently.” [#35]

Some interviewees noted that their companies have rebounded from the economic downturn. [#7, #10, #14] For example:

- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company, mentioned that the industry for electrical companies has been improving since the recession. She said, “Four years ago we were still kind of in the recession, and so the opportunities and jobs that were available to us at that time were smaller, and now it seems

that things are either stabilizing or improving. So now the jobs seem like they are getting more frequent, more abundant and larger." [#23]

- A Hispanic female representative of a small business assistance organization mentioned that the overall conditions in the marketplace have improved. She stated, "I think that the economy is recovering, but there are still some challenges...there are some industries that are saturated, but it is recovering slowly which is good... I think there are opportunities for small businesses to do better." [#13]
- A non-Hispanic white male representative of a trade association mentioned that overall conditions of the marketplace within the construction industry are improving. He said, "I would say they are improving. The majority of new construction projects are being privately funded, which is concerning that there is not a large growth in public works construction. But the market overall is improving." [#19]

Some businesses reported continued struggles from the downturn. For example:

- A non-Hispanic white male owner of a construction firm mentioned that over the past ten years that his company has been in business, it has been tough due to the economic turndown. He mentioned that his company experienced growth prior to the recession, but currently he is the only employee. He said, "It's been very tough. We started before the recession started and we got up to 38 employees at one time." [#22]
- A non-Hispanic white female owner of a DBE-certified engineering firm stated that her firm was based in Northern Nevada in 2003 and in 2014 she moved the firm to Southern Nevada. In 2011, her firm staffed over 10 employees and currently, she is the sole principal and employee; she is reestablishing clients after the recession. [#25]
- A non-Hispanic white male representative of a trade association mentioned that member firms and other small businesses in the industry are trying to recuperate from the economic downturn rather than grow their business. He mentioned that, "The ones who have survived, and the ones who are continuing, I think they're very fearful to make a large investment into growth right now. I think it's just more about trying to heal... people who survived did it by taking money out of their pocket and putting it into their business. It's time to earn that money back." [#19]
- A Black American male owner of a DBE-certified general contracting firm said that it is still very difficult to find work and competition has increased. He said, "The availability of work is almost non-existent. That is huge and makes it very difficult to come by any work and therefore the competition is fierce. In 2007 the average would be 3-5 contractors bidding on the same project. They were competent and we were on equal footing for the projects. In 2008, there was a significant increase, on average 30 contractors bidding. ..We weren't on equal footing as in the past and their pricing would be extremely low. It made taking work at a loss; we would budget for losses instead of profits. If I do this project, I will lose X amount of dollars but I will keep people employed and my doors open. I will spend the \$10,000 or even \$100,000 to keep them employed. I had to make business decisions like

that in hopes of next year we can make it back or maybe the next year and that has been going on for a very long time.” [#02]

Experiences pursuing public- and private-sector work. Interviewees discussed their experiences with the pursuit of public- and private-sector work.

Many interviewees stated their preferences for and the advantages to working in the private sector rather than the public sector. [e.g. #14, #13, #LAS35,#6] For example:

- A Black American male owner of two consulting professional services firms said that he prefers to work in the private sector. He said, “When I first came to this valley, if I would have had stuck with the governmental side I would be out of business right now. Private sector’s much, much easier to get some business with than going through to the government side.” Although he had received some government contracts, he explained that public contracting agencies often did not know what professional services were. [#LAS34]
- A non-Hispanic white male representative of a trade association mentioned that one of the changes he has noted in the marketplace is the shift of the construction industry from the public market to private market. He said, “The biggest thing is the shift to the private construction market... through the recession, public works were what people were relying on, and now there seems to be fewer public works and more private construction.” The interviewee believes that the reason for the shift relies in the lack of additional funding for public works. He said, “The state has not made any move to provide additional funding... The way we fund our roads in the state of Nevada is through the gas tax. The gas tax hasn’t been adjusted since 1993, so we’re using a 23-year-old funding component for today’s construction economy. It just doesn’t go as far as it needs to go.” [#19]
- An Asian American female representing a woman-focused organization noted that obtaining work in the private sector may be easier for women than the public sector. She said, “I would say it is somewhat a bit easier for them to [gain] access into the private sector. What I mean by that is, with networking, some of our WBE’s have been in the community for a long time and [have] create[d] the networking that helps with the private sector but not so much in the government or public sector.” [#12]
- A Hispanic American male President of a minority-focused chamber stated that there is a difference in the private and public sectors. He said, “In the private marketplace they can get things done a lot quicker than the public sector can.” He noted that, “It is about a 70/30 mix with our members; 70% of them private and 30% in the public sector.” [#07]
- A female owner of a woman- and minority-owned project management consulting firm said that her firm works primarily for private industry. She said, “It’s much easier to get in the door.” She described the process of getting work in private industry as a simple two to four week process of expressing interest and then receiving a contract. By contrast, she said, “[To work in public contracts requires a firm to be] a sub to a sub to a sub....to get in the door.” [PH#31]

Challenges to starting a business. Interviewees discussed general challenges to starting a business in their industry. For example:

- A Black American male president of a minority-focused chamber said, “Access to capital is a challenge that our members face in growing or starting a business, as well as strategic planning and understanding the mindset that you have to have to be a business owner.” [#06]
- A Black American male President of a minority-focused trade association discussed the biggest challenges to starting a business. He said, “Everyone will always say capital; I will also say that it is planning. We recognize the need to give our members an understanding of the fundamentals of business; from the accounting to banking, taxes and to the reality of what the landscape of a business should look like. How to help them build that [business] plan, to understand what their capabilities and capacities are.” [#11]
- A Hispanic female representative of a small business assistance organization indicated that the extensive legal requirements included in the process of starting a business can be a barrier to minority business owners. She said, “Many people don’t understand the licensing process, which often frustrates them. Licensing and compliance can be a difficult process to get them through along with the extensive paperwork that comes with it.” [#13]
- A Black American female representing a minority-focused organization stated that there are challenges that minority business owners face when growing their business related to the changes in marketplace. She said, “There are new industries and technologies that have emerged and the minority business owners need to think differently in their approach to business. For an example, if you have served the hospitality industry you may be able to transfer that skill, knowledge, and or service and make it apply to where there is a need versus the business owner trying to continue to make a fit where there is no longer an opportunity; helping them understand where the value is. You have to go with the changing times; organizations and agencies need to support our minority business owners in knowing where to look for new opportunities and how to solve a pain point. At the same time the minority business owners need to know where to look and when to change to overcome these challenges.” [#15]

C. Keys to Business Success

The study team asked firm owners and managers about barriers to doing business and about keys to business success. Topics that discussed included:

- Pre-Approval (*page 10*);
- Networking and building relationships (*page 10*);
- Employees (*page 14*);
- Equipment and tools (*page 16*);
- Financing (*page 19*);
- Bonding (*page 20*);

- Good business sense (*page 20*);
- Other factors (*page 22*); and
- Disadvantages or barriers to business success for a small business (*page 23*).

Pre-approval. Some interviewees indicated that pre-approval was key for landing public jobs. For example, an Asian Pacific American male owner of an environmental consulting firm stated that getting pre-qualified to work with multiple government entities has been a key to success for his business. He stated, “I am pre-qualified with a number of entities, government entities for the most part. UNR, UNLV, City of Reno, City of Fernley, and City of Fallon I believe as well... and with the state of Nevada Public Works.” He indicated that being pre-approved to work for government entities has provided him access to more public jobs. [#03]

Networking and building relationships. Interviewees shared many comments on the importance of networking and building good relationships with customers and other companies.

Many interviewees indicated that getting out into the community and networking is important for successful business. [e.g. #54, #45, #22, #6, #8, #5, #12, #14, #29, #18, #4, #7] For example:

- A Hispanic American male owner of a DBE-certified general contracting firm stated that when starting a small business, networking is important. He said, “Starting out, you do need to be out and get to know people and who to connect with. [As the business grows], I have to now pick and choose as I know I cannot attend everything we are invited too.” He stated that being selective, but knowing who you need to establish relationships with is important. [#05]
- An Asian Pacific American female owner of a DBE-certified environmental engineering firm stated that they market the firm by networking. She said, “Our firm really does focus more on connecting with people in meetings or just picking up the phone and calling a key person and asking if we can just sit down and talk. It really is about working with those who you know and trust.” She stated that with she and her partners are personally involved in different events, which has been a great way to foster relationships. She stated, “It has been great to connect with people, build relationships, and then to do business with them.” [#09]
- A non-Hispanic white female owner of a DBE-certified engineering firm stated that for her firm, relationships have been the key to the success of her firm. She suggested finding out who the key players are in the agencies and building those relationships. She said, “It takes a considerable amount of time before those opportunities ever pan out to but they eventually do. The relationships are a key in keeping the business ongoing.” [#25]
- A Hispanic American female owner of a staffing company, when asked about keys to the success of her business stated that the relationships she established when she first moved to Las Vegas helped her tremendously. She said, “I became very involved with various local chambers and associations, this allowed me to develop great relationship that have helped my business as well as ventures outside of my company to support the Hispanic business community.” [#16]

- A Black American male President of a minority-focused trade association said, “Another key to business success is getting involved with your local trade associations, chambers; community engagement. These organizations have great building powers to help minorities.” [#11]

Many interviewees noted that many opportunities are found through contacts. [e.g. #47, #37, #24] For example:

- An Asian Pacific American female owner of a DBE-certified environmental engineering firm stated that her firm belongs to the construction notebook, so they are able to learn about opportunities in that capacity. In terms of working with public agencies, the prime contractors that they frequently work with will contact them about possible opportunities. [#09]
- A non-Hispanic white female owner of a construction firm said, “We work as a subcontractor for many of the large prime contractors; most of how we hear about the opportunities usually come from the prime contractors we already do business with.” [#17]
- A non-Hispanic white male owner of an electrical construction firm stated that his firm learns about prime contract opportunities from various locations and bid opportunity lists. He stated that he is made aware of upcoming opportunities from personal relationships. [#27]
- A non-Hispanic white male owner of a construction firm, indicated he does not have a hard time learning about contract opportunities because he has been able to build good connections with project managers for example. He said, “A lot of the agencies we work for, they will email us directly and let us know what they have coming up. They know we’ve given them good numbers, bid most of their projects, and done a good job for them.” [#30]

Many interviewees noted the importance of good customer service and relationships.

Interviewees mentioned that customer relationships provide the opportunity for repeat customers and referrals [e.g. #21, #30, #31, #8, #47, #43, #44, #54, #52, #33, #16, #19, #4, #50, #23, #22, #3, #11] For example:

- A Black American male owner of a DBE certified construction company said that relationships with customers are critical to the success of his company. He stated, “One bad relationship with a customer can hurt your business. We work hard to take care of our customers to maintain a great relationship with them... We provide good service to our customers and are prompt to ensure we are able to stay ahead of the project.” [#49]
- A non-Hispanic white male owner of a landscaping company mentioned that investing in relationships with customers is a key to business success. He said, “A smile, being honest, getting a good rapport with the customers and making them feel like they are going to get a good job...results in good business and repeat customers.” [#41]
- A Hispanic American male owner of a construction management company said, “A key to the success of our business has been that we do what we say we are going to do and we do

it in a timely manner. Our focus is customer service and making sure our project timelines are maintained...I give our clients my undivided attention, and go above and beyond to ensure that each client is happy and their needs are met." [#24]

- A Hispanic American male owner of a DBE certified surveying firm, when asked about relationships with customers, stated that creating good relationships with clients has differentiated them from other firms. He said, "That's where we have our success, the way we relate with our clients. I think we have much better public relations with our clients than other surveying firms do. We understand that there is a timeline and a timeframe, and we understand that urgencies come up. We have been able to maintain flexibility when working with our clients, especially contractors. We've accommodated them, where other firms don't do that sometimes, or everything all the time is always extra charges." [#42]
- A non-Hispanic white male owner of an engineering firm said, "There is more work out there and most of our work is return business and making sure they are happy. Our marketing is the history we have, the people we know, and the relationships we have built. That is where our business comes from. We stress to our staff and the younger partners, the importance of establishing relationships, befriending them so we are top of mind when they need someone." [#28]
- A non-Hispanic white male owner of a construction firm mentioned that being courteous with potential customers, even with something as simple as a follow up phone call, is key to his business success. He said, "An awful amount of contractors don't return their phone calls or don't follow up... the fact that we call back is a good step in the door." [#46]
- An Asian Pacific American female owner of a DBE-certified environmental engineering firm stated that a general key to success is customer service. She said, "People want the quality and attention to detail that our firm provides; we are very hands on. In other firms like ours, people in equivalent positions as myself and my partners do not get into the details like we do. They may know the surface, but we really get into the projects and ensure our clients are happy. It has been great to our key to success, but at the same time we do see that it can be a hindrance to the growth of our company because we the partners are so 'hands-on.'" [#09]

Building a good reputation and maintaining a high quality business was noted as a key factor to success by many interviewees. [e.g. #17, #15, #32, #19, #10, #20, #41, #39] For example:

- A non-Hispanic white female owner of a DBE-certified environmental firm stated that having a reliable reputation is critical to business success. She said, "Many firms in the construction industry say they will show up and they do not." She noted that a firm's reputation with creditors is also important to the success of a business. She said, "Pay your creditors. Your reputation is number one in the industry, everyone in their niche market is well known. My company does have a very good reputation and I pride myself in paying the bills, so when I need something I have a reputation to show that I always pay." [#08]
- A non-Hispanic white female representative of a Hispanic owned DBE certified electric company indicated that as a small business, establishing a good reputation is essential to

business success. She said, “When you are small, [general contractors] look at you like, ‘Are you going to show up? Are you going to do quality work?’ I think that they have to weigh that when someone is really small.” [#23]

- A non-Hispanic white female owner of a public relations and outreach firm indicated that 20 years of working with government agencies has helped her create a proven track record of success. She also expressed that if she successfully completes a job, her reputation in that project will produce more job opportunities, subsequently bringing more dollars into the firm. [#01]
- A Hispanic American male owner of a DBE and ESB certified architecture firm noted the importance of establishing a good reputation. He said, “[A key to success is] delivering a great product. If our clients are happy with their design or project that will provide us with repeat work and referral business.” [#40]
- A non-Hispanic white male owner of an architectural firm indicated that establishing good reputation with clients ensures continued relations. He said, “The main stay of our business is repeat clientele. People hire us again because we do what we say and we do it well.” [#37]

Relationships within the industry are important for success. Many interviewees indicated that developing and maintaining relationships with other firms in their industry is a key to success [e.g. #LAS25, #55, #40, #52] For example:

- A non-Hispanic white male owner of an engineering firm indicated that forging good relationships within the industry is a key to business success. In his case, keeping close relationships with architects within the marketplace has resulted in project opportunities for his firm. He said, “In terms of working with particular architects and owners, we have forged long term relationships with those people. In this office for instance, we have a collaborative of two other architects, we share resources, and as a result whenever the architects in here do project we usually get involved and try to help them.” [#36]
- A Black American male President of a minority-focused trade association noted the importance of building financial relationships. He said, “It is important that we [business owners] understand that it is important that we are working with the financial institutions that understand our goods, our needs and our wants. In Las Vegas, I have found that some of the small banks that understand you and may be in your line of work understand what you need better than some of the big corporate banks. The key to success in financing is having a relationship with your banker; grow with your bank so they can see how you spend your money so they can decide if they want to take a chance on you.” [#11]
- A non-Hispanic white male representative of a construction firm mentioned that a key to doing business with the Nevada public agencies has been the ability to cooperate with them in different ways. He said, “I think a lot of it for us, as a niche business, is partnering with [the Nevada public agencies], and helping them understand what products are out there, and developing projects [together].” [#35]

- A non-Hispanic white female owner of a DBE-certified architectural firm stated that the relationships she has been able to develop over the years with sub-consultants has been a key to the success of her firm. She said, “Building relationships with engineering firms and other related services helps me to be able to quickly assemble a team of qualified professionals. I build a team on a case by case basis and utilize their strengths and don’t limit myself to one firm.” [#26]
- A non-Hispanic white male owner of an electrical construction firm stated that the relationships he has with the vendors and distributors has helped with the success of his firm. He said, “We buy from the same distributors we always have, we have been loyal to them for over 20 years as they are to us.” [#27]

Employees. Interviewees discussed the benefits of good, knowledgeable employees have been to their business’ success.

Having an appropriate number of employees was mentioned as important to successful business. A number of interviewees indicated that they expand and contract their employment size depending on work opportunities, season, or market conditions. [e.g. #2, #8, #18, #36, #24] For example:

- An Asian Pacific American male owner of an environmental consulting firm states that he employs people on an as needed basis when he has contracts. This helps him ensure that the work his firm provides is adequately and successfully completed. [#03]
- A Subcontinent Asian American male owner of a geotechnical engineering firm mentioned that currently he has no employees, but he does hire people on an as-needed-basis. He said, “I don’t have a full time employee...unless I have a good job, a big project. I can hire people.” [#29]
- A non-Hispanic white male owner of a construction firm mentioned that being the only employee and absorbing costs has helped him stay in business. He said, “I don’t hire mechanics. I do my mechanical work myself. I don’t put out anything. Try to be very thrifty at what I do but I work a lot of hours.” [#22]
- A non-Hispanic white male owner of an architectural firm stated a key to success for his firm has been the small size. He said, “A key to our success is that we are small and hands-on. I do it all.” [#31]

Many interviewees noted the importance of having good employees. [e.g. #4, #9, #17, #20, #42, #28, #29, #53, #46, #21, #45] For example:

- A Hispanic American male owner of a DBE-certified general contracting firm said that a key to business success for his firm is his employees. He said “I hire top notch employees; I know they are top-notch when I have other companies trying to steal them. Some [other companies] offer them more money and I cannot compete. One day I will be able to.” [#05]

- A non-Hispanic white female owner of an iron construction company said, “Our employees are a key to the success of our company. All of our employees are all cross-trained so workflow never stops, and we hire people with a great attitude and work ethic...I can train people but I cannot train attitudes.” [#48]
- A non-Hispanic white male owner of an electrical construction firm stated that a key to business success for his firm is the longevity of his core group of employees. He said, “We average about 50 employees and out of the 50, 12 of those employees have been with us for 15 or more years.” He stated that with that core group it allows them to take a chance on a project knowing they have capable and loyal people that can handle the project. [#27]
- A Black American male owner of a DBE and MBE certified construction firm said, “[Our employees] are a big part of our success. Most of my employees have been with my firm for 20 plus years.” He explained that they hire based on who can come to work, who is knowledgeable, and very rarely does anyone get let go due to poor performance. [#54]
- A non-Hispanic white male owner of an engineering firm stated that his employees are the most important thing to the success of his firm. He said, “In engineering you can’t really make mistakes. Most of my employees I have known for many years and knowing how they work, that is why I hired them and they have a great attitude.” [#32]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm said, “You are only as good as your weakest employee and they represent who we are.” [#55]
- A non-Hispanic white male owner of controls firm stated that, “Las Vegas is a unique city that you can make a lot of money without an education. With a younger generation there is a lack of emphasis put on hard work. When looking at hiring or helping the next generation, we don’t look at what you know; we look at who you are. We can teach someone how to do controls, but I can’t teach someone how to be a good person. That is critical to the long-term success of our firm.” [#45]

Maintaining good relationships with employees. Many interviewees mentioned that treating their employees well and developing good relationships with them is key to their business’ success. For example:

- A non-Hispanic white female owner of a construction firm stated that a key to business success is employee relations. She said, “[A key to success is] being good to your employees and having a good rapport with them...They know you have an open door that they can come and tell you about things that are happening, so you aren’t lost with what is going on in the field.” [#17]
- A non-Hispanic white male owner of a landscaping company indicated that his employees play a substantial role in the success of the company, so he does his best at keeping that relationship intact. He said, “I am not profiting a lot, but I have a lot of work and I make sure I pay my guys on time.” [#41]

- A Hispanic American male owner of a DBE-certified electrical construction firm noted that his employees play a key role in the success of his firm. He said, “Eighty percent of the employees are the same [as] when we started the firm. Even during the recession, we did whatever we could to make sure they were taken care of...I feel we take care of our employees really well.” [#33]
- A Black American male owner of a DBE certified construction company when asked how his employees play a key to the success of his company said, “Without my employees I would be nothing. The number of our employees range from 5 to 25 depending upon the project and we do what we can to make sure they are happy and taken care of.” [#49]

Equipment and tools. Some businesses, especially in construction, require a substantial amount of equipment to perform the work. Interviewees were asked how equipment plays a role in business success.

Many interviewees noted that having the tools you need is key to business success. [e.g. #21,#24]
For example:

- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company mentioned that having diverse equipment sets them apart from other electrical contractors their size. She said, “Our equipment has allowed us to take jobs that other normal electrical contractors our size wouldn’t be able to take. So we have a pretty diverse group of trucks, trailers, lifts...” [#23]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that equipment does play a key to the success of their firm. She said, “For our industry, computers and software can almost add another body to the office. It improves the productivity and overhead costs by utilizing cloud based programs that keep our programs current and saves us time and money.” [#26]
- A non-Hispanic white male owner of an engineering firm stated that new equipment allows one man to do what it in prior years took 2 or more men to do in the field. He said, “The equipment is more efficient, effective and accurate. We are able to produce twice as much now with the technologies that what we were able to do 20 years ago and at least four-times as much when I came out of school in 1985. We are able to do more work with less people.” [#28]
- A Black American male owner of a construction firm said, “You have to have the same technology that others have and it has to be reliable; you cannot take a chance during a project by having outdated and worn equipment, it is costly to a project...It is also important to have the latest industry standard for operational equipment as well, so we are able to work efficiently for our industry.” [#53]
- A Black American female owner of a DBE, WBE, and MBE certified logistical service company said, “Without our equipment, we do not have a business. The equipment is our revenue source, so it plays a critical component in the success of my company.” [#48]

- A Black American male owner of a DBE and MBE certified construction firm stated that when his firm was first established there was a program that the SBA offered that helped to provide some major equipment for his firm. He said, “This program was very helpful in getting our construction firm started.” [#54]

Interviewees discussed whether they rent or own their equipment. Many business owners mentioned that owning equipment is ideal, but only when they are able to afford it. [e.g. #2, #55, #33] For example:

- A non-Hispanic white male owner of a construction firm mentioned that being a conservative consumer of equipment has helped his business prosper as he fully owns most of his equipment now and is debt free. He said, “Instead of me going out and buying a bunch of equipment and all this, I was on the conservative side. I went out and bought two fairly new backhoes and I did make payments on those. They are paid off; they’ve been paid off for three years.” [#22]
- A Hispanic American male owner of a DBE-certified general contracting firm said that they do buy some equipment based on their needs. He said “We try to buy used when we determine that we will be using it for too long and renting it is not cost effective.” He stated that when his firm needs large equipment, they rent it. [#05]
- An Asian Pacific American female owner of a DBE-certified environmental engineering firm said, “We have equipment and apparatus’ that will wear out and we have to replace them... We remain very lean and frugal and make sure that when something goes down we have the cash to cover the cost.” [#09]
- A non-Hispanic white male owner of a landscaping company, when asked about equipment, stated that until recently he had not financed anything for his business. Everything had been paid out of pocket, which helped him through the economic downturn. He said, “I just now bought a mower for \$16,000, but everything else like my truck, the bobcat, my tools, I paid for outright because I do not like to have loans.” [#41]
- A non-Hispanic white male owner of a construction firm, when asked about the role equipment plays in his success, said that having equipment available is essential and a key to business success. He explained that over the years they have been able to move away from renting equipment, and are now able to purchase it. He said, “In the beginning we didn’t have much of anything and we would rent, but now we tend to buy the equipment. So we do have the equipment and if we have it it’s good.” [#46]
- A non-Hispanic white male representative of a construction firm mentioned that equipment plays a critical role in the work they do; therefore, it is essential to own the equipment. He said, “We have specialized equipment for the placement of the products, so we do micro surfacing which takes specialized equipment, we do chip seals. Equipment as far as getting it is not hard, but it is an essential part of what we do. It’s not like you can go rent a piece of equipment to do what we do. All the equipment we have, we buy, because people don’t rent it.” [#35]

Many businesses noted that having access and knowledge about specialty equipment, such as software, is a large factor in the success of their business. [e.g. #3, #20, #40] For example:

- A non-Hispanic white female owner of a DBE-certified architectural firm stated that her firm has to stay on top of technology and provide the latest computers and software. She said, “In an architectural firm, your draftsmen are only as good as their tools...Our biggest expense is our computers and software. We spend between \$30-40,000 per year just in software. That is a lot of money, but it has actually gone down one due to less number of employees and computers are not as expensive as they used to be.” [#10]
- A Black American male owner of a DBE certified architectural firm said, “For us, our software is our equipment, the technology is a critical component for our firm, we invest in the latest and best software in our industry allowing our team of 7 to have a capacity of more than double our size; our technology plays a key to the success of our firm.” [#50]
- A non-Hispanic white male owner of an engineering firm indicated that up-to-date knowledge and technology are key factors for success for his firm. For the scope of work that he provides, he said, “[That would include] sustainability, awareness of energy cost, use of technology tools...We do everything in 3D design. I know some government agencies mandate the use of 3D design, and so we adopt it internally as a base for everything that we do. It makes our life easier in making sure that everything fits and works within a building.” [#36]

Having access to the products that are needed and finding a good price on materials was noted as an important factor for business success. For example:

- A Hispanic American male owner of a DBE-certified general contracting firm stated that when he first started his firm it was very hard get access to good pricing and credit for materials and products. He said, “I was very lucky, my personal credit was very good, I was very responsible...We have to pay as soon as we get paid so that they do not report us not paying and our credit goes down. We have been very successful in paying all our creditors on time.” [#05]
- A Black American male owner of a DBE certified construction company said, “Material pricing in our industry is very important. It is not as good as we would like for it to be and it is always changing. Much of the better pricing is dependent upon volume, so for us the larger jobs we are able to get better pricing than our smaller projects.” [#49]
- A non-Hispanic white male owner of an electrical construction firm stated that having access to equipment when needed is critical to the success of his company. He said, “When we need to buy equipment, the financing is so affordable; I am able to purchase what we need directly from one of our local companies.” [#27]
- A Hispanic American male owner of a DBE-certified electrical construction firm stated that access to pricing for materials is key to the success of his firm. He said, “I have to shop around for pricing, but I don’t share numbers. I believe that is unethical... we only share our numbers with the general contractors. When another distributor asks what the competition

numbers were so they can beat it; I let them know that I won't share and I asked for your best price the first time." [#33]

- A Hispanic American female owner of a staffing company, in discussing access to pricing and credit for products, stated, "I am creative and I do my research...Cheap is not always better...The relationships I have built have also helped us when needing access to good pricing for products or services." [#16]
- A Hispanic American male owner of a construction management company stated that material pricing can make you or break you. He said, "Most projects we know ahead and there is nothing to worry about. However, if there is a product that is changed at the 11th hour, not having access to good pricing or relationships established with the suppliers that could impact the project." [#24]
- A non-Hispanic white female owner of a DBE-certified engineering said, "Our firm... does construction management and if you have to get an employee to a project you have to lease a truck, you are paying for that expense long before you are ever getting paid, So being able to cash flow, that is not easy. Based on the relationships we have established we do have some firms that will work with us and will delay when payment is due. [#25]

Financing. Interviewees discussed the importance of establishing good financing early on and throughout [e.g. #8, #10, #50, #21, #22, #23, #41, #27, #54, #46, #35, #17, #20] For example:

- A Hispanic female representative of a small business assistance organization indicated that having a solid financial plan will result in a successful business. Therefore, she helps in providing that assistance to her clients so they are ready. She stated, "I help my clients do a start budget. [Including] for example: licensing, insurance, marketing, paying the rent, buying the supplies... You have to be ready." [#13]
- A non-Hispanic white male owner of an engineering firm mentioned that reducing the amount of debt and financing has contributed to the success of his business, especially during the economic downturn. He said, "We are a 100 percent cash business, we have never financed anything... and with the economic downturn, we didn't have to worry about an overhead." [#36]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm stated when asked how financing has played a key to the success of her firm said, "The projects that we have completed required that we maintain a strong financial credibility; my financial background has helped us strategically to grow incrementally while increasing our credit worthiness." [#55]
- A non-Hispanic white female owner of an environmental engineering firm said, "Having access to capital has been a key to the success of our business. It has been able to sustain us while waiting to get paid. Without access to financing we would not have been able to keep our business open at times." [#04]

- A Black American female representing a minority-focused organization said, “A key to business success when accessing capital is looking at different ways to get financing. There are non-traditional and alternative ways to now get financing...Historically minority business owners do not always have the best credit history and that can be a barrier when needing financing now that they are a business owner...It is important to understand that as a minority business owner, you need to have a company that is attractive where you can get financing when needed.” [#15]

Bonding. Interviewees discussed how good a relationship with their bonding agent has contributed to success in their industry. For example:

- A Black American male owner of a DBE certified construction company stated that having a relationship with your bonding agent plays a role in the success of their company. He said, “I have been with my bonding company for a long time, they know me. When things get tight, he is there to help our company.” [#49]
- A non-Hispanic white male owner of an electrical construction firm stated that his firm has been with the same bonding agent for many years. He said, “They provide us with great service and competitive rates. If we are qualified to do the work, they will bond it. If they [the firm’s bonding agent] do not want to bond a project that tells me that [I] need to take a long hard look at that project.” [#27]
- A Hispanic American male owner of an electrical company, stated bonding in this industry is very well regulated. He said, “There are a large number of electrical contractors so there is standard policy that is used for us. We have been fortunate that we have met people in the industry that has helped lead us in the right direction.” [#21]
- A non-Hispanic white male owner of a construction firm indicated that establishing a good relationship with a bonding company is good for business within this industry. He said, “I have a great relationship with our bonding company and I can bond substantially bigger than I probably want to build.” [#30]

Good business sense. Interviewees discussed having a good business sense, including the importance of having a business plan, being honest, transparent, and flexible with the changing marketplace.

Many business owners specifically mentioned good business sense. [e.g. #2, #10, #5, #23, #9, #30, #55, #WBEC3] Examples included:

- A Hispanic American male President of a minority-focused chamber said, “A key to business success in gaining access to pricing is for businesses align themselves with the public sector, who can usually get you statistical data and can get you things that are important as far as pricing. However, a lot of that [gathering information] should be done prior to starting the business. You should know the market, the price of your products that you will be selling. This is homework information that goes back to the education component that we talked about earlier; your business plan.” [#06]

- A Black American female representing a minority-focused organization, stated that a key to business success is having a strategy and being able to communicate what your firm offers and what challenges are you able to solve for the corporation or buyer. She said, “For minority business owners that come from a corporate environment generally are more successful than those that have not...Being able to identify and remove all things that [don’t add value] and having a solid foundation to build their business and work on their business...is a key to the success of a minority business owner.” [#15]
- A Black American male owner of a DBE and MBE certified construction firm stated that, for success, businesses have to have a mix of money and knowledge with a back-up plan. He said, “I chose the types of clients to work with because I knew that funding was not a barrier for agencies.” He also explained that bonding companies do not want you to mix various types of work or clientele, he said, “That has helped us be able to channelize our clients; another key to our success.” [#54]
- A non-Hispanic white male owner of a construction firm, mentioned that after the economic turndown, he has been able to succeed by being more thorough with the jobs he acquires by ensuring the he will be able to complete the job properly. He said, “I’ve gotten a lot smarter since then. I pick and choose the jobs. I stay small. And the reason why is because you don’t have the margin in there to make a mistake, so I try to make sure that my jobs go very smoothly. I basically homestead the job from start to finish so it gets done properly.” [#22]
- A Black American male President of a minority-focused trade association said a key to success is knowledge of your trade. He said, “As a minority-owned company, I know that my work has to be the best, as good if not better than my competitors.” [#11]

Transparency. Interviewees stated that communication and being up front with customers is important. For example:

- A non-Hispanic white female owner of a DBE-certified architectural firm said, “With our government clients there is stability but the payments can stretch out, so I make arrangements with my sub-consultants up-front so that we are able to maintain that relationship and payment terms are covered.” [#26]
- A Black American male owner of a construction firm said, “The first key to the success of our firm is to always do what you say you are going to do and clarify the expectation. The second is that you must be fair and trustworthy. The other key to our success is showing up and getting back up; I have uncanny bounce-back ability that no matter what we are faced with, I bounce back. Share lessons learned and enroll people in your vision; all these have been a part of our core and keys to success.” [#53]
- A Hispanic American male owner of a construction management company stated that a key to the success of their firm has been in their follow-up. He said, “We stay in communication with our owners and subcontractors to ensure they are where they need to be for the project, doing what their scope of work is to do and that the owners know the status of the project.” He stated that communication allows them to make sure that they are on top of the

project and “that we are able to maintain the timelines and any issues that would arise in an early stage.” [#24]

Flexibility. Many interviewees mentioned that being flexible, adaptable, and doing the kind of work that is in demand in the current market is a key to success. For example:

- A Hispanic American male owner of an electrical company, stated that a key to the success of our business has been having tenacity, keeping your head down and getting the work done, treating their customers the way they would want to be treated. He said, “Being flexible when the economy is changing; being able to balance with what the economy is allowing you to do, you cannot stay in one spot in a moving economy.” [#21]
- A non-Hispanic white male owner of an electrical construction firm stated that a key to business success for his firm is their ability, at any time to change their focus and move into an unrelated industry, relying on the core group of the firm to be able to get the work done. [#27]
- A non-Hispanic white female representative of a non-Hispanic white male owned construction firm stated that diversifying the type of work that they do has helped the firm succeed. She said, “I would say our willingness to diversify, and think outside the box when needed” has been a key to the success. [#30]
- A non-Hispanic white female owner of an environmental engineering firm said, “Having a diverse client base has been a key to the success of our firm.” [#04]
- A non-Hispanic white female representative of a non-Hispanic white male owned construction firm mentioned that what helped the firm during the economic downturn was opening up their firm to a broader market. She said, “During the economic downturn we started looking at federal work and broadening our horizons on where we were going to go.” [#30]
- A non-Hispanic white female owner of a DBE-certified environmental firm stated that the regulations and census standards are always changing, so the best equipment is the brain. [#08]
- A Hispanic American male owner of a DBE-certified general contracting firm, in discussing keys to business to success, said, “The fact that I studied and have been working in civil engineering on both the design side and the construction side has given me a broad vision of what construction is all about as well as my studies in business.” He stated that having a different view or perspective has been a key to success for him. [#05]

Other factors. Interviewees discussed other factors that are important to business success. For example:

- A Hispanic American male owner of a DBE certified surveying firm, when asked about other factors related to his business success, indicated that having the DBE certification has been key. He said, “I think the program really helped us out. We had the experience but we were

also small. If that program had not been there, we would not have had the opportunity to be involved in some of these projects. Once we got involved in many large key projects, it has just been continuous return business.” [#42]

- A non-Hispanic white male owner of a landscaping company, when asked about keys to business success, stated that quality is key. He said, “Quality in every way, doing quality work and not having to go back to do a better job.” [#41]
- A non-Hispanic white male representative of a Nevada chamber of commerce mentioned being tech savvy in today’s technological world is a key to business success. [#14]
- A Black American female owner of a DBE, WBE, and MBE certified logistical service company stated that a key to the success of her firm is the company’s uniqueness in the industry. She said, “[A key to our success is] the uniqueness of my company and who we serve, as well as our efforts in staying educated in industry trends.” [#48]
- A non-Hispanic white male representative of a trade association indicated that within his members, a unique factor to business success is that they are risk takers. He said, “Our members, the thing that makes them successful is that they’re risk takers... They are willing to take a risk, and literally risk their own wealth and well-being to go get a project and they put it all on the line day per day.” [#19]

Disadvantages or barriers to business success for a small business. Interviewees discussed some of the difficulties that small businesses face that affect success. For example:

- A Black American male owner of a DBE-certified general contracting firm said that hiring talented employees has been a barrier for his business. He said, “It is hard for a small company like mine to attract qualified individuals. If I offer you a job, it seems to me that if I make an identical offer to you versus [other leading competitors] they are going to get the worker. I have had to pay more to get less talent.” [#02]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company, indicated that one of the company’s biggest challenges is finding qualified employees. She said, “The employees, that’s been a challenge because this whole area [electrical industry] was affected by economy so as that kind of went away a few years ago, a lot of the employees left with it. So that’s probably one of our biggest challenges, finding qualified employees.” [#23]
- A Black American male president of a minority-focused chamber noted many barriers for small business owners. He said, “A barrier for small business owners is the lack of access or funding for long-term commitments or capacity. Small business owners must begin with the end in mind and understand that business success does not happen overnight and that must be considered into your business plan...A disadvantage for some small business owners is they do not research their industry or the trends in that market segment as they should prior to launching their business. Many go into industries that have a very high failure rate.” [#06]

- A non-Hispanic white male representative of a Nevada chamber of commerce mentioned that constant fee increases, such as business tax for business, healthcare, and licensing, are a barrier for small businesses. He mentioned that some businesses are not able to keep up. He said, “It’s not like their income is increasing commensurate with those fee increases.” [#14]
- A non-Hispanic white male representative of a trade association indicated that a barrier that small business face, particularly in northern Nevada, is the ability to mobilize for work in counties outside of Washoe County. He stated, “I think the difficulty, particularly in northern Nevada, is the ability to mobilize for a construction project that may be happening in Ely. If you are a small firm, it’s hard to mobilize and go to Ely to get the work... The geographic area that serves the construction industry in northern Nevada, the majority of that in services out of Washoe County by the larger firms, and for subcontractors particularly, it’s difficult for them to mobilize for a project 300 miles away.” [#19]
- A non-Hispanic white female owner of an environmental engineering firm said that a barrier in learning about prime contract opportunities is that as a small business owners do not have resources readily available that the larger firms have to learn about upcoming projects. She said “We have found that if we want to work on a project we have to thoroughly understand the project, understand where the funding is coming from and present that to an entity to alert them of a potential opportunity and hope they have interest in the project.” [#04]
- A non-Hispanic white male owner of an architectural firm mentioned that bureaucratic policies and requirements only add more burdens on smaller businesses that are trying to survive. He would like there to be more consideration towards them on that end. He said, “Don’t put any more bureaucratic burden on small businesses than is already there... there are all kinds of different reporting that we have to do, different taxes that we have to cover, and they all add up... everything keeps wanting to grab a little more time out of me and also more money out of my pocket. The income does not increase as much, and certainly neither does time, and so we are having to continue to be more efficient and do more with less.” [#37]

D. Doing Business as a Prime Contractor or as a Subcontractor

Business owners and managers discussed:

- Mix of prime contract and subcontract work (*page 25*);
- Prime contractors’ methods for choosing subcontractors (*page 26*); and
- Subcontractors’ methods for obtaining work from prime contractors (*page 27*).

Mix of prime contract and subcontract work. Many businesses indicated that they do a mix of prime and subcontractor work depending on the project [e.g. #20, #41, #42, #24, #25, #27, #28, #32, #30, #35, #10, #21] For example:

- A Hispanic American female owner of a staffing company when asked if her firm does business as a prime or subcontractor stated, “I will work as both a prime contractor and a subcontractor, it is dependent upon the project.” [#16]
- A non-Hispanic white female owner of an iron construction company stated that her company generally works as a subcontractor unless working directly with a homeowner. [#47]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company, mentioned that the company does work both as a prime contractor and a subcontractor. She said, “When we can bid directly as an electrical, or bid directly electrical work, we function as a prime. But we do probably about half of the work as a sub too. Slightly skewed more towards prime.” [#23]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that her firm serves as both a prime and subcontractor. She said, “Our most recent and interesting projects have been as a sub-consultant so I am interested in pursuing more of those opportunities.” [#26]
- An Asian American female representing a woman-focused organization shared that the WBE’s in the organization work both as prime and subcontractors. She said, “Those that work as prime are very experienced in their industry and have over time have become prime contractors; 40% of our WBE’s are prime contractors and the remaining would work as a subcontractor.” [#12]
- A Black American female representing a minority-focused organization stated that the majority of the minority business owners in the organization work as subcontractors. She said, “The capacity of many of the minority business owners are limited in their capabilities and that is the reason they work as subcontractor versus a prime contractor.” [#15]
- A non-Hispanic white male representative of a trade association indicated that member firms make decisions on how to do jobs based on their own unique business model and based on what works for them. He said, “Every company is unique in their business model. Some companies perform as much carpentry, for instance, as they can because that’s what they are very good at doing. Other companies sub everything out... Every business is unique; every contract is unique, in what they can self-performance versus what they can’t. More and more we are seeing, prime contractors subbing out 100 percent of the actual work. Four or five years ago, we didn’t see that at all.” [#19]

Preferences for working as a prime contractor. Many interviewees noted that although they have done work as both prime and subcontractors, the majority and preference is to work as the prime [e.g. #44, #36, #37, #54, #55, #43, #23, #46] For example:

- A non-Hispanic white male owner of a construction firm mentioned that he does work both as a prime contractor and a subcontractor; however, he prefers to do work as prime contractor. He said, “I find that having control of your job is important. As a subcontractor, that control is lost to the prime contractor.” [#22]
- A Hispanic American male owner of a DBE-certified general contracting firm stated that his firm now works only as a prime contractor because of the barriers of being a subcontractor. He said, “[A barrier to subcontracting] was that many of the large companies are understaffed and their project managers have multiple projects in multiple areas and cannot keep up with everything and the subcontractors are the ones that suffer.” [#05]
- A Black American male owner of a DBE certified construction company stated he works both as a prime and subcontractor; although approximately 80% of their work is as a prime. He said, “It is a challenge working as a subcontractor, the barriers are timely payment, lack of project management, work environment for subcontractors. It is very important for a subcontractor to find good prime contractors to work with to eliminate or reduce these challenges.” [#49]

Prime contractors’ methods for choosing subcontractors. Interviewees indicated different methods for choosing subcontractors. For example:

- A Black American male owner of a DBE-certified general contracting firm said he chooses subcontractors for projects through a trial and error process. He said, “I try to get to know the owner(s), find out who they have worked for, what kind of jobs they have done, what their bonding capabilities are... Subcontractors that at least have bonding set up, have an agent, have an underwriter, have a limit. Even if the limit is not high enough, I keep in contact with them and use them for smaller projects. They are conscious, they want to do well, and they are responsible...A lot of subcontractors out there they just want to make a quick dollar and those are the ones you have to dodge.” [#02]
- An Asian American female representing a woman-focused organization said, “Among all of our certified WBE’s, they are seeking to work with other WBE’s first. Depending upon the RFP, it may require them to do certain things. They seek WBE’s first and then local owned businesses before they go outside of our community.” [#12]
- A non-Hispanic white male representative of a trade association mentioned that some member firms choose who they work with based on previous working relationships. He said, “I think that relationships are developed... this is particular for probably a private construction job. That if you have a good working relationship and you’ve been doing business with a specific mechanical contractor for instance, that that mechanical contractor, you know that they are going to perform, that they are going to come in on price. You’re probably more likely to lean on that person and go to that person.” [#19]

- A non-Hispanic white female owner of a public relations and outreach firm was asked if her company has a preference to work with certain primes. She expressed that she does have a preference, and added that “you want a contractor that provides quality work and safety. Those are the core values.” [#01]

Subcontractors’ methods for obtaining work from prime contractors. Interviewees discussed finding work opportunities through networking and other relationships. For example:

- A non-Hispanic white female owner of a DBE-certified environmental firm said, “If it was not for the Urban Chamber of Commerce and their commitment to small business owners, some of the meet and greets that the prime contractors host, we would never know about them. But what I find is that many of them are just lip service.” [#08]
- A Hispanic American male owner of a DBE and ESB certified architecture firm stated that generally, as an Architect, he works as a subcontractor. He said, “I am looking to build a relationship with a prime contractor that will allow us to partner together and go after larger projects as well as to keep a steady stream of work provided to us.” [#40]
- A Hispanic American male President of a minority-focused chamber said, “Our members obtain work with primes through chamber networking or by us, the chamber serving as the liaison for our members.” [#07]
- An Asian American female representing a woman-focused organization stated that many of their members learn about opportunities from the corporations that are a part of their corporate partnerships; those firms will contact the organization and ask if they have businesses that are able to do a particular line of work. She said, “I personally am asking the agencies or corporations, ‘What are your upcoming projects?’ so we are able to share that information with our members. I am also putting together a construction related workshop that is being sponsored by one of our private sector corporate partners, they will bring their buyers because they buy differently, this will give the subcontractors the opportunity to meet with each organization and buyer.” [#12]
- A Subcontinent Asian American male owner of a geotechnical engineering firm mentioned that for the NDOT project he worked on, he learned about the opportunity directly from the prime contractor. He said, “[The job opportunity] came through the contractor... the contractor reached out to me.” He went on to mention that the contractor needed to meet a DBE goal and that is why he reached out to his firm. [#29]
- A Hispanic American male owner of an electrical company stated that his firm learns about subcontract opportunities through word of mouth, going to networking events and other related meetings. He said, “I seek out business owners, property managers and others who need our service, if I don’t ask I am not giving them an opportunity to work with us.” [#21]
- A Hispanic American male owner of a DBE-certified general contracting firm said, “We are constantly chasing the opportunities and looking around to see what is going on...We probably get notified here and there, but we get some many notifications that many get

disregarded...Every week [our team] looks at the opportunities to determine if we will bid or not. We do pick and choose on what we want to pursue.” [#05]

E. Potential Barriers to Doing Business with Public Agencies

The study team asked interviewees about potential barriers to doing work for public agencies, including NDOT, RTC – WC, RTC –SN, RTA and McCarran. Topics included:

- Learning about work and marketing (*page 28*);
- Bonding requirements and obtaining bonds (*page 33*);
- Insurance requirements and obtaining insurance (*page 34*);
- Obtaining financing or access to capital (*page 36*);
- Prequalification requirements (*page 37*);
- Licenses and permits (*page 41*);
- Size of contracts (*page 41*);
- Prevailing wage, project labor agreements, or any requirements to use union workers (*page 43*);
- Other unnecessarily restrictive contract specifications (*page 45*);
- Bidding processes (*page 46*);
- Non-price factors public agencies or others use to make contract awards (*page 47*);
- Timely payment by the agency or prime (*page 49*);
- Disadvantages or barriers for small businesses regarding the above factors (*page 52*); and
- Any additional disadvantages or barriers based on being a minority- or woman-owned small business (*page 54*).

Learning about work and marketing. Interviewees discussed learning about work as a barrier to doing business with public agencies.

Difficulty finding work with public agencies. Many interviewees indicated that they had difficulties finding out about opportunities to work with public agencies. [e.g. #2, #4, #LAS21, #23, #17] For example:

- A Black American female owner of a DBE, WBE, and MBE certified logistical service company discussed the barriers she faces in learning about subcontract opportunities. She said, “The barriers are the lack of communication with the agencies in letting me know the status of the bid and the timeliness of in posting of bid opportunities. Posting a bid 1-2 days prior to the deadline is not conducive for a small firm to properly prepare or even in some instances the proposal was posted yet already intended to be awarded to a large firm; a complete waste of time and resources for a small business owner.” [#48]

- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm, stated that she will look at the agency website for new opportunities, reach out both in email and phone calls to the agencies. She said, “Some of the agencies, we are already on their bid list and have done work with [them] in the past, but have not heard of any opportunities. I have tried to get new opportunities from McCarran ever since I opened the firm and I am just not able to get through. I have attended meetings where other contractors, architects, and service companies would be, I would meet some of the buyers but the same firms that had a history of doing business with McCarran are the firms getting the work, none of the smaller firms. I don’t know if they are no longer hosting those meetings or if I was removed from the list because I have not been invited back. I was able to connect with McCarran’s DBE liaison and she was able to connect with me with one of the prime contractors and I was told there is no new work for at least 3 years.” [#18]
- A non-Hispanic white male owner of an architecture firm, when asked about barriers in learning about prime contract opportunities said, “In the private sector, in order to develop projects, you have to develop relationships. In the public sector, you only have the process. The barrier in learning about prime contract opportunities is that the process with the public agencies is designed for large firms. It is time consuming and very costly for small firms.” [#43]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company, indicated that learning about subcontract opportunities as a DBE-certified company has been a hurdle. She said, “Because of our size, they don’t know us as much around here. We don’t have them reaching out to us as much. It’s really been us finding DBE requirements on the Sierra Contractors Source and going to the GC[s] and saying ‘hey we are here.’” [#23]
- A Hispanic American male President of a minority-focused chamber stated that there should be more information made public by the agency. He said, “In particular, NDOT is not very good at getting opportunity information to the smaller tier operations.” [#07]
- A Black American male President of a minority-focused trade association stated there are many opportunities that are not advertised locally. He said, “[The opportunities] are given to companies out of state that should be kept here locally. And there are many opportunities being awarded that we do not even know about. How do we learn about these bidding opportunities?” [#11]
- An Asian American female representing a woman-focused organization noted that there can be difficulties learning about prime contract opportunities. She said, “The barrier is that they do not hear about the opportunities. I am not saying that the agency is at fault, we do tell our WBE’s that you have to seek out the opportunities; they will not just come to you automatically. In some instances by the time the opportunity is announced it is too late...[The agencies] do not go out and connect with the organizations such as the local women’s chamber, National Association of Women Business Owners (NAWBO), our organization... They need to have [WBE’s] in their database so when opportunities are publicized, there is a large number of WBE’s that will directly receive that information; that is one way to reach the small businesses.” [#12]

- A non-Hispanic white female owner of a DBE-certified engineering firm stated that her firm learns about the prime contract opportunities by reaching out to the agencies. She said, “You have to know the right questions to ask, if you don’t you will be challenged. Some of the information that is coming out from McCarran is there but is not easy finding out who to contact, by the time it is on the list it is too late.” She stated that if the agencies would provide information on projects happening in the next 6-12 months that would be ideal but it is not coming from any of the agencies in that manner. [#25]

Difficulty gaining experience needed. A lack of opportunity to market to, establish relationships, and gain experience with agencies was noted. [e.g. #34, #55, #9, #50, #48] For example:

- A Black American male owner of a DBE certified architectural firm when asked about barriers in doing business with public agencies said, “We have worked to establish ourselves with the public agencies, but have not been successful because of our perceived lack of expertise by the agencies.” He stated, “If it is all about experience, how do you get the experience if you are not given an opportunity to work with the agencies to obtain the experience... A barrier for firms trying to establish themselves with the agencies is the established relationships with other firms and contract administrators. Therefore, firms looking to do business with the agencies are not able to get the access they need to the agency.” [#50]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated she has not had very good luck in having the opportunity to market her firm to the agencies individually. She said, “I now have one of the SBA officers’ trying to help me get into some of these agencies; most of the governmental agencies are the ones that I have just not been able to get into. I may see them over and over again; keep sending them our capability statement. When I request an appointment, I get shut down...I just feel that one of these days, one of the good ol’ boys is going to mess up and I am going to be there. I will just keep trying to get in the door.” [#10]
- A non-Hispanic white male owner of a construction firm mentioned that as a small firm he does not see the opportunities readily available for him to do business with Nevada public agencies. He believes this is due to the fact that agencies tend to favor certain firms and do not open up the doors to other firms. He said, “A job comes up and there are four companies they use, and they use one of them and that’s it. I don’t think they open up the doors to other small companies like me.” [#46]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company, mentioned that as a small business, marketing their firm has been a hurdle. She said, “I think the only time our size is really an issue is getting our name and reputation to other contractors, because they kind of have their names that they know, and that’s been, I think, a hurdle to us.” [#23]
- A Hispanic American male owner of a construction management company, stated that a barrier in being able to market their firm to the agencies is not knowing who the players or key decision makers are. He said, “The good ol’ boys already know who they are, but unless you are in that network you don’t know who you should be marketing to. As a small

business owner, you don't have the time or resources to chase people around; you should be able to know who you need to talk to about a project or who to market your firm to."
[#24]

Using agency bid portals. Many interviewees discussed the time and resources needed to search through each of the agency bid portals to find work opportunities. [e.g. #31, #40, #37, #50, #18, #41, #8, #50, #43, #37, #25, #26] For example:

- A non-Hispanic white male owner of a controls firm when asked about potential barriers in doing business with the public agencies said, "The barrier for us is the bureaucracy of the agencies. We value our time and resources and the service we provide and working with a public agency is not conducive for our firm." He stated, "For a small firm, the amount of time and resources to complete one of the agencies bid submittal is not worth the investment only to learn you were outbid by a few dollars. In the public sector I am able to submit a proposal, get it approved, do the work, and get paid much faster than the public sector and that is critical for the success of a small firm." [#45]
- An Asian Pacific American male owner of an environmental consulting firm indicated that much effort must be made from his end to learn about contracting opportunities with public agencies, and that lack of outreach efforts and favoritism from public agencies minimizes his chances to do business with them. He said, "I have to go to their [States Public Works] site and see what is coming up. I have to do the same with City of Reno, go on their site. By the time you do this research every day, it gets old. They [public agencies] should have to advertise this stuff. They should be contacting us... they want to deal with their favorites and it is a battle to get in there." [#03]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that some of the agencies would list their opportunities on various portals and you would have to become a member of each portal to see the opportunity that the agency would have available. She said, "Most of the diversified companies are small businesses and those fee(s) we cannot afford. For example, if I wanted to get the leads or opportunities for the cities just in our metro and surrounding areas, there are 7 of them I would have to pay a fee for each entity; that would be for just one search engine." She stated that her firm is licensed in 7 different states which could cause them to incur a large cost each year. [#10]
- A non-Hispanic white female owner of a DBE-certified architectural firm said, "With McCarran, you must be on their list of qualified or selected contractors. If you are not able to get listed, you will not learn about prime contract opportunities, only subcontract opportunities." [#26]
- A non-Hispanic white male owner of a construction firm mentioned that he has to invest in other sources to learn about job opportunities within the industry. He said, "Sierra Contractors Source for northern Nevada is probably the best... however, it should always be on the website of the agencies and it would be nice if there was an agency that put something like [like Sierra Contractors Source does] together that, as a contractor, I did not have to pay a thousand dollars a year for it, because again, its barrier to entry. You force me to buy a bunch of subscriptions." [#30]

Some businesses noted that misunderstandings have caused lost opportunities. For example:

- A Hispanic American male owner of a DBE certified painting company when asked about any barriers in learning about subcontract opportunities stated that he has not properly registered with the agencies. He said, "It was my understanding once I become DBE certified I would automatically be registered with the agencies." [#51]
- A non-Hispanic white male owner of a construction firm, when asked why he has not attempted to do work with any of the agencies, said, "I would like to look for more work but I haven't contacted those agencies. I thought you would be on a list and [the agencies] would contact you as a firm they could use." [#46]

Interviewees noted additional barriers to marketing their companies. For example:

- A Hispanic American female owner of a staffing company, when asked if there is a barrier with opportunities in marketing her firm to the agency stated, "The barrier in marketing our firm is lack of funding, as it is with other small business owners...The opportunities to market our firm is not a barrier, the barrier is having the capital to provide the product or service at the level or quantity that the larger firms are requesting; is it worth marketing to the agencies if my firm is not ready to do business at that level?" [#16]
- A Black American male owner of a DBE and MBE certified construction firm, when asked about potential barriers in marketing opportunities, said "The agencies have 'meet & greets'; however, I do not feel that their marketing efforts are geared to a specific group; their efforts are global." He added that if the agencies and prime contractors would target specific groups and sizes of companies and "think outside the box" in their marketing efforts that would allow small firms to market their companies more effectively to the agencies. [#54]

Some interviewees mentioned that they did not have any barriers in opportunities to market their companies or work with public agencies. [e.g. #49, #47, #29, #22] For example:

- A Black American male owner of a construction firm said, "We don't have any barriers in working with the agencies; our first job here in Las Vegas was with McCarran and we have worked with many of the agencies over the years." [#53]
- A Black American male owner of a DBE and MBE certified construction firm said "As far as learning about the prime contract opportunities, that is not a barrier. The opportunities are well published." [#54]
- A non-Hispanic white male representative of a construction firm said that the firm does not have problems learning about prime contract opportunities. He said, "As far as advertising, I think they do a good job. I don't think there are projects out there that we don't know about...NDOT has its own weekly advertisement, RTC - WC has an email service, and there are also different publications that we subscribe to." [#35]

- A Hispanic American male owner of a DBE-certified electrical construction firm stated that his firm has not experienced any significant barriers. He said, “It all comes back to lowest bid, and we hope that the generals will do the right thing and pick the company with the lowest number, not their favorite.” [#33]
- A non-Hispanic white male owner of an architectural firm indicated that he does not learn about prime contract opportunities with NDOT and RTC – WC as he does with RTA. He said, “The Airport Authority does a great job at reaching out every year and inviting people to do business with them, and ask them to ‘send in our application,’ and we do. But agencies like NDOT or the RTC, either I am not as aware of their efforts or I am just not getting them.” [#37]
- A Subcontinent Asian American male owner of a geotechnical engineering firm mentioned that learning about subcontractor opportunities is not a barrier to him. He said, “You have a way to find out because jobs are advertised... There are ways. Like if you are signed up with NDOT, you receive those notifications.” [#29]

Bonding requirements and obtaining bonds. Interviewees discussed the ease or difficulty of obtaining bonds.

Many businesses noted that getting bonded can be difficult and costly. [e.g. #5, #49, #48, #34, #21, #23, #24, #6, #7, #12, #13, #34, #54, #53] For example:

- A Black American male owner of a DBE-certified general contracting firm stated, “If you can’t bond, you can’t bid, and that is an obstacle.” After a few years in the business, a track record and money in the bank, when requested an increased bonding limit; it went from \$50,000 to \$100,000. He stated that when “My cash flow was over a million dollars in revenue, I was feeling confident. I requested a bonding ability for \$5,000,000 my bonding limit was increased only to \$1,000,000. I was really disappointed, I began to feel something else was a-miss.” He received the same response from multiple large national lenders. He said, “I went to an out of state agent that I have never met, sent in my financials blind and said ‘I am looking for a new agent’ and asked what kind of bonding could I get. This agency granted me a \$5,000,000 bond. Someone I have never met and out of state.” [#02]
- A Hispanic American female owner of a staffing company, when asked about barriers in obtaining bonds said, “It is not that I cannot obtain a bond, it is that I cannot afford it.” [#16]
- A Hispanic American female owner of a WBE and MBE certified construction company stated that when doing business with public agencies, there are bonding requirements that her firm cannot meet. She said, “We are operating without any loans and working from the cash-flow or capital that the company has; we do not want to tie up working capital to seek out apply for higher bonding limits. It does restrict our capacity to actually perform the project because we have no-cash flow to cover associated cost during a project, so we are working on smaller projects or those that do not have any bonding requirements.” [#20]

- A non-Hispanic white male owner of a construction firm, states that bonding has been a barrier for him as a small business owner. He gave an example, saying that during a contract with the City of Reno, the bonding requirement changed and he lost the contract. He said, “There was \$65,000 worth of hydrants to be done, it was on the contract. So it said on there specifically I had to get a bond. I went and got a bond, but it put me out of range with the other competition...all these guys that do city works all the time, they got a cheaper bond rate. I lost the bid by \$1,000.” [#22]
- A Black American male owner of a construction firm said, “Bonding is just a way to exclude companies by not having the longevity or financial stability they require; another tool to keep small firms out of the marketplace.” [#53]

Some representatives stated that bonding is not an issue for their business. For example:

- A non-Hispanic white female owner of a construction firm stated that she did not have any barriers in bonding requirements or obtaining a bond. They have a 1.5 million bond limit and they have not had any issues maintaining. [#17]
- A non-Hispanic white male representative of a trade association indicated that he does not believe bonding requirements and obtaining a bond are potential barriers to doing business in Nevada. He said, “Getting a performance bond or a surety bond is a direct component, is a mathematical formula. Either you qualify or you don’t.” [#19]
- A non-Hispanic white male representative of a construction firm, when asked about barriers due to bonding, indicated that they do not face any barriers when obtaining bonds because bonding is facilitated by their larger parent company. He said, “[the larger firm that owns the company] provides the bonding for us. They are a couple billion-dollar company, so they facilitate that for us. We are a wholly owned subsidiary of them.” [#35]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm said, “Initially, it was difficult in obtaining bonds; however, we learned that the bonding firm we were working with had their own limitations. Once we moved on, there were no barriers.” She added, “It is also important to have an understanding and expectation of the bonding requirements, which can eliminate the barriers. If a firm has revenue of \$100,000 you cannot expect to receive a \$2M project; the perception is there is discrimination since they are not able to obtain a bond when the company does not have the financial capacity to perform at that level.” [#55]

Insurance requirements and obtaining insurance. Interviewees discussed whether insurance requirements and rates were barriers for their businesses.

Many interviewees said insurance requirements and high insurance rates are barriers. [e.g. #8, #48, #7, #2, #5, #16, #17, #21, #22, #41, #37, #25, #28, #34, #46] For example:

- A non-Hispanic white male owner of an electrical construction firm stated that a barrier for his firm is keeping the injury rate low enough so they are able to maintain an appropriate Safety Instrumented Systems [SIS] rating. He said, “Even with minor injuries it can impact

your ratings and some companies require a certain point and if you do not meet that, you do not qualify to bid on the work; based on the timeline that could impact you for 4 years.” [#27]

- A non-Hispanic white male owner of a construction firm mentioned that insurance requirements on jobs have become a large barrier. He said, “Insurance requirements have been ballooning out of control. As far as what was required last year, what’s required this year, and what’s current... I know I do work for Reno Tahoe Airport so I have the five, six million dollar insurance limit, but there are a lot of companies that are small and have a million dollar insurance limit, and that use to be the gold standard. If you had a million dollar liability insurance you could bid work, now it’s like two and four, and then they are adding these weird additional policies on.” [#30]
- A non-Hispanic white male owner of an engineering firm stated that insurance requirements and obtaining insurance is a barrier for a small firm. He said, “When I opened the firm, we already had projects we were working on, so I had to get insurance and the amount was very high and we had to pay for it all up-front... [Insurance requirements] are a cost barrier for a small growing firm in the first years of business.” [#32]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that her firm must carry errors and omissions insurance and the cost is based on a percentage of your previous year gross of your receipts. She said, “That makes it really tough. Eventually I want to go fight for legislation because I have to insure my projects at a very high level...In most cases the actual architecture fees are very minimal and a great portion of our gross income goes out to other trades [engineers] and are not retained in our revenue, we are required to insure at that top level...I am asking our insurance agents why we doubly insure the work. I insure the work and the engineers also have to insure their work.” [#10]
- A Subcontinent Asian American male owner of a geotechnical engineering firm mentioned that insurance requirements limit his ability to do work with Nevada public agencies. He said, “Sometimes they ask for one million, two million, but as a small firm it’s hard to meet that limit... This applies to general liability insurance or errors and omissions for example.” [#29]
- A non-Hispanic white male owner of an engineering firm, when asked about insurance requirements, mentioned that with Construction Manager at Risk projects there is much more liability so insurance rates are much higher compared to other projects. This creates a barrier for a small business like his. He said, “Insurance companies have realized that Construction Manager at Risk has a bad name... when I renew my insurance, I don’t want to have Construction Manager at Risk projects on my policy because they are the new problem. We went through a bad time [during the recession] and insurances companies got hit hard, everyone’s rates went up.” [#36]
- A non-Hispanic white female owner of an environmental engineering firm stated that one of the biggest misconceptions with subcontractors is insurance requirements, such as workers compensation. She said, “When you are a subcontractor, you do have to carry workers compensation or we, the prime, have to pay it for you. Trying to explain this to our

subcontractors, is a barrier; we spend a lot of our time trying to educate our subcontractor as well as the prime contractors.” [#04]

Some interviewees have not had problems with insurance. For example:

- A Hispanic American male owner of a DBE certified surveying firm mentioned that obtaining insurance to run his firm has been a smooth process. He said, “We have really good insurance coverage, more than [is] sometimes needed, but for public works projects we need to have a certain amount of insurance. Obtaining insurance coverage has been good, as far as professional liability, general liability, automobile and workers’ comp.” [#42]
- A non-Hispanic white male owner of a construction firm, mentioned that while insurance is an expensive part of the business, it is needed to have a successful business and being able to obtain it has not been a problem. He said, “Insurance is always expensive, but I think we got a good deal on it. Again, having a good relationship with our insurance company. I think it has always been easy getting insurance, but it is definitely an expensive part of the business.” [#30]

Obtaining financing or access to capital. Financing and access to capital is important for small businesses. Business owners and representatives discussed whether obtaining financing has been a barrier.

Many interviewees discussed the difficulty for small business to get financing and access to capital. [e.g. #2, #49, #48, #18, #27, #6, #12, #42, #ABC1, #WBEC3] For example:

- A Hispanic American male owner of a DBE-certified general contracting firm stated that it is a barrier for a small business owner to get access to capital or get financing. He said, “I was fortunate to have good personal credit and that helped, but it still was not enough. But I did what I had to do until we were able to get the work. Not all new and or small business owners have that to help them.” [#05]
- A Hispanic American female owner of a staffing company stated, “Access to capital or obtaining funding is the biggest barrier small business owner’s face...It doesn’t matter minority or woman-owned, all small business owners are faced with the barrier in obtaining financing or access to capital.” [#16]
- A non-Hispanic white male owner of an engineering firm stated that obtaining financing can be a barrier for a small firm. He said, “Getting a loan is a joke. They don’t even look at performance of you company; some of the items that they look at are not even relevant.” [#32]
- A Hispanic female representative of a small business assistance organization indicated that establishing credit is a barrier to starting a small business for Hispanic Americans due to different cultural norms pertaining to money. She stated, “Some people in the Latino/Hispanic community pay in cash...They have the money [to start and maintain a business] but they don’t have the credit established, and it is important to have the credit.” She went on to note that obtaining financing can be difficult. She said, “I have a client for

example...She needs to get a loan because she doesn't have the cash flow. She was asked to do a big project [and she needs a loan to fulfill the job]...The loan process takes a long time...You are required to do a business plan. You are required to do projections. We can help them, but it's not going to be tomorrow and they get impatient." [#13]

- A Hispanic female representative of a small business assistance organization indicated that financial assistance is essential in the Latino community. She mentioned that she has heard of instances of unethical practices from traditional banks. She stated that banks promise small business owners a loan and are asked to sign up for services provided by the bank, yet in the end, the loan gets denied. She said, "There is one bank, a really big bank here in Reno that will say, 'Yes, will give you the loan but sign up to our payroll system'... Then they tell you, 'No [your loan is not approved]'. They are not being ethical." [#13]

Some interviewees indicated that financing and access to capital has not been a barrier for them. For example:

- A non-Hispanic white female owner of an environmental engineering firm, when asked if obtaining financing or access to capital has been a barrier for her firm, said, "We have been fortunate to have access to capital that could help cover expenses temporarily while waiting to be paid." She stated that not all small firms have that access to capital and it is a barrier. [#04]
- A non-Hispanic white male owner of a controls firm when asked how financing played a key to the success of his firm stated, "We are a self-funded firm, no financial institution wanted to lend us money, now that we have money they all want to give us money." [#45]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm stated when asked about potential barriers in obtaining financing said, "Due to my finance background, obtaining financing has never been a barrier for our firm." She stated that their financial creditability has allowed them to carry a \$30M bond, and their largest project has been \$9M. [#55]

Prequalification requirements. Interviewees discussed prequalification requirements, and whether those had been a barrier to business success.

Many interviewees stated that prequalification requirements are a barrier for small businesses. [e.g. #12, #27, #3, #6, #31] For example:

- A Hispanic American male President of a minority-focused chamber stated that prequalification requirements are a barrier for small businesses. He said, "Our members feel the prequalification requirement increased to be able to cut the small business out. When so many of the lower tier subcontract work is bought 'in-house,' there is not much opportunity for a small subcontractor to have opportunity to get a project that would allow him the qualification. Rather than minimizing it [the prequalification] and making it easier to get access to opportunities, [other barriers, such as bonding] make it very difficult to gain the qualification needed." [#07]

- A Black American male owner of a construction firm, when asked about prequalification requirements said, “Many of the requirements are there to keep the new-comers out of the game; we have seen large firms do this with small firms.” He stated that prequalification requirements including experience, work history, insurance, and bonding are barriers for small firms. He said, “Agencies or entities should have tier programs for smaller contractors so they are playing within the area that will help them be successful, rather than to create more barriers and keep them from having opportunities. One size doesn’t fit all.” He added that prequalification requirements are exclusionary for most firms and added, “For our firm it is there for inclusion; we want to find opportunities for small, woman- and minority-owned firms.” [#53]
- A non-Hispanic white male owner of a construction firm mentioned that prequalification requirements are a hurdle to his firm. He said, “We are prequalified with the state’s public works, and we are prequalified with the state’s contractors board, and with NDOT. We are already prequalified with them and on top of that we are having to prequalify on everything else.” [#30]
- A non-Hispanic white male owner of an engineering firm stated that the prequalification requirements can be a barrier for a small firm. He said, “To be able to qualify you have to have the experience, and if you are not able to get the experience how will you ever qualify?” He also added that some of the prequalification requirements are unnecessary. As an example, he said, “Why does it matter how long a firm has been in business? The agencies [should] put more emphasis on the resumes of the people working on the project rather than looking at how long the firm has been in business.” [#32]
- A non-Hispanic white male owner of an architecture firm said, “We have spent many hours and monetary resources in the preparation of a statement of qualifications when requested by the agencies, only to be told that they do not have adequate funding for any projects. Large firms may be able to absorb the costs associated, but smaller firms are not able to and it is a barrier.” [#43]
- A Hispanic American male owner of a construction management company stated that some of the prequalification requirements are low. He said, “I feel that they are low because they want to make you think you have a chance and then when you open the bid you realize [you] don’t have a chance. I think they are low and they do it for a purpose and they vary from job to job.” [#24]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm said, “Generally, our firm does not have any barriers with prequalification requirements; however, with the Construction Management At-Risk (CMAR) program, it has created a barrier. It created exclusivity where contractors who have never been awarded a CMAR are able to bid; this is eliminating able- contractors in bidding.” She stated in a recent CMAR project, the final project cost were in excess of \$6M, when the project should have been in the \$2-3M range. “How does this prequalification requirement and program create opportunities and produce projects that are in the best interest of the community and tax payers?” She said, “The barriers the agencies have created, the reduced opportunities for contractors, prequalification requirements have taken all the joy out of the business.” [#55]

- A non-Hispanic white male owner of a construction firm mentioned that he would like to see the prequalification process be more streamlined, and that agencies work together to have one prequalification process that is used across the board. He said, “Why have a contractors’ board if NDOT wants to pre-qualify and pre-pre-qualify above that? It’s redundant... [they should] work as agencies together to have one licensing board or qualification board.” [#30]

Many interviewees noted difficulties getting the experience needed to be prequalified. [e.g. #18, #19, #30] For example:

- A Black American male owner of a DBE-certified general contracting firm said that all work experience is not considered equally for prequalification requirements. He said “I understand the reasoning and the rationale behind it [requiring prior work experience for prequalification], but it is a barrier. At the time in 2006, we had performed some sizeable projects for some local municipalities but [we could not use those as] qualifications [for] Federal projects.” [#02]
- A non-Hispanic white female owner of an environmental engineering firm stated that prequalification requirements are a barrier for a small business owner in the aspect that agencies want to see experience but if firms cannot get work in the area they cannot get the experience. She said, “The barrier is that the agencies continue to hire firms from out of the state to do the work, eliminating the opportunities for local firms to gain the experience... One of the biggest barriers small business owners face is the previous work experience requirement. If you have never been given the opportunity to work with the agency to develop that particular scope of work expertise how are you ever able to be included.” [#04]
- A Hispanic American male owner of a DBE-certified general contracting firm said, “Prequalification requirements [are] a massive problem that we [small business owners] have...The agency does not look at the experience you have personally, rather it is only looks at the experience of the company. So as a small business, when you first start your company you do not have a resume yet...It took me like 7 months to get my first project.” [#05]
- A non-Hispanic white female owner of a DBE-certified environmental firm stated that prequalification requirements are a barrier. She said that her firm has been asked if they have the experience with a project of a certain size and/or type and if not, they lose points and may not qualify for the project. She said, “I do have the expertise and knowledge, it is just that our firm has not done a project of that size or that there has not been a project like this in Nevada for us to have meet the prequalification [requirements].” She said that the entity will then bring in a firm from out of state that does not have the experience in Nevada’s environment, but yet they have the experience from other states and that qualifies them. [#08]
- A male representative from an architectural firm that has completed multi-million dollar projects stated that experience is the largest barrier to doing work with public agencies. He asked, “How do we get experience? And that’s the whole key... Capacity is one but

experience. Because if you don't get the experience you can't compete. The city hall project, \$118 million. Not one minority architect on that project." [#LAS35]

Some interviewees explained that small firm size resulted in disqualification from projects. For example:

- A non-Hispanic white male owner of an architecture firm, when asked if there are barriers with prequalification requirements for his firm said, "I have recently noticed that some of the agencies have restricted their project budgets based upon the number of principals or staff within a firm." He stated "For example, if your firm is 1-3 people the agency is only able to release up to certain amount in fee." He said, "Due to our size, not our qualifications, we are limited opportunities." [#43]
- A non-Hispanic white male owner of an architecture firm, when asked about barriers with prequalification requirements said, "A barrier is the selection process for qualified firms; a single partner firm is not considered qualified and not included in the list of approved firms." [#43]
- A non-Hispanic white female owner of a DBE-certified engineering firm when asked if prequalification requirements are a barrier for her firm, she stated that generally they are not unless it the size of the firm is being looked at. She said, "Most small to mid-size engineering firms do not carry a bench of people. A small firm may get over-looked when being ranked for the qualifying list due to size. We let the agencies know that just because we are a small firm, we are able to partner with other firms if necessary and we have commitments from other engineer's that will come take that into consideration when ranking small firms. So size is a barrier for small to mid-size firms when it does not have to be." [#25]

Some representatives stated that they have had no problems with the prequalification process. For example:

- A non-Hispanic white female owner of an iron construction company when asked about potential barriers with prequalification requirement stated, "The only barrier for our company, which is by choice, is our licensing limits. I don't feel there are any barriers with prequalification requirements for our company." [#47]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company, indicated that prequalification requirements have not been a barrier. [#23]
- A Hispanic American female owner of a WBE and MBE certified construction company stated that her firm has been able to work through some of the prequalification barriers by marketing their business and meeting with potential clients to establish a relationship with them before an opportunity is solicited. She said, "From there we go through the process of becoming a vendor and in some instances a preferred vendor. We have been providing our statement of qualifications from there. We are now receiving solicitations within the scope that we are able to do business." [#20]

Licenses and permits. Some interviewees indicated that not having knowledge about how to get licenses and permits has been an issue. For example:

- A non-Hispanic white female owner of a construction firm, said, “When we first started, getting assistance for licensing and permits was very difficult. When I would go to the County and the City offices to obtain the license and permits we needed they were not helpful, they would tell me to just read it. Having better support at these agencies when trying to obtain the proper license and permits for a project would be very helpful; for someone new this is a barrier.” [#17]
- A Hispanic American male owner of a construction management company stated that licensing and permitting is not a barrier for them. He said, “For most of the work that we do, we are not required to be licensed unless it is related to the electrical work and one of our principals is a licensed C-2 contractor.” [#24]
- A Hispanic female representative of a small business assistance organization indicated that obtaining licensing for Latino business owners in the construction industry is a challenge due to the extensive requirements and the owners’ low level of understanding of the process. She said, “Constructor’s board license, that’s a tough one because they have to take a test. The constructor’s board is very strict about it. I don’t think they are very friendly oriented to helping clients and there is a lot of envy in the market... So I tell [my clients] to study the requirements and find someone to mentor them through the process.” [#13]
- A Black American male owner of a construction firm when asked if licensing and permits were a barrier for his firm said, “No, we were the first minority contractor to have an unlimited license in the State of Nevada. [#53]
- A Black American male owner of a DBE and MBE certified construction firm, when asked about potential barriers in licensing and permits, said “Starting out, it was a barrier to meet all the requirements established, but it is no longer a barrier.” [#54]

Size of contracts. Interviewees discussed the size of contracts available, and whether size is a barrier to obtaining contracts.

Size of contract was noted as a barrier by many business owners and representatives. [e.g. #20, #21, #22, #23, #07, #54, #WT01] For example:

- A Black American male owner of a DBE certified construction company when asked about barriers size of contracts said, “In the State of Nevada, the contractors board limits what you are able to bid, so size of contracts does become a barrier only because of the limitations set forth by the contractors’ board...In the other states that we have contractor’s license in, there are no contract license limits set forth by the contracting board...The State of Nevada Contractors Board established new limits regulations following the economic crash here in Nevada, these are barriers for contractors...Recently, we applied for a new license; it took 6 months to receive the license from the contractors’ board.” [#49]

- A non-Hispanic white male owner of an engineering firm stated that in some instance the size of a contract does need to be taken into account. He said, “We do have to look at the size of a project and must determine if our staff is capable of taking on more with the projects that we are currently working on.” He stated that if there were smaller contracts going out, we would bid on those because the larger firms would not compete for those. [#28]
- A Black American male President of a minority-focused trade association shared that a barrier that minority owned business owners have is the size of contracts. He said, “A recent roadway project that was a multi-million dollar project that included many trades. But instead, all of it was awarded to one large private construction firm rather than breaking it up and saying ‘Can you do this small portion for me? This will create the opportunities for the smaller firms.’” [#11]
- A non-Hispanic white male representative of a trade association mentioned size of contracts as a barrier to business success for smaller firms. He said, “Not being big enough to take on the size of the job that may be required [is a challenge]... I am always advocating for public agencies to not bundle their contracts, to not combine smaller construction projects into one large construction project... It restricts the small firms, their ability to perform. A small contractor can’t do a 20 million dollar job. They might be able to do a two million dollar job. But if you take 10 two million dollar jobs and you make them one 20 million dollar job, it restricts who is even able to compete.” [#19]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm stated that until you are awarded a large contract it is difficult to have the opportunity for larger projects. She said, “Even though our firm financially was able to carry large projects [and] our license and bonds limits were not a barrier...It is near impossible to be awarded a large project, if you do not have that history.” [#55]

Some interviewees noted that size of contract is not a barrier. [#2, #3, #16, #51, #42, #24, #29, #35, #32, #31] For example:

- A non-Hispanic white female owner of a DBE-certified environmental firm said, “I have positioned myself and my company [in a way] that reflects our capabilities. I have built great relationships and a reputation of financial ability, integrity, and hard work that has allowed me access to the financing or resources I would need to have the capacity to perform in a contract, and the size of the contract would not be a barrier.” [#04]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that size of contracts being a barrier to small businesses is a misconception. She said, “My firm can go head to head with any larger firm. We do not have bonding capacity restrictions, so there is no reason for this to be a barrier for us.” She stated that she is in the process of engaging in 3 joint-ventures. She said “I believe it will take a village to come together to knock off some of the larger firms, so we [smaller firms] are coming together and will go after, toe to toe with some of the larger firms.” [#10]

- A Black American male owner of a DBE certified architectural firm when asked if there are any barriers in size of contracts said, “Size of contracts is not a barrier for our firm, we are able to integrate other architect firms should we need to increase our capacities.” [#50]
- A non-Hispanic white male owner of an architecture firm said, “Size of contracts are not [a barrier] as long as my firm has the bandwidth for that project.” He stated that, “We have great relationships with other firms and if we need to have access to additional architects or consultants, we are able to increase our capacity when necessary.” [#44]

Prevailing wage, project labor agreements, or any requirements to use union

workers. Interviewees discussed prevailing wage requirements that agencies place on certain public contracts, as well as other wage-related issues.

Many interviewees indicated that prevailing wage and union requirements could present a barrier to working on public contracts. [e.g. #51, #20, #28, #14, #30, #34, #WT05, #07, #ABC3] For example:

- A Black American male president of a minority-focused chamber stated that for the smaller businesses, the prevailing wage, labor agreements and requirements to use union workers is a barrier. He said, “There are certain work crew rules...It is much different for a small business owner pulling together a crew than when the union has to pull together a crew. If you are small, that 20-30% burden, if it doesn’t rule you out for the bid, will hurt you in actual execution of the contract.” [#06]
- A non-Hispanic white male representative of a trade association indicated that certain clauses to labor agreements puts minority- or woman-owned small businesses at a greater disadvantage. He said, “Some of the larger firms, they’re signatory to labor agreements, they have clauses in the labor agreement that require them to use subcontractors that are also signatory to those labor agreements.” [#19]
- A non-Hispanic white male representative of a construction firm, when asked about barriers involving union workers, mentioned that being non-union is a barrier to the firm. He said, “In Nevada being non-union is a hindrance. Union contractors can’t use non-union firms...so we don’t quote them because we know they won’t use us due to their labor agreements.” [#35]
- A non-Hispanic white male owner of a construction firm mentioned that when CMAR projects are picked up by unionized contractors, he can no longer bid a subcontract on those jobs, limiting the pool of opportunities for his small business. He said, “You have these businesses that pick up the CMAR project and they are union contracts. Then you are excluding 90 or 88 percent of business in Nevada because they are not unionized.... You can’t even bid the sub-work to them.” He went on to say that project labor agreements are a “Terrible barrier to entry...Just brainwashing by unions saying that if you don’t use a project labor agreement, you’re not going to have enough labor to complete the job... these agencies that do these project labor agreements are big companies, big unions just taking advantage of the tax payers and eliminating the competition.” [#30]

- A non-Hispanic white male owner of an electrical construction firm said that the project labor agreements are a huge barrier for his firm, noting that Nevada is a right-to-work state. He said, “I don’t see how these two philosophies can fit in the State, you cannot be a right-to-work state and then have a PLA on publicly funding projects.” [#27]
- An Asian American female representing a woman-focused organization shared that getting sustainable rates can be an issue. She said, “The majority of our WBE’s today are non-union. They have a difficult time [gaining] access to the contracts. Pricing is affecting them. Recently, I had a WBE that had bid a project. She had been in the business for a long time and because of her networking they had sat down with her to give her a debrief[ing] and it was because of pricing. She had to reduce her prices way below what she normally would to get the contract, which she needed to have on her resume. That [contract] would allow her to get other work in the future. Whereas other WBE’s they will just walk away and will not lower their prices. So this is a barrier. Maybe they can get the project, but can they make money that they need to sustain their business?” [#12]

Many firms said that prevailing wage or union requirements are not a barrier when working on public projects. [e.g. #52, #17, #25, #5] For example:

- An Asian Pacific American female owner of a DBE-certified environmental engineering firm stated that they do pay the prevailing wage on the majority of their projects which have a much higher benefit package. She said, “There are some non-union companies that can out-bid us and we are ok with that; we just do what we can do.” [#09]
- A non-Hispanic white male owner of a landscaping company, when asked about prevailing wage, mentioned that he has previously worked with prevailing wages and has not faced any barriers. He said, “The guys sure love [to work with prevailing wages]. It’s a good incentive for your workers.” [#41]
- A Hispanic American male owner of a construction management company stated that prevailing wage is not a barrier for his firm. He said, “If you are bidding that project, you understand that going into it, what the expectations are and ensuring you are able administratively to handle that project.” [#24]
- A non-Hispanic white male owner of an electrical construction firm said, “I don’t have a problem with prevailing wage...with a higher wage for my employees that provides them a better lifestyle, and I have no problem with it.” [#27]
- A Black American male owner of a construction firm when asked if prevailing wage or project labor agreements are a barrier for his firm said, “Most people feel that union requirements is a barrier to entry; I have found that unions are more than willing, in most locations, to give project labor agreements and that makes it possible for non-union firms to work on a union project...I do not feel it is a barrier, the majority of minority firms do believe that it is a barrier. I have been able to navigate and overcome those barriers.” [#53]

Other unnecessarily restrictive contract specifications. Interviewees discussed contract specifications that they believe to be unnecessarily restrictive, noting such things as excessive paperwork, insurance, and software requirements. For example:

- A Hispanic American male owner of a DBE and ESB certified architecture firm stated that in most cases, contract specifications are cumbersome. He said, “I had a recent situation, following the completion of an awarded project, [where] the agency came back and said that the person who signed the contract did not have the authority to do so. They had requested that I sign a new contract before I would be able to get paid for the completed work...With having very limited resources, to avoid litigation I had to renegotiate the contract, costing me additional time and resources that it shouldn’t have.” [#40]
- A non-Hispanic white male owner of an architectural firm mentioned that he has faced unnecessarily restrictive contract specifications when considering a job with RTC – WC. He said, “We looked into [a job with RTC – WC] and we felt their expectations were an awful lot for the project itself. There was a lot of bureaucracy. They wanted financial statements; they wanted all kinds of things to be part of it. I am a little four man firm; I did not want to invest that much more time and effort on unnecessary requirements... I voiced my concerns at the pre-proposal meeting... no one else wanted to speak up about it in the meeting even though some of my colleagues in the room were all having the same issue. In the end, we did not chance the project. We decided to back away. I saw that this was not something no matter what we would not be favored for.” [#37]
- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm, stated that there is some risk in working with state, city, and county agencies in Nevada because of insurance requirements that are above what most insurance companies are willing to insure. She said, “I reached out to the State on this, but due to the type of project they would not give me valuable information to help us respond. Most firms still bid on the projects in spite of their being a conflict between State of Nevada contractors and insurers in the professional service industry.” [#18]
- A non-Hispanic white female owner of a DBE-certified engineering firm stated that an unnecessarily restrictive contract specification is the professional liability insurance. She said, “I have worked for agencies and based on the scope of work we were doing it did not require us to carry it and we were able to just strike through the language. For other agencies they are not as willing to do that.” [#25]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that there is restrictive contract language that is not supported by errors and omissions insurance. She said, “This is something that had been discussed in our industry for many years with state officials, associations and agencies and it has not been changed.” She stated that it would benefit the agencies if they would get in alignment with their contracting provisions and remove the contract language contradictions so that it is supported and not a risk that small business owners in her industry must take. [#26]
- A non-Hispanic white male owner of an engineering firm stated that a barrier with NDOT is that they require you to use a particular kind of CAD software that they do not have. He

said, “Because of that barrier I probably will not get any projects from NDOT because I am not willing to spend more money on the licensing fee for that program. I pay over 6-figures a year for the right to use software and not willing to spend another six figures to hope that will help me land a job with NDOT. If that requirement is listed, we will not continue reading the RFP.” [#28]

- A non-Hispanic white male owner of an architectural firm stated that public agencies include more requirements of compliance than private firms. He said, “I don’t really see any barriers or unnecessarily restrictive contract specifications other than at McCarran, where they require you to use certain CAD software or format your CAD in a certain way. For a small firm, this is a barrier due to the cost of licensing additional software program that you need only for one agency and that you are not guaranteed a project.” [#31]
- A non-Hispanic white male owner of an architecture firm said, “Yes, there are unnecessary contract specifications; for example, the agencies provide the same contract specifications and requirements for small projects as they do for the large projects...The insurance requirements for a \$100,000 project require a \$5 million dollar insurance policy; this is unnecessary for small projects and for small firms.” [#43]
- A non-Hispanic white female owner of an environmental engineering firm said, “One unnecessarily restrictive contract specifications is the payment terms for subcontractors...For a small firm that is in the start-up phase of a project, timely payment is critical for a contractor.” She stated that some of the agencies have unnecessary restrictive contract specifications regarding the payment terms for subcontractors. She said, “It should be a level playing field for the agencies, prime and subcontractors and all are required to be paid in a timely manner.” [#04]
- A Black American male owner of a DBE certified architectural firm, when discussing unnecessarily restrictive contract specifications, stated, “The contracts are standard for a \$20,000 project and a multi-million dollar project.” Because they don’t have a legal team that can review the contracts, the owners must review the contracts and do their best to determine areas where they may be overexposed and work with what they are able to. He said, “I recommend the agencies establish contracts and associated items that are more conducive to small firms.” [#50]

Bidding processes. Business owners and representatives discussed the bidding process and potential barriers to be awarded contracts.

Many interviewees stated that the bidding process was time consuming and that they did not have the resources or staff necessary to submit bids within the allotted time frame. [e.g. #49, #34, #53, #31, #51, #WBEC2] For example:

- A Black American male owner of a DBE-certified general contracting firm said the time and cost of putting proposals together can be a barrier for new DBEs. He said, “The amount of materials is extensive and costly...As a new DBE, it is a barrier. It is not an intentional barrier, but the municipalities have to do it to ensure they are getting qualified bidders.” [#02]

- A Hispanic American male owner of an electrical company said, “A barrier for our firm in the bidding process is that I am both an owner and I am one that is doing the work. I don’t have the staff to research and prepare the bids as they should be within the time frames that we have to submit the bid. They are intellectual jobs so you have to be very precise and I don’t have that person to do that, so it does inhibit my ability to bid quicker. Speed is a factor in many bidding projects, if they see you are able to bid quicker that shows that you have history, regardless of if you do or not, but the perception is that you have the experience and that makes the contractors feel better.” [#21]
- A non-Hispanic white male owner of a landscaping company indicated that the bidding process with public agencies has been a barrier to him, largely due to his lack of time and resources. He said, “My biggest barrier is bidding the work. It takes knowledge and practice on bidding the work....I don’t have a formula yet. I need to break it all down and make sure all the parts are covered, and all the labor is covered. I am still a little old school; I don’t have a program that is just going to generate all the numbers for me.” [#41]
- A Hispanic American male owner of a construction management company stated a potential barrier in the bidding process is the amount of time provided to bid. He said, “In some instances, the lead time on the opportunities are just not feasible to prepare a sufficient bid and we will have to turn it down. I am not going to bid a \$30 million dollar project in 5 days and take a chance of missing something and then not have an opportunity at all.” He stated that providing sufficient time to submit a bid is critical to the bidding process. [#24]
- A non-Hispanic white male representative of a construction firm mentioned that short bid windows are a barrier for the firm. He said, “A lot of times the bid window for these jobs is two to three weeks, maybe a month long, so it is hard to get some of these things [like DBE goals] in place for these jobs.” [#35]
- A non-Hispanic white female owner of a DBE-certified engineering firm stated that the bidding process can be a barrier. She said, “Some of the agencies and other public works have a statement of qualification requirement for professional services and that can be very cumbersome.” She stated that it can be intimidating for a small firm that has not gone through that process previously. She said, “It takes a considerable amount of time to become qualified, but if you want the work it must be done.” [#25]

Non-price factors public agencies or others use to make contract awards.

Interviewees discussed factors that are perceived to impact contract awarding.

Many interviewees noted that favoritism plays a role in who receives contract awards. [e.g. #3, #46, #5] For example:

- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm stated that a non-price factor when awarding contracts is name recognition. She said, “I interviewed with an organization and when the award came out, it was the same firms that had always done work with this particular organization. I had requested a debriefing. I wanted to understand why I didn’t get an opportunity. I believe name recognition played a big factor in the contract award.” [#18]

- A Black American male owner of a construction firm stated that a local university has a number of firms that perform the majority of the required work. He said, “They do so much work for the university that they not only have offices on-site they also have helped draft the contract specification to read that the more experience you have in doing work with the university...the higher your qualification rating is, and the better chance you have in winning the contract. It is rigged.” [#53]
- A non-Hispanic white male owner of an engineering firm mentioned that he believes special favors are taken into consideration when contracts are being awarded. He said, “I don’t wink at contractors and I don’t wink at owners, because that’s typically what is going on in the meetings. There is a problem, and the contractor will make it go away, and then engineer knows that he got covered and now he is in debt with that contractor. I don’t think it should be an adversarial relationship between contractors and engineers, but I think that they should not be as aligned as they are right now.” [#36]

Many interviewees said that small firms do not receive contracts because of the company size, even though the firms have the capacity to perform the work. [e.g. #22, #46, #32] For example:

- A Black American male owner of a DBE certified architectural firm when asked about non-price factors the agencies use to make contract awards said, “Perception of capacity.” He added that many small firms are disqualified for a project or approved list due to their size. He said, “Our firm has the latest software and technologies and will allow our staff of 7 to perform double the work, if not more. This allows us to integrate into various areas of a project, work efficiently and effectively while providing a great design and product for our customers. This is not a barrier in the private sector, yet, the public agencies deem it so.” [#50]
- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm, stated that some of the other private agencies, such as Public Works, had contract restrictions that would only allow them to do business with firms that had more than three employees. These agencies did have a desire to work with smaller firms. She said, “They were able to determine what their new requirements would be and with that change in their restrictive contract specifications. That created opportunities for small firms to now be able to do business with them. We understand the intent was to eliminate the non-local firms so when the agency was open to making a change to support the small firms, which is no longer a barrier.” [#18]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that on a project her firm was selected in the top three firms for a prime contract opportunity and was placed in second based upon the proposal. She said, “We had put together a great presentation, built a solid team that was in ready and in place for this project, it looked very promising...Once the award was made and we learned who we had competed against, I questioned why we were the only small firm up against the larger firms, it felt as if we were placed there so that the larger firm would be selected.” [#26]

- A non-Hispanic white male owner of an architecture firm said, “The barrier is that the agencies do not look at our capabilities or experience. They look at the size of our firm and that creates the barrier in size of contracts our firm is able to participate in.” [#43]
- A non-Hispanic white male representative of an engineering firm said, “We have direct access to additional support from the main headquarters; however, when the agencies look at the size of the local firm they will not consider due to our size and limit us on larger projects.” [#39]
- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm stated that size of contract is not really a barrier for her firm; however, for the agencies the size of her firm is a barrier. She said, “The agencies feel that architecture firms need to be larger than what it really needs to be. Many firms only have one principal and only have one architect, that does not keep us from outsourcing with other architect’s that may have a lag in their schedule and are able to assist us on larger projects.” [#18]
- A non-Hispanic white male owner of an architecture firm said, “It should not be due to our size that we are considered not qualified, when our capabilities prove that we are. Most firms do not have specific industry or design experience, when they need it they hire a consultant that does and learn from [them], then [they] are able to provide the experience being requested...All professional service firms may not have a full staff until the projects become available...The agencies should not limit our opportunities because of their perception of our abilities. Technologies today [allows] all small firms to perform more and with less people.” [#43]

Timely payment by the agency or prime. Interviewees discussed whether they had issues with receiving timely payment.

Many owners and representatives indicated that timely payment is a problem. [e.g. #2, #10, #16, #8, #49, #21, #43, #22, #42, #14, #REN13, #REN14, #LAS44, #19, #32, #53, #ABC3] For example:

- An Asian Pacific American male owner of an environmental consulting firm indicated that while working on a project for RTC – WC, he had a 75-day delay on payment from the prime contractor. He stated that the policy of the prime contractor was to pay subcontractors after they had received a check from RTC – WC. He indicated that even with this process in place, payment lag was a problem for the prime of the project. He said, “We were proving to them [that they] got this check from RTC and it cleared your bank on this date. Why didn’t we get paid right away based on that?” [#03]
- A non-Hispanic white female owner of an environmental engineering firm said, “Timely payment by the agency and the prime contractors is a barrier, if not one of the greatest barriers to small business owners...[my] firm has declined bidding on a number of contracts because we could not take the risk of not getting paid timely. ..Contractors are required to pay their subcontractors within 30 days of receiving an invoice, regardless. However, for the agencies, [they] generally pay when they are happy with the job or when they ‘feel’ like paying, regardless of contract terms...There must be consistency or some

consideration for small business owners and ensure timely payments are enforced all around.” [#04]

- A Hispanic American male owner of a DBE-certified general contracting firm shared his experience with prime contractors, government and state agencies requiring a 100% payment performance bond up front and then subcontractors having to wait for payment from the agencies and/or primes. He said, “What is the point of having the 100% payment performance bond when we [small business owners] have to put out all of the money up front? We do the work and wait to get paid whenever they are ready to pay us. They tie you on the bonding, they tie you on the work and then all of a sudden you are there with your hands tied. For a small contractor this is a killer... Why can’t the key decision makers in these agencies make the decision to release the funds quicker for a small, woman or minority business owners... They [prime or agency] already have guarantee with the payment performance bond...It is like they have the money three times.” [#05]
- A non-Hispanic white female owner of a construction firm said, “Timely payment is a barrier for smaller businesses; the prime contractors will tell us ‘you will get paid when we get paid,’ but we are not able to wait 60-90 to get paid. I have learned to utilize the contractor’s board to file a complaint on a general contractor. I will fax a copy of the complaint to the contractor and let them know this is being submitted to the contractor’s board in 24 hours and it is amazing how quickly we get paid. We are to be paid no more than 10 days after the prime contractor has received payment, but that is not always the case.” [#17]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company mentioned that timely payment has been a problem when working with a Nevada agency as a subcontractor. She said, “We were a sub that did a job for Public Works and we just found that they were really slow in responding to our invoice, and then when it came down to being due, they told us that it wasn’t right. They sat on it for so long that why was it okay for this many days, and now it’s not?... even though their contract said that they could pay us at any time, that it didn’t depend on when they got paid, they’re still sticking to that they hadn’t been paid.” [#23]
- A Hispanic American male owner of a construction management company stated that timely payment by the agency or prime contracts is a barrier for small businesses. He said, “When we are a prime contractor, I let our contractors know that we are on a 30 day pay cycle and we stick to that. The quicker we are able to get them paid, the better it is for us. The less frustration they have and the better they perform.” [#24]
- A non-Hispanic white female owner of a DBE-certified engineering firm stated that timely payment is a barrier for smaller firms managing their cash flow. She said, “I worked with an agency that allowed us to bill every two weeks so we would be able to build up some cash flow and process payroll without any problems.” She stated that when you are a subcontractor, the prime contractors are very slow in paying. If the agencies could provide the incentive or requirement for the prime contractor to pay their subcontractors in a timely manner that would eliminate many of the barriers the small firms have. She stated, “I

have been able to have some prime contractors be willing to reduce the payment terms to ensure we get paid in a timelier manner.” [#25]

- A Hispanic American male President of a minority-focused chamber stated that he often receives complaints related to timely payments. He said, “When a prime takes their time to pay, it can really hurt a small business. This has created a barrier, because it has caused some of small subcontractor members scared to even bid on jobs.” [#07]
- A Hispanic female representative of a small business assistance organization mentioned that timely payments have been a problem for her clients. She indicated that late payment has been detrimental to some small businesses. She said, “There are many people who have gone out of business because of late payment... We warn people... We tell them that if [they] want to do these kinds of projects, [to] remember that they are going to get paid in 90 days so that they won't have a problem with the cash flow.” [#13]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm stated when asked about potential barriers in timely payment by the agencies stated that she has experienced this barrier with NDOT. She said, “It is frustrating when the agency’s ability to pay is based upon their in-house limitations. For a firm to have to wait 90 days or more for payment is critical to [their] financial stability...As the contractor, we met our obligations and deliverables; however, the agency did not, and that should not be acceptable. [If] it would not be [acceptable] for the contractor, why is it acceptable for the agency?” [#55]
- A Black American male owner of a construction firm when asked if time payments by the agencies or primes is a barrier said, “Timely payments is the biggest barrier for firms, especially when you are a second or third tier subcontractor.” He stated that there are some new regulatory changes that help the smaller firms when getting paid. He said, “I tell small minority firms, don’t jump on signing a bad deal; plan out the work, the timeline, and let the agency know what the financial requirements are going to be up-front. If the agency is not able to accommodate based upon that detailed information, then do not take a job that is set up for you to fail from the beginning.” [#53]
- A female co-owner of a woman-owned DBE-certified environmental business stated that although they have won several contracts, the largest barrier is payment delays. She explained, “We have had subcontractors who are international companies but a lot of our contracts with the state say “Thou shalt pay your subcontractors within 30 days. We’ll pay you when we’re ready.” She recalled that many of her competitors had “gone under” due to payment policies. [#LAS32]

Other interviewees noted that they had not had issues with timely payment by agencies or prime contractors. [e.g. #51, #27, #6, #28, #54] For example:

- A Black American male owner of a DBE certified architectural firm said, “We have no barriers with the payments by the agencies; they are consistent with 30-45 day payments.” [#50]

- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm said, “We have not had any issues with timely payments by any of the agencies or primes. I have made sure I stay in contact with the agencies so it does not become an issue.” [#18]
- A Hispanic American female owner of a WBE and MBE certified construction company stated that they have not had any issues with timely payment by prime contractors that they have worked with. She said, “We have done work with the City of Las Vegas and were paid very promptly.” [#20]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that her firm does not have a barrier with the timeliness of payments by the agencies or primes. She said, “My expectations were aligned with the reality of how they operate so I have learned to stay on top of our invoicing, and I have the line of credit if I need it. But I am able to pace the cash flow; I have never exceeded 60 days of payment from the agencies or primes that I have worked with.” [#26]
- A Black American female representing a minority-focused organization shared that some of the minority business owners have had some delays in timely payment, but once it has been communicated it gets resolved. She said, “It could be that the invoice was not submitted correctly and that is the delay for processing the invoice in a timely manner. That is an education[al] and development[al] component that we need to provide to the minority business owners so that this is not a barrier.” [#15]

Disadvantages or barriers for small businesses regarding the above factors.

Interviewees discussed barriers for small businesses, such as contractor pricing, contract regulations, and finding good employees.

- A Black American male owner of a DBE-certified general contracting firm, said that one barrier his firm faced was with contractor pricing. He stated, “It is difficult for me to get good solid contractors to give me good pricing. I have a few friends that are subcontractors and they have told me without a doubt, ‘the first time we sent you a proposal it was 20% higher than everyone else. WHY? We don’t know you and we don’t trust you. Now that we know you, we know you pay your bills’. I don’t know if that was because I was a small company or maybe because of me. It happens every day.” [#02]
- A non-Hispanic white female owner of an environmental engineering firm, when asked about barriers for small businesses, said, “One of the greatest barriers for a small business owner is trying to get the information about the how-do-you-do it is almost impossible.” She stated that each agency has their own contract policies, billings, rules and regulations, understanding all the variations and requirements for each contracts and agencies is a barrier. [#04]
- A Hispanic American female owner of a WBE certified construction firm, when asked about other barriers, stated that lacking complete information is a barrier to her firm. She explained that her firm was awarded a job contract, but was then told that her crew would have to work at night. She said, “This is the reason why costs are so high...you get thrown in at the last minute with these issues.” [#34]

- A Hispanic American female owner of a staffing company, when asked about barriers for small business owners, stated, “With the local market place conditions, it is difficult to find good, qualified individuals who are willing to work.” She stated that this is a barrier for small business owners. She said, “Unemployment may be high, but not everyone is willing to work, limiting companies from growing.” [#16]
- A Hispanic American male owner of an electrical company stated that a barrier for his firm is being comfortable with the capacity that his firm has to do business at a higher level. He said, “For a small firm we are so busy now, we do not have the man-power or financial capacity at this time to seek out any more work. I want to know that when we seek it out, we are able to perform the job and at the level that is our standard.” [#21]
- An Asian American female representing a woman-focused organization stated that finding skilled workers can be difficult. She said, “I recently had a WBE called me looking for resources to access skilled workers. She has been in this community for over 25 years and could not find skilled workers for her line of work.” [#12]
- A Black American male owner of a DBE certified architectural firm stated that it is not uncommon to have a change of work, or proposed change to the project. He stated that “In many instances, we have had to concede with the agencies on items that they would not allow a fee change and perform the work but cover the cost when the agencies were not willing to approve the fee request. For a small firm, when this happens, this is a barrier.” [#50]
- A non-Hispanic white male owner of an architecture firm stated, “Some agencies have tried to reduce cost by redirecting the oversight of a project to someone other than the architect; long-term it is not efficient or cost effective. When we brought this to surface, it was not received well by the agency, and we were excluded from future opportunities for over a 10-year period of time.” [#43]
- A non-Hispanic white male owner of an architecture firm said, “A barrier for small firms is competing with the large firms for small projects with the agencies.” He stated that prior to the recession, the public agencies awarded small to mid-size projects to small firms. During and post-recession, large firms began to capture the small projects with the governmental agencies eliminating any opportunities for small firms. He said, “The small firms that were willing to take on small projects, worked their way through the trenches to get projects when no one else wanted them, are now left with nothing.” [#43]
- A non-Hispanic white male representative of an engineering firm, when asked about barriers for small businesses said, “Time and resources is a barrier for small firms. We are not able to be everywhere and participate in everything, so we have to pick and choose what will be the best return on our investment.” [#39]

Additional disadvantages or barriers based on being a minority- or woman-owned small business. The study team asked interviewees whether there were any additional disadvantages or barriers for minority- or woman-owned businesses.

Interviewees noted a variety of barriers associated with being a minority- or woman-owned business. For example:

- A Hispanic American male owner of a DBE certified surveying firm, when asked about any additional disadvantages to being a minority-owned business, indicated that lack of diversity in the industry has made it more difficult in general for minority-owned businesses like his to thrive in Nevada. He said, “For so long [Nevada] has been low in diversification. I think we are the only minority-owned surveying business in all of northern Nevada.” [#42]
- A Black American male president of a minority-focused chamber shared that a barrier to business success for a small business owner is not being equal when it comes to business practices. He said, “When a larger firm makes a mistake, they may just get a phone call. When a small business owner makes a mistake, especially a minority- and woman- owned firm, all of a sudden they only get one shot.” [#06]
- A Hispanic American male President of a minority-focused chamber noted barriers for small minority-owned businesses to be successful as subcontractors. He said, “We hear that the goals both Federal and State minority participation are 3.5% on the federal level with Project Neon and on the state level it is sometimes 0%.” He also noted less subcontract work being available, saying, “The barrier is that many of the large organizations [prime contractors] have gone “in-house” things that were traditionally subcontracted out to minority-owned companies; this eliminates a lot of work.” [#07]
- An Asian American female representing a woman-focused organization said, “It is still very difficult for women business owners to get contracts, especially in construction. I don’t want to say it is a man’s world, but it is here [in Las Vegas]. When I go out and do site visits for our WBE’s, they are still having difficulty accessing the contract that they need. Not so much with the smaller contracts like \$25,000 or under, but beyond that, they still struggle.” She shared an experience from a WBE within her organization. She said, “An environmental firm that was very qualified, had all the personnel to perform the work, had the expertise for the study, overall very qualified and experienced. She bid for a project and was not awarded the project and strongly believes that it because she was a woman. The contract was awarded to an out-of-state contractor. When you have a tremendously qualified company, with a proven track record in doing business with the county, why would you go out-of-state when you have a locally qualified business owner capable of doing the work? [The business owner said], ‘If I would have won that contract I would not have had to lay off some of my staff or reduce them to part time, the impact is bigger than just getting the contract. I have the experience and the local expertise and a proven track record and still that wasn’t enough.’” [#12]

- A Hispanic female representative of a small business assistance organization indicated the lack of knowledge within the minority community about starting a small business is a barrier for success. She said, "Sometimes people want to get into a saturated market or they want to start a business tomorrow. I let them know that they need to work in a timeline if they want to open a business. They need to gather information, and meet with the appropriate people who can provide them guidance." [#13]
- A Hispanic female representative of a small business assistance organization mentioned the excessive technical terminology of procurement documents as a potential barrier for small business owners for whom English is their second language. She mentioned that the office where small businesses must register to do business with government agencies, Procurement Technical Assistance Center (PTAC), does not provide assistance in any other language aside from English, creating a barrier to those who need assistance in other languages such as Spanish. She stated, "I don't think that the Nevada Governor's Office which is PTAC, the procurement office that they have to go to register, they don't have anyone [that speaks] Spanish or any other language." [#13]
- A non-Hispanic white male representative of a Nevada chamber of commerce mentioned the language barrier as a potential barrier to doing business for Hispanic-owned small business. He relayed his concerns by asking, "In the Hispanic community, especially those that English is the second language, how do you communicate [business development] with them?" [#14]
- A Black American female representing a minority-focused organization said that there are barriers for small minority owned firms related to performance of work. She said, "When a large firm has been doing business for many years with a corporation or agency and when they make a mistake they are brought to the table, it is discussed and everyone moves on. There are no consequences for that large firm. For a small, minority-owned firm if they make one mistake they are kicked to the curb and are not given an opportunity to rectify the mistake...We cannot compare apples to apples or expect that the minority business owner is going to know everything to do like the incumbent organization does. There must be an equal and fair process for the minority firms as there is with the larger firms." [#15]

Some interviewees indicated that they have not experienced barriers based on being a minority- or woman-owned business. [e.g. #51, #49, #19] For example:

- A Black American male owner of a DBE and MBE certified security company, in discussing additional disadvantages or barriers to being a minority- or woman-owned business, said, "It is how you conduct yourself in business; the minority companies that have the barriers [have them] because they operate like a mom & pop operation and are not willing to reinvest in the themselves or the company to overcome those perceived barriers." [#52]
- A non-Hispanic white male owner of an engineering firm stated that he knows one woman engineering firm and being a woman-owned firm has not been a barrier, probably more of an asset to her. He said, "She doesn't push being a woman owned firm; she is good at what she does and recently beat us out on a project." [#28]

- A Hispanic American male President of a minority-focused chamber noted that there are typical barriers, such as gaining access to capital, that are universal, but being minority-owned may help. He said, “If you are a Hispanic minority company you are poised to do very well, if you can just get access to a little bit of capital; our demographic is the fastest growing.” He went on to state that none of his members had ever been refused work because of being a minority-owned company. [#07]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm stated when asked about disadvantages or barriers based on being a minority- and a woman-owned firm said, “I ensure we meet the qualifications and lead with our capabilities; I don’t wear my race or gender on my sleeve.” She stated that she has been asked by an agency project manager if she was awarded a project because she was a minority. She said, “I don’t see this as a barrier, I see it as ignorance and some people need to be better educated.” [#55]
- An Asian Pacific American female owner of a DBE-certified environmental engineering firm stated that she could see how some small business owners could feel intimidated but does not feel there are any disadvantages for regarding these various issues. [#09]

F. Nevada State and Local Agencies

Business owners and managers discussed working with Nevada state and local agencies including:

- Experiences attempting to get work with public agencies (*page 56*);
- Recommendations to improve state agencies’ notification and bid process (*page 61*);
- Public Agency payment (*page 62*);
- Perception of public agency outreach efforts (*page 64*);
- Recommendations related to improving agency’s administration of contracts or payment methods (*page 67*); and
- Other concerns (*page 72*).

Experiences attempting to get work with public agencies. The study team asked business owners and representatives about their experiences attempting to get work with public agencies.

Many interviewees noted that they have had difficulties getting contracts with public agencies. Many reported that many contracts get awarded to out-of-state firms. [e.g. #3, #48, #34, #18, #LAS21, #43, #36, #55, #39, #WBEC1, #WBEC3] For example:

- A non-Hispanic white female owner of a DBE-certified architectural firm stated that she has been trying for over 20 years to get work from these agencies and has had one opportunity with McCarran and NDOT. She said, “What does it take to get work from them?...I have had 12 meetings, I have attended every function where they are, I say hello to them, do everything I can to try to get something from them and I just cannot. Do you know who HMS

Host has doing all of their projects at McCarran? A firm out of Phoenix, AZ, I had on opportunity to bid on a project but they requested it be turned around in 4 days and I just could not get it through the process, so I lost the project opportunity.” [#10]

- A Black American male owner of a DBE and MBE certified security company said, “Our experience has been in obtaining opportunities with McCarran Airport, but was unsuccessful. In a particular bid we were seeking, a requirements was that the company had to be a local [licensed and office] Nevada company. The bid that we had submitted for was awarded to an out-of-state company.” He stated that the when he had requested a debriefing, he was denied and determined “why waste your time on agency not willing to communicate with you or provide feedback.” [#52]
- A non-Hispanic white male representative of an engineering firm, when asked of his experience in getting work with the agencies, said “Our firm has been promised to receive work for a project with McCarran, but have not been awarded a project to date. We hear many promises, but do not always receive the opportunity. Currently, we have no experience in working with the participating agencies.” [#39]
- A Subcontinent Asian American male owner of a geotechnical engineering firm, mentioned that he has not encountered much opportunity for him to do business with Nevada state and local agencies. He said, “I am very interested in going after some design work, because that only involves me. But I am not seeing any [opportunities].” He went on to say, that he has not taken part in the bidding process because that most of the DBE opportunities are concentrated in the construction side and not the engineering and design, limiting his ability to try and do work with any of these agencies. [#29]
- The president of a woman-owned environmental firm expressed challenges working with NDOT. She said, “[It is a challenge] mainly because when we have tried to approach them on doing projects, the number one recommendation they have is going to the prime contractor and get a subcontract first so that you can establish your reputation and then go forward.” She said this was difficult, and explained that most environmental firms compete with larger companies who already have an established environmental department. She said, “[It would be almost impossible since a subcontractor is asking for] the opportunity to take a portion of their work. So they have no incentive to subcontract, especially professional services.” [#LAS40]
- A Black American female representing a minority-focused organization stated that a recommendation for improving bidding processes is to have a requirement for inclusion of local minority businesses in the Nevada law. She said, “I just recently attended pre-bid informational event with the Las Vegas Visitors Authority for a two-billion dollar project and the prime contractor stated that he was sorry, but with the current laws he is not required to include local diverse business owners and had no intention of engaging with them because the overall is low bid and he knew that the overall cost will be higher and he needed to win this bid. Some of these prime contractors are not even from our state; it is a tragedy that this is being allowed to happen in our State.” [#15]

- A non-Hispanic white male owner of an architecture firm, when describing his experience in getting work with NDOT, stated, “I have been persistent in reaching out to NDOT, seeking opportunities for over 10 years with no success.” He said that recently his firm was asked to participate in an on-site meeting at the request of the NDOT project manager in Northern Nevada only to find they were one of many firms invited. He said, “This cost our firm thousands of dollars to learn that it was not necessary for us to attend and that it resulted in no opportunity for our firm.” [#43]
- A non-Hispanic white male owner of an architecture firm, when asked about his experience in getting work with the agencies stated that he had experience in working at McCarran with a larger architectural firm prior to opening his firm. He said that he had sought out opportunities at McCarran but to no avail. He stated “At an outreach meeting, it was discussed the need to get more small, local firms engaged and there I was able to connect with a representative to discuss our firm and capabilities. I was contacted by the agency for an upcoming opportunity and it was implied that I would have to prove my abilities to McCarran and at a much reduced fee. This is not the way small business owners in our professional industry should have to conduct business. It not only impacts our business, but our way of life, our families, and the local economy.” [#43]
- A non-Hispanic white male owner of an engineering firm stated that his firm will not bid on opportunities that he believes will be awarded out of state. He said, “I do see that many of the large public works projects are not going to local firms. For example the new bridge was awarded to an international firm, well equipped for the project...When that project was posted, we declined the opportunity to be considered for the bridge. We could handle the project but we knew we didn’t have a chance and did not want to waste the time and resources in putting together a solicitation for the project...The primary reason many local firms don’t participate in going after these larger projects is that we know we won’t get it anyway.” [#28]
- A non-Hispanic white male owner of an electrical construction firm said, “Doing business with NDOT is ridiculous; their prequalification process is cumbersome and not worth the time.” He stated that the projects that are put out to bid are so large that an out-of- state firm or private large firm will be awarded that project. He said, “It is nearly impossible for a smaller firm to break into; they are just too powerful.” [#27]
- A female owner of a woman- and minority-owned construction management company recounted her experiences working with NDOT, Clark County Public Works, and RTC. She stated that certain agencies lend more support to the DBE programs than others. For example, she spoke of the selection process in Clark County, when federal funding was involved and therefore NDOT worked on the selections. She said, “Clark County has their own way of selecting consultants. And they didn’t like [involving NDOT] because they lost control of that. [When it came to] the phase two project, [Clark County] said, ‘Well, that’s not going to happen. If we have to let go of...federal money, we’re going to do that...We’re going to have a DBE goal, but we’re not really going to implement it like the way the federal implements it. It’s just going to be like a face thing. You know a good faith thing. But it’s not really real.’” She went on to say that she was awarded a project with Clark County, who had

advertised a 6 percent DBE goal. Later, Clark County decided to only award her 3 percent and give the other 3 percent to a non-DBE woman-owned company. [#LAS41]

- A Black American male owner of a DBE certified architectural firm, when discussing his experience in getting work with the agencies, said, “Projects for our firm are consistently small. We are capable of so much more but the agencies will not allow us the opportunities...With one public agency, we were the architect on the qualified list in line to receive the next opportunity that was a larger project, yet still in our approved range. One day prior to the schedule meeting, we were told it was canceled and the project was being shelved and that the next project would come to us was a \$100,000 construction budget project...It is becoming very apparent that only the large firms are receiving the large projects and we continue to receive only the very small projects.” [#50]
- A non-Hispanic white male owner of an engineering firm mentioned that there is a lack of transparency in regards to how projects are awarded by Nevada public agencies. He firmly believes that Public Works is more involved in the process than they should be and that they do not allow for competitive bids to take place. He said, “The lack of transparency is when someone from Public Works goes and talks directly to a contractor or vendor telling them that they are going to get a specific part of a specific project before the project is even designed. That’s the biggest problem.” [#36]
- A non-Hispanic white female owner of a DBE-certified architectural firm said, “It is so important that the projects that are federally funded and or local tax payer dollars stay in the state, which is given to us to help with our economic development of our state.” She stated that she knows who the prime contractors are on the NDOT and RTC projects and most of them are from out of state. She stated that we must keep more of our local dollars here in Nevada. It would be very simple to include a paragraph in the bid request or appropriate documents with a list of the requirements to bid on this work. She suggested this would include a minimum number of years that you have had an office in the State of Nevada and that your employees must be based in Nevada. She said, “I have to report this information when I work on a government project and if I do work in California, I have to report that work versus what work I do in Nevada because we are taxed differently. So why not do that here with these agencies?” [#10]
- A Black American male President of a minority-focused trade association shared a recent experience attempting to work with the public agencies. He said, “Having a ‘B’ license allows me to do everything related to the project. But when I go to the municipality a ‘B’ license is no longer good enough, now I need an ‘A’ license. The barriers in which NDOT, McCarran, and particularly RTC has set up without the facts [laws or regulations] that states you have to have an ‘A or B’ license to put that road in. These agencies have fixed it where it is only for the ‘good ol’ boys’ and it [is] something that needs to be challenged. Why can we not have portions of the contract or work broken out? For example, break out the concrete, landscape, etc. Why does these agencies not use contact management system? By sticking to the way we do stuff, we will get the same results. We need to look at a city that does not have these issues, see what they do, and mirror that. We know the results will be favorable

for everyone.” He recommended looking at Texas and California; these states are similar to Nevada. [#11]

Some interviews stated that they have had overall positive experiences working with public agencies. [e.g. #41, #30] For example:

- A non-Hispanic white female owner of an environmental engineering firm said, “RTC Southern Nevada has been great to work with and are very supportive.” [#04]
- A Hispanic American male owner of a DBE certified surveying firm stated that his firm originally obtained work with RTA through prime contractors. That allowed them to build a relationship with the airport that has resulted in further job opportunities. He said, “We were able to get in the market with the prime contractor, so we have been doing about 90 percent of the work at the airport and Stead included. Now, because that has allowed us to get in with them, they have had the opportunity to know us and our work. This year we have been able to get our first design project with another engineering firm that selected us because we had a good reputation with the airport.” [#42]
- A Black American male president of a minority-focused chamber said, “I have found [both] RTC [and McCarran] to be very proactive, engaging, committed to inclusion, and involvement of our membership.” [#06]
- A female representative of a DBE certified company stated that she has had largely positive experiences with public agencies. She said, “First of all, I receive weekly invites... whether it’s PTAC or SBA or anything, I receive this [invite]. I have had some very, very good experiences as far as working with NDOT, working with RTC. It’s just a matter of making those phone calls and saying, ‘This is what I’m in need of. This is what I’m lacking. This is where I’m feeling like I’m kind of being thrown under the bus.’ I have had great experiences as far as them jumping in and helping me as a woman owned business. So the meetings that [are held are] incredible. But you have to show up. You have to show up and you have to put the time in.” [#REN18]
- A non-Hispanic white male representative of a construction firm indicated that the move to electronic bidding by NDOT has streamlined the bidding process. He said, “NDOT had moved to electronic bidding which is nice, a lot more streamlined. So the bidding process is pretty straight forward.” [#35]

Some interviewees noted a lack of opportunities for their industry. For example:

- A non-Hispanic white male representative of an engineering firm said, “Most of the opportunities from the agencies that we see are request for quotes and generally do not require engineering; very rarely do you see a request for [an engineering] proposal from the agencies...We provide structural engineering for vertical projects rather than horizontal; generally these agencies do not have opportunities for our firm.” He stated that he will be reaching out to RTC and hopes that he is able to have an opportunity to market his firm and learn of upcoming projects. [#39]

- A non-Hispanic white female owner of a DBE-certified engineering firm stated that there are not very many subcontracting opportunities for firms that do provide the services they do. She said, “Most of the large firms will not subcontract out the professional services unless there is a DBE requirement. What we are seeing now are ‘spin-offs’ of the larger firm that is now being used for their DBE requirements. For those firms, like [my firm] that have been around for a while we do not have a shot at the work because there is already an arrangement made to use the ‘spin-off’ firm.” [#25]

Recommendations to improve state agencies’ notification and bidding process. For example:

- A Black American male president of a minority-focused chamber stated that having a feedback or follow-up mechanism after bidding or prequalification would be great for small businesses. [#06]
- A non-Hispanic white male representative of a trade association mentioned that there is a lack of clarity in the bidding process. He indicated that consistency would allow for better quality in the bidding process. He said, “One thing that could be done is improving the consistency in the bidding process for all state agencies. For every awarding body to advertise and receive bids the same way.” [#19]
- An Asian Pacific American male owner of an environmental consulting firm, states that Nevada state agencies should do a better job advertising contracting opportunities. He said that he has to expend extra time and effort to learn about potential contracting opportunities. He suggested that agencies, “[Get] advertisements out there to where they are easy to find, and [make the ads] clear, concise, and well refined.” [#03]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company mentioned that she has not been able to figure out how and where to find bidding opportunities for NDOT because that process is not streamlined. She said, “I have about four or five data bases that I have to frequent to find opportunities, and every agency is different, so I think that’s the biggest challenge. If I can figure it out and streamline that process, I think I can make it so that we bid more.” [#23]
- A non-Hispanic white male representative of an engineering firm stated that giving additional time for bids would improve Nevada public agencies processes. He said, “I would recommend that they agencies send notification of request for proposal much sooner, so the firms have ample time to prepare and provide a proper proposal.” [#39]
- A non-Hispanic white female owner of a DBE-certified architectural firm said, “I would love to be a fly on the wall when statements of qualifications are reviewed...The key decision makers see barriers and drawbacks. However, that is not communicated and because of that we, as small business owners, are in the dark...I can anticipate some of the barriers, but it would be so helpful for the agencies to let us know what barriers are perceived by them; I believe this is one of the biggest barriers faced.” [#26]

- A Hispanic American male owner of a DBE and ESB certified architecture firm, when asked about recommendations, suggested that when the agencies advertise for upcoming opportunities, they ensure that the notifications are publicized with ample time for small firms to properly prepare a proposal. He said, “Time is our most limited resource and when we have to rush at the last minute to prepare for a proposal due within days, that does not serve the agency or us as a small firm well.” [#40]
- An African American female representing a minority-focused organization stated that the organizations need to be engaged with the minority business owners and share the information that could help them in the bidding process. She said, “We need to be more intentional about supporting and sharing the information, provide educational events and workshops so that the bidding process is not a barrier for a minority business owner...I have attended workshop and educational events where an agency representative will provide a presentation and it is the same presentation they have been giving year after year, nothing that is current. If we are doing business the same way we did 5 years ago, something is wrong and this applies to the agencies as well.” [#15]
- A Hispanic American male owner of a construction management company stated that a barrier in the bidding process for a small firm is not hearing from the agency if there was an issue with a bid. He shared a recommendation, “When the lowest bid is reviewed and it is determined that there was a missing piece and it is no longer a complete bid why are the agencies or contractors not selecting the second lowest or next complete bid? The entire bid package is sent back out to the public to rebid and now everyone knows what [is] the low number. It creates another scramble trying to beat everyone up for better pricing.” He stated that when his firm sees that happen, they will just walk away it is not worth the effort to go through that process again or try and beat out someone else for better pricing. He said, “When we submit our bid, it was with the best prices we could get and we leave it at that.” [#24]

Public agency payment. Interviewees discussed their experiences with payment from state agencies.

Many business owners and representatives said that there are timely payment is an issue with state agencies. For example:

- An Asian Pacific American male owner of an environmental consulting firm indicated that RTC – WC has payment problems. He said, “I had one lab bill from [Pyramid and McCarran] RTC project of sixteen hundred and something dollars, and that’s in one month. When I am not getting paid for the work by the RTC for 60 or 70 days, I’m having to pay the lab out of my pocket.” [#03]
- A non-Hispanic white male owner of an architecture firm stated that while working with one of the governmental public agencies, his firm was not paid for work that was performed and approved by the agency. He said, “We sell our time in the professional arena and we expect to get paid. Because of their lack of management on the project, the agency did not feel they could justify the expense, nor did they want to explain their error to the

commissioners. This should not constitute my firm taking a financial loss on a project, due to the lack of management.” [#43]

- A non-Hispanic white male owner of a landscaping company, when asked about payment by the agencies, indicated that he has experienced a lag of payment when working with NDOT but has been able to work through it. He said, “It always comes through, just some of them are 30, 60, or 90 days late. But as long as I maintain a good balance in my account and keep a good cash flow going, I can afford to hold out a little bit. It is rough sometimes, but they always come through.” [#41]
- A Hispanic female representative of a small business assistance organization mentioned that timely payment has been a problem with the Reno-Tahoe Airport Authority, Regional Transportation Commission of Washoe County, Nevada Department of Transportation. [#13]
- A non-Hispanic white male owner of an engineering firm stated that he has yet to be fully paid from a past job that he did with NDOT. He mentioned that this was due to contingency problems in the project that he was forced to take responsibility for, although it was the project managers who ran an unorganized project. He said, “We started into a bid phase one, in the middle of it we expanded the building by two bays because they felt they had it within their budget. Phase one was just the shell of the building. We bid that project, it was under construction, now we start phase two. The reason they did this was to accelerate the schedule. In the middle of this they realized that they wanted to add two more bases to the building. I don’t know specifically what that cost, but it must have been substantial. So then we get into phase two, and we are designing phase two which includes all of the interiors... essentially, they took parts of that while we are in the middle of phase two design and negotiated with the phase one contractor and gave them the work without a competitive bid. I don’t know how much that cost the state, but there was no transparency. And then we had bid and put the controls in the building in phase one, by the time phase two came, they took the building controls and gave it to another company. They ended up costing them another 48 thousand dollars... so we get to the end of the project, there is no money left, there is no contingency, and the building is tight, we got pressurization controls and we need to put in some controls so we had a meeting with them and they said we would have to pay for that and that answer to that was absolutely not. So to date they owe me about \$6200 that’s never been paid.” [#36]
- A non-Hispanic white male representative of a construction firm said they have not experienced any payment lags on normal pay estimates; however, they have faced issues with getting retention payment released after a project completion. He said, “Receiving retention is a big issue. It seems to drag out. It’s a long process. With some of these contracts, ten percent is a great deal of money. If we have a four million dollar job, it would be four hundred grand. Sometimes it is hard getting that retention released. We had a job with NDOT that we just got paid. We did the work in May [of last year]... A lot of times, the RE’s we deal with at NDOT don’t have a say of when the retention will be released so it goes to another department in NDOT, so it is kind of a black hole trying to figure out how to get our money out.” [#35]

Some interviewees said that they have not experienced any payment problems with the agencies. For example:

- An Asian Pacific American female owner of a DBE-certified environmental engineering firm stated that she loves working directly with public agencies because they are so swift in paying. She said, “I will choose working with one of these agencies over someone else because I know they will pay like clockwork.” [#09]
- A Black American male owner of a DBE certified construction company said, “Overall the agencies have been good in paying, a few issues but nothing major.” [#49]
- A non-Hispanic white female owner of a DBE-certified engineering firm stated her experience getting paid from these agencies varies. She said, “The RTA is great in getting paid in a timely manner and they pride themselves on that.” She also stated that if there is an error on your invoice, they will not hold up payment processing and you it will be able to make the correction on your next invoice. She said, “If all agencies would do that, that would be very helpful.” [#25]
- A Subcontinent Asian American male owner of a geotechnical engineering firm mentioned that while working on project with NDOT, payment to him by the prime contractor was made in a reasonable time. [#29]

Perception of public agency outreach efforts. Interviewees discussed their impressions of the outreach efforts of public agencies.

Many interviewees noted that they believed public agencies to have good outreach efforts. [e.g. #29, #5, #33, #40, #39] For example:

- An Asian Pacific American female owner of a DBE-certified environmental engineering firm stated that she thinks that they are adequate in their outreach efforts. She said “RTC did an amazing job on their outreach efforts on the FRI (fuel revenue indexing) outreach program. Additionally, McCarran also has great outreach in their emailing out of information which is also very helpful.” [#09]
- A Black American female owner of a DBE, WBE, and MBE certified logistical service company said, “NDOT has been the most helpful from certification to different ideas in ways to market our business. However, none of it has produced any opportunities yet.” [#48]
- A Hispanic American male owner of a DBE certified surveying firm mentioned that he has seen a positive change in NDOT’s outreach efforts. He said, “I’ve seen a huge difference from when I first started in 2009 to now... We’ve seen a lot more outreach, and opportunities to meet prime contractors.” [#42]
- A Hispanic American male owner of a DBE and ESB certified architecture firm stated that the outreach efforts by McCarran have been very helpful. He said, “As great as the outreach efforts are, currently there have been no opportunities in our firm doing work with McCarran. There has not been anything that has been a fit.” [#40]

- A non-Hispanic white female owner of a DBE-certified architectural firm stated that RTC – SN and NDOT have been really good about reaching out about opportunities. She said, “There is a real narrow range of work that is a good fit for me, so I review all the opportunities looking for that fit. We have been able to recently work with RTC as a sub consultant because we were a DBE certified firm.” [#26]
- A Hispanic American male owner of a DBE and ESB certified architecture firm stated that his perception of the outreach efforts of some public agencies, such as Clark County and the State of Nevada, have been positive. He said, “They have been very helpful and the programs they offer to assist small firms and notification of upcoming opportunities has been excellent.” [#40]
- A non-Hispanic white female owner of an environmental engineering firm said, “I am very impressed with the outreach efforts of RTC Southern Nevada.” [#04]
- A Black American male owner of a construction firm said, “Out of these participating agencies, for the years our firm has been in Las Vegas, McCarran Airport is the only agency with great outreach efforts.” [#53]
- A Black American male owner of a DBE and MBE certified construction firm, when asked about the perception of the agencies in their outreach efforts, said, “McCarran has the best outreach, RTC would be next in my opinion in outreach efforts. NDOT talks about it, but I have not seen much of their efforts.” [#54]

Some interviewees said that the outreach efforts of some agencies are poor or could be improved. [e.g. #4, #36, #34, #41, #52, #35, #34, #48, #42, #50] For example:

- A Black American male owner of a DBE certified architectural firm when asked about the perception of the agencies outreach efforts said, “They are reaching out to us now, because we have been complaining.” [#50]
- A Black American male owner of a DBE certified construction company said, “NDOT’s outreach efforts are good; however, they do not know how to reach out.” He stated, “An example is their small business contracting program. Their outreach is great; however, it is to everyone, not just the small firms the program is designed for.” He added, “For the participating agencies, overall the agencies outreach efforts are okay.” [#49]
- A non-Hispanic white female owner of an iron construction company when asked about her perception of the agencies outreach efforts said, “They are reaching out to the prime contractors, not the subcontractors. Unless they need a WBE to meet a project goal, they will not seek us out.” [#47]
- A non-Hispanic white male owner of an architectural firm indicated that he is kept aware of what projects are going on with the RTA because of the relationships that he has forged with the agency, but that is not the case with NDOT and RTC – WC. He said, “The RTA, only because I have relationships over there, keeps me posted of what they have going on. I don’t have the same well-established relationship with NDOT and RTC – WC. From that

perspective, I could say that they are not reaching out to me enough, but I think it works both ways.” [#37]

- A non-Hispanic white male owner of an architecture firm, when asked about the perception of the agencies outreach efforts stated, “My perception of their outreach efforts is not very good. Despite their promotional programs and outreach efforts, for our firm there has been no opportunity come available to us because of their outreach efforts.” He stated that he was a participant in one government agency business development training program, but that also has not opened opportunities with these participating agencies. He said, “These programs and outreach efforts are made to look like the game is being played fairly, but it is not.” [#43]
- A Hispanic American male owner of a DBE certified surveying firm said, “There is none... as far as [RTA] doing outreach, none.” He stated that he has been able to build a relationship with RTC – WC through prime contractors, but other than that he believes that, “they [RTCWC] do absolutely no outreach.” [#42]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm stated when asked perception of the agencies outreach efforts said, “The outreach efforts for some of the agencies has not been as ethical as it should be, conducting business on the side with our subcontractors, requesting for work to be completed yet not willing to pay for it. These have been some of our experiences with the agencies.” [#55]
- A non-Hispanic white male owner of an architectural firm, when discussing his perception of the agencies outreach efforts, mentioned that it would be great if the agencies could send mailers or email lists regarding projects to qualified firms in a more direct way. He said, “It is on us as a business owner to look for the opportunities, but it would be helpful if there was a centralized place for all the agencies to post their RFP’s and to have a more user-friendly database to find the opportunities.” He added that having a drop-down menu for the various types of industries would make it very easy to search opportunities specifically for your trade or industry. [#31]
- A Hispanic American male owner of a DBE certified surveying firm mentioned that they have had a hard time learning about subcontracting opportunities in the design process. He said, “For our line of work, there are two locations [construction jobs and design jobs]. Construction jobs, we don’t have a problem getting information on, we get those notifications and a lot of times a contractor will call us directly. Where there is a lack of information from agencies is at the very beginning of a project, when they are just going out for design. There is no notification, even if we register with Washoe County, City of Reno, and a couple of other places, we don’t get notifications when a project is out for design purposes for engineering. That’s when we would like to contact engineering firms to say ‘hey do you need a DBE certified surveying firm to be part of your team on this project?’ We rarely see that.” [#42]

Recommendations related to improving agency’s administration of contracts or payment methods. Business owners’ recommendations included such things as payments directly to subcontractors, better communication, and ensuring that small business programs are being followed. For example:

- An Asian Pacific American male owner of an environmental consulting firm would recommend that government entities assure prompt payment to the DBEs. He suggested that agencies pay subcontractors directly to assure that payment is made in a timely manner. He also mentioned that he has seen contracts awarded to companies that are not DBEs. His recommendation to address this issue is to, “Make sure that [the agencies] are listing every DBE that has been invited to bid on these projects and why they weren’t used.” [#03]
- A Black American male owner of a DBE certified construction company, when discussing recommendations or how the agencies could support subcontractors, stated that it would be very helpful if the agencies could provide some oversight or monitoring to ensure subcontractors are paid when the primes are paid. He stated, “If the prime doesn’t want to pay you, they will tell you that your invoice is incorrect and keep holding your payment, when in fact it was not incorrect.” [#49]
- A Hispanic American female owner of a staffing company stated, “The agencies need to get more involved in the various associations, chamber and organizations in our community supporting small business owners.” [#16]
- A Black American male president of a minority-focused chamber said, “The information [about public agency contracting procedures and bidding opportunities] is available, but not as efficient or accessible as it could be. Utilizing the latest technologies when disseminating the information to be more efficient and streamline information for the small business owners.” [#06]
- A Black American male owner of a DBE and MBE certified construction firm said, “Hearing about more of the prime contract opportunities sooner from the agencies would be helpful to a firm like ours. We are able to handle larger projects, but in case of the project neon, we did not hear of it until after the prime contractors were selected.” [#54]
- A Black American male owner of a DBE certified architectural firm said, “More education for the contract administrators, project managers, or those selecting professional service firms to work with in ways to integrate smaller firms into large projects and in determining who is qualified and how to make that determination.” [#50]
- A Black American male owner of a DBE certified construction company stated that the agencies need to ensure that they are utilizing small business program for their intended purpose and to develop a way to ensure that is happening. He said, “A recommendation for the agencies would be to look at a firms contractors or bonding limits to determine if they fall under that small business category.” [#49]

- A non-Hispanic white male owner of a landscaping company stated that he would like to see local jobs done by local companies. He recommended that Nevada agencies, “Try to keep it local,” and went on to say, “I hate seeing out of town companies come in and landscape our local areas.” [#41]
- An Asian Pacific American male owner of an environmental consulting firm indicated that he would like to see a more universal and streamline pre-qualification process among Nevada state agencies. He believes that, “it would get more people in the door with these different agencies.” [#03]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company, mentioned that she would like for the paperwork required to do business with Nevada public agencies to be more streamlined. She said, “The burden of the paperwork can get obnoxious at times. Just making sure that you are compliant with all of the regulations, making sure that you put together everything that needed to be included with the bid... it just gets a little tedious... I rather have it a little more streamlined. I don’t mind doing it but it would be nice if it was a little more streamline and easy.” [#23]
- A non-Hispanic white female owner of a DBE-certified engineering firm stated a recommendation would be to look at and potentially model the Florida DOT small business program. She said, “The FDOT incentivizes DBE participation, it brings value to the program.” [#25]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm, when asked for recommendations for the agencies, said “If we the contractors rated the agencies the way they rate us, it would be for a much better working environment.” [#55]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm, when asked about recommendations, stated “Many of the agencies will not allow for any management or subcontractor changes during a project. However, the agencies are making changes continuously creating a challenge for project teams in working together; having the same standard would be beneficial.” [#55]
- A Black American male president of a local Chamber of Commerce recommended that all of Nevada adopt principles that were working in Northern Las Vegas. He stated, “One of the first things I went through when I got into this position was [Northern Las Vegas] put a bid out and they had a DBE participation rate as a part of the bid. In addition to that, they were smart enough to put in what they call the boiler plate language for the bid proposal. The fact that you needed to meet that 5 percent bid requirement. The way it played out was you had two, maybe three of the five people that submitted bids that met or exceeded that 5 percent and then you had somebody submit a bid that did not meet that 5 percent.” As a result of including the DBE participation rate language, participation rates increased. [#LAS24]
- The female co-owner of an environmental safety training and consulting firm recommended that in order to keep payment delays in check, a contact person is needed at the agency. She said, “There needs to be a contact person with whoever is giving the contract and their procurement agency that would be a point person that a small business

who is being subcontracted with could actually go to them to force the larger company to pay.” [#LAS45]

- A non-Hispanic white male owner of an engineering firm stated it would be helpful if the agencies would reach out to the firms and help them understand the process to getting on one of the agencies qualified lists. He said, “Having two different lists [would be useful]; the first would allow prime contractors to find someone qualified to work as a subcontractor and the second list is for those who do not need architecture and can serve as the prime.” [#32]
- A Hispanic American female owner of a WBE certified construction firm, when asked for recommendations for the agencies, stated that it would be helpful to have a requirement where primes notify the subcontractors when they get paid. This would allow the subcontractors to be paid in a timelier manner. [#34]
- A Hispanic American male owner of a construction management company stated a recommendation for improving a process related to the timely payment would be to have an entity or person that is overseeing the bidding process that is also handling the payment for the prime contractors and subcontractors; when the agencies make payment to the prime contractor a 2-party check is written to ensure that the smaller firms are paid in a timely manner. He stated that this will eliminate the agency having to be the “bad guy” and this person is the liaison and works to coordinate these efforts.

He also suggested that the agencies have an oversight committee that would review all of the bids; make the determination of who is the lowest bid and the recommendation to award who come from this committee not someone in the agency. He said “For my firm, we have chosen to get into Federal work and work outside of the State because we know there is things going on behind closed doors. If there was an oversight committee would be a great solution to the many barriers the small business has when doing business with the large prime contractors and agencies.” [#24]

- A Hispanic American male owner of a DBE and ESB certified architecture firm mentioned that the lack of qualified agency personnel makes the process more difficult. He said, “[I recommend] having qualified personnel within the agencies. There are many positons that people are not qualified for and that is resulting in many problems that ultimately we, the small business firms, have to deal with that [we] should not...In many instances, we the small business owner are more qualified and understanding of the process and the rules than those that are selecting us to do business with.” [#40]

Many interviewees mentioned that there should be greater effort to include small, local businesses. [e.g. #8, #25, #29] For example:

- A non-Hispanic white female owner of a DBE-certified architectural firm said “I went to NDOT and talked to one person, he said I needed to talk to someone else, then she sent me to someone else, so I have talked to all these people and still don’t have opportunities and on top of all of that, they [the agency] is still not doing any set-asides.” She stated that, “You

would think that as the awarding [granting] agency for the DBE program they would at least have DBE set-asides.” [#10]

- A Black American female owner of a DBE, WBE, and MBE certified logistical service company when asked about any recommendations for the agencies said, “We all understand the bureaucracy of the government agencies, so why don’t we come together and make something work for everyone. Additionally, I would recommend they look at up and coming business to see the impact that business could have for the agency and see how they can be supported.” She stated that currently, only secondary businesses are providing this support, not the agencies. She said, “There are some misleading’s when being told about how to obtain work with the agencies; some say it is who you know, other say it is the process; either way neither of them are working for me, so how do you obtain new work with these agencies? Having a small business advocate to help you navigate the process would be so helpful for small firms.” [#48]
- A non-Hispanic white male owner of an architecture firm when asked about recommendations stated that he recommends having a small business advocate. He said, “There is no advocate or voice for small business owners to help overcome barriers placed on us by the agencies. Having better observation and monitoring would be a great benefit to the small business owners and the tax payers.” [#43]
- A non-Hispanic white male owner of an architecture firm stated that he understands that generally smaller firms are viewed as not having the capacity to handle larger projects. He said, “If the agencies would consider it, many boutique or small firms like to pair with other architects for different parts of the project, some may focus on design the other will focus on the project and flow of the project; multiple amazing small firms working together for a successfully executed larger project.” [#44]
- A non-Hispanic white male owner of a controls firm when asked about any recommendations or insight regarding working with public agencies stated, “Many of the large contractors do not have any loyalties to the State and to local contractors, that is a deterrent for us when being asked to work with large contractors who we know do not have the best interest of the agency, entity, or our firm.” He went on to recommend that, “All local firms be registered in a database and all the agencies are required to utilize local companies and not until it is clear there is no local firm able to provide the service requested then would you do business with an out of state firm...Save the 98 page contract for the out of state firms and make the process for local firms, who are paying taxes a much simpler process and support local firms first.” [#45]
- A Hispanic American male owner of a DBE and ESB certified architecture firm, when asked about any other measures, stated “A barrier as a small firm is the evaluation, or perception of lack of experience because of being a small firm.” He recommends the agencies consider the experience of the principal or the team, rather than an immediate disqualification due to size. He said, “All my experience has been working on larger projects prior to starting my own firm, but I am not considered capable because I am a new, small firm.” He stated that even though he has been working in the industry for many decades, his firm has a limited

amount of completed jobs, which puts him at the bottom of the list regardless of his capabilities. [#40]

- A non-Hispanic white male representative of an engineering firm, when asked about any recommendations, stated that the agencies should not limit smaller firms due to size, since many firms have non-local or sub-consultants that can provide additional services for a project. He said, “With technologies today, we have direct or indirect access to other engineers or support that allows us to handle larger projects. Agencies do not consider smaller firms on many projects that we would be capable of handling, due to their size.” He added, “Consideration of sub-consultant or other support for small firms would be beneficial and would create more opportunities; if the experience or capabilities reflect the ability to perform, don’t disregard the firm because of just one principal.” [#39]
- A non-Hispanic white male owner of an architectural firm, would like for public agencies to provide more opportunities for smaller firms to get their foot in the door and do business with them. He said, “We are always looking for a chance to prove ourselves, and after 37 years in the industry I think we can show that we have repeatedly proven ourselves, and all you have to do is talk to the people who have continued to come and utilize our services, that we not only do it, but we do it well. Getting that initial foot in the door is a tough one.” [#37]
- A Black American male owner of a DBE certified construction company stated when asked about his experiences in getting work with the agencies said, “Our experience in getting work with the agencies has been good, if we could get opportunities it would be better.” He added that there are many large opportunities that they are capable of and would sustain them for a longer period of time, but those opportunities are unavailable to them due to their small size. [#49]
- A Black American male owner of a construction firm, when asked about his experience or recommendation with the agencies said, “I believe there is something flawed with the low bid scenario - you don’t get the best value by low bid. Contracting should be based on value; there are considerations other than money.” He stated “There should be more emphasis supporting the economic growth in the under-utilized communities; award contracts to those who live and work. Consideration for being a local company, create competition rather than the same select contractors being awarded the majority of the work.” [#53]
- A Black American male owner of a construction firm, when asked about his experience or recommendation with Nevada public agencies, said “If the agencies would work together with the smaller firms in assisting them rather than creating ways for them to fail.” He stated some recommendation for the agencies would be: “Prompt payment. Insurance Requirements; structure a small firm or contractors insurance that is compensatory to their volume so they are not paying higher premiums. Know who you are working with; bridge the gap for the contractors to ensure they know who they are working with. Build relationships; this is the key to breaking barriers between the agencies and minority business owners.” [#53]

Other concerns. Interviewees discussed other concerns that they have with Nevada State and local agencies. For example:

- An Asian Pacific American male owner of an environmental consulting firm, indicated that there is a lack of professionalism within RTC – WC. He mentioned an instance where members of a prime contractor suggested he keep quiet about a compliance issue within a project. He said, “I asked him, ‘are you saying you want me to turn a blind eye to the regulations if they don’t fit with your agenda,’ and he said ‘yes.’” After he brought the issue to RTC – WC, no disciplinary action was taken towards the incident. He believes this is a case of favoritism towards certain companies within the agency. [#03]
- A Black American male president of a minority-focused chamber said, “Tone, attitude, and approach are important... RTC and McCarran have a very proactive, positive, productive approach to doing this study and they are going to be pushing us [the small businesses] to do better. On the other hand, with NDOT if the study is used in a defensive manner after this study is over instead of taking the data and saying what can we proactively and positively do together, it is all for nothing and the message that it will send to the business community is that you are not interested in making any changes or progress, you are more interested in remaining comfortable and doing what is convenient.” [#06]
- A non-Hispanic white male representative of a trade association mentioned that one of the difficulties his members have experience when getting paid on work with NDOT has been in regards to their process to close out contracts. He said, “The only difficulty, and this is particularly with NDOT, is to close the contract out. They hold 50 thousand dollars at the end of the project after substantial completion is done, and then you have to go through a process to close out that contract. That process takes a long time... If there was a way for them to become less of a bureaucratic monster, it may help streamline processes.” [#19]
- A non-Hispanic white male owner of an engineering firm mentioned that he did not have a positive experience when working on a project with NDOT. He said there was a lack of team effort in getting a successful project out. He explained, “I built a project for NDOT... I got involved with the project because I had several successful projects done with the architect and the architect wanted to work with me, so we came in as a team. The problem that I saw during the project was that it was very unorganized from NDOT and Public Works’ standpoint. They had to get a building up and they decided to split it into two phases. They spent money like drunken sailors, and there was no contingency for the design team. When the final project was nearing completion, and there were things that had to be done in the building, the project managers that had allocated hundreds of thousands of dollars for things that they wanted personally on the project turned around and looked at the design team and said ‘you are going to have to fix these things out of your pocket.’ Our design fee on projects like this might be five to seven percent and when somebody says ‘you are going to have to spend five to six thousand dollars out of your own pocket,’ that might be 20 percent of your design fee...There is not a team effort [to get the project done].” [#36]

- A Hispanic female representative of a DBE-certified trucking company stated that the trucking broker companies she works with in Southern Nevada give preferential treatment to union-affiliated trucking contractors. She reported that those union-affiliated trucking contractors are given more work and their invoices are not scrutinized as closely. [#WT05]
- A non-Hispanic white male owner of a construction firm mentioned that all he wants is a leveled plane field for him to do business. He said, “I don’t ask for an advantage, I just don’t want a disadvantage.” [#30]
- A non-Hispanic white male owner of a construction firm mentioned that the only time he has submitted a bid to work with NDOT was because the project did not require a bond. Bonding is a barrier to his firm as a small business therefore, he restrains from attempting to do work with Nevada public agencies. [#22]
- A non-Hispanic white female owner of a DBE-certified engineering firm stated when asked about her experiences in getting work with the agencies. She said, “I feel the pain of the small firms trying to get work with NDOT. I am very familiar the agency and being a DBE with no work is very frustrating. There needs to be a change of culture in the agencies, especially for NDOT in the DBE department. They need to have an enabling, helpful attitude and that is willing to help you when you call.”

She went on to say that she has developed relationships with the RTA, however for McCarran it has been more of a challenge to get in to meet the right people that can help get the work. She said, “It would be so helpful to have someone that you could pick up the phone and reach out and they can guide you along the process.” [#25]

- A non-Hispanic white female owner of an environmental engineering firm, when discussing her experience in getting work with the Nevada state agencies, said, “We have not been successful in getting work with NDOT.” She stated that she was told directly by a representative of the NDOT DBE program that to get work with NDOT you must subcontract to a prime contract to build a relationship. She said, “In the environmental engineering industry, the prime contractors have their environmental teams in place and they don’t want competition coming in and participating on their teams. It is very difficult for us to have an opportunity with the prime contractors having teams already in place or they will keep the work in-house.”

She went on to say, “Our firm has worked with many of the rural agencies and have found that NDOT does not participate or engage with rural agencies on projects.” She stated that it appears that NDOT does not review the information shared by the agencies. She said, “When we solicit NDOT on opportunities available to them, we have been told they would charge us if we submitted unsolicited proposals.” [#04]

- A Black American male owner of a DBE certified architectural firm, in discussing his experience with the agencies, said, “Our firm was providing peer review services for the agency, due to the recession the projects were being scaled back. Our firm was told there were no upcoming projects. Plans were delivered to our office, we received a phone call stating that those were sent to us in error – it was determined that the agency had taken the

peer review projects from our firm and it was given to a larger firm to help sustain them during the recession.” [#50]

- A Black American male president of a minority-focused chamber stated that the Nevada Department of Transportation (NDOT) only works with who they are comfortable with. He said, “We as a chamber are not going to sit by and continue to let people be comfortable and do what is convenient to the detriment of the economic growth and development of our business owners. They have a corporate culture that they need to work on; leadership starts at the top, so does corporate culture. And [yet] you continue as an agency with that corporate culture and do what is comfortable and convenient, even when people point out to you that perhaps you should do something that is a bit more inclusive. Yes, it may require some temporary artificial measures until you get to a permanent place of equitable competition, you should do it. How it impacts the prime and subcontractors, if the corporate culture of the agency is not right, then they will not enforce or encourage certain things with the prime or the larger subcontractor.”

He went on to say, “There is lot of room for improvement with NDOT. The corporate culture needs to change, such that the operational people whether at the agency level or the prime level take a different approach moving forward.” [#06]

- A Black American female owner of a DBE, MBE, and WBE certified construction firm stated that their first experience in getting work with RTC – WC was not the best. She said, “We were the lowest responsible bidder on a project that RTC – WC tried to secretly award to another firm; this firm had submitted their bid past the bid cutoff. It was necessary to challenge this award not only for our firm but for all contractors. No contractor or business should have to deal with cronyism with a public agency, or any entity for that matter.” [#55]
- A non-Hispanic white male owner of an electrical construction firm said that some of the public agencies are very difficult to work with. He said, “Their attitude is the biggest barrier in getting anything solved; it is apparent that they don’t want to help in trying to solve the issue with the small business owner.” He stated that the failure rate is much higher today than it used to be with small firms. [#27]
- A Hispanic American male President of a minority-focused chamber said, “I want to be a fan of the Nevada Department of Transportation (NDOT), but the fact that there has been four Civil Right Officers in the last four years, tells you the kind of problems that they have. I hear a lot of complaints from my members regarding the constant change.” [#07]
- A Hispanic American male owner of an electrical company, said, “One of my concerns is the laziness of people that work in the public agencies, they are not willing to do their job as they should.” He stated that they are there to assist you, provide access to information or resources necessary to complete a job. He stated that many of them are at the greeting stage of these entities. He said, “I am not for sure if they are uneducated or just unwilling to help. I see this both in the technical and administrative positions. On the technical side, they have no sense of urgency they will just get to it when they can. I can see why the public agencies want to outsource some of the projects because our urgency is higher than those within

their own agency. As far as the administration there is two extreme's, those that are there to help you and are doing a great job and then the complete opposite where they are not doing anything at all to support you, just enough to collect a paycheck. They need better suited personalities for this environment." [#21]

- One interviewee indicated that an NDOT agent unexpectedly arrived early for a site visit. She expressed that the agent arrived an hour and a half early for the site visit. She said, "[Had I not been at home by chance], I would've missed my window...I would have been pushed another month." [#01]

G. Any Other Allegations of Unfair Treatment

Interviewees discussed potential areas of unfair treatment, including:

- Denied opportunity to bid (*page 75*);
- Bid shopping (*page 77*);
- Bid manipulation (*page 78*);
- Treatment by prime contractors and customers during performance of the work (*page 80*);
- Unfavorable work environment for minorities or women (*page 82*);
- Approval of work by prime contractors (*page 83*);
- Other (*page 84*);
- Any additional disadvantages or barriers based on being a minority- or woman-owned small business (*page 85*); and
- Any double-standards for minority- or women-owned firms when performing work (*page 86*).

Denied opportunity to bid. Interviewees discussed whether they had ever experienced being denied the opportunity to bid.

Some interviewees stated that they had been denied the opportunity to bid. For example:

- A Hispanic American male owner of a DBE certified surveying firm, mentioned that he has been denied the opportunity to bid on two different occasions, one with a job in California, and one in Nevada. Both occasions were similar experiences where he submitted a proposal to a prime contractor who needed to meet a DBE requirement, but instead the prime refused to use his services and submitted good faith efforts. He said, "For a project with an airport in Tonopah, in Esmeralda County, the contractor submitted good faith efforts when we had submitted a proposal to them and they refused to use us." [#42]
- A non-Hispanic white male representative of a Nevada chamber of commerce mentioned that he has heard allegations of unfair treatment from his members who request for bidding opportunities to be reopened. However, he believes that some business owners do not do their due diligence to find out about these opportunities in time to bid. [#14]

- A Black American male owner of a construction firm, when asked about allegations of unfair treatment or being denied an opportunity to bid said, “Yes, I have been denied an opportunity to bid because of being a minority.” He explained that he had been awarded many contracting projects at a privately owned entity in the gaming industry, but all future opportunities were halted because one board member made it clear that under his tenure, no minority contractor would have opportunities at that property. [#53]
- A Black American male owner of a DBE and MBE certified construction firm, when asked about allegations of unfair treatment and denied an opportunity to bid, said “We were recently denied by a State agency in an application process due to a minor portion of the application not being completed.” He stated “The application was submitted the same way the year prior and was approved, I believe they tried denying us because we won a case against them; we have submitted an appeal and will see what happens.” [#54]
- A female general manager of a minority-owned massage business believes that her company was not given a fair opportunity to bid for an airport location contract. She stated that a competing company was advertising their award of the new airport location before the final word was given on who won the contract. Additionally, a second airport location was given to the competing company that her company was never contacted about. [#LAS33]

Many interviewees indicated that they had never been denied opportunity. [e.g. #50, #21, #29, #32, #07, #24, #51] For example:

- A Hispanic American male owner of a DBE-certified general contracting firm stated that he has not been denied an opportunity to bid or had unfair treatment. He said, “I have only seen denial of bid due to bonding capacity.” [#05]
- A Hispanic American female owner of a staffing company, when asked about allegations of unfair treatment and being denied an opportunity to bid said, “I have not been denied an opportunity to bid due to unfair treatment, however, I have been denied an opportunity to bid due to lack of capacity in meeting the scope of the contract.” [#16]
- A non-Hispanic white female owner of a construction firm, said, “I have not been denied an opportunity to bid because I am a woman-owned construction firm.” [#17]
- A Black American male owner of a DBE certified construction company stated that he has not experienced unfair treatment, nor been denied an opportunity to bid because of being a minority-owned business. He said, “I tried to get on NDOT’s bid list and was not able to get on their list to bid, I talked to everyone I could yet was still not successful. I believe it is due to our size or background, not my ethnicity.” [#49]

Bid shopping. Interviewees discussed whether they had experienced bid shopping.

Some interviewees stated that they have encountered bid shopping, often to appease good faith efforts. [e.g. #49, #21, #22, #23, #40, #24, #7, #11, #12, #15, #51, #NCA3] For example:

- A non-Hispanic white female owner of an environmental engineering firm said, “There [are] companies that will request a bid and it is solely for bid shopping; I have learned which companies are bid shopping and will decline the opportunity to bid.” [#04]
- A Hispanic American male owner of a DBE-certified general contracting firm stated that he has experienced bid shopping mainly by prime contractors. He said, “I quit bidding for a lot of them [prime contractors]; I just say I am not interested. They will call him and ask where your bid is; [he] will tell them after submitting at least 25 bids and knowing the results, we know what you are doing.” [#05]
- A non-Hispanic white female owner of a DBE-certified environmental firm stated that she has learned over the years to pick and choose who she provides bids to. She said, “A firm would ask for a proposal, you work on the task list prepare the proposal and then they tell you it has to go out to bid. Guess what, I just did their work for them and of course they take the lowest bidder regardless of where they are from...They [the agency] will accept a bid from an out-of-state firm that has much lower overhead so their rates are lower. Why don’t they get penalized for being out-of-state?” [#08]
- A non-Hispanic white female owner of a construction firm stated that a disadvantage of being a small business is bid shopping. She said, “I get bid shopped all of the time, more than you know. It is frustrating, you give a bid and they [the prime] use your bid amount and go shop it afterwards.” [#17]
- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm stated that bid shopping happens often and is very frustrating. She said, “If an entity is in need of your bid to reach their three competitive bids, they should let you know that they are bid shopping. For contractors, many times I have spent the time putting together a bid package only to find out they never had any intention of hiring me; they just wanted other architect to come down in fee. We are professionals. I don’t even like that they do it to the subcontractors, I would think that at this level we would not have to deal with this but apparently we do.” [#18]
- A Black American male president of a minority-focused chamber said, “Bid shopping has been expressed to me as a concern. I personally do not like the good-faith clause, but I know what it is constitutionally; but to me people figure out how play the games and get around things. I can’t put my finger on it, but based on the feedback of our members the perception is out there that they have bid shopped. I appreciate the ‘good faith’ but as a contractor, I can’t eat good faith, I can eat based on a contract that I receive, work that I have performed or an invoice that gets paid.” [#06]

- A Black American male owner of a DBE and MBE certified construction firm, when asked about allegations of unfair treatment in bid shopping, said “We have not experienced any unfair treatment in bid shopping.” He stated “This happens in our industry, all the shopping for the best price just prior to submitting a bid.” He said, “The concern I have is the bid-shopping that happens after the award has been made. This should not be allowed.” [#54]

Some interviewees noted that they do not see bid shopping, it does not apply to industry, or that it is not negative. For example:

- A Black American male owner of a DBE certified architectural firm said of bid shopping, “For architects, we are governed by the board of architects to not advertise fees, so this is not a barrier for our industry or firm.” [#50]
- A Hispanic American male owner of a DBE-certified electrical construction firm stated that his firm does not get bid shopped. He said, “I work with the same general contractors and they know the number I give is good.” [#33]
- A non-Hispanic white male owner of an engineering firm stated that although bid shopping does occur, it is standard. He said, “Bid shopping is not a negative.” [#32]

Bid manipulation. Interviewees discussed whether they have seen or experienced bid manipulation.

Some interviewees mentioned that bid manipulation does occur. [e.g. #17, #6, #11, #21] For example:

- A Hispanic American male owner of a DBE certified surveying firm, when asked about bid manipulation, stated that he has experienced it. He explained that while attempting to do business with McCarran Airport, he submitted a proposal to one of the biggest contractors in Las Vegas but experienced a bid manipulation that favored a local Las Vegas surveying firm. He stated, “I was asked for a proposal with a huge project...I submitted my numbers... and [the project manager] called me and emailed me later saying ‘all of these days are going to be overtime and you are going to have two hours of overtime each day, so please add all of that there’... I resubmitted this to him with all the new information he asked me to add. A couple of days later he got back to me and said ‘well you were up too high’...I think they already knew who they wanted to use, so I think what happened was that my numbers had to be showing higher than the other local firm.” [#42]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm, when asked about allegations of unfair treatment or bid manipulation, said “I have experienced this with an agency that accepted and awarded a contract to a firm that submitted their bid after the deadline; our firm protested due to bid manipulation.” She said this allows for cheating within the agencies. [#55]

- A Black American male owner of a construction firm when asked about bid manipulation said, “This is an issue all across the country, locally I see entities that will work with a few contractors, even to provide office space at their locations to help reduce overhead cost or specific contract requirements to ensure they are winning the contracts.” [#53]
- A Hispanic American male owner of a construction management company stated that due to the barriers that the small business owners have with the agencies or general contractors during the bidding process, many small firms will add costs to the bid to account for the hassle the agency or general contractor gives to them. He said, “I have added that into a bid to a general contractor that I did not want to do business with because of their business practices, but they always came to us to obtain a bid and you know that there are performance milestones you can or will not be able to meet because of them. It is not worth it.” [#24]
- A Black American male owner of a DBE and MBE certified construction firm, when discussing potential barriers in the bidding process, said “Many prime contractors will show a good faith effort in the bidding process. In this process, this will help them determine that they are able to perform the work in-house allowing for better profit margins for their firm rather than subcontract portions of the work out.” [#54]
- A non-Hispanic white female owner of an environmental engineering firm, when asked about barriers in the bidding process, said, “Inadequate request for proposals by the agencies is a barrier. If we are not awarded a project our finance team will review the bid to identify if we overbid the project or not, most of the time, we are right in alignment.” She stated that “we will look at the winning contract and our internal review of our bid and in many instances it has been determined that there is no way that it could have been done for the cost that the firm was awarded the project for.” She stated that she has learned, that many of the firms that are awarded the project know they are not able to do the project for that amount, and after getting awarded the bid because of their low cost will then begin requesting change orders which then brings the project well over what we submitted our proposal for.” She stated that she has addressed these concerns with the agencies they have stated that they are required to take the lowest bid. She said, “Our firm has lost contract opportunities multiple times to out of state contractors due to this process. When we request copies of change orders from agencies, they are not willing to share that information.”[#04]

Others have not experienced bid manipulation. [#5, #18, #20, #7, #15] For example:

- A non-Hispanic white female owner of an environmental engineering firm, when asked if her firm has been asked to manipulate a bid or if she has seen a prime contractor manipulate a bid, said “I am not aware of any bid manipulation by contractors, nor have we been asked to manipulate a bid.” [#04]
- An Asian American female representing a woman-focused organization shared that she was not aware of any of the members within her organization that have experienced bid manipulation. [#12]

Treatment by prime contractors and customers during performance of the work.

Interviewees discussed the type of treatment they had experienced during work.

Interviewees gave examples of receiving poor treatment [e.g. #8, #17, #18, #6, #15, #54, #46]

For example:

- An Asian Pacific American male owner of an environmental consulting firm mentioned that during one instance while working on a project for RTC – WC, a demolition contractor who was part of the project threatened one of his staffers with physical violence. He said, “A contractor that hired the abatement contractor that we were monitoring, threaten to kick [an employee] that works with me.” He added that when the instance was brought up to RTC and the prime contractor of that project, the issue was dismissed and no disciplinary action was taken towards the demolition contractor. He said, “They let this guy bid in the next phase of the project again and we were out of the picture.” [#03]
- A non-Hispanic white female owner of a construction firm stated that she has experienced some unfair treatment by prime contractors while performing work related to being a woman. She said, “I have had men not want to talk to me, but will talk to my general manager because I’m a woman.” [#17]
- A Black American male owner of a DBE certified construction company stated when discussing unfair treatment by prime contractors or customers during their performance of the work stated, “Yes...we have experienced unfair treatment by a prime contractor while working on a project...The prime contractor tried to ‘bully’ us on the project to the extent of us having to get our bonding company involved to resolve the issue.” [#49]
- A non-Hispanic white female owner of an iron construction company when asked about unfair treatment by prime contractors during performance of work said, “Yes, I have experienced unfair treatment because I am a woman on a job site. A contractor was not willing to talk with me at the job site; he only wanted to talk to a man.” She added that she had to go find a man on the project to be her voice with this contractor. [#47]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm, when asked about allegations of unfair treatment by prime contractors, said “Our firm has experienced unfair treatment by our customers where process and procedures were not followed. Request for additional services or work to be performed is requested without our knowledge and then refusing to pay for the additional work request...Representatives should not be requesting work; our subcontractors and employees expect to be paid when we are not paid.” [#55]
- An Asian Pacific American male owner of an environmental consulting firm believed he has experienced unfair treatment when getting work from RTC – WC by the prime who promised him a scope of work that was later awarded to another firm that was not DBE certified. He said, “I was promised \$230,000 which was the second phase of consulting on a project I did that we finished last year... then they hired a local consultant that was not a DBE. I’ve been licensed just as long as he has, and then they had to bring an abatement contractor from Las Vegas to meet their DBE quota.” [#03]

- A non-Hispanic white female owner of a DBE-certified engineering firm, when asked about unfair treatment by prime contractors, stated that she has experienced obtaining work because you are a DBE firm and then dropped because the prime contractor decided to perform the work in-house. She said, “There is nothing that holds their feet to the fire to use you after they were awarded the project and used you as the DBE participation portion.” [#25]
- A non-Hispanic white male owner of an engineering firm mentioned that Construction Manager at Risk (CMAR) projects result in unfavorable treatment towards engineers and the work that they do. He believes that engineers are often treated as second-class citizens when the work that they do is primordial to each project. He said, “Business-wise it’s a very negative thing to do Construction Manager at Risk, because you will be assigned 20 percent blame for something that was negotiated in another room and you weren’t part of that discussion... why would I step into a situation where I know the engineer is not going to be fairly treated.” [#36]
- A non-Hispanic white male owner of a construction firm mentioned that he has previously experienced unfair treatment by RTCW. He said, “When we first started going work for RTCW we were treated pretty unfair... they scrutinized us a lot more heavily and they would ask us to do things after the bid, to turn in stuff that no one else was being asked to do.” [#30]

Many interviewees indicated that they had not experience any poor treatment by prime contractors [e.g. #6, #8, #51, #50, #20, #26, #7, #29] For example:

- A non-Hispanic white female owner of an environmental engineering firm, when asked about treatment by prime contractors during their performance of the work, said, “I have not seen any negative treatment by prime contractors, all the primes that we have worked for have been very helpful.” [#04]
- When asked about treatment by prime contractors and customers, an Asian Pacific American female owner of a DBE-certified environmental engineering firm stated, “Yes, there will be your favorites and certain firms that are easier to work with but overall it’s fair and professional and does not feel that there is anything unfair.” [#09]
- A Hispanic American male owner of an electrical company stated that he has not experienced any unfair treatment by prime contractors when we are working on a project. He said, “I have been blessed that we get more praise than negative treatment by the contractors we work with.” [#21]
- A Black American male owner of a construction firm, when asked about unfair treatment by prime contractors during performance of the work, said “It does happen in the industry, but we have not experienced unfair treatment. Other contractors know what we stand for and what they are up against.” [#53]

- A Hispanic female representative of a DBE-certified trucking company stated that she has had a positive experience working with prime contractors in Northern Nevada. Those prime contractors show genuine efforts to incorporate DBE trucking companies in the whole project and maintain open lines of communication with the DBEs. [#WT05]

Unfavorable work environment for minorities or women. Interviewees discussed whether they had experienced unfavorable work environments for minorities or women.

Some interviewees noted instances in which poor treatment based on race and gender has occurred. For example:

- A Hispanic American male owner of a DBE certified surveying firm, when discussing unfavorable work environments, mentioned that on more than one occasion a prime contractor has treated him in a demeaning way based on his race. He stated, “[Prime contractors] start treating us like we are their laborer, how they treat their own laborer, and how they yelled at them. I had an instance with a project with [a prime contractor], and I called the project manager and said, ‘If this guy ever talks to me like that again I am not working on this project.’ I am not going to have someone demean me, yell at me. We are professionals. On top of that, they shouldn’t be treating their laborers that way.” He went on to mention that for the most part, the laborers of these prime companies are Hispanics and, “don’t defend themselves because they are worried about maintaining a job so they don’t speak up.” [#42]
- A Black American female representing a minority-focused organization stated that there is somewhat of an unfavorable work environment for minorities. She said, “People tend to gather around people they know on the job site; so the unfavorable work environment may not be a reality just a perception...Sometimes it is implied by the contractor that they [minority business owner] are only there because they have to be.” [#15]
- A Black American male owner of a DBE certified construction company stated when asked of unfair treatment or unfavorable work environment said, “Our Company has not experienced any unfavorable work environments, but I have seen other minority companies that have experienced unfair treatment creating an unfavorable work environment.” [#49]
- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm mentioned that barriers based on gender should not occur. She said, “We shouldn’t have to have these barriers at all. As the principal of my firm, I should not have to send in my male architect to communicate with an end-user client because he does not want to talk to me, as a woman, and that I have to make sure that the next person that I hire needs to be a man so I can have him with me to diffuse these situations.” [#18]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that she has had people tell her, “Too bad you are not a man, I could give this to you so much easier.”[#10]

Other interviewees noted that unfavorable conditions have occurred, but were handled well.

For example:

- A non-Hispanic white female owner of an environmental engineering firm said, “I have had one issue with a female employee that was working in the field; the issue was addressed by the prime contractor and it was resolved it immediately. The prime contractor did a great job handling this situation.” [#04]
- A Black American male owner of a construction firm said, “When we first started, it was not uncommon to hear of unfavorable work environments for woman and minorities in our industry.” He stated that when he began to focus on diversifying his workforce, he was able to mitigate some of that. He said that he has seen improvement in the favorability of work environments, adding that, “Things are changing.” [#53]

Some interviewees have not experiences any unfavorable work environments. [e.g. #9, #50, #20, #12] For example:

- A Hispanic American male owner of a DBE certified painting company when asked about unfavorable work environment for minorities said, “I have not experienced unfavorable work environment for minorities.” [#51]
- A non-Hispanic white male representative of a trade association stated that he is not aware of any instances where his member firms experienced any unfavorable work environments for being minorities or women in the industry. [#19]

Approval of work by prime contractors. Interviewees discussed their experiences with getting approval of work by prime contractors. For example:

- A Hispanic American male owner of a DBE certified painting company when asked about allegations of unfair treatment of approval of work prime contractors said, “We have experienced with a local prime contractor, request for us to make changes on the project, approve the request for work [in an email], they approve the work yet refuse to pay because we did not have a written change-order. As a small firm, these are the barriers we are facing.”[#51]
- A Black American male owner of a DBE certified construction company stated when discussing unfair treatment or approval of work by prime contractors stated, “[It] is an issue. The prime contractors want you to do work outside of the approved scope of work, but refuse to give you a change order so they can try and get out of paying you for the work.” [#49]
- A non-Hispanic white male owner of an architecture firm, when asked about unfair treatment in the approval of work by prime contractors for small business owners, stated that “Large firms make mistake after mistake on the tax payers’ dollar, those mistakes are not talked about.” He said that a large firm is not reprimanded like a small firm is. He said, “A small mistake or error can be detrimental to a small firm, as we do not have the same level of support by the agencies.” [#43]

- A Black American female representing a minority-focused organization, stated in regards to approval of work by the prime contractors, she believes the prime contractors could do a better job of providing feedback ongoing throughout the project so minority business owners are able to correct the problem early and mitigate other barriers that may arise. [#15]

Other. Interviewees discussed other instances of unfair treatment, such as abuse of DBE certification, false accusations, and misinformation. For example:

- A Black American male owner of a DBE-certified general contracting firm gave an example of unfair treatment when he believed he was the low bidder and yet did not receive the contract. He said, “Every contractor has been in that situation. I had a project with Clark County Reclamation that I was the low bidder on for a tenant improvement project. There was no protest on the project; I got a notice from the owner that I was not the apparent lower bid. When I asked why, I was told I made a clerical error. Yes, I did make the error. However, the error was not a statute error, the owner did not have to deem my bid non responsive. They [Clark County Reclamation] had every right to because of the clerical error. I wrote a letter stating that this doesn’t seem fair; you’re costing the public [the tax payer] for this project when you don’t have to and I have done a lot of work for Clark County. Why would you do that when you don’t have to? Their response was, well we are tired of bad bids and used you for an example so have a nice day.” [#02]
- A Hispanic American male owner of a DBE certified painting company stated that his firm has experienced barriers in working with a local prime contractor who requested their services as a DBE certified company, was awarded the project, then the project was given to another painting company, with no communication or explanation. He said, “This has happened on multiple occasions with a large, local prime contractor; abusing our DBE certification to award us the project.” [#51]
- A non-Hispanic white male owner of an architecture firm stated that the expectation is that small firms should charge less. He said, “In the professional services industry, we all pay the same insurance and licensing costs; however it is expected that since we are a small firm our fees should be much less than larger firms...Yes, some of our overhead cost may be less by not having a large payroll and office expense, but we do not have the revenue that affords us those expenses because we are not able to get the opportunities to help the small firms develop...We are the constant mercy of the agencies to choose our firm; it is feast or famine.” [#43]
- A non-Hispanic white male representative of a Nevada chamber of commerce indicated that one of the allegations of unfair treatment that he has heard from his members has been in regards to projects being awarded to out of state companies. He said, “Mostly I hear, ‘Why did that out of state company get that contract?’” He mentioned one of the reasons why out of state companies are awarded projects is because they have a branch in this state, and because, “By law you have to choose the lowest, most responsible bidder,” and those companies meet that. [#14]

- A male owner of a construction company stated that his firm was discriminated against. He recalled a story in which his firm had done \$35 million of work with a casino. His firm had built up its volume to be able to handle five or ten different projects for the casino. Despite their record of work capabilities, he claims that his firm was treated with discrimination. He said, “And one of their board members found out that we were a minority owned firm. And he said, and I quote, ‘Ain’t no [racial slur] gonna work here.’ The next year we did \$2.00 with [casino]. From 35 million to zero. Because the board decided to go in a different direction once they realized what was happening.” [#LAS39]

Any additional disadvantages or barriers based on being a minority- or woman-owned small business. Interviewees discussed barriers based on being a minority- or woman-owned small business that were not previously mentioned. For example:

- A Hispanic American male owner of a DBE certified painting company when asked about additional barriers for minorities said, “Yes, there are many barriers. If you are not given the opportunities, you can’t grow. It is near impossible to compete with the larger firms.” [#51]
- A Black American male owner of a DBE certified architectural firm when asked about disadvantages or barriers based on being a minority owned small business said, “In the professional services, small should not be an immediate disqualification of capabilities. Our firm has extensive architectural experience, and to be told you don’t qualify because you have not worked with a public agency is a disadvantage and a barrier for small, minority – owned firms, when it should not be even a consideration.” [#50]
- A Black American male owner of a DBE certified construction company stated when asked of any additional disadvantages being a minority-owned small business said, “Banking relationships. If you don’t have your banking or financing in order, this is a disadvantage for small minority-owned businesses.” [#49]
- A non-Hispanic white male owner of an architecture firm stated that there are disadvantages for small firms. He said, “The agencies put their most seasoned project managers on the larger projects, giving the large firms an easier work-flow process; this is a barrier for small firms.” He stated that having access to the seasoned project managers for the small firms would be great value and allow the process to be much more efficient and supportive to the small firms. [#43]
- A non-Hispanic white male owner of an architecture firm stated that there are disadvantages for small firms. He said, “Recovering cost due to lack of understanding by the agencies of industry or projects specifications; for a small firm they cannot be absorbed and that is a barrier for small firms.” He stated that in some instances his firm had to prepare the scope of work for the agency and were not compensated for those hours invested to support the agency. He said, “Some fees can be absorbed in large projects, but not the small projects.” [#43]
- A Hispanic American male owner of a DBE certified surveying firm said, “[A disadvantage is] the perception that us being small means we are not qualified.” [#42]

- A non-Hispanic white female owner of a DBE-certified architectural firm stated that there are barriers based on being a woman-owned small business. She said, “With some of the local entities I will get side-way questions asked about how the firm is doing, the size, how old is my child. I think I am being sized up and the reality is that family is a priority for me but I work really hard and our firm delivers so it shouldn’t be a barrier.” [#26]
- A Black American male owner of a construction firm said “Many of the large, private firms are still gate-keepers to their own firms and not opening opportunities for new, small or minority owned firms...My firm has tried to meet with the owner of [another] firm for the past two years. Once we were able to meet with the owner, he would not allow us to meet directly with his project team. Recently, after some intentional outreach, we have been able to establish relationships and have been given a few opportunities to view plans for upcoming projects.” [#53]
- The male owner of a minority-owned steel company said that he has found it very difficult to receive opportunities for work. He stated that price is a huge concern because he can neither compete with the big companies or the small companies. He noted that when he had won part of an award for steel material, he only charged 10 percent on top of the material costs. The contractor still did not allow him to do additional work. [#LAS22]
- A non-Hispanic white male owner of an engineering firm stated that a barrier for his firm is the taxes and other related cost that the State requires. He said, “The new modified business tax changes that were implemented, and we knew nothing about the changes, another high monthly tax bill. What does revenue have to do with the success of your company? It should be based on profit. If you make profit, I don’t mind paying taxes.” [#32]

Some interviewees do not believe there are disadvantages based on being a minority or woman. For example, a Black American male owner of a DBE and MBE certified construction firm, when asked about allegations of unfair treatment or additional disadvantages of being a minority, said “I haven’t been anything other than a minority, but have not experienced any disadvantages due to being a minority.” [#54]

Any double-standards for minority- or women-owned firms when performing work. Interviewees discussed whether they believe there to be double-standards for minority or women-owned businesses.

Interviewees noted that they believe there are double-standards for minority- or women-owned firms. [e.g. #9, #48, #53, #8] For example:

- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm stated that there is a double standard for a woman owned firm when performing work. She said, “This happened during an interview with a private entity and the drilling of questions were not the same as there were to the male architecture [that is a friend of mine] who won the contract.” [#18]
- A non-Hispanic white male owner of an architecture firm, when asked about double-standards for small or minority owned firms said, “Yes, there are double-stands for small

firms. We do not have the time and resources as the large firms do, but yet that does not limit our capabilities.” He stated that the agencies afford large firms’ greater opportunities and support than what that the small firms are receiving. [#43]

- A Black American male president of a minority-focused chamber stated that minority or woman-owned firms experience double-standards. He said, “Oh we have to treat them different, poor little contractor or consultant,’ never mind the fact that my resume is just as good if not better than [the person I am interacting with].” [#06]
- A Hispanic American male President of a minority-focused chamber stated that his members believe there is a double-standard in that the work by minority- and woman-owned businesses should be done cheaper. He said, “I think there is this thought that ‘it must be cheaper if I go with you because you are Hispanic owned,’ and that this applies to woman-owned and small, local businesses as well.” [#07]
- A Black American male owner of a construction firm, when asked about double-standards for minority or woman-owned companies, said “Yes, there are double-standards. We are not immune to the double-standards. Even in our firm it happens, but it must be addressed immediately so it is understood that it is not tolerated.” [#53]

Some business owners and representatives do not believe there are double standards for minority- or woman-owned businesses. [e.g. #51, #52, #12] For example:

- A non-Hispanic white female owner of an environmental engineering firm said, “I don’t think there is a double-standard for women-owned firms. From what I have seen, if you do a good job then you are going to get additional work.” [#04]
- A Black American male owner of a DBE certified architectural firm when asked about double-standards for minorities when performing work said, “We have not experienced any double standards because we are a minority owned firm; we are professionals.” [#50]

H. Any Additional Information Regarding any Racial/Ethnic or Gender-based Discrimination

Interviewees discussed additional potential areas of any racial/ethnic or gender-based discrimination, including:

- Stereotypical attitudes about minorities or women (*page 88*);
- “Good ol’ boy” network or other closed networks (*page 89*);
- Other allegations of discriminatory treatment (*page 92*); and
- Factors that affect opportunities for minorities and women to enter and advance in industry (*page 93*).

Stereotypical attitudes about minorities or women. Many interviewees had comments about whether they had experienced stereotypical attitudes about minorities or women.

Interviewees noted that they have experienced stereotypical attitudes. [e.g. #5, #48, #18, #26, #55, #54, #30, #ABC3, #WBEC2] For example:

- A non-Hispanic white female owner of a DBE-certified architectural firm said, “I think there is a perception that we [WBE/MBE/DBE’s] get our work because of our certification.” [#10]
- A Black American male owner of a DBE certified construction company stated when discussing stereotypical attitudes about minority companies said, “The perception is that minority owned firms are lazy and do not have the capabilities as others, I have experienced this and until they get to know me and realize my background.” [#49]
- A non-Hispanic white male owner of an architecture firm, when discussing stereotypical attitudes about small or minority owned firms stated, “Yes, no question there are stereotypical attitudes for small, minority owned firms...The perception is that there is very little confidence in minority owned firms...But minorities received their education the same way they [whites] did.” [#43]
- A Hispanic American male owner of a DBE certified surveying firm mentioned that more than once he has heard other firms comment that the only reason why his firm gets work is because they are a minority. He shared an instance where a representative of another surveying firm referred to him in racial slur. He said, “A friend was at a lunch meeting with a couple other surveyors and our name came up because we just got the contract to continue on the rest of Tesla, and this individual from another firm who is a principal said, “The only reason why they get the work is because they are a bunch of [racial slur].” [#42]
- An Asian American female representing a woman-focused organization noted that bias can inhibit WBE’s from getting work. She said, “The challenges our WBE’s have when working as a prime contractor is that they are still not viewed as credible because they are female. This is a huge challenge... By working with the WBE’s, we find that many of the prime and sub-contractors still have to have a male representative doing the networking and bringing opportunities to them [the woman business owner]. It is sad; it shouldn’t have to be like that.” [#12]
- A Black American female representing a minority-focused organization said, “The stereotypical attitude for minority business owners is that the work is not going to be as [high of] quality and will cost more; it will not be up to a standard that they [prime contractor] prefer.” [#15]
- A non-Hispanic white male owner of an engineering firm mentioned that he has a unique perspective regarding stereotypical attitudes towards women in the industry because his wife is a small business owner of an architectural firm. He said, “In the construction industry as a whole, and in the design industry as a whole, women are not afforded the opportunities and they are not afforded the same income...and in construction there is this idea that men communicate better with men and that women don’t understand.” [#36]

Some interviewees noted that they do not believe there are stereotypical attitudes within their industries, or that stereotypical attitudes are changing. For example:

- A non-Hispanic white male representative of a construction firm indicated that he does not believe any stereotypical attitudes about minorities or women exist within the industry. In regards to their firm specifically, he said, “I don’t think there is a barrier for either of those groups to work here.” [#35]
- A non-Hispanic white male owner of an engineering firm stated that he does not think there are any stereotypical attitudes about woman-owned firms. He said, “I do think that opportunities should be based upon performance.” [#32]
- A non-Hispanic white male owner of an architectural firm stated that he does not feel there are any stereotypical attitudes towards woman- or minority-owned firms. He said, “Not among architecture. And because I feel there are so few of them.” [#31]
- A Black American male owner of a construction firm when asked about stereotypical attitudes said, “In the past, there was a perception when working with minority companies; the cost was too high or there was a lack of quality of work. With the changing demographics and new realities in the workplace, minority contractors and workers are now being embraced. Our time is now.” [#53]

“Good ol’ boy” network or other closed networks. Many interviewees had comments concerning the existence of a “good ol’ boy” network that affects business opportunities.

Those who reported the existence of a “good ol’ boy” network included minority, female, and white male interviewees. [e.g. #2, #4, #5, #10, #16, #48, #7, #23, #41, #26, #12, #53, #15, #REN15, #46, #54, #29, #LAS45, #WT03, #55, #36] For example:

- A non-Hispanic white female owner of a public relations and outreach firm said she believes there is a “good ol’ boy” network. She said, “Sometimes you already know who is going to get it [the contract] before the RFP even comes out.” [#01]
- An Asian Pacific American female owner of a DBE-certified environmental engineering firm stated that there is a “good ol’ boy” network. She said, “Sometimes we have a seat at the table and other times we are not invited.” [#09]
- A Black American male owner of a DBE certified architectural firm said, “In our industry, the large private firms have the history and the political power. One firm a few years back asked for \$10,000 to contribute to a campaign to help win upcoming projects. These firms are able to position themselves. The negative impact for small firms is not being able to compete for opportunities with these firms.” [#50]
- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm stated, “Yes, there is a ‘good ol boy’ network in our industry; it is generally the general contractors. I have experienced when walking a job site with male principals and female

principals and the general contractors do not treat the woman the same as they do the male principals.” [#18]

- A Hispanic American male owner of a DBE certified surveying firm, when asked about “good ol’ boy” networks, mentioned that he has noted their existence within local agencies’ selection of firms. He said, “On the qualification submittals to be on the local agencies’ list is very difficult. It is one thing if the contractors are required to have DBE participation, because it is a benefit to them and a benefit to us. They know us already and they know we do good work. But when the local small agencies do not require DBE participation... I think that there is a huge tendency locally of the ‘good ol’ boy’ network.” He went on to mention that this tendency of a ‘good ol’ boy’ network has negatively affected their opportunity to do business with local agencies. He said, “We have more qualifications than a lot of other local firms...This year we were able to get on the list as a prime for surveying which is a very difficult list in Plaster County for Tahoe region, but in the six years that we’ve been in business now, we never get an opportunity with the City of Sparks, City of Reno, Carson City.” [#42]
- A non-Hispanic white male owner of an engineering firm, when asked about “good ol’ boy” networks, acknowledged the existence of closed networks and mentioned that these networks are threatened by the presence of women in a male dominated field; therefore, they also have a negative effect on women. He said, “The last thing that the ‘good ol’ boy’ network wants to have is a predominance of women in that industry. They may have organizations that say ‘we support women in construction,’ but if you take an industry like real estate and construction and compare the number of women in both of them, it is staggering. It comes down to stereotypical attitudes of women in a male dominated field.” [#36]
- A Black American male owner of two consulting professional services firms believes that there is a “good ‘ol boy” network. He said, “[Even before the contract is awarded], the deal is already cut...That committee that’s evaluating that paperwork on the back end that makes the decision because he has the relationship with the broker that he currently [doesn’t] want him to go anywhere [else]. So they are going to figure out a way to check off, well, you’re proposal wasn’t right, you didn’t fill out certain things. Like you left a T off here. You didn’t dot this particular I [even though] you may have [done that] already. But at the end of the day, if that relationship is built already on that particular end, they are going to do whatever they have to do to protect that relationship.” [#LAS34]
- A Hispanic American male owner of a DBE-certified general contracting firm stated that a bigger closed network, rather than the typical “good ol’ boy” network, is a particular religious group. He said, “I don’t go to church just to get work and religion should not be a key factor to exclude others and no one can say anything about it.” [#05]
- A non-Hispanic white female owner of a DBE-certified environmental firm said that there is a “good ol’ boy” network but she tries to look past that type of behavior. She said, “Yes, there is one [a ‘good ol’ boy’ network] for [the] construction industry and if I was competing against two other men I would not get the contract.” She stated that she has learned how to work around it and knows who works better with her and who works better with her

husband. She stated that she has learned that due to certain religious beliefs some men did not want to deal with a woman so she has trained her co-owner to represent the company in those types of instances. [#08]

- A non-Hispanic white female owner of a construction firm, when discussing the “good ol’ boy” network said, “Obviously the one large construction company that has everything in town, there is that clique from way back ... if you are not of a particular religious group you are not getting into this closed network. If you have the ‘right’ connections you can move quick, because then you have the opportunities.” [#17]
- A Hispanic American male owner of a construction management company said, “There is a ‘good ol’ boy’ network, but I have also seen it amongst the minorities that are in high positions and make decisions based on another minority rather than the one is who is the most qualified.” [#24]

Some who reported the existence of a “good ol’ boy” network believe that they are not negative, or are starting to break down. For example:

- A non-Hispanic white male owner of an architecture firm stated, “Yes, there is a ‘good ol’ boy’ network in our city. I do believe that what society was not able to bring order to, nature has taken its course and many of those considered to be a part of that closed network have either retired or are no longer an active part in the business community...My hope is that the new generation does not carry the same mentality of those generations before. It is time for a change in culture and attitude towards small, local, minority- and woman- owned firms.” [#43]
- A non-Hispanic white male owner of controls firm when said, “Yes, there is a good ol’ boy network, but is starting to fall apart. People wanted to get elected and need to fund campaigns, the first place they go are to the large businesses.” He stated that many of those that are in that “good ol’ boy” network are retiring so you see some of that networking not as strong as it once was. He said, “As a young business owner, I cannot build my business thinking about those people, I want to build my company thinking about the next generation. All the firms that we are working with are younger, but with a proper amount of experience to be able to make it happen.” [#45]
- A Hispanic American male owner of an electrical company stated that he has seen the “good ol’ boy” networks. He said, “I have been blessed because I look like a white guy and I am bi-lingual so I am able to talk to everyone on a job site. I treat everyone with the same level of respect. I tend to be treated better, but I don’t think it is because of a ‘good ol’ boy’ network, I believe it is just common courtesy.” [#21]
- A Black American male owner of a DBE certified construction company when asked if there is a good ol’ boy network stated, “Yes, there is, but it is a double-edged sword. Many contractors work with others that they can trust, that can perform the work, and that can be misinterpreted as a ‘good ol’ boy’ network when in fact [it] is more about trust and capabilities in performing the work.” [#49]

- A non-Hispanic white male owner of an architecture firm when asked if there is a “good ol’ boy” network in Las Vegas stated, “I wonder if it is the ‘good ol’ boy’ network or just long-term relationships that appear as a good ol’ boy network.” He stated that “Las Vegas does seem to be behind other larger metropolitan areas when it comes to equality. How the ‘good ol’ boy’ network plays a role in that, I don’t know.” [#44]
- A non-Hispanic white male owner of an electrical construction firm said, “But maybe I am a good ol’ boy and just don’t see it...It is not 20 years ago, most of the generals are professional in how they conduct themselves and I don’t see much of the stuff going on that did years ago...The public sector may be a little different, but everyone knows that information can be subpoenaed, so it does not happen.” [#27]
- A non-Hispanic white female owner of an iron construction company said, “If there is a ‘good ol’ boy’ network it does not have a negative impact on our company. If anything it benefits my company; woman support woman and some men prefer to work with a woman, because we are more organized and detailed.” [#47]
- A non-Hispanic white male owner of an engineering firm does not believe “good ol’ boy” networks have a negative impact. He said, “There are a lot of relationship driven projects in the private sector, but a lot of the ‘good ol’ boys’ are getting older and I don’t think it is that bad anymore.” [#32]

Others do not believe there are “good ‘ol boy” networks [e.g. #20, #37, #40] For example:

- A Hispanic American male owner of a DBE certified painting company said, “I don’t think there is a ‘good ol’ boy’ network. They may be contractors or prefer working with one subcontractor over another, but that comes with trust and relationships.” [#51]
- A non-Hispanic white male representative of a trade association mentioned that closed networks are only an appearance within the industry. He said, “I think the appearance is that the big contractors get all the work and it’s really not the circumstance... but I do think that that’s an appearance.” [#19]
- A non-Hispanic white male owner of an architectural firm, when asked if there is a “good ol’ boy” network, said he sees certain firms getting all the projects, but that makes sense. He explained, “We are a small market of architects in the valley; there are only a small amount of firms that are able to handle certain projects...I don’t believe this is intentional. You see the same 5 or 6 firms getting the projects and it is because they are the only local firms that can handle the project.” [#31]

Other allegations of discriminatory treatment. Some interviewees gave additional examples of discriminatory treatment. For example:

- A non-Hispanic white male owner of a construction firm, when asked about allegations of discriminatory treatment, mentioned that some of his Hispanic employees have experienced discriminatory treatment from customers while on the job. He said, “The vast majority of my employees are Hispanic. We have been on a job where someone has said

'Well, we don't want those Mexicans here' and I called the HOA and said I can't do your job and left. That has happened a couple of times." [#46]

- A male owner of a construction company recalled a pre-bid meeting in which his firm and several other minority contractors had attended. At the meeting, the agency publically stated that they were committing to utilizing woman- and minority-owned firms. He claims that the atmosphere amongst the larger, majority was tense. He stated, "[When the meeting ended, the majority contractors said], Not on our watch, there's not going to be this is our town. We built this town and we're going to continue to build this town. And you all are not welcome here." [#LAS39]

Factors that affect opportunities for minorities and women to enter and advance in your industry. Many interviewees discussed factors that affect entrance and advancement opportunities for minorities and women. For example:

- A non-Hispanic white female owner of a DBE-certified environmental firm stated that there are a number of factors up against small businesses and minority- and woman-owned businesses. She said, "One being a small business you are at a disadvantage because you have to prove yourself. Secondly, you can have all the experience but if the men you are working with don't have daughters or wives as business owners they [men] cannot still open the minds up to it." [#08]
- A non-Hispanic white female owner of a construction firm said, "A limitation that affects opportunities for women advancing in this [construction] industry is that you have to prove yourself more than what a man would have to prove that you have the experience and you know what you are doing." [#17]
- A Hispanic American male owner of a DBE certified surveying firm, when asked about factors that affect opportunities for minorities and women to enter or advance in his industry, mentioned that he believes it is tougher for women to enter and advance in his industry because surveying has always been a male dominated industry. [#42]
- A Hispanic American female owner of a WBE and MBE certified construction company, said, "Yes there are some factors that affect minority and woman business owners in advancing in our industry. Being a woman and a minority sometimes it is hard to get work, when they find out that you are a woman they don't believe that you are capable of getting the work done, they don't believe in you and think you have no idea what you are doing... When I first started the company there was a project we had been working to get and was successful in getting the opportunity. One of the guys on my staff was working on the project bid all along and when I showed up to sign the contract and they saw that I was a girl that is when they said they did not want to work with us." [#20]
- A Black American male president of a minority-focused chamber stated that education and workforce development is a factor that affects opportunities for minorities and women to advance in the marketplace. He said, "In order for our companies to grow, they need a qualified workforce that focuses on not just predominate casino service industry but [also

on] getting the skills necessary to step out and get other types of education and training so they can compete.” [#06]

- A Hispanic female representative of a small business assistance organization mentioned that the woman-owned businesses she works with have shared concerns establishing credibility as a minority woman in a male-dominated industry. She said, "One of them told me that it's hard... to establish credibility because she is a [Hispanic] woman." [#13]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm said, "There should be marketing through agencies, higher education to encourage woman and minorities firms; there needs to be education on both for woman and minorities as the agencies." She stated that individuals need to put themselves out there more, be willing to grow and expand rather than just wait for the agencies or opportunities to come to them. [#55]
- A non-Hispanic white male owner of an engineering firm mentioned that the lack of awareness of available resources to minority- and women-owned small business is a factor that affects their opportunities to advance in the industry. He believes that more efforts should be put towards connecting these businesses to the available resources. He said, "We do not have an organized process by which any minority business has a direct connection with objects and resources." [#36]
- A Hispanic American male owner of a DBE and ESB certified architecture firm, when asked about additional disadvantages to being a minority-owned business, stated that there are additional disadvantages, especially related to overly complicated paperwork and legal documentation. He said, "When paperwork gets too complicated or conditions get changed that require revisions of contracts or legal advice, that becomes a barrier...If you have to go through these barriers with the agencies rather than the agencies helping the small firms there is an issue...Due to the contract issue I had with the State of Nevada, I reconsidered my efforts in doing public works going forward and did scale back my outreach efforts." [#40]

I. Insights Regarding Business Assistance Programs, Changes in Contracting Processes, or Any Other Neutral Measures

The study team asked business owners and managers about their views of potential race- and gender- neutral measures that might help all small businesses, or all businesses, obtain work in the transportation contracting industry. Interviewees discussed various types of potential measures and, in many cases, made recommendations for specific programs and program topics. The following pages of this Appendix reviews comments pertaining to:

- Business assistance programs (*page 95*);
- Contracting processes (*page 102*);
- Pre-bid conferences (*page 109*);
- Unbundling (*page 111*);

- Price or evaluation preferences for small businesses (*page 113*);
- Small business set-asides (*page 115*);
- Subcontracting minimums and goals (*page 117*);
- Formal complaint or grievance procedures (*page 119*); and
- Other (*page 119*).

Business assistance programs. Interviewees gave insights regarding business assistance programs.

Many interviewees stated that technical assistance and support service programs were advantageous. [e.g. #2, #6, #48, #49] For example:

- A non-Hispanic white female owner of an environmental engineering firm said, “The workshops that the Governor’s Office of Economic Development (GOED/PTAC) [provided] was great.” [#04]
- A non-Hispanic white male owner of an architectural firm stated that he participated in the Clark County business opportunity & workforce development (BOWD) program and it was helpful. He said, “After going through that program, I received a phone call from Clark County and was given a \$17K project that was stretched out over 3 smaller projects.” He stated that was a nice contract to have, but he has not had another project through them. He said, “I am not sure where I rank on the list, and maybe there are not any new projects and that is why I have not heard back from Clark County.” [#31]
- A non-Hispanic white female owner of a DBE-certified architectural firm said, “SCORE, SBA, and PTAC offer great support and technical assistance to small business owners.” She stated that some of the programs you may have difficulty finding the person that is the right fit for you, but overall they offer good support. She said, “PTAC has been a great resource for us. Anything we need, I know I can pick up the phone and call them and they help us in what they can or connect us to who can.” [#10]
- An Asian Pacific American female owner of a DBE-certified environmental engineering firm stated that she participated in the county business workforce development program. She said, “I made some good contacts and the overall information I received was helpful. In other things, it is my own fault that I have not participated. There are some support services that are offered that our firm has now moved past and then there are somethings not offered that our firm could use, possibly a tier 2 level of support services.” She stated that her firm could use some support in helping them smooth out some things in their operational side of the house, but not at the start-up level. [#09]
- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm stated that she has just recently been made aware of these types of business assistance programs. She said, “I now have a business coach with the Nevada Small Business Development Center (NSBDC). They have really helped me work through some barriers I had as a small woman business owner... I sat down with that group and shared with them

my struggles and they were able to connect me with another local woman business owner who is now helping me with my public relations.” [#18]

- A Hispanic American male owner of a DBE and ESB certified architecture firm stated that he has participated in business assistance programs. He said, “I attend the Clark County Business Opportunity Workforce Development (BOWD) and the NeXT Level business start-up programs through the University of Reno, both were very helpful...Through my participation in the BOWD program, I was awarded an on-call contract with Clark County.” [#40]

Some business owners indicated that they have had negative experiences with business assistance programs. For example:

- An Asian Pacific American male owner of an environmental consulting firm indicated that he has had a negative experience with the local SBA program. He stated, “The SBA 8(a) program ... should be dissolved and they [federal government] should use that money to support small businesses in other ways... it’s a joke. I spent nine years of wasting my time with the SBA 8(a) program and I never got a project through them.” [#03]
- A non-Hispanic white female owner of an environmental engineering firm said, “I have participated in many workshops, support services that I could and found in many cases, I knew more than the person teaching the class...The agencies, other support services, and resource centers need to do something constructive to help these businesses; develop good programs for those that want to learn can attend and make it worth our while...If there are more learning opportunities or support services out there, advertise them better, because they we are not finding them.” [#04]
- A Hispanic American male owner of a DBE certified painting company said, “I have been invited by some to attend workshops and other support services, but have lost faith in these programs. Until we were called on for the disparity study interview, we felt that no one was listening to our concerns.” [#51]
- A Hispanic American female owner of a WBE and MBE certified construction company stated she has not participated in any of the technical assistance and support services. She stated that she has heard of the programs. She said, “It is very hard to get information directly from the source of some of these services. When I call to ask for support they are really no help. It would be great if there was more support and the application process not so difficult. Sometimes it is not even worth the effort.” [#20]
- A non-Hispanic white male owner of an architecture firm assistance stated, “I participated in one of the local government agencies business development programs, it was helpful in the education component, but not in creating opportunities for my firm.” [#43]
- An Asian Pacific American male owner of an environmental consulting firm mentioned that he has attended contracting seminars. He indicated that these seminars are very little help because there is no follow up assistance provided. He said, “ [The presenter] comes in... gets this whole seminar started but has to take off by noon...and come time to follow up and

contact [the presenter] after the fact to establish a relationship [he or she is not available], it isn't going to happen." [#03]

Many interviewees indicated that joint venture relationships would be and are helpful for small businesses. [e.g. #52, #25, #32] For example:

- An Asian American female representing a woman-focused organization shared that some of her members do have joint venture relationships. She said, "WBE's are getting smarter and they are learning, whether through experience or networking or through WBE's that have been successful or have failed and learned lessons were shared. It is still a challenge for WBE's to have a joint venture with a prime contractor. If the agency would include in the contract that the prime contract must report to the agency, how many subcontractors they are using on the project, and how much money have they spent with each, that would be very helpful. Additionally, the agency needs to not only talk to the prime contractors but to the subcontractors to ensure that the information is correct, there is no follow-through or verification." She stated that this process may help with joint-venture relationships and with successes that would encourage more to engage. [#12]
- A Hispanic American male owner of a DBE-certified general contracting firm stated that he would love to enter into a joint venture relationship, but that restrictions and requirements by the contractors' board make it cost and time prohibitive to do. He stated that with the requirements you are only able to enter into a joint-venture relationship for one project. He said, "By the time you get all the paperwork together and get it approved, the one project would already be gone and it is too expensive. It would be very helpful to partner with others, but for me it is not possible." [#05]
- A Black American female owner of a DBE, WBE, and MBE stated, "I would participate in a joint-venture relationship. I have been seeking out opportunities to partner with other small business owners that maybe struggling for opportunities but have not been successful." [#48]
- A Hispanic American male President of a minority-focused chamber said, "There [are] not enough joint venture relationships happening and it could be very important and help companies. We as a chamber will be advocating for this and want to encourage companies to come together. With their financing, bonding, and insurance, they will be able to go after some projects." [#07]
- A Black American female representing a minority-focused organization stated that she is not aware of any joint venture relationships, but believes they would be helpful. She said, "That would be so helpful to our minority business owners if we could get more training and assistance so that we could create more joint venture relationships." [#15]
- A Black American male owner of a DBE certified architectural firm said, "In the private sector working with other larger firms, 'teaming' has been very successful; our recommendation would be to do the same in the public sector, allowing more small firms opportunities." [#50]

- A non-Hispanic white female owner of a DBE-certified architectural firm said, “I am a woman in a man’s world; women in construction we still have to fight and claw our way through it and that is why I am doing joint-ventures with a male just to see if we can get in that way.” [#10]

Some interviewees believe that joint venture relationships are not beneficial. For example:

- A non-Hispanic white female owner of an environmental engineering firm said that she tries not to engage in joint venture relationships because of the liability issues. She stated that it is much cleaner to do a prime and subcontractor relationship than it is to do a joint-venture. [#04]
- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm stated that she has had one joint venture relationship and on a project she worked with on NDOT. She said, “It was not very successful, more education needed before participate in another join venture.” [#18]

Interviewees discussed their experiences with on-the-job training programs. For example:

- A Hispanic American male owner of a DBE-certified general contracting firm stated that it would be good if there was a location for on-the-job training, but it really depends upon the worker. He said, “I do provide training for our employees, I want to make my team better.” He stated that he does not rely on where someone states they get their training; for his firm he wants to see how the employees or worker perform. [#05]
- A Hispanic American female owner of a WBE and MBE certified construction company said, “Many of our tradesmen do take advantage of the training provided by OSHA or other training programs...We seek out those qualified in the trades we work in before we hire so we have those that come trained and work ready.” [#20]
- A Hispanic American male President of a minority-focused chamber stated that there are on the job training programs and RTC is a part of those programs. [#07]

Many interviewees stated that mentor-protégé relationships would be beneficial, but that they are unsure how to find information about these programs or that they would not qualify. [e.g. #REN12, #8] For example:

- A non-Hispanic white female owner of a DBE-certified architectural firm stated that she is trying to get into a mentor-protégé relationship and is currently working with the local SBE office to assist her in this process. She said, “The challenge is that we are not for sure exactly how to do it. Generally, it is more for construction contractors’ not professional service firms.” [#10]
- A Hispanic American male owner of an electrical company said, “I would like to find some mentor-protégé relationships for myself. I am an electrician first and businessman second, so having some business coaching and mentoring would be very helpful to me.” [#21]

- A Hispanic American male owner of a DBE certified surveying firm mentioned that he has heard of mentor-protégé programs. He said, “I think it would help us with certain agencies. Mainly with Cal-Trans. Cal-Trans has a pretty good mentor-protégé program. I have not heard of NDOT having one.” [#42]
- A Black American male owner of a DBE and MBE certified security company said, “I am currently working in a mentor-protégé program with SDVO firm and was also mentored by another 8(a) firm prior to my certification.” [#52]
- An Asian American female representing a woman-focused organization said, “[The] mentor-protégé relationship is a very funny program. I know that on federal, prime contractors are supposed to have programs like this, but they don’t do anything. It is a great program, but there is just never any substance or follow-through.” [#12]
- A Black American male owner of a construction firm mentioned a program that his firm has set up internally to support minority and woman owned firms. The program helps to set up other disadvantaged businesses to succeed. He explained, “We offer majority to minority and minority to minority training, recruit, retain and promote woman owned businesses in the industry. Our program is designed to remove some of the barriers that small firms experience that agencies are not able to offer or provide to small, minority and woman-owned firms.” [#53]

Business owners gave insights into their experiences with financing and bonding assistance.

For example:

- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm stated that she had heard of financing assistance programs. However, she said, “I never thought we qualified for them. I thought we needed to go through our bank first, that is who we had history with.” [#18]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company mentioned that they are currently receiving bonding assistance from the local SBA office. She said, “We are in the process of utilizing that right now... they are willing to look at everything we have and help us.” She went on to indicate that their experience with the local SBA so far has been positive. She said, “We are still in the early phase... but the point of contact that I do have seems to be really helpful in explaining everything and how it works.” [#23]
- A Hispanic American male owner of a DBE certified surveying firm, when asked about financing assistance, mentioned that trying to obtain financing assistance from the local SBDC was unsuccessful. He said, “I think it was a waste of my time because there is a lot of paperwork, a lot of involvement. I know our credit score is not the greatest, but it’s not that bad. I was able to work with the vendor of our surveying equipment and they actually financed us directly.” [#42]

- An Asian American female representing a woman-focused organization stated that the SBA has a great bonding assistance program. She said, “Even though they have this great bonding assistance, their outreach effort to disburse the information is still lacking when getting the information to those needing the assistance. Again, these agencies need to reach out to organizations, like the chambers, NAWBO, [and] our organization, and allow us to help them share the information. That is the only way many of the business owners are going to learn about these resources.” [#12]
- A non-Hispanic white female owner of a DBE-certified environmental firm stated that she has utilized the SBA to provide the financing assistance she needed in the recent purchase of her new office building as well as private banking institutions. She said. “[They have been] very good to work with.” [#08]
- An Asian Pacific American male owner of an environmental consulting firm mentioned that while working on the abatement side for a project in Colorado, his company was in need of bonding assistance, but he received no help from the local SBA agency in Nevada where he was a member. He said, “They advertised that they offered bonding assistance and they didn’t... [I] was asking my point of contact in the SBA 8(a) program about bonding assistance...She knew nothing about bonding.” [#03]
- A Black American male president of a minority-focused chamber believes that there is poor small business start-up assistance. He said, “The small business development center’s budget was recently cut by nearly 40 percent and are not able to provide the same level of service or resources as previously they have been able to do.” [#06]
- A non-Hispanic white male representative of a Nevada chamber of commerce indicated that financing assistance programs are helpful to business. He said, “We have the Small Business Development Center at the University where you can go and get that help. Or SCORE, the retire executives that you could sit down with and they will help you come up with a business plan and walk you through it. So there are resources in the community available so that when you are ready to get that financing, and you have got a better shot at it.” [#14]

Interviewees discussed assistance with emerging technology. For example:

- An Asian Pacific American female owner of a DBE-certified environmental engineering firm stated that her firm could use the assistance in using emerging technology, but more for the internal operations of the firm not so much technology in the field. [#09]
- A non-Hispanic white female owner of a construction firm stated she has not reached out for any assistance in emerging technologies. She said, “For training with software that we utilize for prevailing wage jobs is \$400.” She stated that the cost is a challenge and it would be helpful if the prime contractors were able to provide some in-house training for the subcontractors. [#17]
- A Hispanic American male President of a minority-focused chamber stated that assistance in using emerging technology would be very beneficial to small business owners and could play a significant role in the efficiency of the businesses. He shared an example, “By

implementing a newer technology that would allow [a minority business owner] to move away from the pre-historic days in the way he was doing business and tracking his inventory, he was able to receive a grant for new software. Within 90 days, he increased his revenue by 22 percent.” [#07]

- A non-Hispanic white male owner of an engineering firm recommends contractors and engineers work more closely together to incorporate emerging technology and new ideas into projects. He said, “Engineers should not be put in this place where they have to constantly defend their design. There are different ways to do things and the contractor and the engineer may have different ideas about how that should be done. The contractor may want to continue doing what he has done for the last 20 years, but we have new technology and new ideas, and as we incorporate those the contractor may not be familiar with those ideas and that’s where the engineer comes in.” [#36]

Business owners gave recommendations regarding business assistance through public agencies. For example:

- A Black American male owner of a DBE-certified general contracting firm recommended that the public agencies provide more bonding and financing assistance. He said, “They [DBEs] should be interested. If they are not, they would not be a responsible company.” [#02]
- An Asian Pacific American male owner of an environmental consulting firm recommended that business assistance programs follow-up with small businesses to assess the extent to which the programs were advantageous. He said, “They should have a structured way of following up. What was gained from each of the seminars? How many DBE got a contract after that?” [#03]
- A non-Hispanic white female owner of an environmental engineering firm stated that there needs to be more education and training with well-equipped and knowledgeable trainers. She believes additional training can provide tools and resources to the small business start-up firms. She said, “Identify what their needs are and provide the support. With each agency having a different process and requirement, having a more unified process would be very helpful to the small businesses.” [#04]
- A Black American female representing a minority-focused organization recommended changes to the assistance programs that are available. She said, “We have the agencies that can provide assistance in many of these areas, but they don’t or are repetitive in what assistance or programs they provide. We have to be more intentional in providing the education and training assistance, and programs that are relevant to the level of the business owner; to be able to provide the education that will help the small, minority firms that we can help grow them, help build their capacity.” [#15]

Contracting processes. Interviewees discussed their experiences and recommendations for the contracting processes of public agencies.

Some interviewees noted that information on public agency procedures and bidding opportunities is difficult to find, the procedures are tedious process, and/or that information that is received is irrelevant. [e.g. #17, #42, #40] For example:

- A Black American male owner of a DBE certified construction company stated when asked about information on public agency contracting procedure and bidding opportunities said, “For some, it is a barrier in learning of bidding opportunities. If you are not able to be [on] an agency’s approved vendor list or if you don’t have an established relationship with the agency.” [#49]
- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm said, “For our industry we submit a statement of qualification to the agency. We also respond to request for proposal or request for quotes. The overall process from approval to receiving your purchase order is very long and can take a while for it all to work through the process. I understand checks and balances with a public entities, it just seems to take a lot longer than it should.” [#18]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm stated when asked about the contracting process said, “Within Nevada, every agency is different. Having a more uniform process would eliminate many barriers.” She stated that many of the agencies are always changes rules, process adding loop-holes that create a non-user friendly process for contracting or bidding opportunities. [#55]
- An Asian American female representing a woman-focused organization stated that the bidding process is a large barrier. She said, “[The bidding process is] horrendous. There have been some WBE’s that I have helped with a bidding process and the information that is requested, I wonder why do they need all of that – why can’t the agencies simplify the bidding process; either you are qualified or you are not qualified and there is no uniformity between the agencies.” [#12]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm said, “The State of Nevada and the Contractors Board have created barriers that impact the bidding process. As a Nevada general contractor we are not able to subcontract to another general contractor.” She added that until legislation implements changes, general contractors will always have barriers in the bidding process. She said, “If this barrier were not there, it would allow contractors to gain the history and the experience they need to grow and create new opportunities.” [#55]
- A non-Hispanic white male owner of an engineering firm said he believes that the bidding process is arranged in a way to benefit some firms over others. He believes this goes back to the way Public Works is involved in the process. He said, “Consultants are supposed to be selected not on price but on qualifications, they are supposed to be qualification based... UNR for instance uses the same consultants over and over and over... If you were to look at other public agencies, the problem exists across, with NDOT and everyone else. The reason

for that is that there is an overreach by Public Works. Public Works has reached into some projects at UNR and has mandated a particular selection of vendors and contractors, when in reality the only thing they are supposed to be doing is reviewing the project like an administrative authority. They should not be telling UNR what equipment to go with. That should be done as a competitive bid... Public Works right now is a broken system. They have a way of making it very bad for you. They started a new process called Construction Manager at Risk (CMR) and it's been a fiasco. Nobody likes it. Nobody wants it. It was meant to try to bring accountability but it is not what it's happening at all." [#36]

Interviewees discussed their experiences with on-line registration with public agencies as a potential bidder. For example:

- A non-Hispanic white female owner of a DBE-certified architectural firm stated that her firm is so grateful that the agencies are working on a unified system that will allow them to be able to see all the opportunities in one place. She appreciates that it will be a free business resource to the small business owners. [#10]
- A Hispanic American male President of a minority-focused chamber stated that his members do not have any issues with the on-line registration process with the public agencies. [#07]
- A Hispanic American male owner of a DBE-certified general contracting firm stated the on-line registration portal that some of the agencies use or have used cost money to join and are difficult to navigate. He said, "The agencies should provide this free to the vendors." [#05]
- A Black American male owner of a DBE certified construction company noted that you could miss online posting if not watching for them. [#49]
- A non-Hispanic white male owner of an architectural firm said, "It is daunting the first time, but after that once you have the forms complete and are in the system it is much easier to market to the agencies from there." [#31]
- A non-Hispanic white female owner of a DBE-certified engineering firm said, "The DBE listing is very hard to use and to identify other DBE firms. I had a hard time even finding myself within the list." She stated that there is a limit on the services you are able to list for your firm, that can become a challenge for the prime contractors when needing to identify a DBE firm. [#25]

Some interviewees noted difficulty in finding subcontractors, and/or that having access to an online directory of subcontractors would be helpful. [e.g. #12, #27, #17, #39, #UCC4] For example:

- A non-Hispanic white female owner of a DBE-certified architectural firm stated that directories should be available electronically. She said, "If I want a copy I will print it out...don't waste the paper." [#10]

- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm stated that having online registration is great for a small firm to be able to register with them as a potential bidder. She said, “It is great to have us look the same as everyone else, there are no flashing logos or other distractions having the same online system allows all firms to be on the same level playing field.” [#18]
- A non-Hispanic white male owner of an engineering firm mentioned that he does not see on-line registration services being provided through the state at the same level as he sees it through the federal government. [#36]
- A non-Hispanic white male owner of a construction firm mentioned that he would like to see NDOT include a list of DBE subcontractors who have shown interest in specific contracts that are out to bid. He said, “When you have a website that shows what’s out to bid, have a tab that says these DBEs have expressed interest in bidding this job.” [#30]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that a recommendation for improvement would be having a directory for small businesses. She said, “When firms are searching for DBE’s, allowing to search for keywords so that there is a better chance of being found by the prime contractors. Many times we are looked over because there is not a good search system in place.” She stated that for the DBE search engine there is no ability to edit or change your profile which could make it a challenge for someone searching for someone with our skillset if it is not listed. [#26]
- A non-Hispanic white female representative of a non-Hispanic white male owned construction firm mentioned that the list of DBE subcontractors provided by NDOT is lengthy to go through. She indicated that for the most part, the list is composed of subcontractors that are not appropriate to the jobs they are looking to bid. She said, “If you go through the list of DBE subs that NDOT makes available to you, most of them are not even business that are applicable to the jobs you are bidding. There are very few paving companies on there, and obviously if we are going to be bidding the job, we are going to be paving it ourselves, so the firms that we actually do use, they are the ones that we’re willing to bid to us. Then you go through this monster list of engineering firms, and people that supply things that you don’t need, and it is hard to go through the list and find any number of subs that are actually appropriate for the job.” [#30]

Many interviewees stated that they would benefit from better communication, clarity, and/or more feedback. [e.g. #25, #41, #8, #7, #WBEC1] For example:

- A non-Hispanic white female owner of an environmental engineering firm, when asked about the on-line registration with the public agencies as a potential bidder, said, “My firm has not had any issues with the online registration. It would be nice if the agencies communicated a little bit more.” She stated that for the Nevada based firms rather than having to provide an annual statement of qualification or re-register annually, allow firms to update when information has changed in the system. She said, “As a small firm, this will save time and resources.” [#04]

- A Hispanic American male owner of a DBE-certified general contracting firm stated that his firm receives email notifications daily and that the agencies are doing their best in sending the information. He said, “With all the information we receive, we have found that the filters are not very good and you can spend a lot of time trying to figure out what you can really bid on.” He stated that sometimes that information can be very confusing; a centralized location would be very helpful. [#05]
- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm stated that having online registration is great for a small firm to be able to register with them as a potential bidder. She said, “As great as the online registration process is, I think there still needs to be opportunities for us to be able to meet with buyers face to face. Some of us are better meeting and having the opportunity to understand what exactly you need, that helps us and it will help them get to know us better as well.” [#18]
- A Hispanic American male owner of a construction management company stated that most large firms have lawyers that will review the contracts. As a small business owner, they do not have the resources to review the contracts. He said, “I would like to see for a small business the contracts are very simple so that the small business owners are able to participate in more opportunities and not be restricted by unnecessary contract regulations.” [#24]
- A non-Hispanic white female owner of a DBE-certified engineering firm stated the agencies contracting procedures is cumbersome. For a small DBE firm just getting started it can be overwhelming. She said, “It would be helpful if some of the agencies could provide copies of some winning bids to the smaller firms, providing a template so you have an idea of where to begin. She stated that streamlining the process, reduce the request for proposal and contract to less pages and in an electronic format; all these would be helpful in overcoming some of the barriers for a small firm when trying to get work with the agency. [#25]
- A non-Hispanic white male owner of a service-disabled veteran-owned business services consulting firm stated that his firm has had trouble finding bid opportunities with NDOT, RTC – WC, RTC – SN, RTA, and McCarran, because there is no central source to find information about public procurements. He recommends that the Procurement Technical assistance Center (PTAC) create a centralized website that lists all the public sector bid opportunities in the state. [#WT04]
- A non-Hispanic white female owner of an environmental engineering firm, when discussing recommendations for improving Nevada public agencies bidding process, said “Engage the staff of the agency, not just the director of the agency in the bidding process.” She stated that agency director and staff need to get out into the community and start meeting people. She said, “They are only comfortable with working with the people they know, but are not willing to get to know anyone new.” [#04]
- A Hispanic American female owner of a staffing company, when discussing recommendations for improving the bidding process, stated, “The agencies must have a clear scope of work and be available to answer questions in a bid.” She stated that in a recent proposal the agency had not provided enough clarity in the scope of work, there

were many assumptions. Additionally, they were not able to get through to someone at the agency and calls and emails were not returned. She believes this is a barrier for a small firm. She said, “I recommend the agencies have staff readily available to answer any questions during a bidding process so small firms are able to have a better opportunity and not waste time and resources.” [#16]

Many interviewees believe the bid turn-around time is too short. For example:

- A Hispanic American male owner of a DBE and ESB certified architecture firm, when asked about contracting procedures and bidding opportunities, said, “There are opportunities advertised, but not in a timely manner. Many times we do not have ample time to prepare a proper proposal.” [#40]
- A non-Hispanic white male representative of an engineering firm, when asked about potential barriers in learning about subcontract opportunities, stated that a barrier in learning about subcontract opportunities is the lack of timely communication. He said, “If we could learn about opportunities ahead of time if there is something that is happening. For instance, we learned about an opportunity that was sent out for a request for proposal that had the deadline one day following.” He stated that that does not allow sufficient time to prepare for the opportunity. [#39]
- A Hispanic American male owner of a construction management company stated that in some instances the lead time on the opportunities are just not feasible to prepare a sufficient bid. He said, “We have had to turn down opportunities to bid due to the timing, we understood to prepare a solid bid the amount of time that was allowed just wasn’t sufficient.” [#24]
- A Black American male owner of a DBE-certified general contracting firm stated that he does not like the way the agencies process the bidding opportunities now. He said, “It gives the contractors very little time to respond to prepare. The notices you have to really read to find the opportunities. I know you want to hear they are doing a great job. I know when to look, where to look, and how to find the projects, but obviously they could do a lot better job in advertising. But it doesn’t affect me as I have been doing it so long now that I know the program. New contractors would have a hard time finding the work.” [#02]
- A non-Hispanic white male representative of an engineering firm stated that a recommendation for the agencies would be to allow more time between the release of a proposal and its due date. He said, “Give us a fair chance to present what we are capable of doing and efficient information exchange of opportunities so that we are aware of new opportunities and have the time to review and prepare an adequate proposal in a timely fashion.” [#39]

Many business owners and representatives suggested streamlining or simplification of bidding procedures. [e.g. #12, #15, #18, #20, #24, #25, #40, #49, #54] For example:

- A Hispanic American male owner of a DBE certified painting company stated that the bidding procedures need to be simplified for local, small firms. He said, “I received two

request for [a] quote from Clark County, one is 150 pages and the other 10 pages with one only page to submit back to the agency; same agency, two different departments and two very different request for quote packets.” [#51]

- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company mentioned that streamlining or simplifying the bidding procedure would be helpful. She said, “Understanding what the different questions mean and how to answer it, and a little insight behind why they ask what they ask. That would be really helpful.” [#23]
- A Hispanic American male owner of a DBE and ESB certified architecture firm, when discussing contracting procedures and bidding opportunities, said, “[I recommend] clarifying the requirements of the agency and the jurisdictions, make it very clear what you are subject to and what the process is.... Many of the contracts have language, that unless you hire an attorney, you are at great risk if you do not understand the requirements or contract specifications.” He recommended the agencies consider implementing either streamlined contracts or industry standard contracts from organizations such as Americans Institute of Architects (AIA) or other Trade Associations for small firms. [#40]
- A non-Hispanic white male representative of an engineering firm stated that bidding procedures need to be simplified. He explained that the City of Henderson has a simple professional services process, adding, “There is no deadline to submit a statement of qualifications and you update if there are any changes at any time.” He stated that with many of the other public agencies there is an annual or biannually time to submit your statement of qualifications. He said, “If the agencies had an open time to submit a statement of qualification for professional services [that] would be very helpful to small and newer firms to be able to get on their qualifying list at any time.” [#39]
- A non-Hispanic white female owner of a construction firm stated, “One frustration is a contractor will have you rush to submit a bid and then it is on-hold for a long period of time. There is a lack of communication in the bidding process, keeping us informed on the status of the project or if we were even awarded, would be very helpful.” [#17]
- A Black American male owner of a DBE and MBE certified security company said, “The agencies don’t request any information that would set your firm apart from another firm, other than a bottom line number. So rather than simplification of the bidding procedure, including information that would help make the determination of who is the best qualified, not just low bid.” [#52]
- A non-Hispanic white female owner of a DBE-certified environmental firm said, “I would love to be able to get online and upload or fax my proposals and then if you won the contract you would submit the original documents. For a recent proposal we put together for the State of Nevada, I had to put together 6 binders, multiple cd’s with the a PDF version of the binder, that took almost a day to work through the details, put the binders together and then the expense for the binders and the shipping...I could have polished up the proposal with all the time I spent on putting a binder together and would have had the extra time if I could have uploaded it just before the deadline.” [#08]

Some interviewees had different comments regarding the public agencies' outreach, vendor fairs, and other events. [e.g. #3, #7, #41, #42, #20] For example:

- A non-Hispanic white male representative of a Nevada chamber of commerce recommends that government agencies increase outreach so that businesses are aware of government contracts available to them. He said, "The key is for there to be a process for them to know that there are those government contracts out there." [#14]
- An Asian American female representing a woman-focused organization shared that she works with the SBA. She said, "They have great technical assistances, support services, workshops, leadership series, and educational programs. Unfortunately, they do not have a method to reach out to all of the organizations that have contacts or house the database of small business owners to include woman, minority, and veteran owned. The outreach for these agencies needs to be better so that small business owners are aware of the services and programs they offer." [#12]
- A non-Hispanic white female owner of a DBE-certified environmental firm said "I participate as often I can, but honestly at the end of the day it is all lip service, until the state and or the agencies make a requirement to use local businesses not just low bidder." [#08]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that the Committed to Our Business Community outreach events is great. She said, "There are other agencies that offer outreach fairs but just nothing has come out of them and some of the local government events are the same folks and again, nothing every comes out of it." [#10]
- An Asian Pacific American female owner of a DBE-certified environmental engineering firm stated that the agency outreach vendor fairs and events are a nice "try" but she does not feel that there are any real relationships built at those events. The people at the table can only provide information. She said, "The key decision makers do not usually attend those events." [#09]
- An employee through the city of Reno stated that communication efforts could be improved to inform women and minority-owned businesses that opportunity exists. He stated, "At least from my interactions with different businesses and business owners, they're not aware of the opportunity of being part of those bids. You know typically people think, 'Oh, that's only for the big guys, for the big companies.' And someone knows someone. Whether it's right or wrong, whether it's true or not, regardless, the perception exists that it's not available to the small businesses. Which a good percentage [of those companies] are women and minority owned. So I think there has to be a campaign of some sort to try to get the information out there. Not just an ad, 30 second ad at midnight on TV local television. But rather where they actually go out, whether it's the Chamber of Commerce or it's whatever literature is out there that they see. Business Weekly, for example, that we have here locally. That's one of our local business related literatures that we have." [#REN16]

Some interviewees stated that they have had positive experience with outreach efforts and they can be helpful. For example:

- A Black American female owner of a DBE, WBE, and MBE certified logistical service company said, “Their outreach on their events have been good; however, some events we are not given enough to time to coordinate schedules.” She stated that some events are during business hours and that after hours or alternate times would be helpful for smaller firms. [#48]
- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm stated, “The agency outreach events are helpful for us to remind you [agencies] who we are.” [#18]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company, mentioned that she has previously attended small business outreach events and networking events. She indicated that attending these events has been a good opportunity for her to network and market the company.[#23]
- A Hispanic American male owner of a DBE and ESB certified architecture firm said, “In the early days of the firm, the outreach events that the agencies have are very helpful; however, in some instances, agencies are there because they have to be, but they have no opportunities to share.” [#40]
- A non-Hispanic white male owner of an electrical construction firm stated that he has assigned a person in his firm to look at the outreach events the agencies or primes make available to the public and determines if they will send a representative from the firm to attend. He said, “In the past we never participated because I thought it was a waste of time, but there are some relationships that get started at those types of events and are helpful. We have done very little but I plan for us to attend many more.” [#27]

Pre-bid conferences. Interviewees discussed their experiences with pre-bid conferences.

Many interviewees stated that there were not enough communication around pre-bid conferences. [e.g.#8, #31, #35, #47, #49] For example:

- A non-Hispanic white female owner of a construction firm said, “How do we find out about pre-bid conferences? I usually find out about it on the news, after the fact.” [#17]
- A non-Hispanic white male representative of an engineering firm said, “I went to a few [pre-bid conferences] just to meet contractors. Pre-bid meetings usually do not affect structural engineering. Unless there is a specific requirement that we need additional information, we generally do not participate.” [#39]
- A non-Hispanic white male owner of an architectural firm mentioned that he has attended pre-proposal conferences; however, he expressed that the occurrence of the conferences is not always communicated in a timely manner. He said, “There are pre-proposal conferences that these people do, and can attend if you are aware of them. The communication

component is the problem here. If you find out about them after they have happened [the opportunity is lost].” [#37]

- A Hispanic American male President of a minority-focused chamber shared that his members do engage with the pre-bid conferences. He said, “There are not enough of pre-bid conferences where the subcontractors are able to meet the primes.” [#07]
- A non-Hispanic white female representative of a non-Hispanic white male owned construction firm indicated that mandatory pre-bids are a barrier to entry. She said, “They will put out a job to bid, they will call the guys that want to bid it, and then they’ll schedule a mandatory pre-bid two days later.” She went on to mention that by the time they learn about it, the pre-bid meeting has already happened. [#30]
- A non-Hispanic white male owner of an architectural firm said, “[Pre-bid conferences] should not be handled by their purchasing departments. They don’t understand professional services for the most part, and they don’t understand what is associated with them. Often times the purchasing agents will ask you to give a bid when it is not allowed by Nevada law. To me it should be handled by the planning department, the engineering department, or the architectural services department as opposed to the same department that goes out and buys paper and pencils. They tend to treat professional services as if they were going out to buy a box of paper.” [#37]

Some interviewees noted that pre-bid conferences were helpful. [e.g. #10, #27, #51] For example:

- A non-Hispanic white female owner of an environmental engineering firm said, “Attending pre-bid conferences are vital to our firm, as a small business owner and subcontractor.” She stated that the agencies and prime contractors need to ensure that something beneficial comes out of those meetings, it is important to the small business owner. [#04]
- A Hispanic American male owner of a DBE-certified general contracting firm stated that an area that some small business owners should consider for project success is participating in the pre-bid meetings. He said, “That is where they [the agency or prime] explain to you the special requirements for the project [such as badging, vaccines, background checks, etc.]. This will allow you to know to include these costs in your project bid as well as the time it takes to get all of these things done so you are not losing money and time on the project.” [#05]
- A non-Hispanic white male owner of a landscaping company mentioned that he has attended pre-bid conference meetings and believes they are positive. He said, “It is great. It gets everybody together, it puts a schedule together, it shows what everybody expects... it puts a positive outcome on the job period.” [#41]
- A Hispanic American male owner of a DBE certified surveying firm indicated that he has attended pre-bid conferences because he sees the value in them. He said, “Depending on the project, if it is a substantial project, I definitely make an attempt. They are definitely beneficial.” [#42]

Unbundling. Interviewees discussed their thoughts on unbundling contracts.

Some interviews believe that unbundling would be good for small businesses. [e.g. #16, #20, #34, #40, #24, #25, #26, #7, #11, #12, #29, #LAS34, #LAS35] For example:

- A Hispanic American male owner of a DBE-certified general contracting firm said that when his firm works as a prime contractor, they will unbundle a project so that he is able to give it out opportunities to local, small and minority business. He said, “I do it because I have faith in the process and I try as the secretary of the national association of minorities to do what I can or at least asking others to do it.” [#05]
- A non-Hispanic white female owner of a DBE-certified environmental firm said, “[The agency] should carve out the smaller pieces of the contact after it has been awarded, ensure that it doesn’t go from one prime to the next to the next, but that local, small businesses; set a percentage that is a minimum standard for the small business.” [#08]
- A Hispanic American male owner of a DBE certified painting company when asked about unbundling contracts into small pieces said, “Unbundling is great for small firms, it allows them to gain experience. For the owners, it can be a cost savings.” [#51]
- A Black American male owner of a DBE certified architectural firm stated, “Unbundling is a great way to engage small firms into projects within their capacity and will help develop them while obtaining the experience for future projects.” [#50]
- A Black American male owner of a DBE certified construction company when asked about breaking up large contracts said, “I recommend the agencies unbundle projects so smaller firms could participate. Break out portions that the agencies could manage and the larger portions stay with the prime contractor, allowing more firms would be able to participate in projects.” He stated that many large firms may perform in-house services so much of a large project would not be subcontracted out. [#49]
- A Hispanic American male owner of an electrical company, stated as a small firm breaking up larger contractors into small pieces would be a great benefit. He said, “The contractor’s board will not allow you to do certain things when it comes to breaking up larger contracts and the reason is related to the bonding requirements. I know there are other firms like ours that will bid on a project outside of the bonding limit that is scheduled to be over a period of time and will then try to negotiate to get that contract ‘broken up’ so that their bonding limit is compliant. If the contractor’s board would change that rule, then it would open up more opportunities for smaller firms.” [#21]
- A Black American male president of a minority-focused chamber is supportive of unbundling contracts. He said, “[Unbundling] is a way to create opportunities for the smaller businesses... You don’t give them the main thoroughfare, but maybe a peripheral area that would allow them to get some of the work. You are creating a temporary artificial measure that hopefully will lead to a more permanent point where small, minority business owners are able to compete and can compete long-term.” [#06]

- A Black American female owner of a DBE, MBE, and WBE certified construction firm stated that unbundling is good for the industry. She said, “Without unbundling, it can create exclusivity where small firms will never have an opportunity to gain the experience or history needed to grow their business.” [#55]
- A non-Hispanic male representative from a woman-owner heavy construction firm expressed the need to break contracts into smaller pieces so that DBE firms can work on the portion they are capable of completing. He said, “Like we do asphalt and all sorts of various stuff. Well, a lot of times because their [the prime’s] main production or their main goal is to do the asphalt work or to do the type of work that we do, I don’t see them seeing any pressure to say, ‘Well, we can give them.’ Say it’s a ten mile road maybe they give us, you know, 10 percent of the asphalt work. We don’t see that happening. We see where, you know, they might need flaggers; they might need something like that. So they can kind of pick and choose on what we want to bid on. And I just wonder if that’s going to change or if that’s something that you guys are looking at? Because basically as a sub, you compete with a prime in their category of the work they do.” [#REN17]
- A non-Hispanic white male owner of a service-disabled veteran-owned business services consulting firm stated that bundled prime contracts have been a barrier to doing business with the state of Nevada. His firm is not large enough to bid the typical NDOT, RTC – WC, RTC – SN, RTA, and McCarran procurement alone. He recommends unbundling prime contracts into small pieces so that small businesses can develop relationships with the state of Nevada. [#WT04]

Some interviewees believe that unbundling is not good for the industry. [e.g. #17, #23, #27]

For example:

- A Hispanic American male owner of a DBE-certified general contracting firm said, “An agency is not a general contractor and does not have the capacity to understand the unbundling of a project and the effect that it could have to the overall project...For an example, if an agency broke out a project into five different bid proposals for various trades and as a subcontractor you may exclude certain parts in the proposal. Once all the exclusions come back from the subcontractors, the agency would have to have the knowledge and capacity to know how to fill in the holes; it would cause a problem for the project because they are missing components in the project. That is where a general contractor would come into play and would fill those holes. That is why I say that from the agency standpoint they should not unbundle a large project.” [#05]
- A Black American male owner of a DBE and MBE certified security company said, “Rather than breaking up a large contract, the agencies should have a small business plan to determine what each ‘set-aside’ percentage should be and work with companies inside those parameters.” He also added, “If you implement a small business program, you have to have someone to monitor the program.” [#52]
- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm said, “It would be too much for the agencies to break up those large contracts to create opportunities for the smaller firms. For the projects that require a more experience firm

that is understandable, just make sure that they include the local small firms on the project to create the opportunities that the smaller firms are capable of doing.” [#18]

- A non-Hispanic white male owner of an engineering firm said, “There are a lot of logistics involved in that [unbundling] process. That could be added pressure and responsibility on the entity if they were to unbundle a project. That may open up the opportunity for more mistakes to be made and I personally and not a fan of unbundling.” [#28]
- A Black American male owner of a construction firm, when asked about insight about unbundling, said “I used to be a champion of unbundling projects, I am not today. I suggest keep the projects bundled - if the incentive is there for the prime contractor, this allows them to customize portions of the project and create opportunities for small, minority-, and woman-owned firms. Unbundling is not the best fit for all contractors, having a goal can create manipulation and even more segregation.” [#53]

Price or evaluation preferences for small businesses. Interviewees discussed their views on price or evaluation preferences for small businesses.

Many interviewees stated that price or evaluation preferences for small businesses would be beneficial. [e.g. #47, #23, #54, #24, #29, #26, #53] For example:

- A non-Hispanic white female owner of a DBE-certified environmental engineering firm stated that there should be some type of preference for local small businesses. She said, “You have to put it in writing to get more of your local small businesses; it has to be in the contract. I find it hard to believe that they can’t specify a local preference which they have done for construction, and enforce it.” She said that she understands that low cost bid is the preference and an out-of-state firm may win the bid and if they are the lowest bid but that they should be required to use local businesses as subcontractors and/or suppliers. She said, “There are plenty of qualified businesses in Nevada; I think we need to look out for our own. Or if you are included in the proposal, the contractor gets awarded the project there must be checks and balances to ensure that the firm or firms you said you were going to use, you used...This would apply to contracts that had a small business or DBE set aside and the contract was probably one based up on the DBE firms that were included in the proposal.” [#08]
- A Black American male owner of a DBE certified construction company stated when asked about price or evaluation preferences for small businesses said, “Evaluation preferences for small businesses would be helpful and there are various ways to determine a price or evaluation preference. The agencies need to ensure that the company is capable of performing the work as well when giving a preference to a small business.” [#49]
- A Black American female owner of a DBE, WBE, and MBE certified logistical service company when asked about evaluation preferences for small business said, “That is hard to answer because I feel you can’t have it both ways, you can’t say I am being discriminated against and then ask for preferential treatment...If it is an equal playing field then you shouldn’t need the preferences but if it isn’t then yes, let there be a evaluation preference for small business owners.” [#48]

- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm said, “That it would be helpful if the agencies required small business subcontracting goals so that the prime contractors were required to partner with a woman-owned firms in our local community.” [#18]
- A non-Hispanic white male owner of controls firm said, “The preference should be to look for local first!...The public agencies’ funds are generated by the tax payers, and when these agencies choose to use firms outside of the state how does that help the agencies, our City and local business owners?...When you use an outside firm to save \$1,000 are you really saving \$1,000? If the agencies invested in local business, the return will be much greater because you are allowing the economy to work, not trying to manage the economy.” He stated that for every opportunity the agencies create and utilize a local firm, which is allowing the firm to grow and develop, hire more local employees, pay taxes, put money back into the local economy for growth and development. [#45]

Some interviewees stated that rather than price or evaluation preferences for small businesses, capacity and quality of work should be considered. For example:

- A Hispanic American male owner of a DBE certified painting company when asked about evaluation preference for small firms said, “Low cost is not always the best, someone should not get a job because of a preference; it should be based upon quality of work.” [#51]
- A non-Hispanic white male owner of an architecture firm, when asked about price or evaluation preferences for small business stated, “No, I don’t want to compromise safety just because the agency had to give a small business preference to a firm not capable of performing the work.” He stated that it is up to the small firms to ensure they deliver. [#43]
- A Hispanic American male owner of a DBE and ESB certified architecture firm, when asked about price or evaluation preferences, stated that there should not be a high evaluation preference for being a small business. He said, “Qualifications must be considered as the priority...An evaluation preference for being a small business would be beneficial to small firms, but something small not a huge preference that would then make it unfair to all firms...It should also be understood rates aren’t cheaper for a small firm; the result needs to be good regardless of a small or large firm. Provide a great service and the cost will be competitive small to larger firm.” [#40]
- A Black American male owner of a DBE and MBE certified security company said, “If the contract is set-aside for small business, or other segment I am against giving a preference to a small business. That may be more harmful than helpful from a stand-point of them being able to compete.” He explained that small businesses should not be awarded a project solely due to their size, and indicated that small businesses should instead focus on the quality of their work to win projects. [#52]
- A non-Hispanic white male representative of an engineering firm stated that a price or evaluation preference for a smaller firm should be carefully considered. He said, “For professional services such as engineering, an owner must consider the capacity of the firm before considering awarding a preference because it is a small business.” [#39]

Small business set-asides. Interviewees discussed whether they believe small business set-asides are beneficial.

Many interviewees stated that they believe set-asides to be helpful to small businesses. [e.g. #4, #51, #26, #LAS21, #29, #8] For example:

- A Hispanic American female owner of a staffing company, when asked insight regarding small business set-asides stated, “With a small business set-aside it encourages small, minority-, woman-owned firms to participate, to submit bids.” [#16]
- A Black American male owner of a DBE certified construction company said, “They are great programs when you use them for what they are intended for.” [#49]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company mentioned that small business set-asides are contracts they go after. She said, “We like to go after those as much as we can because it’s easier for us to compete with the same pool of people our size than it is for us to compete with a large multimillion company.” [#23]
- A non-Hispanic white female owner of a DBE-certified engineering firm stated she is aware that in the past, some of the agencies resisted including small business set-asides. She said, “The concern was that there were not enough qualified small, minority- or woman-owned firms. There are other small, minority-, and woman-owned firms in my industry alone so having a small business set-aside I think would be very helpful.” [#25]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm said, “There should be set-asides for small businesses; thresholds or tiers for small firms to compete on a level-playing field...Without the set-asides, large firms will scoop up the small projects or create new divisions just so they are able to obtain the smaller project work eliminating opportunities for small firms to gain experience.” [#55]

Many interviewees mentioned that they do not believe there are enough small business set-asides. [e.g. #52, #9] For example:

- A non-Hispanic white female owner of a DBE-certified architectural firm stated that she does not see very many set asides from the local agencies on bidding opportunities. She said, “All these agencies, all talk about the various certifications and the importance of having them but they don’t help you. As a small business owner, if they are not going to help me I would love to spend those dollars in other areas to help keep my doors open.” [#10]
- A non-Hispanic white male owner of a construction firm indicated that he would like to see more small business set-asides for him to take advantage of. He said, “Small business set-asides come few and far between as far as I know.” [#22]
- A Black American female representing a minority-focused organization said, “The small business set-asides are too low at 3 to 4 percent inclusion rate depending upon the agency.

It should be more progressive, like 30 to 40 percent. Everyone should have a seat at the table and their capabilities are the determining factor in the opportunity.” [#15]

- A Hispanic American male owner of a DBE-certified electrical construction firm, when discussing price or evaluation preferences for small businesses, said he believes set-aside percentages should increase. He stated, “No evaluation preferences for small businesses; just increase the set-aside percentages.” He explained that it is a competitive market, and raising the set-asides will help more small businesses participate. He went on to say that he would like to see the DBE set-asides increased to 7 to 10 percent participation. [#33]
- A non-Hispanic white female owner of an environmental engineering firm said, “If you cannot have a set-aside for a project, at least have a point system that if someone is using a local, Nevada based firm and has one of the certifications that you would be able to get some extra points in the evaluation or determination.” She said, “We have seen many request for proposals or solicitations for some of the agencies and there was no DBE set aside and no real incentive for them to hire someone that is local.” [#04]
- An Asian American female representing a woman-focused organization recommends that Nevada’s local bidding and other processes can be improved by focusing on local business owners. She said, “If there is no qualified local business owner, then it is understood. But when there are well qualified, local firms, do not overlook them. When they are seeking out these large private corporations to come into our State, what are they saying to them? How do they put it in the contract that there are some mandates for them to hire local businesses, to have diversity program that covers everything from small, local, disadvantaged, woman, minority and veterans; these are all a part of the “diversity” it is not about race or color, it is about small, local business overall. A new private held, very large corporation that just moved into our State. They do not have a diversity program. I personally called them because their website states that they do. However, when I called to talk to the buyers they have no idea what I am talking about. The recommendation is requiring the State and our public agencies, when bringing in new business, ensuring that they understand the impact in using locally owned businesses. There needs to be mandates to ensure that they perform rather than just talking about it. If you want to improve our economic situation, it has to do with creating jobs. Whether a large firm hires a local owned business directly or indirectly, when they do, it is job creation.” [#12]

Some interviewees noted that set-asides are less than ideal. [e.g. #18, #27] For example:

- A Black American male owner of a DBE certified architectural firm when asked about his insight on the small business set-asides said, “The terminology and perception of ‘set-asides’ needs to be reevaluated, possibly renamed. As a minority firm, with all the experience and capabilities of any other architect, why does this work have to be ‘set-aside’ for me? The best, most qualified minority should be the consideration in who receives the opportunity, not the one that it had to be set-aside for.” [#50]
- A non-Hispanic white male owner of an architectural firm indicated that business set-asides for minority- or women-owned small businesses minimize the opportunities for firms like his and places them at a disadvantage. He said, “I think there should be no discrimination

one way or another, but now all of the sudden my white Anglo-Saxon firm should probably not bother, because there are all of these strong set-asides for all of these other groups that are meant to deal with issues that I had no control over or participation in the past.” [#37]

- A Hispanic American male President of a minority-focused chamber said, “I’m not particularly an advocate for special preferences or set-asides, set-aside goals. If the process itself was fair, if bonding and insurance was lower, allowing more joint venture, then you would not have to have these set-asides or small business subcontracting goals.” [#07]
- A non-Hispanic white male representative of a trade association stated that small business set-asides tend to be counterproductive. He said, “They don’t help the industry remain competitive. When you actually have set-asides or mandatory participation, what happens is [that] people look for opportunities to take advantage of it.” He also mentioned that small business set-asides are exclusive in nature. He said, “For instance, if you say, ‘We are going to set aside all the carbon gutter in this project,’ you just now excluded all the firms who are not DBE certified that can perform that work.” [#19]

Subcontracting minimums and goals. Interviewees discussed whether they believe subcontracting minimums and goals to be beneficial.

Interviewees indicated that subcontracting minimums and goals are beneficial. [e.g. #23, #26, #34] For example:

- A Hispanic American female owner of a staffing company, when asked about small business subcontracting goals stated, “It is important that the agencies have the small business subcontracting goals as long as they are viable companies to fill those goals.” [#16]
- A non-Hispanic white male owner of an architectural firm, when asked about small business subcontracting goals, mentioned that both small business subcontracting goals should exist. He said, “The goals should be there. They should be goals, although it seems like sometimes they are mandates. You have to make sure that if you mandate something that it is accomplishable.” [#37]
- An Asian American female representing a woman-focused organization said, “There should be mandates requiring subcontracting minimums for woman-owned business to participate, and for those agencies and or prime contractors that do not reach meet those mandates, there should be consequences. This should also apply to the large corporations that the State or Agency brings into the State; that should be part of what they do. If you do not mandate it from the beginning, it will not work its way through the supply chain; creating a standard for everyone to understand what the expectations are is a must from the beginning.” [#12]
- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm stated that she would recommend the agencies require more certification on their projects. She said, “For me it is not about suppliers, there are not the same requirements for more for professional services and there should be. If there was a requirement to have a DBE, that

would allow me to team up with a number of firms. There should be some mandates for the prime contractors to utilize more local firms.” [#18]

- A non-Hispanic white male owner of an engineering firm stated that there should be a preference for using small, local firms. He said, “It is just not worth it to go after some of the projects. Just keep the money in the valley, the profits are being sent elsewhere. Every dollar I make in this company, I spend in this valley.” [#28]

Interviewees indicated that subcontracting minimums and goals can create challenges. [e.g. #30, #19, #36] For example:

- A non-Hispanic white male owner of an architectural firm, when asked about mandatory subcontracting minimums, said that when jobs have mandatory subcontracting minimums and the pool of availability is limited, this creates a challenge for his firm. He added that in order to meet the mandatory subcontracting minimum, he has to subcontract out portions of work that he is already able to do, which minimizes his potential revenue. He stated that mandatory subcontracting minimums compromise the quality of the work. He said, “The projects that smaller businesses tend to get the opportunity to do, do not provide a lot of scope to divide...giving up some of the scope means that you do not have as much control and there is a potential for the performance side to not be delivered as well as you would like it to be.” [#37]
- A non-Hispanic white male representative of a construction firm mentioned that a major barrier they face with NDOT is finding DBEs to meet DBE goals, especially as a large firm that can self-perform most of the work. He believes that this is partially due to the lack of a well-established DBE program in Nevada. He said, “The DOT is the only one in Nevada requiring DBEs... The biggest problem in Nevada with DBEs is that there is not that many out there, is not as well established... a lot of our contracts, the only item of work is work we would self-perform so it is hard to find a DBE to do, for example, your trucking or traffic control, something that we would normally perform ourselves... there are not that many companies that are DBEs in Nevada, so the number of DBEs makes it hard, and also there aren't that many other components that we can sub out.” He went on to mention that while NDOT provides a list of potential subcontractors to be able to meet the DBE goal, the list is not enough because of the limited amount of DBEs that can perform the work they are in need of. [#35]
- A non-Hispanic white male owner of a construction firm mentioned that when he is required to self-perform a certain amount of work and also meet a DBE goal, this creates a problem. He said, “There are specifications in certain agencies that create a barrier to entry because you are required to self-perform x amount of work. If you are required to perform x amount of work and I got this DBE sub and I am supposed to meet this goal too, well how do you meet the goal?... Why as a general contractor can't I hire qualified subcontractors? Maybe my paving crew is busy, and I have this other one that is qualified with the contractors board, and I only do 20 percent of the work but you still have a team of people that are all qualified... and I am still owning up to getting the job done on time, why does it matter what team I put together as long as we've turned the job?” [#30]

- A non-Hispanic white male owner of an electrical construction firm stated that NDOT has the highest percentage of DBE participation requirements in their contracts and they are very difficult to fill. He said, “We have to look very hard to fill that gap and in many times we are not able to bid the job because we are not able to fill the DBE participation... since we do not qualify with the state it makes it very difficult to bid the jobs.” [#27]

Formal complaint or grievance procedures. Interviewees discussed their experiences with formal complaint or grievance procedures. For example:

- A Hispanic American male owner of a construction management company said, “Even if I did have a formal complaint or grievance to file, there is no way financial I would be able to do so because of the financial requirement just to be able to file.” He stated that no small firm has the financial resources to compete against a large firm, another barrier for small firms. [#24]
- A non-Hispanic white male owner of an electrical construction firm said “I have filed a formal complaint and grievance procedure and it worked for our firm, so I have no issues with these procedures.” [#27]
- A Black American male president of a minority-focused chamber said, “I have had some members that needed to file a formal complaint and were scared of the repercussions and therefore will come to us at the chamber, so we can be the third-party advocate.” [#06]
- A Hispanic American male President of a minority-focused chamber stated one of their members had to file a formal complaint and the chamber was able to be there, support, guide and mentor him through the process. [#07]
- A Black American male owner of a DBE and MBE certified construction firm, when asked about filing a formal complaint or grievance procedure, stated that his firm has filed a formal complaint. He said, “There are issues with a bid that the agency should recognize and are not [recognized] unless a protest is submitted. If no one protests an issue in a bid, the agencies will let it proceed.” [#54]
- A non-Hispanic white male owner of an engineering firm indicated that he submitted a formal complaint process four years ago with NDOT, but he never received a response. He said, “We’ve complained to the right people, we’ve asked for help, and we don’t get a response. We feel very much that it is a process that is rigged.” [#36]

Other. Interviewees discussed other issues and suggestions for contract processes. For example:

- A Hispanic American male owner of a DBE certified painting company stated, “When sending a request for proposal to the subcontractors that are DBE certified, don’t send it to 100 contractors pick three and let them compete against each other, not against 100 other contractors.” [#51]

- A non-Hispanic white male owner of a controls firm said “One of the main reasons why our firm will not pursue working with public agencies, is that if there is an error or issue on a project, the agencies have unlimited legal resources and as a small firm, you may not be willing to take that risk.” [#45]
- A Hispanic American male owner of a DBE and ESB certified architecture firm stated that a barrier for small businesses is “The agencies and financial institutions relying upon Dun and Bradstreet (D&B) reporting to make determinations for new, small firms.” He added that he was denied financing because his D&B report showed inadequate financial income. He said, “I have paid out a costly amount to have a DUNS number to comply with the request of the agency and financial intuitions, and it has been a barrier, not beneficial.” [#40]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that if the agencies had a separate evaluation process for small business that would be helpful, but not limit opportunities for small firms because of size. She said, “We have teams that we work with, and independent contractors that we are able to pull from when we have the work but will not staff them without the work.” [#26]
- A non-Hispanic white male owner of a service-disabled veteran-owned business services consulting firm stated the agencies can more clearly define the set asides in their bid documents. He noted a bid where his firm invested significant time and energy into a proposal that he later learned was set aside for private non-profits. [#WT04]
- A non-Hispanic white female owner of an environmental engineering firm said, “The agencies and purchasing agents need to hear the barriers that small business owners are facing and work together in an effort to overcome some of these barriers for the local, small, minority- and woman-owned businesses.” She stated that she does not believe the agencies or purchasing agents understand the barriers in the bidding process for a small business owner. [#04]
- A Black American male owner of a DBE certified construction company stated, “The agencies need to have a better system or process for determining a company’s capabilities.” He stated that for architects and engineers it is very common to have a small staff and increase capacity based on the project’s needs. He said, “The personnel within the agencies making the determination or qualification for a company to do business with that agency, in many instances they are not familiar with the industry and trends and make an uneducated determination on that firm’s capability.”

Additionally, he stated, “NDOT has a program for small contractors for projects under \$250,000 however, they are sending out request for proposals to both large and small contractors when this program is meant to help support small firms with opportunities.” [#49]

- A Hispanic American male owner of a DBE certified surveying firm, when discussing recommendations for improving bidding processes, indicated that he would like to see more opportunities for DBE’s specifically in design jobs. He said, “We see a lack of DBE

participation in the design process of a project. I would say that about 90 percent of the DBE requirements are still only in the construction end of the project, and not in the design.” [#42]

- A non-Hispanic white male representative of an engineering firm stated some of the public agencies request a statement of qualifications every two years. He recommends this process happen more often to include new firms to be able to participate. [#39]
- A Black American male owner of a DBE and MBE certified construction firm stated that it would be helpful if they were to qualify towards the minority participation requirement while working as a prime. He said, “We still have to comply with the minority participation requirements; however, we, as a minority-owned firm, are not taken into consideration for minority participation.” [#54]

J. Insights Regarding the State ESB Program, Federal DBE Program or any other Race/Gender-Conscious Program

Business owners and managers discuss their experiences with state and federal certification programs, including comments related to:

- MBE/WBE/DBE programs (*page 121*);
- Federal DBE programs (*page 123*);
- Other Nevada state or local agency programs (*page 124*);
- Issues regarding Nevada or local state agencies monitoring and enforcement of its programs (*page 125*);
- Negative effects of programs on businesses not eligible for the program (*page 128*);
- MBE/DBE or supplier diversity programs in the local private sector (*page 128*).

MBE/WBE/DBE programs. Interviewees discussed their experiences with MBE/WBE/DBE programs.

Many interviewees indicated that they had positive experiences with MBE/WBE/DBE programs. [e.g. #23, #14, #19] For example:

- An Asian American female representing a woman-focused organization spoke of the advantages and disadvantages of WBE certification. She said, “The advantages or benefits of the certification [are] to give an opportunity to access corporations or agencies that have the mandate to do business with woman-owned businesses. For the corporations that are actively engaged in their diversity program, it is a marketing tool for them. Large private corporations like Shell, Wal-Mart, AT&T to name a few, all they have to do is see the WBENC logo on the WBE’s marketing material, they will seek out that WBE. So the benefit is huge for the WBE’s to be able to access some of the corporations and contractors, otherwise they would not have that direct opportunity... The process is difficult but the advantage through this process forces the WBE to [be] organized. Now that they have the all the information

together from the certification, when a contract opportunity comes up they are ready.” [#12]

- A Hispanic female representative of a small business assistance organization indicated that certifications from the state or federal government to do business in the public sector for small businesses are important to the success of the business, as they can lead to more opportunities. She said, "Every certification will help you to do business with the government." [#13]
- A Black American male owner of a DBE-certified general contracting firm, said, “I appreciate what the DBE organizations have done for me and getting started out.” [#02]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that the W/DBE programs have been a helpful program for her firm. She said, “I am not always tapped into knowing the projects and where we might be a good fit, but overall, the programs have been very helpful for us.” [#26]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that she needs to learn to work the system better to learn about subcontract opportunities. She said, “A recent project we learned about came out of the blue and we were contacted because we were a DBE firm on the list. I plan to leverage the recent subcontract project that was very successful with the agency to identify other subcontracting opportunities.” [#26]

Many interviewees indicated that MBE/WBE/DBE programs are not beneficial or are problematic. [e.g. #23, #14, #19] For example:

- A Black American female owner of a DBE, MBE, and WBE certified construction firm, when asked about the M/W/DBE program in general, stated “As a M/W/DBE and graduate of the 8(a) program, our DBE certification benefited our firm one time. As a prime contractor in the State of Nevada, we are not able to subcontract to another prime and as the prime we are not able to use our own DBE status to meet DBE contracting requirements.” [#55]
- A Black American female representing a minority-focused organization said that the certification programs are not always useful. She said, “There are minority business owners that have applied for every certification, including the ESB. They did not want to miss any opportunity. However, they still end up to a dead end, so [they are] not always helpful...What would be helpful for these programs is that there is a pathway, a journey that the minority business owner can understand the process and what steps to take so that these certification programs can become more helpful to them in creating opportunities for new business.” [#15]
- The female owner of a woman-owned company noted that many of Nevada’s contracts only include a 3 percent goal. She said, “That’s not enough for us to encourage anybody to use us.... [Higher goals are needed] to make it fair. To make it an incentive for our primes to want to use us. Not to have to use us.” [#LAS23]

- A Black American male owner of a DBE and MBE certified construction firm, when asked about insight regarding the agencies M/W/DBE subcontractor programs, stated “For contracts requiring minority participation, the agencies have policies established monitoring of the minority participation; however, they do not consider when the prime is a minority performing 100 percent of the work; they request additional minority participation.” [#54]
- A non-Hispanic white male owner of a construction firm mentioned that DBE requirements are a barrier to his firm due to the low availability of DBE firms in the industry that are applicable to the jobs that he does. He said, “If [the DBE subcontractors] do get a job, let’s say a big job with one of these bigger contractors, then they’re out. I don’t want them to overbook work because then they can’t show up to my job... you have all of these jobs bid at the beginning of the season with all of these DBE requirements and these subcontractors get a bunch of work, and then if they bid for five percent in the spring and you are in the middle of the summer, they can’t use the same percentage because those contractors aren’t around anymore, they are booked up for the year.”

He also stated that he would like for NDOT to do a better job at analyzing the DBE availability within the marketplace for each type of project. He said, “If they can’t come up with five percent, then why would you even recommend for us to come up with three percent [of DBE subcontractors specific to a job].” He went on to say, that if public agencies continue having DBE requirements, they should encourage qualifying small businesses to get certified to grow the pool of available DBEs. [#30]

- A non-Hispanic white female owner of an iron construction company, when discussing her experience in working with McCarran, stated, “I have provided services to McCarran for one project, a woman-owned company was required on the project and we learned of the opportunity from another company because they did not meet the requirement.” She explained that because she was not WBE certified, she was required to be a member of a woman-owned business association; it was not enough to just be a woman-owned business. She said, “I thought this requirement was ridiculous and it cost me \$1,200 for an \$8,000 project; but we did it to get the contract.” [#47]

Federal DBE programs. Interviewees discussed their experiences with Federal DBE programs. For example:

- A Black American male owner of a DBE certified architectural firm when asked about the Federal DBE program stated, “For the professional services there are no DBE requirements or goals to be met in this industry as there is set for the construction industry.” He stated that there should be required goals or mandates to ensure that those in the professional services industry have the same opportunities as the construction and other firms have in participating in larger projects. He said, “The agencies are the owners and have the authority to initiate these mandates or requirements to include a DBE set-aside or initiative for the professional services industry.” [#50]

- A non-Hispanic white male owner of an architecture firm, when asked about the Federal DBE program, stated that he was told he qualified for DBE certification under the category “other socially advantaged,” but was later told differently. He said, “When the agency representatives are not clear on the definition and misleading small, economically disadvantaged firms on the DBE certification program, it is another barrier for a small firm.” [#43]
- A Hispanic American male President of a minority-focused chamber stated that his members have some issues with the limits on becoming certified. He said, “Non-profit organizations cannot be certified as a DBE and we do not understand why, if it is a supporting service type industry. Why should they be penalized if they are a non-profit?” [#07]
- A non-Hispanic white male representative of a trade association stated that business assistance programs are helpful for their member firms. He said, “There is an advantage that DBE firms get, and they have opportunities with the federal government to do certain jobs that are appropriate for what their capacity is.” He went on to mention that it is helpful that all of these entities have a single DBE certification process. He said, “When you go online now, you do the FAA DBE certification. The Airport Authorities, NDOT, and RTCs meet, they certified the DBE and you are on the DBE list for all of them, all contract awarding agencies in the state of Nevada.” [#19]
- A non-Hispanic white male owner of a construction firm mentioned that his company has been DBE certified in the past. He went on to mention that unlike DBE contractors in the current marketplace, he was very popular because he self-performed and actually did the work. He said, “When we [first] did federal work, we were a minority contractor, we serviced as a disabled veteran small business, and so we were on a program like that. But we actually self-performed almost all of our work, and that’s why we were extremely popular with the federal government.” [#30]

Other Nevada state or local agency programs. Interviewees discussed other programs, such as veteran and the Emerging Small Business Program.

Some interviewees noted the usefulness of veteran programs. For example, a non-Hispanic white male representative of a trade association mentioned the Disabled Veterans preference as a local agency program that is helpful. He said, “The state of Nevada has a Disabled Veterans bidder preference on smaller contracts. I think that is helpful. It is very rarely taken advantage of.” [#19]

Interviewees discussed their experiences with the Emerging Small Business (ESB) Program. For example:

- A non-Hispanic white female owner of a DBE-certified architectural firm stated that the ESB program has done nothing for her. She asked, “What is it supposed to do? I have never had anyone tell me that they ‘found’ me on the ESB database nor have I seen any set-asides for an ESB.” [#10]

- An Asian American female representing a woman-focused organization stated that about 95 percent of the WBE's in the organization registered for the ESB certification and have not received work from it. She went on to say, "Many of the small business owners certified as an ESB do not even know what the program is about or how they are able to utilize the information or the database. Again, great intention but no follow through. If you are going to start something to help the small business owners, do it all the way so that it can be beneficial to the business owners and the community." [#12]
- A Black American female representing a minority-focused organization believes the ESB program is useful. She said, "The emerging small business (ESB) program is a great start... [I] applaud those that were able to get that written into legislation and the implementation of the program...However, we have to be more engaged and start looking at our elected officials and holding them more accountable when it comes to their track record on minority and inclusion contracting within our State." [#15]

Issues regarding Nevada or local state agencies monitoring and enforcement of its programs. Interviewees discussed whether they believe there are any issues with the monitoring or enforcements of state or local agency programs.

Some interviewees noted that monitoring and reinforcement is lacking and could be improved. For example:

- A non-Hispanic white female owner of a DBE-certified architectural firm stated that there are no real goals and for the agencies and or primes and there is no enforcement. She said, "So why have them?" [#10]
- A Hispanic American male owner of a DBE certified painting company when discussing the monitoring and enforcement of its program said, "Yes, there needs to be monitoring and enforcement for the DBE program. The prime contractor commits to a DBE firm, reports that commitment to the agency, [is] awarded the project but [then] gives the work to another firm...[the agency needs to] ensure that the prime contractors uses who they say they are going to use." [#51]
- A Black American male owner of a DBE certified architectural firm said, "For prime contractors seeking DBE firms to work with, many firms that would qualify do not become certified because of the barrier of time and resources in the certification and recertification process; creating an additional barrier for prime contractors looking to engage with certified DBE firms." [#50]
- A non-Hispanic white female owner of a DBE-certified engineering firm said, "I don't believe there is any monitoring of the program nor is there any enforcement of the program." She stated that she has heard that some of the agencies will be adding more DBE programs. She said, "I am still waiting to see this happen." [#25]

- The male vice president of sales and marketing for a preventative maintenance firm recommended that Nevada take more action on DBE participation. He said, “One of the reasons is that there is nothing that I see, and I may be wrong, that compels businesses here to want to utilize companies like ours.” [#LAS21]
- An Asian Pacific American male owner of an environmental consulting firm mentioned that more than once he received incorrect information from RTC – WC regarding a DBE requirement on a project. He said, “During the first phase of the [RTC – WC] project, [RTC – WC] said we put all the federal funding in the first phase so we don’t have to worry about DBE’s in the second phase. That was a lie.” [#03]
- A non-Hispanic white male owner of an electrical construction firm stated that the State should more closely enforce or monitor the policy that allows firms to bid over their limit one-time. He stated that there are firms with a low bonding limit and are passing tens of millions of dollars through their firm, but are not checked because they are spreading that out over projects. He said, “For example a residential contractor with a 20,000 limit building tract homes and he has just built over 500 homes, but each were under his threshold.” [#27]
- A non-Hispanic white female owner of a DBE-certified engineering firm stated that it would be good for each of the agencies to identify what their goals are for the DBE program. She said, “If it is just to meet the federal requirements, then don’t do anything. Don’t do a disparity study and just tell us. But if they really want to make a change, establish a goal and see it through.” [#25]

Some interviewees noted that program reinforcement and monitoring has been good. For example:

- A Black American female owner of a DBE, WBE, and MBE certified logistical service company said, “I don’t think there are any issues with the monitoring of the DBE/ESB programs.” [#48]
- A Black American male owner of a DBE-certified general contracting firm said that Clark County Department of Aviation’s (DOA) goals for DBE participation have been helpful. He said, “The DOA always has a goal in their bid documents for DBE participation and they have part of the bid document that is called a good faith estimate – other agencies have something similar. DOA actually exercises there [good faith effort goals], which is great. Having that accountability it is good.” [#02]
- A non-Hispanic white female representative of a Hispanic owned DBE certified electric company, believes that NDOT’s DBE program does a good job at enforcing and monitoring the program. She said, “I think that they are pretty thorough. They looked at everything that we provided. So I think that they do a good job at making sure that they substantiate the certification.” [#23]
- A Subcontinent Asian owner of a geotechnical engineering firm, mentioned that based on his experience, they do a good job a monitoring the DBE program. [#29]

Many business owners and representatives have noted that they have seen or experienced abuse of the good faith effort process. [e.g. #8, #52, #17, #21, #54, #WT05, #53, #48] For example:

- A non-Hispanic white female owner of an environmental engineering firm said, “We have seen quite a bit of abuse in the good faith effort process...The prime contractors want to show their efforts... we will receive request to bid for project completely outside our line of service, but it allows them to report back that they reached out to a DBE firm.” [#04]
- A Hispanic American male owner of a DBE certified painting company discussing abuse of the good faith efforts said, “Yes, there is abuse of the good faith efforts, they request your quote because you are DBE and then give the work to other firms, even out of state contractors.” [#51]
- A Black American male owner of a DBE certified construction company said, “Beyond a doubt there is abuse of the good faith effort process. Contractors will send a request to bid to a company that does not provide that service and then will state that there was no response and check a box to prove their ‘good faith efforts.’” [#49]
- An Asian American female representing a woman-focused organization stated that there is abuse of the good faith effort process by the prime contractors. She said, “They will seek out the bids from the WBE’s, win the contract with those numbers, but will either not utilize the WBE to the full extent that was proposed or push them out completely.” [#12]
- A Black American female representing a minority-focused organization stated that there is abuse of the good faith effort process. She said, “What I would like for organizations to be able to do is come to the table and identify other ways to measure the good faith effort. What are you doing outside of when you are bidding? Being more intentional in outreach measures 12 months of the year? Enlist those efforts. What type of impact is the process having in inclusion of local and minority owned firms and opportunities? There needs to be some additional education for the agencies and the prime contractors so you are not just checking a box you understand the impact that it has.” [#15]
- The female co-owner of an environmental safety training and consulting firm said that her firm has experienced the abuse of good faith efforts. She explained, “[The general contractors receive] the award based on the extra points that they used for our company [satisfying the DBE percentage]. And they’ll turn around, because there’s nothing in the actual contract saying they have to use us. That’s one of the barriers. They had a 2 million dollar contract. And I kept asking. They said, ‘Well, you need to go contact all the procurement people and get your own little contracts under ours.’ Instead of being forced to actually use us in the intention that was to use us for the environmental safety side.” [#LAS45]
- A non-Hispanic white male owner of an architecture firm stated, “We cannot allow the abuse of the minority status to benefit non-minority firms.” He stated that some firms understand the benefits of utilizing minority owned firms in winning contractors. He said, “They are benefiting, but not helping the minority owned firms they hire in developing their

companies. They fail to give back to the community and that is a detriment to our community, our economy, and those small minority owned firms.” [#43]

Negative effects of programs on businesses not eligible for the program.

Interviewees discussed differing views on negative effects of the program for non-eligible businesses. For example:

- A Hispanic American male owner of a DBE certified painting company stated, “There could be a negative effect on those not eligible for the program. Many of these programs have been around for 50+ years; they may have outlived their usefulness to a certain degree; if they haven’t accomplished their mission right now it may not be effective.” [#51]
- A Black American male owner of a DBE certified construction company said, “I don’t feel there are any negative effects, if they are not eligible in most cases they are already successful.” [#49]
- A Hispanic American male owner of a DBE certified surveying firm mentioned that he does not believe that the DBE and ESB program have a negative effect on business that do not qualify for the programs. [#42]
- A non-Hispanic white male owner of an engineering firm stated that the he believes project awards should be made based on qualifications rather than race or gender. [#28]
- An unidentified male said that companies that are not DBE certified may suffer. He said, “It doesn’t matter what their price is or anything else, they get listed because [they are] a DBE and [prime contractors] know it’s an easy way to meet that DBE requirement.” He felt that gives an unfair advantage because other suppliers, non DBE suppliers, do not receive as many contracts as a result. [#REN11]
- A non-Hispanic white male owner of an engineering firm said, “I think it is a disadvantage to us to give a disadvantage or a ‘one-up’ [to certified businesses]. Put blinders on and figure out who is the most qualified and these selections should not be based up on color, gender, creed or any other criteria other than qualifications.” [#28]
- A non-Hispanic white female owner of a DBE-certified environmental firm said, “Now a veteran can immediately get awarded a project, I think that we should all be on the level playing field.” [#08]

MBE/DBE or supplier diversity programs in the local private sector. Some

Interviewees discussed diversity programs in the private sector. For example, a Black American male owner of a construction firm, when discussing the MBE program in the private sector, said, “I was brought to Las Vegas to help diversify the marketplace for a local private entity and I am very familiar with supplier diversity and the programs in the private sector. Public agencies could benefit from their models; it must start with the leadership in making these programs successful.” [#53]

K. MBE and DBE Certification

Business owners and managers discussed the process for MBE certification and DBE certification, including comments related to:

- Knowledge of certification opportunities (*page 129*);
- Ease or difficulty of becoming certified (*page 130*);
- Advantages of certification (*page 132*);
- Disadvantages of certification (*page 133*);
- Recommendations for improvement (*page 134*); and
- Abuse of certification by firms (*page 136*).

Knowledge of certification opportunities. Interviewees discussed their knowledge, or lack thereof, of certification opportunities. For example:

- A Black American female owner of a DBE, WBE, and MBE certified logistical service company, when discussing certification opportunities said, “I have received everything I can locally; there may be other options available that I am not familiar with or aware of how to obtain.” [#48]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company, mentioned that she learned about MBE and DBE certifications by attending outreach events from business assistance programs. She said, “I didn’t hear about it until I went to the small business match maker, and so that’s when I learned about all of the certifications. And then as I was going to all the monthly outreach events, each of the outreach events was kind of a reiteration about the certifications, and where to find bids, and the process.” [#23]
- A Hispanic American male owner of a DBE and ESB certified architecture firm stated the knowledge of certification opportunities has helped his business get additional projects. He said, “Because I had completed the BOWD program with Clark County, one of the conditions in completing the program that we would have an opportunity with Clark County... Due to the satisfaction of the client, we had renewed opportunities.” [#40]
- A Black American female representing a minority-focused organization stated that their organization does MBE certification, so the knowledge of certification opportunities is readily available. Additionally, she stated that the uniformity of the DBE program has made the process of becoming certified easier. [#15]
- The female owner of a woman- and minority-owned outreach firm said that she did not know about the DBE program for over fifteen years, even though she was well-connected in the community. She stated, “No one really ever reached out and said this is the process that you really have to go through if you want to compete in this world. I’m beginning to learn this this year. And I think it has a lot to do with the bill that was passed. I think its AB151.” [#LAS42]

- A Black American male owner of a DBE certified construction company, when asked about his insight on the programs said, “I am DBE certified, but not familiar with the State ESB program and previously was MBE certified with the MSDC agency.” [#49]
- A non-Hispanic white female owner of a DBE-certified environmental firm stated that it is up to each individual owner to market themselves and to know about the certification opportunities. She said, “Outside of PTAC and McCarran there is really no one that will help you.” [#08]

Ease or difficulty of becoming certified. Interviewees discussed how easy or difficult they believe it is to become certified. .

Some interviewees noted that becoming certified was a difficult process. [e.g. #5, #50, #26, #53] For example:

- A Black American male owner of a DBE-certified general contracting firm stated that the process of getting certified was very difficult. He said, “I thought it would be pretty easy to see that I was disadvantaged, but they [NDOT] made it extremely difficult. I had to work while the sun was up and do the paperwork afterwards, which was tough.” He also said that preparing all the paperwork without any assistance was very difficult. [#02]
- A non-Hispanic white female owner of an environmental engineering firm stated that the process was painful and took quite a bit of work. She said, “It took us 6 months to get our DBE application together; it is a very extensive process. Just the complexity of the process is a barrier for small businesses... Being certified by multiple agencies may be a disadvantage to my firm.” She stated that, with the amount of effort that it takes to become certified, annual recertification and all the requirements and updates in between, the attitude from others that she has received has been, “When do you actually do the work?” [#04]
- A Hispanic American female owner of a staffing company, when asked about the difficulty of being certified stated, “Many are very time consuming, even those that are considered to be free, in fact are not due to the amount of time and resources required in becoming certified; time is money.” [#16]
- When asked about the ease or difficulty of becoming certified, a Hispanic American female owner of a WBE and MBE certified construction company said, “The process is very time consuming, when I was began the application process the local office was able to walk me through the process. She understood that I was new in business and was so helpful in getting us certified.” [#20]
- A female owner of a woman- and minority-owned project management consulting firm said that the costs of submitting certifying applications are prohibitive. She explained, “I practically have to give my first born... And so for a lot of, I think, smaller businesses, that’s a challenge. And probably not something that they’re willing to face cause they’re too busy trying to get money in the door to take that time and effort to actually get [certified]– and if they don’t do it themselves then they have to pay someone to do it, which is sometimes really expensive as well. So I think that’s another barrier. Because in order to get on some of

these bid lists, especially for government work, and get priority for minority you have to have that certification. And in order to get it, [you need] a binder of information that you have to submit.” [#LAS31]

- A Hispanic American male owner of a DBE-certified electrical construction firm, when asked about difficulty of certification, stated that it is a lot of work to obtain the DBE certification, but he appreciates the difficulty. He said, “With the tough requirements not just everyone will become certified - the process will eliminate that.” [#33]

Some interviewees did not find the certification process to be difficult. [e.g. #42, #52, #6, #29,#19] For example:

- An Asian Pacific American female owner of a DBE-certified environmental engineering firm stated that the certification process was not too difficult. She said, “There is definitely paperwork you have to gather but it is not difficult.” [#09]
- A Black American male owner of a DBE certified construction company said, “It wasn’t difficult at all, I felt it was pretty streamlined.” [#49]
- A Black American female owner of a DBE, WBE, and MBE certified logistical service company said, “I went through NDOT and it was very easy. Being a sole partner made the process easier.” [#48]
- A non-Hispanic white female owner of a DBE and WBE certified architecture firm, stated that was really easy for her firm to become DBE certified, the entire process took about a month. She said, “It was easier for me since I am 100 percent woman owned. I also had all the information gathered for my WBE certification, so everything was already put together and was readily available for the DBE application process.” [#18]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company, mentioned that the process of becoming DBE certified was for the most part smooth and easy. She said, “Our application for that was probably the easiest because it was all electronic, it was very straight forward, and I think the biggest bulk of time was inputting all of the data. And I found that throughout the whole process they were really responsive to answering my questions... out of all the applications that I tuned in for certification, theirs was probably the easiest.” [#23]
- A Hispanic American male owner of a DBE and ESB certified architecture firm, when asked about the process of becoming certified stated, “It was not difficult.” He added, “There was a lot of paperwork to complete, but it was very straightforward and I understood it all. The agency was very helpful in answering any questions that we had through the process and [we] had great support.” [#40]

Advantages of certification. Interviewees discussed whether they believe there are advantages to certification.

Business owners indicated that certification has been advantageous for their firms. [#9, #42, #29, #34] For example:

- A non-Hispanic white female owner of an environmental engineering firm said, “With all the certifications we have, I believe the DBE certification has been our most valuable. It helped us get a foot in the door and we have been able to maintain a high level and quality of work to continue to receive opportunities. I appreciate the DBE program for that and honestly, without it I don’t think we would have the opportunities we have without it.” [#04]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company mentioned that becoming DBE certified has provided more bidding opportunities for the company. She said, “Since we got our certification, because we have other federal certifications, that’s actually kind of improved opportunities to bid...Now that we have the certification, it seems that more people are finding us based of that, now it’s kind of changing. I think we are in this transition phase...People are more willing to take a second look at us... [the certification] means that our business is legitimate and that we are here to stay, because when you look at the process of becoming certified, it means that you had everything evaluated so that makes you look a little bit more polished.” [#23]
- A Black American male owner of a construction firm said, “Certification is foot in the door; it doesn’t keep you but it will help you get there.” [#53]
- A Black American female representing a minority-focused organization said that certification is advantageous. She said, “Becoming certified lets that organization know that they are a legitimate company and they are intentional in wanting to do business with them [the organization]. It could be the differentiator from any other company in all things equal. There are companies that want to make sure there is inclusion, an inclusive supply chain will be a better supply chain and that is the hub of a business.” [#15]

Some interviewees indicated that they have not seen any advantages to certification. [e.g. #49, #48, #54] For example:

- A non-Hispanic white female owner of a DBE-certified environmental firm said, “For all the years I have had the certification, it has allowed me to get to the bidding table and that is it...It has not helped me win any contracts, but I know understand how I can market myself with it.” [#08]
- A Hispanic American male owner of a DBE certified painting company said, “I thought there were advantages, but I am not seeing them.” [#51]
- A Black American male owner of a DBE certified architectural firm said, “The prime contractors do ask for it; however, for the amount of time we have spent on the process we have not received very many projects because of the certification.” [#50]

- A Hispanic American female owner of a WBE and MBE certified construction company said, “When I first became certified I honestly thought that opportunities would just pour into our company and it was disheartening to know that is not exactly how it works. So, we have not had any advantages of the certification, but maybe one day we will.” [#20]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company indicated that one of the barriers the company has faced when doing business with Nevada public agencies has been finding opportunities to bid as a DBE certified company. She said, “We really haven’t done any work with NDOT. We were hoping that the DBE certification would get us more interest that way, but it doesn’t seem like its generating interest the way some of our other federal certifications are... we have to do more direct marketing, and it’s hard to do that.” [#23]
- The owner of a MBE-certified business says that MBE certification has provided no real benefits. They said, “My company has been a member since 2006 and has not seen benefits from this organization. I don’t feel that minority business has contributed more business our way or have seen benefits from this organization.” [#WT02]

Some interviewees stated that primes will often try to incentivize certified companies. For example:

- A Black American male owner of a construction firm stated, “For our firm, we purposely seek out and do business with woman and minority owned businesses and contractors, to support and create growth in that demographic.” He stated that it can be a double-edged sword because the cost is not the lowest and it can create more work than his small firm is prepared for. He said, “We don’t want to see a firm fail and we want to help establish good working relationships, so we have created an internal program that allows us to identify firms that the best fit for a particular project, or we partner them with another firm...in most instances, it is not always the best price, but it does help grow the other small, minority-, and woman-owned firms.” [#53]
- A non-Hispanic white male representative of a trade association mentioned that he knows prime contractors try to encourage smaller DBE certified firms to participate by providing incentives for working with them. He said, “I’ve seen prime contractors actually incentivize DBE firms to say ‘Hey, we will help you with mobilization cost’... The prime contractors get pretty creative to try and encourage them to come to these projects, it’s just very difficult to do so. If you only have five people, not all five people want to go to live in Carlin for six months, and that’s what happens.” [#19]

Disadvantages of certification. Interviewees indicated that there were some problems that could come from being certified, such as double standards or perceptions of being a disadvantaged business. For example:

- A Black American male owner of a DBE-certified general contracting firm said, “Work [of certified companies] is definitely scrutinized more than others...[I have] had people that worked for me that went to work for other [non-certified] companies say ‘Wow, when I worked for you, we had inspectors up our tail every day. Here they have lunch, shake your

hand, and say, see you later.’ So the work for us, [consequently] we have to dot our i’s and cross our t’s, whereas others may not have to.” [#02]

- A Black American male owner of a DBE certified construction company said, “I wouldn’t say disadvantage but would say the perception for some is that if you have the certification, [it] is a crutch.” [#49]
- A Black American male president of a minority-focused chamber stated that a disadvantage of certification is the perception. He said, “Some minority- and woman- owned businesses have a perception in regards to the language of certification and of being considered a disadvantaged business. Some members choose not to become certified because of that stigma, or to be labeled before they even got in the door, they wanted to be respected for who they are...At the chamber, we encourage our members to get all the certification that will enhance their business profile, and look at it from that vantage point versus it being a disadvantage.” [#06]
- A non-Hispanic white female owner of an architecture firm said, “Perception is a negative effect of these programs. That we are not good enough so we have to become certified to help us get our foot in the door. It should be that you are comparing work apples to apples; if they are a certified minority- or woman-owned firm that is just the icing on the cake. The certification is your foot in the door, your capabilities is what should win you the project.” [#18]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that she does not want her certification to get her the job. She said “I want to get the job because I am the best person to do the job. The certification should just be the tool to open the door for me to prove to them [the agencies or prime contractors] that we are the best firm to do the job.” [#10]

Some interviewees indicated that there were no disadvantages to certification. For example:

- An Asian Pacific American female owner of a DBE-certified environmental engineering firm stated she feels there could be a negative perception, but it’s not a real disadvantage. She said “I don’t think that we are thought of less because we are a DBE, maybe our competition but I really don’t care what they think.” [#09]
- A Black American female owner of a DBE, WBE, and MBE certified logistical service company said, “I don’t feel there are any disadvantages of certification.” [#48]
- A non-Hispanic white female owner of a DBE, WBE, and ESB certified architecture firm said, “I am not aware of any disadvantages, other than the perception by others.” [#18]

Recommendations for improvement. Interviewees offered recommendations for improvement of certification programs.

- A Black American male owner of a DBE-certified general contracting firm stated that all certifying agencies need to apply the same level of scrutiny. He said, “Sitting on this side of

this desk, I know that those guys [certifying agencies such as NDOT] try to scrutinize. I would say they need to get on the same page. When I was certified, it was tough and [I] did several interviews, [an NDOT representative] came to my place of business, made certain that I was the one doing the estimating, in the operations and management. NDOT made sure I wasn't a façade. So, I don't know if every entity does that or not." [#02]

- A Hispanic American female owner of a staffing company, when asked for recommendations for improvement of certification process, stated, "Rather than have a class on how to do it, there should be more workshops, hands-on teaching business owners exactly what to do rather than to just talk about how to do it." [#16]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company, mentioned that understanding the application and the requirements to receive the certification as a DBE was a challenge for her. She indicated that the language and requirements were not clear enough. She said, "I think that for small businesses, that they don't have the availability of staff assistance or people that understand all the documents; that could be a big barrier. For me, to be able to understand the forms was a big challenge." [#23]
- A non-Hispanic white female owner of a DBE-certified engineering firm stated that a recommendation she has would be to make the process electronic to eliminate the need for the paper because the certification packet can be costly to put together. [#25]
- The female owner of DBE-certified demolition company said that she attempted to bid on the demolition of terminal two at McCarran Airport. Whereas her firm had a high DBE percentage on a million dollar contract, the company who won had zero percent DBE participation. She explained, "When the DOA doesn't require it, nobody will do it...they have all these documents that they make you fill out for the DBE effort. But they don't care...so I think the only way to really implement helping the minority and women businesses is to mandate a goal for all government agencies. It doesn't matter the size of the project." [#LAS43]
- The female president of a governing agency, said that the DBE program does not help LGBT certified businesses. She stated, "And so I think one of the biggest struggles, as I listen to all of you, quite jealous that you have the opportunity to be at the table as a minority business when they're not even recognizing a certified LGBT business enterprise. So that's a big piece of a disparity." [#LAS37]
- A female director for a local MBE development council, cited the importance of measurements and cross-state comparisons. She stated, "I've seen the challenges that happen with race and gender discrimination because there is not a consistent sourcing process that happens. And whenever there's not a consistent sourcing process that happens from the time of identifying a supplier to the time that that contract is awarded and the work is done and the payment and everything, things happen and there is no inclusion. And what gets measured gets done...[In] Texas and other states, they are really more aggressive, really more proactive, really have more stronger language, measureable language in those contracts." [#LAS46]

- A non-Hispanic white male owner of a construction firm, mentioned that different definitions of small business might put him at a disadvantage. He said, “Your definitions of small business [doesn’t] match the federal government’s definition... I am a small business with the federal government as a general contractor... with certain subcontracting codes we might be or we might not be [considered a small business], and with NDOT we are not.” He went on to mention that classifying businesses on their yearly revenue is simpler than classifying them on their net worth. [#30]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company, mentioned that it would be helpful if all certifying programs had a similar more streamlined process. She indicated that it took her some time compiling the required documents, but even then, each agency had specific requirements to follow such as order of documents. She said, “It took me probably about three months to compile all of the information for all of the certifications... once I had one done, then it was more or less adjusting it to the [specific program].” [#23]
- A Black American male owner of a DBE certified construction company said, “A huge barrier for contractors is obtaining bonds. If the agencies could work with a bonding company to go through a voucher control program, this would be one way to eliminate barriers for small firms in obtaining bonds.” [#49]

Abuse of certification by firms. Interviewees discussed whether they have seen or experienced any abuse of certification.

Many interviewees believe that there is a problem of abuse of certification, and that fronts are an issue. [e.g. #4, #10, #50, #49, #22, #25, #30, #32, #33] For example:

- A Black American male owner of a DBE-certified general contracting firm, said he is not familiar with the enforcements efforts or how they are monitored. He said, “But when I see the same company over and over again getting the same DBE projects set aside, joint venture with so and so and the same company, which I can name, getting the same over and over, this isn’t fair. But that is the way it is.” [#02]
- A non-Hispanic white male representative of a trade association indicated that certification programs should take family trust funds into consideration when awarding DBE or WBE certifications. He said, “The way that wealth or personal wealth is counted is a little disingenuous. If you have a family trust fund with 10 million dollars in it, that doesn’t count towards your certification as DBE or WBE. So as long as you keep your personal wealth outside of family trust, and down below one point seven million dollars, you can continue to be a DBE.” [#19]
- A Hispanic male owner of a DBE-certified flagging company believes there has been a great deal of abuse of the program. He said, “The DBE program in Nevada...is in desperate need of reform as it is causing irreparable harm to minority DBEs...Caucasian men [are] transferring majority ownership...to their wives to take advantage of the program...[two Las Vegas firms]. appear to be the biggest beneficiaries of this fraud...In Las Vegas, the ‘good old boy’ is alive and well and now sanctioned by NDOT...It is now legal to discriminate

against minorities as long as the DBE goals are ‘met’ all the while NDOT looks the other way...It is incumbent on NDOT to either set separate goals for MBEs and WBEs or take another look at suspect WBEs with an eye to decertifying them.” [#WT03]

- A non-Hispanic white female owner of a construction firm stated that she is aware of a few companies where the female business owner comes in occasionally to take care of the financials but is not involved with the business. She said, “I have always wondered how they get certified as a WBE. I understand that in the construction company, not everyone goes out into the field but you do need to work more than just a few hours on the “books.” But on the other side, I know a good business owner will have a staff under them; the owner doesn’t do everything, so you have to pick and choose. I can’t be everywhere.” [#17]
- A Black American female owner of a DBE, WBE, and MBE certified logistical service company, in discussing abuse of certification by companies and front companies said, “I hear all the time where husbands will brag about having D/WBE certification, the husband is the one doing all the work and the wives, the majority owner, has no real purpose in the company.” [#48]
- A Hispanic female representative of a small business assistance organization mentioned that she has heard of instances where bi-racial couples register firms under the spouse representing the minority in order to be able to receive DBE certification. She said, “I have heard of Hispanic women married to a white guy who owns a business, so he will put his wife with 51% ownership so he can get the [certification] business. That happens.” [#13]
- A Black American male owner of a construction firm said, “In some jurisdictions woman business owners are accounted for as both a minority- and a woman-owned firm when winning contract opportunities or diversity spend. There is some manipulation in the tracking of spending for minorities- and woman-owned firms.”

Additionally, he stated, “The front companies, especially the woman-owned businesses, are not like they have been in years past. I believe they are still there it is just not as apparent as it once was. They just have access to more resources so they can be more successful.” [#53]

Some interviewees indicated that they have not seen any abuse of certification. [e.g. #12, #20]

For example:

- A Hispanic American male owner of a DBE and ESB certified architecture firm, when asked if he is aware of any abuse of firms that are considered to be a “front” company, said, “I have not seen any abuse of front companies.” [#40]
- A Black American male owner of a DBE and MBE certified security company stated when asked about abuse of certification front companies, said, “I have not experienced any abuse nor was aware of any abuse of front companies.” [#52]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm, when asked about abuse of certification by firms considered to be a front company, stated that

she has not seen any abuse. She said, “There are just not very many woman or minority firms in the program in our area, so I don’t see abuse.” [#55]

L. Any Other Insights and Recommendations Concerning Nevada Contracting or MBE/DBE Program

Interviewees, participants in public hearings, and other individuals made a number of comments and suggestions regarding Contracting Programs and MBE/DBE programs. Comments regarded:

- Follow Up and monitoring (*page 138*);
- Advertising (*page 139*);
- Language barriers (*page 139*); and
- Assistance (*page 140*).

Follow-up and monitoring. Many interviewees indicated that local agencies lack adequate follow up and monitoring. [e.g. #52, #ABC4] For example:

- A Black American male owner of a DBE-certified general contracting firm provided a recommendation of making entities self-perform the work. He stated, “You get paperwork contractors that are just fronts that just sign it and don’t do the work.” [#02]
- A Black American male owner of a DBE-certified general contracting firm stated that the agencies should visit the DBE-certified companies often to make sure the owner is on the job site. “When the employees don’t even know who that person is – it wouldn’t be very difficult.” [#02]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated she feels the goal setting should be real goals and there should be consequences for the entities and agencies that do not meet their goals. [#10]
- A non-Hispanic white male owner of an architecture firm said, “We need to follow the money; with large federally funded projects, it is owed to the local, small, minority-, and woman-owned firms. Are they getting what the agencies or prime contractors say they are receiving?” He stated that there should be a monitoring of these system and programs. [#43]
- A non-Hispanic white male owner of an engineering firm mentioned that he would like for Public Works to be monitored more frequently so that preferential treatment towards some firms does not continue to occur. He said, “[We need] a very careful eye on how Public Works interfaces with some of the groups that they work with when projects are constructed by the state.” [#36]
- A non-Hispanic white male owner of a construction firm commented that he believes there is a lack of adequate monitoring and enforcement of the DBE program. He said, “They are not even DBEs anymore in Nevada. They are disadvantage businesses because of how much money they have... it has nothing to do with race or anything like that. There are so many

ways to get around it...some of them have more money but because of the way they shuttle their money around and make sure they qualify.” [#30]

Advertising. Many interviewees indicated that local agencies lack adequate outreach. For example:

- A non-Hispanic white male owner of a construction firm mentioned that he would like to see more outreach effort done towards small business. He indicated that as of now he does not know who to contact to do business with these agencies. He said, "If there is someone I could call and say I am interested in jobs under \$200,000 or these kind of jobs or that... I don't know who to call." [#46]
- A Black American female owner of a DBE, MBE, and WBE certified construction firm, when asked about any insights or recommendations regarding any of these questions or for the agencies said, "More outreach, marketing, and training to small businesses so they know what the agencies are looking for and are better prepared when opportunities arise. These efforts would be very beneficial to small business owners." [#55]
- A non-Hispanic white male owner of an architectural firm stated that it would be helpful if there were a central database where small business firms were easily searchable. He explained, "I think that each of the agencies may already have something like this in place, but they do it in their own way. Having one location and process for all would be helpful." [#31]
- A non-Hispanic white female owner of a DBE-certified architectural firm stated that a recommendation for these agencies is that they all should be on NGEM (Nevada Government Marketplace). [#10]

Language Barriers. Interviewees discussed the importance of cultural sensitivity and the difficulty of language barriers. For example:

- A Hispanic female representative of a small business assistance organization mentioned the language barrier as a potential problem for Latino small business owners when pursuing certification. [#13]
- A non-Hispanic female owner of a DBE certified community outreach firm expressed that home visits would be more effective if agents were to increase awareness of cultural differences and language barriers. She indicated that there was a language barrier during her interview process for DBE status and suggested that cultural sensitivity should be incorporated into site visits in order to avoid these barriers. [#01]
- A Hispanic female representative of a small business assistance organization recommends that the business assistance programs and public agencies provide services in more than one language to adequately serve minority-owned small businesses. She said, "Some of these agencies don't have anyone who speaks Spanish or any other language." [#13]

Assistance. Many interviewees indicated that additional assistance and training would be beneficial. For example:

- A non-Hispanic white female owner of a DBE-certified engineering firm stated that a recommendation for the agencies would be to have a centralized location where representatives from each agency are available and able to provide you with the resources, introductions, information on upcoming projects, and education and training assistance. [#25]
- A non-Hispanic white male owner of an engineering firm, indicated that having a third party provide the communication between contractors and customers with Construction Manager at Risk projects would help alleviate potential problems that might arise due to lack of organizational management. He said, “One way to strengthen and improve Construction Manager at Risk is to have a third party commissioning agent outside of the design process, outside of the contractors that talks directly to the owner and can explain to the owner technically the kinds of things that are going on and why it is that there is a problem between the contractor and the designer about a particular issue.” [#36]
- A Hispanic female representative of a small business assistance organization recommends that more training on how to do business with Nevada transportation agencies be provided to small business owners. She said, “[It would be helpful] that these agencies have some recommendations, informing small business owners of some things they encounter that hinder the contracting of minority-owned businesses...What is the bidding process like? How long does it take? Having those seminars or classes...free of charge, and for [the seminars or classes] to be promoted to the Hispanic community.” She mentioned that this would be specifically helpful for the bidding process. [#13]
- A Hispanic American male President of a minority-focused chamber stated that technical assistance is important for small businesses. He said, “Having more access to technical assistance and support services is a positive.” [#07]
- A Black American male owner of a construction firm when asked about insight or recommendation for the agencies said, “In the private sector, procurement officers that are working diligently in inclusion, they get paid for their performance. The public agencies could learn something from this practice.” [#53]
- A non-Hispanic white female owner of a DBE-certified engineering firm said, “A recommendation for the agencies would be to have a one-stop shop for the small and DBE firms to be able to have access to all the resources they need in one location.” [#25]
- A non-Hispanic white female representative of a Hispanic owned, DBE certified electric company, mentioned that providing bonding assistance as part of the contracting process would produce a better applicant base. [#23]

- A Hispanic American female owner of a staffing company, when asked for suggestions for the Nevada state or local agencies stated, “Small business owners need agencies, financing companies and organizations to be flexible and willing to help support small business owners [with] insurance, bonding, access to capital, and other barriers to help reduce some of the strain in starting or maintaining their companies.” [#16]

Interviewees suggested that requirements be better defined and processes clearer. For example:

- A non-Hispanic white female owner of a DBE-certified environmental firm suggested having some of the requirements included in as a line item on the proposal. She said, “Many times the small business owner may not know what they are required to maintain compliance especially related to health and safety. Not knowing something up front could really have an impact on the small business owner and the bottom line of the project cost.” [#08]
- A Black American male owner of a DBE and MBE certified security company said, “The agencies needs to define, clear guidelines goals and objectives to share with the small D/M/WBE community.” [#52]
- A non-Hispanic white female owner of a construction firm suggested making the small business and W/DBE certifications process more understandable. She said, “I had an attorney that was going through the process she could not figure [out] the process. There is no real clear definition on what you need to get, which agency or company you are to use and do you have to get all of them. So a better understanding of what program is best for you and your business would be very helpful.” [#17]
- A non-Hispanic white male owner of an architecture firm stated that the statement of qualification process for the public agencies is very costly and time consuming. He said, “If the agencies could request an update of information annually rather than request a complete statement of qualifications for current, approved firms that would be very beneficial for small firms.” [#43]
- A non-Hispanic white male owner of an architecture firm, in discussing his experience in starting a business in the State of Nevada said, “It was cumbersome in getting our firm established, at times we were not clear on what piece was required first and created some confusion. If the State agencies could better blend their systems or process to help a new business owner navigate the process that would be very helpful.” [#44]
- A Hispanic American male owner of a DBE and ESB certified architecture firm stated that insufficient contract language details are a barrier for small businesses. He explained that with limited access to legal support, there are challenges in understanding the contract language, especially with language regarding added scope of work. He would like contracts to contain language regarding added scope of work so that small firms do not end up non-compliant. He said, “Having language or a clause for consideration of additional work or the amount of work that can be added to a project after an award would be beneficial for a small firm.” [#40]

- A Black American male President of a minority-focused trade association said, “Why aren’t we asking these big entertainment events or conventions that come to town what their diversity plan looks like? I recently sat in a meeting with another public agency and the question was asked [about] other states and agencies, what do they do different. I said, ‘what they do differently is that they have a diversity plan that they share with everyone and everyone knows what it is. That is where we need to be.’” [#11]
- A non-Hispanic white male owner of an engineering firm emphasized the importance of a contingency fee for architects and engineers especially for accelerated projects. Architects and engineers cannot always anticipate additional cost, especially when working on an older buildings or an accelerated project. Writing in contingency fees into projects would provide them the opportunity to deliver quality work. He said, “If you were to look at a contingency fee as an engineer would look at it, a new building would not depend much on a contingency fee, unless they accelerated the schedule. Then all of the sudden things come in late, things have to be changed...so the contingency fee on something when you accelerated would make a difference.... When you look at an existing building that is 50 years old, that would have a huge contingency fee because if you open up walls you might find things that you didn’t even know where there... you need a contingency to cover those costs.” [#36]

Many interviewees stated that they would like to see more DBE opportunities. For example:

- A Subcontinent Asian American male owner of a geotechnical engineering firm mentioned that he would like to see more large firms work with smaller DBE firms especially with their numbers to ensure that they are included in the bidding process and in more projects. [#29]
- A non-Hispanic white female representative of a Hispanic owned DBE certified electric company mentioned that she would like to be able to look for sole source opportunities for DBE’s. As a small business, it would be more beneficial to concentrate time and resources on bids for which they had a higher probability of winning. She said, “It would be nice to see opportunities specific to DBE’s... if they could make it a little more targeted that way we can put out time and energy and don’t feel like it was shopped.” [#23]
- A non-Hispanic white male owner of an architecture firm, when asked for suggestions or recommendations for the local agencies to improve small businesses or its programs said, “If the agencies want their programs to be effective, don’t kill talent, promote it. Help the small firms become established. We need a voice, an advocate, someone that small firms know has our back.” [#43]
- A Hispanic American male owner of a DBE certified surveying firm, when asked about any other suggestions regarding program improvements, indicated that he would like to see more DBE opportunities in the design end of projects from all public agencies. He said, “I think overall, in the whole state of Nevada, if a project is being federally funded, to me it is being funded from beginning to end, and it seems like in Nevada there is not a lot of input in the design in the beginning. Even though they are using surveyors and other contractors, it seems that they leave the DBE requirements just on the construction end.” [#42]

- A non-Hispanic white male owner of a controls firm said, “The agencies should ask the general contractors, prior to awarding a contract, who are your preferred vendors to determine how many of those firms are local; the company or person overseeing the project must support local business, if they do not that may be a consideration in awarding a project.” [#45]

APPENDIX E.

General Approach to Availability

APPENDIX E.

General Approach to Availability Analysis

The study team used a *custom census* approach to analyze the availability of minority- and woman-owned businesses for construction and engineering prime contracts and subcontracts that the Nevada Department of Transportation (NDOT) awarded between January 1, 2012 and December 31, 2015. Appendix E expands on the information presented in Chapter 5 to describe the study team's:

- A. General approach to collecting availability information;
- B. Development of the business establishments list;
- C. Development of the survey instrument;
- D. Execution of surveys; and
- E. Additional considerations related to measuring availability.

A. General Approach to Collecting Availability Information

BBC Research & Consulting (BBC) contracted with Customer Research International (CRI) to conduct telephone surveys with thousands of business establishments in Nevada, which BBC identified as the *relevant geographic market area* for NDOT contracting. Business establishments that CRI surveyed were businesses with locations in Nevada that the study team identified as doing work in fields closely related to the types of contracts that NDOT awarded during the study period. The study team began the survey process by determining the subindustries for each relevant NDOT contract element and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries.¹ The study team then collected information about local business establishments that D&B listed as having their primary lines of business within those work specializations. Rather than drawing a sample of business listings from D&B, the study team attempted to contact every business establishment listed under relevant work specialization codes.²

Although the disparity study focused on transportation-related construction and engineering contracts that NDOT awarded during the study period, some of those contracts included the participation of subcontractors whose primary lines of work were related to providing goods and support services. Thus, the study team's availability survey effort focused on construction; professional services; and goods and support services business establishments. As part of the

¹ D&B has developed 8-digit industry codes that provide more precise definitions of business specializations than the 4-digit Standard Industrial Classification (SIC) codes or the North American Industry Classification System (NAICS) codes that the federal government has prepared.

² Because D&B organizes its database by *business establishment* and not by "business" or "firm," BBC purchased business listings in that manner. Therefore, in many cases, the study team purchased information about multiple locations of a single business and called all of those locations. BBC's method for consolidating information for different establishments that were associated with the same business is described later in Appendix E.

survey effort, the study team attempted to contact 7,155 business establishments in the local marketplace that perform work that is relevant to NDOT contracting. That total included 5,117 construction establishments; 926 professional services establishments; 1,105 goods and support services establishments; and 7 establishments with a primary line of work that turned out to be outside of the contracting areas relevant to the disparity study (Those 7 business establishments were not considered further as part of the availability analysis.) The study team was able to successfully contact 3,786 of those establishments— 59.8 percent of the establishments with valid phone listings (1 business establishment did not have valid phone listings). Of business establishments that the study team contacted successfully, 1,390 establishments completed availability surveys.

B. Development of the Business Establishments List

The study team did not expect every business establishment that it contacted to be potentially available for NDOT work. The study team’s goal was to develop—with a high degree of precision—unbiased estimates of the availability of minority- and woman-owned businesses for the types of contracts that NDOT awarded during the study period. In fact, for some subindustries, BBC anticipated that relatively few businesses would be available to perform that type of work for NDOT.

In addition, BBC did not design the research effort so that the study team would contact every local business possibly performing construction; professional services; or goods and support services work. To do so would have required the study team to include subindustries that are only marginally related or even unrelated to the types of contracts that NDOT awarded during the study period. Moreover, some business establishments working in relevant subindustries may have been missing from corresponding D&B or other listings.

BBC determined the types of work involved in NDOT contracts by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. Figure E-1 lists the 8-digit work specialization codes within construction; professional services; and goods and support services that the study team determined were most related to the contract dollars that NDOT awarded during the study period and that BBC considered as part of the availability analysis. The study team grouped those specializations into distinct subindustries, which are presented as headings in Figure E-1.

C. Development of the Survey Instrument

BBC drafted a survey instrument to collect business information from construction; professional services; and goods and support services establishments in Nevada. As an example, the survey that the study team used with construction establishments is presented at the end of Appendix E. The study team modified the construction survey slightly for use with establishments working in other industries in order to reflect terms more commonly used in those industries (e.g., the study team substituted the words “prime contractor” and “subcontractor” with “prime consultant” and “subconsultant” when surveying engineering establishments).³

³ BBC also developed a fax and e-mail version of the survey instrument for business establishments that reported a preference to complete the survey in those formats.

Figure E-1.
Subindustries included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Construction			
Ceiling and floor contractor		Fencing, guardrails and signs	
17520000	Floor laying and floor work, nec	17999912	Fence construction
17439904	Tile installation, ceramic		
Concrete and related products		Heavy construction	
32720303	Concrete products, precast, nec	17710301	Blacktop (asphalt) work
32730000	Ready-mixed concrete	16110000	Highway and street construction
50320504	Concrete mixtures	16110100	Highway signs and guardrails
		16110200	Surfacing and paving
		16110202	Concrete construction: roads, highways, sidewalks, etc.
		16110204	Highway and street paving contractor
		16119901	General contractor, highway and street construction
		16290000	Heavy construction, nec
Concrete work		Industrial equipment and machinery	
17710000	Concrete work	35560000	Food products machinery
		50850000	Industrial supplies
		50850200	Hose, belting, and packing
Drilling		Landscape Services	
17999906	Core drilling and cutting	07829903	Landscape contractors
Electrical equipment and supplies		Masonry, drywall and stonework	
36690206	Traffic signals, electric	17420100	Plaster and drywall work
36990000	Electrical equipment and supplies, nec	17420101	Drywall
50650300	Electronic parts		
50630400	Lighting fixtures	Other construction materials	
Electrical work		29510000	Asphalt paving mixtures and blocks
17310000	Electrical work	39930100	Electric signs
17319903	General electrical contractor	52110000	Lumber and other building materials
Elevators			
76992501	Elevators: inspection, service, and repair		
Excavation			
17940000	Excavation work		
17949901	Excavation and grading, building construction		
16299902	Earthmoving contractor		

Figure E-1.
Subindustries included in the availability analysis (continued)

Construction (continued)			
Other construction services		Structural metals	
17930000	Glass and glazing work	34419901	Building components, structural steel
17990200	Coating, caulking, and weather, water, and fireproofing	34490101	Bars, concrete reinforcing: fabricated steel
17990302	Service station equipment installation, maint., and repair		
17990900	Building site preparation	Structural steel and building construction	
17990801	Asbestos removal and encapsulation	17910000	Structural steel erection
73899921	Flagging service (traffic control)	15420000	Nonresidential construction, nec
		15420101	Commercial and office building, new construction
		15420300	Garage and service station contractors
Painting		Trucking, hauling and storage	
17210000	Painting and paper hanging	42120000	Local trucking, without storage
17210200	Commercial painting	42129905	Dump truck haulage
17210303	Pavement marking contractor		
Plumbing and HVAC		Water, sewer, and utility lines	
17110000	Plumbing, heating, air-conditioning	16230000	Water, sewer, and utility lines
17110401	Mechanical contractor	16239906	Underground utilities contractor
Roofing		Wrecking and demolition	
17610103	Roofing contractor	17950000	Wrecking and demolition work
		17959901	Concrete breaking for streets and highways
Sand and gravel			
52110506	Sand and gravel		
Professional Services			
Architectural and design services		Environmental services and transportation planning	
87120101	Architectural engineering	87480204	Traffic consultant
87120100	Architectural engineering	87420410	Transportation consultant
87120000	Architectural services	87489905	Environmental consultant
		87310302	Environmental research
Construction management		87480200	Urban planning and consulting services
87419902	Construction management		
Engineering		Surveying and mapmaking	
87110401	Building construction consultant	87130000	Surveying services
87110402	Civil engineering		
87110000	Engineering services	Testing services	
87119905	Electrical or electronic engineering	47850202	Inspection services connected with transportation
		73890210	Safety inspection service
		73890200	Inspection and testing services

Figure E-1.
Subindustries included in the availability analysis (continued)

Goods and Support Services			
Advertising, marketing and public relations			
73110000	Advertising agencies		
87430000	Public relations services		
Automobiles			
55110000	New and used car dealers		
Business services and consulting			
87420406	Real estate consultant		
87420104	Maintenance management consultant		
Cleaning and janitorial services			
73490101	Building cleaning service		
73490104	Janitorial service, contract basis		
50840901	Cleaning equipment, high pressure, sand or steam		
50870304	Janitors' supplies		
Communications equipment			
59990601	Audio-visual equipment and supplies		
36630000	Radio and t.v. communications equipment		
Computer systems and services			
73780000	Computer maintenance and repair		
Finance and accounting			
87210100	Auditing services		
Furniture			
17990610	Window treatment installation		
17990607	Office furniture installation		
Local Transit			
41190103	Limousine rental, with driver		
Office supplies			
51129907	Office supplies, nec		
Other goods			
72180203	Industrial uniform supply		
Other services			
73420200	Pest control services		
Petroleum and petroleum products			
49240000	Natural gas distribution		
49230000	Gas transmission and distribution		
51710000	Petroleum bulk stations and terminals		
51719901	Petroleum Bulk Stations		
Printing and copying			
27520000	Commercial printing, lithographic		
Security guard services			
73810101	Armored car services		
73810105	Security guard service		
Security services			
73820000	Security systems services		
Towing			
75490300	Towing services		
Transit Equipment			
36990500	Security devices		

Source: BBC Research & Consulting.

Survey structure. The availability survey included 15 sections, and CRI attempted to cover all sections with each business establishment that the firm successfully contacted and that was willing to complete a survey.

1. Identification of purpose. The surveys began by identifying NDOT as one of the survey sponsors and describing the purpose of the study (e.g., “developing a list of companies interested in construction, maintenance, or design on a wide range of highway and other state or local government transportation-related projects”).

2. Verification of correct business name. The surveyor verified that he or she had reached the correct business, and if not, inquired about the correct contact information for the correct business. If the business name was incorrect, surveyors asked if the respondent knew how to contact the business. CRI followed up with the desired company based on the new contact information (see areas “X” and “Y” of the availability survey instrument at the end of Appendix E).

3. Verification of work related to relevant projects. The surveyor asked whether the organization does work or provides materials related to government contracting (Question A1). Surveyors continued the survey with businesses that responded “yes” to that question.

4. Verification of for-profit business status. The surveyor asked whether the organization was a for-profit business as opposed to a government or nonprofit entity (Question A2). Surveyors continued the survey with businesses that responded “yes” to that question.

5. Confirmation of main lines of business. Businesses confirmed their main lines of business according to D&B (Question A4a). If D&B’s work specialization codes were incorrect, businesses then described their main lines of business (Question A4b). Construction businesses also confirmed their main lines of business according to prequalification categories that NDOT and other local agencies use (Questions A4c, QA4d, and A4e). After the survey was complete, as necessary, BBC coded new information on main lines of business into appropriate 8-digit D&B work specialization codes.

6. Sole location or multiple locations. Because the study team surveyed business establishments and not businesses, the surveyor asked business owners or managers if their businesses had other locations (Question A5) and whether their establishments were affiliates or subsidiaries of other businesses (Questions A6 and A7).

7. Past bids or work with government agencies and private sector organizations. The surveyor asked about bids and work on past government and private sector contracts. CRI asked those questions in connection with both prime contracts and subcontracts (Questions B1 through B8).⁴

8. Qualifications and interest in future work. The surveyor asked about businesses’ qualifications and interest in future work with state or local government agencies in Nevada. CRI

⁴ Goods and support services businesses were not asked questions about subcontract work.

asked those questions in connection with both prime contracts and subcontracts (Questions B9 through B12).⁵

9. Geographic areas. The surveyor asked questions about the geographic regions within Nevada in which businesses serve customers (Questions C1a through C1c).

10. Year established. The surveyor asked businesses to identify the approximate year in which they were established (Question D1).

11. Largest contracts. The study team asked businesses to identify the value of the largest contract on which they had bid on or had been awarded during the past five years. CRI asked those questions for both prime contracts and subcontracts (Questions D2 through D4).⁶

12. Ownership. The surveyor asked whether businesses were at least 51 percent owned and controlled by women or minorities (Questions E1 through E4). If businesses indicated that they were minority-owned, they were also asked about the race/ethnicity of their business' ownership. The study team confirmed that information through several other data sources including:

- NDOT and other participating agencies' directories of certified Disadvantaged Business Enterprises (DBEs);
- NDOT and other participating agencies' vendor data;
- NDOT staff review; and
- Information from D&B and other sources.

When information about race/ethnicity or gender of ownership conflicted between sources, the study team reconciled that information through follow-up telephone calls with the businesses.

13. Business revenue. The surveyor asked several questions about the size of businesses in terms of their revenues. For businesses with multiple locations, the Business Revenue section also asked about their revenues and number of employees across all locations (Questions F1 through F5).

14. Potential barriers in the marketplace. The surveyor asked an open-ended question concerning general insights about conditions in the local marketplace (Question G1). In addition, the survey included a question asking whether respondents would be willing to participate in a follow-up interview about conditions in the local marketplace (Question G2).

15. Contact information. The survey concluded with questions about the participant's name and position with the organization (Questions H1 and H2).

⁵ Goods and support services businesses were not asked questions about subcontract work.

⁶ Goods and support services businesses were not asked questions about subcontract work.

D. Execution of Surveys

BBC held planning sessions both in person and via telephone with CRI executives and surveyors prior to conducting the availability surveys. CRI conducted all surveys in 2016. CRI programmed the surveys, conducted them via telephone, and provided BBC with weekly data reports. To minimize non-response, CRI made up to five attempts during different times of the day and on different days of the week to successfully reach each business establishment. CRI attempted to survey a company representative such as the owner, manager, chief financial officer, or other key official who could provide accurate and detailed responses to survey questions.

Establishments that the study team successfully contacted. Figure E-2 presents the disposition of the 7,155 business establishments that the study team attempted to contact for availability surveys and how that number resulted in the 3,786 establishments that the study team was able to successfully contact.

Figure E-2.
Disposition of
attempts to survey
business
establishments

Source:
BBC Research & Consulting
availability analysis.

	Number of firms	Percent of business listings
Beginning list	7,155	
Less duplicate phone numbers	40	
Less non-working phone numbers	640	
Less wrong number/business	141	
Unique business listings with working phone numbers	6,334	100.0 %
Less no answer	2,325	36.7
Less could not reach responsible staff member	202	3.2
Less language barrier	21	0.3
Establishments successfully contacted	3,786	59.8 %

Non-working or wrong phone numbers. Some of the business listings that the study team purchased from D&B and that CRI attempted to contact were:

- Duplicate phone numbers (40 listings);
- Non-working phone numbers (640 listings); or
- Wrong numbers for the desired businesses (141 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time that D&B listed them and the time that the study team attempted to contact them.

Working phone numbers. As shown in Figure E-2, there were 6,346 business establishments with working phone numbers that CRI attempted to contact. CRI was unsuccessful in contacting many of those businesses for various reasons:

- CRI could not reach anyone after five attempts at different times of the day and on different days of the week for 2,325 establishments.

- CRI could not reach a responsible staff member after five attempts at different times of the day on different days of the week for 202 establishments.
- CRI could not conduct the availability survey due to language barriers for 21 establishments.

After taking those unsuccessful attempts into account, CRI was able to successfully contact 3,786 business establishments, or about 59.8 percent of establishments with valid phone listings.

Establishments included in the availability database. Figure E-3 presents the disposition of the 3,786 business establishments that CRI successfully contacted and how that number resulted in the 637 businesses that the study team included in the availability database and that the study team considered available for NDOT and other agency work.

Figure E-3.
Disposition of successfully contacted business establishments

	Number of Establishments
Establishments successfully contacted	3,786
Less establishments not interested in discussing availability for Nevada work	2,163
Less unreturned fax/email surveys	233
Establishments that completed interviews about firm characteristics	1,390
Less no relevant work	472
Less not a for-profit business	23
Less line of work outside scope	7
Less no past bid/award	181
Less no interest in future work	26
Less established after study period	12
Less multiple establishments	32
Establishments potentially available for entity work	637

Source: BBC Research & Consulting availability analysis.

Establishments that completed surveys. Of the 3,786 business establishments that the study team successfully contacted, 2,163 establishments were not interested in discussing their availability for NDOT work. Another 233 establishments requested to complete the survey via fax or email but did not return completed surveys to BBC. In total, 1,390 (37%) successfully-contacted business establishments completed availability surveys.

Establishments available for agency work. The study team only deemed a portion of the business establishments that completed availability surveys as available for the prime contracts and subcontracts that NDOT and other agencies participating in the disparity study awarded during the study period. The study team excluded many of the business establishments that completed surveys from the availability database for various reasons:

- BBC excluded 472 establishments that indicated that their businesses were not involved in relevant contracting work.

- Of the establishments that completed availability surveys, 23 indicated that they were not a for-profit business. The survey ended when respondents reported that their establishments were not for-profit businesses.
- BBC excluded seven establishments that indicated that their businesses were involved in construction; professional services; or goods and support services work but reported that their main lines of business were outside of the study scope.
- BBC excluded 181 establishments that reported not having bid on or been awarded contracts within the past five years.
- BBC excluded 26 establishments that reported not being qualified or interested in either prime contracting or subcontracting opportunities with state or local government agencies in Nevada.
- BBC excluded 12 business establishments that reported being established in 2015 or later. Those business establishments would not have been available for contract elements that NDOT or other participating agencies awarded during the study period.
- Thirty-two establishments represented different locations of the same businesses. Prior to analyzing results, BBC combined responses from multiple locations of the same business into a single data record.

After those exclusions, BBC compiled a database of 637 businesses that were considered potentially available for NDOT and other agency work.

Coding responses from multi-location businesses. Responses from different locations of the same business were combined into a single summary data record according to several rules:

- If any of the establishments reported bidding or working on a contract within a particular subindustry, the study team considered the business to have bid or worked on a contract in that subindustry.
- The study team combined the different roles of work that establishments of the same business reported (i.e., prime contractor or subcontractor) into a single response corresponding to the appropriate subindustry. For example, if one establishment reported that it works as a prime contractor and another establishment reported that it works as a subcontractor, then the study team considered the business as available for both prime contracts and subcontracts within the relevant subindustry.⁷
- Except when there were large discrepancies among individual responses regarding establishment dates, BBC used the earliest founding date that establishments of the same business provided. In cases of large discrepancies, BBC followed up with the business establishments to obtain accurate establishment date information.
- BBC considered the largest contract that any establishments of the same business reported having bid or worked on as the business' relative capacity (i.e., the largest contract for which the business could be considered available).

⁷ Goods and support services businesses were not asked questions about subcontract work.

- BBC considered the largest revenue total that any establishments of the same business reported as the business’ revenue cap (for purposes of determining status as a potential DBE).
- BBC determined the number of employees for businesses by calculating the mode or the mean of responses from its establishments.
- BBC coded businesses as minority- or woman-owned if the majority of its establishments reported such status.

E. Additional Considerations Related to Measuring Availability

BBC made several additional considerations related to its approach to measuring availability to ensure that the study team’s estimates of the availability of minority- and woman-owned businesses for NDOT work were as accurate as possible.

Not providing a count of all businesses available for NDOT work. The purpose of the availability analysis was to provide precise and representative estimates of the percentage of NDOT contracting dollars for which minority- and woman-owned businesses are available. The availability analysis did not provide a comprehensive listing of every business that could be available for NDOT work and should not be used in that way. Federal courts have approved BBC’s use of that approach to measuring availability. In addition, federal regulations, such as the United States Department of Transportation’s (USDOT’s) “Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program” recommend similar approaches to measuring availability for agencies implementing minority- and woman-owned business programs.⁸

Not basing the availability analysis on MBE/WBE or DBE directories, prequalification lists, or bidders lists. Federal guidance, such as USDOT guidance for determining the availability of minority- and woman-owned businesses, recommends dividing the number of businesses in an agency’s certification directory by the total number of businesses in the marketplace, as reported in United States Census data. As another option, USDOT suggests using a list of prequalified businesses or a bidders list to estimate the availability of minority- or woman-owned businesses for an agency’s prime contracts and subcontracts. The primary reason why the study team rejected such approaches when measuring the availability of minority- and woman-owned businesses for NDOT work is that dividing a simple count of certified businesses by the total number of businesses does not provide the data on business characteristics that the study team desired for the disparity study. The methodology applied in this study takes a custom census approach to measuring availability and adds several layers of refinement to a simple head count approach. For example, the surveys provided data on qualifications, relative capacity, and interest in NDOT work for each business, which allowed the study team to take a more refined approach to measuring availability. Court cases involving implementations of minority- and woman-owned business programs have approved the use of such approaches to measuring availability.

⁸ Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program, <http://www.osdbu.dot.gov/dbeprogram/tips.cfm>.

Using D&B lists as the sample frame. BBC began its custom census approach of measuring availability with D&B business lists. D&B does not require businesses to pay a fee to be included in its listings—it is completely free to listed businesses. D&B provides the most comprehensive private database of business listings in the United States. Even so, the database does not include all establishments operating in Nevada:

- There can be a lag between formation of a new business and inclusion in D&B, meaning that the newest businesses may be underrepresented in the sample frame. Based on information from BBC’s survey effort, newly formed businesses are more likely to be minority- or woman-owned, suggesting that minority- and woman-owned businesses might be underrepresented in the final availability database.
- Although D&B includes home-based businesses, those businesses are more difficult to identify and are thus somewhat less likely than other businesses to be included in D&B listings. Small, home-based businesses are more likely than large businesses to be minority- or woman-owned, which again suggests that minority- and woman-owned businesses might be underrepresented in the final availability database.

BBC is not able to quantify the degree to which minority- and woman-owned businesses were underrepresented in the final availability database, if at all. Moreover, there are no alternative, unbiased business listings that would better address the issues described above. As a result, estimates presented in the disparity study should be considered conservative estimates of the availability of minority- and woman-owned businesses.

Selection of specific subindustries. Defining subindustries based on specific work specialization codes (e.g., D&B industry codes) is a standard step in analyzing businesses in an economic sector. Government and private sector economic data are typically organized according to such codes. However, some industry codes are imprecise and overlap with other business specialties. Some businesses span several types of work, even at the 8-digit level of specificity. That overlap can make classifying businesses into single main lines of business difficult and imprecise. When the study team asked business owners and managers to identify main lines of business, they often gave broad answers. For those and other reasons, BBC collapsed many of the work specialization codes into broader subindustries to more accurately classify businesses in the availability database.

Non-response bias. An analysis of non-response bias considers whether businesses that were not successfully surveyed are systematically different from those that were successfully surveyed and included in the final data set. There are opportunities for non-response bias in any survey effort in which response rate is less than 100 percent. The study team considered the potential for non-response bias due to:

- Research sponsorship;
- Work specializations; and
- Language barriers.

Research sponsorship. Surveyors introduced themselves by identifying NDOT as one of the survey sponsors, because businesses may be less likely to answer somewhat sensitive business questions if the surveyor was unable to identify the sponsor. In past survey efforts—particularly those related to availability studies—BBC has found that identifying the sponsor substantially increases response rate.

Work specializations. Businesses in highly mobile fields, such as trucking, may be more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering businesses). That assertion suggests that response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to estimate the availability of minority- and woman-owned businesses would lead to estimates that were biased in favor of businesses that could be easily contacted by telephone. However, work specialization as a potential source of non-response bias in the BBC availability analysis is greatly reduced, because the availability analysis examines businesses within particular work fields before calculating overall availability estimates. Thus, the potential for businesses in highly mobile fields to be less likely to complete a survey is less important, because the study team calculated availability estimates within those fields before combining them in a dollar-weighted fashion with availability estimates from other fields. Work specialization would be a greater source of non-response bias if particular subsets of businesses within a particular field were less likely than other subsets to be easily contacted by telephone.

Language barriers. NDOT contracting documents are in English and are not in other languages. For that reason, the study team made the decision to only include businesses able to complete surveys in English in the availability analysis. Businesses unable to complete the survey due to language barriers represented less than one percent of contacted businesses.

Response reliability. Business owners and managers were asked questions that may be difficult to answer including questions about their revenues. For that reason, the study team collected corresponding D&B information for their establishments and asked respondents to confirm that information or provide more accurate estimates. Further, respondents were not typically asked to give absolute figures for difficult questions such as revenue and capacity. Rather, they were given ranges of dollar figures. BBC explored the reliability of survey responses in a number of ways. For example:

- BBC reviewed data from the availability surveys in light of information from other sources such as vendor information that the study team collected from NDOT and other participating agencies. For example, certification databases include data on the race/ethnicity and gender of the owners of DBE-certified businesses. The study team compared survey responses concerning business ownership with that information.
- BBC examined NDOT contract data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability surveys. BBC compared survey responses about the largest contracts that businesses won during the past five years with actual NDOT contract data.
- NDOT reviewed vendor data that the study team collected and compiled as part of the availability analysis and provided feedback regarding its accuracy.

Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Customer Research International. We are calling on behalf of the Nevada Department of Transportation, Regional Transportation Commission of Southern Nevada, McCarran International Airport, Regional Transportation Commission of Washoe County, and Reno-Tahoe International Airport.

This is not a sales call. NDOT, RTC SNV, McCarran, RTCWC, and RTAA are developing a list of companies interested in construction, maintenance, or design on a wide range of highway and other state or local government transportation-related projects. This call should take between 5 and 15 minutes to complete. Who can I speak with to get the information that we need from your firm?

[AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS]

[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO EXISTING DATA ON COMPANIES INTERESTED IN WORKING WITH THE ENTITIES]

X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [firm name]?

1=Right Company – **SKIP TO A1**

2=Not Right Company

99=Refuse to Give Information – **TERMINATE**

Y1. What is the name of this firm?

1=Verbatim

Y2a. Is [new firm name] the same firm as [firm name] doing business under a new name?

1=Yes, same firm doing business under a different name

2=No, different firm – **SKIP TO Y3**

98=No, does not have information – **TERMINATE**

99=Refused to give information – **TERMINATE**

Y2b. Was [firm name] bought or sold, or did it change ownership?

1=Yes, company bought/sold/changed ownership

2=No, same ownership

98=No, does not have information – **TERMINATE**

99=Refused to give information – **TERMINATE**

Y3. Can you give me the complete address or city for [new firm name]?

(NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT):

. STREET ADDRESS

. CITY

. STATE

. ZIP

1=Verbatim

Y5. Can you give me the name of the owner or manager of [new firm name]?

(ENTER UPDATED NAME)

1=Verbatim

Y6. Can I have a telephone number for him/her?

(ENTER UPDATED PHONE)

1=Verbatim

Y8. Do you work for this new company?

1=Yes

2=No - **TERMINATE**

A1. First, I want to confirm that your firm does work or provides materials related to construction, maintenance, or design on transportation-related projects. Is that correct?

(NOTE TO INTERVIEWER – includes any work related to CONSTRUCTION, MAINTINENCE OR DESIGN such as parking facilities, paving and concrete, tunnels, bridges and ROADS AND OTHER TRANSPORTATION-RELATED PROJECTS. IT ALSO INCLUDES TRUCKING AND HAULING)

(NOTE TO INTERVIEWER – includes having done work, trying to sell this work, or providing materials)

1=Yes

2=No - **TERMINATE**

A2. Let me confirm that [firm name/new firm name] is a for-profit business, as opposed to a non-profit organization, a foundation, or a government office. Is that correct?

1=Yes, a business

2=No, other - **TERMINATE**

A4a. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates that your main line of business is [SIC Code description]. Is that correct?

(NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES INFORMATION ON BUSINESSES THROUGHOUT THE COUNTRY)

1=Yes – **SKIP TO A4c**

2=No

98=(DON'T KNOW)

99=(REFUSED)

A4b. What would you say is the main line of business at [firm name/new firm name]?

(NOTE TO INTERVIEWER – IF RESPONDENT INDICATES THAT FIRM'S MAIN LINE OF BUSINESS IS "GENERAL CONSTRUCTION" OR GENERAL CONTRACTOR," PROBE TO FIND OUT IF MAIN LINE OF BUSINESS IS CLOSER TO BUILDING CONSTRUCTION OR HIGHWAY AND ROAD CONSTRUCTION.)

1=Verbatim

A4c. First, does your firm just sell construction materials, just do construction work, or both?

1=Sell materials only – **SKIP TO A4e**

2=Do construction work

3=Both

98= (DON'T KNOW)

99= (REFUSED)

A4d. Next, we're interested in additional types of work that [firm name/new firm name] performs. Does your firm do work in the area of:

[READ, MULTIPUNCH]

1 = Highway, street, and tunnel construction?

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES HIGHWAYS; PAVING OF STREETS DRIVEWAYS AND PARKING LOTS; AND RECYCLING ASPHALT.]

2 = Excavation, grading, drainage, drilling, and demolition?

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES EXCAVATING AND GRADING; AND EXCAVATING GRADING TRENCHING AND SURFACING.]

3 = Bridge and elevated highway construction?

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES BRIDGE CONSTRUCTION; STUD WELDING; EXPANSIONS AND CONTRACTION OF JOINTS, JOINTS SEALERS, AND BEARING DEVICES; STRUCTURE REPAIRS; HEAT STRAIGHTENING; AND POST TENSIONING BRIDGE MEMBERS WORK.]

4 = Structural steel erection and repair?

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES REINFORCING STEEL; STRUCTURAL STEEL ERECTION; AND STRUCTURAL STEEL REPAIRS.]

5 = Water, sewer, and utility lines?

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES DAMS AND RESERVOIRS; PIPELINE AND CONDUITS; AND SEWERS DRAINS AND PIPES.]

6 = Painting, striping, and marking?

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES PAINTING AND DECORATING; SEALING AND STRIPING OF ASPHALTIC SURFACES; AND INSTALLING URETHANE.]

7 = Fencing, guardrails, barriers, and signs?

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES GUARDRAILS AND ATTENUATORS; SIGNING; AND FENCING.]

8 = Electrical work, lighting, and signal systems?

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES ELECTRICAL; AND LINES TO TRANSMIT ELECTRICITY.]

9 = Landscape and erosion control?

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES LANDSCAPE; AND PIERS AND FOUNDATIONS.]

10 = Vertical building trades?

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES CARPENTRY MAINTENANCE AND MINOR REPAIRS; GENERAL BUILDING; MASONRY; REMOVAL OF ASBESTOS; RESIDENTIAL AND SMALL COMMERCIAL; AND ROOFING AND SIDING.]

11 = Concrete work?

12 = HVAC, Plumbing, or Energy?

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES PLUMBING AND HEATING; REFRIGERATION AND AIR-CONDITIONING; AND SOLAR.]

13 = Metal work?

[NOTE TO INTERVIEWER: IF ASKED, THIS WORK AREA INCLUDES ORNAMENTAL METAL; AND USING SHEET METAL.]

14 = Airports?

IF ANSWERED "2" TO A4c, SKIP TO A5

A4e. Does your firm sell:

[READ, MULTIPUNCH]

1=Asphalt, concrete or other paving materials

2=Erosion control materials

3=Traffic or highway signs

4=Traffic signals

5=Fence, guardrail materials

6=Steel

7=Petroleum

8=OTHER [IF NONE OF ABOVE]

IDENTIFY _____

A5. Is this the sole location for your business, or do you have offices in other locations?

1=Sole location

2=Have other locations

98=(DON'T KNOW)

99=(REFUSED)

A6. Is your company a subsidiary or affiliate of another firm?

1=Independent – **SKIP TO B1**

2=Subsidiary or affiliate of another firm

98=(DON'T KNOW) – **SKIP TO B1**

99=(REFUSED) – **SKIP TO B1**

A7. What is the name of your parent company?

1=Verbatim

98=(DON'T KNOW)

99=(REFUSED)

B1. Next, I have a few questions about your company's role in doing work or providing materials related to construction, maintenance, or design. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a state, local, county, or city government agency in Nevada?

1=Yes

2=No – **SKIP TO B3**

98=(DON'T KNOW) – **SKIP TO B3**

99=(REFUSED) – **SKIP TO B3**

B2. Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

- | | |
|--------------------|------------------------------|
| 1=Prime contractor | 4=Supplier (or manufacturer) |
| 2=Subcontractor | 98=(DON'T KNOW) |
| 3=Trucker/hauler | 99=(REFUSED) |

B3. During the past five years, has your company received an award for work on any part of a contract for a state, local, county, or city government agency in Nevada?

- 1=Yes
- 2=No – **SKIP TO B5**
- 98=(DON'T KNOW) – **SKIP TO B5**
- 99=(REFUSED) – **SKIP TO B5**

B4. Were those awards to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

- | | |
|--------------------|------------------------------|
| 1=Prime contractor | 4=Supplier (or manufacturer) |
| 2=Subcontractor | 98=(DON'T KNOW) |
| 3=Trucker/hauler | 99=(REFUSED) |

B5. During the past five years, has your company submitted a bid or a price quote for any part of a contract for a private sector organization in Nevada?

- 1=Yes
- 2=No – **SKIP TO B7**
- 98=(DON'T KNOW) – **SKIP TO B7**
- 99=(REFUSED) – **SKIP TO B7**

B6. Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

- | | |
|--------------------|------------------------------|
| 1=Prime contractor | 4=Supplier (or manufacturer) |
| 2=Subcontractor | 98=(DON'T KNOW) |
| 3=Trucker/hauler | 99=(REFUSED) |

B7. During the past five years, has your company received an award for work on any part of a contract for a private sector organization in Nevada?

- 1=Yes
- 2=No – **SKIP TO B9**
- 98=(DON'T KNOW) – **SKIP TO B9**
- 99=(REFUSED) – **SKIP TO B9**

B8. Were those awards to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier?

[MULTIPUNCH]

1=Prime contractor

4=Supplier (or manufacturer)

2=Subcontractor

98=(DON'T KNOW)

3=Trucker/hauler

99=(REFUSED)

B9. Please think about future construction, maintenance, or design-related work as you answer the following few questions. Is your company qualified and interested in working with NDOT as a prime contractor?

[NOTE TO INTERVIEWER: IF ASKED, "QUALIFIED" MEANS READY, WILLING, AND ABLE TO PERFORM WORK RELATED TO STATE OR LOCAL CONTRACTS.]

[NOTE TO INTERVIEWER: IF RESPONDENT ELABORATES ON WHY THEY ARE NOT QUALIFIED OR INTERESTED IN WORKING WITH THE STATE OR LOCAL GOVERNMENT, RECORD VERBATIM.]

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B10. Is your company qualified and interested in working with cities, counties, or other local transportation agencies in Nevada as a prime contractor?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B11. Is your company qualified and interested in working with NDOT as a subcontractor, trucker/hauler, or supplier?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

B12. Is your company qualified and interested in working with cities, counties, or other local transportation agencies in Nevada as a subcontractor, trucker/hauler, or supplier?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1a. Is your company able to do work or serve customers in any part of Southern Nevada, including the Las Vegas area?

(NOTE TO INTERVIEWER – IF ASKED, SOUTHERN NEVADA INCLUDES ESMERALDA COUNTY, NYE COUNTY, LINCOLN COUNTY, CLARK COUNTY, AND PART OF MINERAL COUNTY.)

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1b. Is your company able to do work or serve customers in any part of Northwestern Nevada, including the Reno-Sparks-Carson City area?

(NOTE TO INTERVIEWER – IF ASKED, NORTHWESTERN NEVADA INCLUDES DOUGLAS COUNTY, LYON COUNTY, STOREY COUNTY, WASHOE COUNTY, AND PORTIONS OF HUMBOLDT, PERSHING, CHURCHILL, AND MINERAL COUNTIES.)

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

C1c. Is your company able to do work or serve customers in any part of Northeastern Nevada, including the Elko and Ely areas?

(NOTE TO INTERVIEWER – IF ASKED, NORTHEASTERN NEVADA INCLUDES ELKO COUNTY, WHITE PINE COUNTY, EUREKA COUNTY, LANDER COUNTY, AND PORTIONS OF HUMBOLDT AND CHURCHILL COUNTY.)

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

D1. About what year was your firm established?

1=Numeric (1600-2015)

9998 = (DON'T KNOW)

9999 = (REFUSED)

D2. What was the largest contract or subcontract that your company was awarded during the past five years in either the private or public sector? This includes contracts not yet complete.

[NOTE TO INTERVIEWER – IF ASKED, INCLUDES EITHER PRIVATE SECTOR OR PUBLIC SECTOR]

[NOTE TO INTERVIEWER - INCLUDES CONTRACTS NOT YET COMPLETE]

[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]

- | | |
|--|--|
| 1=\$100,000 or less | 9=More than \$20 million to \$50 million |
| 2=More than \$100,000 to \$250,000 | 10=More than \$50 million to \$100 million |
| 3=More than \$250,000 to \$500,000 | 11= More than \$100 million to \$200 million |
| 4=More than \$500,000 to \$1 million | 12=\$200 million or greater |
| 5=More than \$1 million to \$2 million | 97=(NONE) |
| 6=More than \$2 million to \$5 million | 98=(DON'T KNOW) |
| 7=More than \$5 million to \$10 million | 99=(REFUSED) |
| 8=More than \$10 million to \$20 million | |

D3. Was that the largest contract or subcontract that your company bid on or submitted quotes for during the past five years?

- 1=Yes – **SKIP TO E1**
- 2=No
- 98=(DON'T KNOW) – **SKIP TO E1**
- 99=(REFUSED) – **SKIP TO E1**

D4. What was the largest contract or subcontract that your company bid on or submitted quotes for during the past five years in either the private or public sector?

[NOTE TO INTERVIEWER – IF ASKED, INCLUDES EITHER PRIVATE SECTOR OR PUBLIC SECTOR]

[NOTE TO INTERVIEWER – READ CATEGORIES IF NECESSARY]

- | | |
|--|--|
| 1=\$100,000 or less | 9=More than \$20 million to \$50 million |
| 2=More than \$100,000 to \$250,000 | 10=More than \$50 million to \$100 million |
| 3=More than \$250,000 to \$500,000 | 11= More than \$100 million to \$200 million |
| 4=More than \$500,000 to \$1 million | 12=\$200 million or greater |
| 5=More than \$1 million to \$2 million | 97=(NONE) |
| 6=More than \$2 million to \$5 million | 98=(DON'T KNOW) |
| 7=More than \$5 million to \$10 million | 99=(REFUSED) |
| 8=More than \$10 million to \$20 million | |

E1. My next questions are about the ownership of the business. A business is defined as woman-owned if more than half—that is, 51 percent or more—of the ownership and control is by women. By this definition, is [firm name / new firm name] a woman-owned business?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

E2. A business is defined as minority-owned if more than half—that is, 51 percent or more—of the ownership and control is Black American, Asian Pacific, Subcontinent Asian, Hispanic, or Native American. By this definition, is [firm name // new firm name] a minority-owned business?

1=Yes

2=No – **SKIP TO E4**

98=(DON'T KNOW) – **SKIP TO E4**

99=(REFUSED) – **SKIP TO E4**

E3. Would you say that the minority group ownership of your company is mostly Black American, Asian Pacific American, Subcontinent Asian American, Hispanic American, Native American, or another minority group?

1=Black American

2=Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia(Kampuchea),Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

4=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)

6=(OTHER - SPECIFY) _____

98=(DON'T KNOW)

99=(REFUSED)

E4. A business is defined as veteran-owned if more than half—that is, 51 percent or more—of the ownership and control is by veterans. By this definition, is [firm name // new firm name] a veteran-owned business?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

F1. Dun & Bradstreet lists the average annual gross revenue of your company, just considering your location, to be [dollar amount]. Is that an accurate estimate for your company's average annual gross revenue over the last three years?

1=Yes – **SKIP TO F3**

2=No

98=(DON'T KNOW) – **SKIP TO F3**

99=(REFUSED) – **SKIP TO F3**

F2. Roughly, what was the average annual gross revenue of your company, just considering your location, over the last three years? Would you say . . .

[READ LIST]

1=Less than \$1.3 Million

6=\$18.1 Million - \$20.5 Million

2=\$1.4 Million - \$3.5 Million

7=\$20.6 Million - \$24 Million

3=\$6.6 Million - \$7.5 Million

8=\$24.1 Million or more

4=\$7.6 Million - \$11 Million

98= (DON'T KNOW)

5=\$11.1 Million - \$18 Million

99= (REFUSED)

F3. [ONLY IF A5 = 2] Roughly, what was the average annual gross revenue of your company, for all of your locations over the last three years? Would you say . . .

[READ LIST]

1=Less than \$1.3 Million

6=\$18.1 Million - \$20.5 Million

2=\$1.4 Million - \$3.5 Million

7=\$20.6 Million - \$24 Million

3=\$6.6 Million - \$7.5 Million

8=\$24.1 Million or more

4=\$7.6 Million - \$11 Million

98= (DON'T KNOW)

5=\$11.1 Million - \$18 Million

99= (REFUSED)

F4. Dun and Bradstreet lists your company's number of employees, across all locations, to be [number]. Is that an accurate estimate for your company's average number of employees from 2010 through 2014?

1=Yes – **SKIP TO G1**

2=No

98=(DON'T KNOW) – **SKIP TO G1**

99=(REFUSED) – **SKIP TO G1**

F5. About how many full-time employees did you have, on average, for all your locations from 2010 through 2014?

1=0-20

2=21-30

3=31-50

4=50 or more

98=(DON'T KNOW)

99=(REFUSED)

G1. We're interested in whether your company has experienced barriers or difficulties in Nevada associated with starting or expanding a business in your industry or with obtaining work. Do you have any thoughts to share on these topics?

1=Verbatim (PROBE FOR COMPLETE THOUGHTS)

97=(NOTHING/NONE/NO COMMENTS)

98=(DON'T KNOW)

99=(REFUSED)

G2. Would you be willing to participate in a follow-up interview about any of those issues?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

H1. Just a few last questions. What is your name?

1=Verbatim

H2. What is your position at [*firm name / new firm name*]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

9=(OTHER - SPECIFY) _____

99=(REFUSED)

Thank you very much for your participation. If you have any questions or concerns, please contact Amy Shaw at McCarran International Airport at telephone: (702) 261-5123; Sonnie Braih at the Nevada Department of Transportation at telephone: (702) 730-3301; Tonita Brown at Regional Transportation Commission of Southern Nevada at telephone: (702) 676-1507; Karen Heddy at Regional Transportation Commission of Washoe County at telephone: (775) 332-9511; or Faith Allen at Reno-Tahoe International Airport at telephone: (775) 328-6979.

APPENDIX F.

Disparity Tables

Figure F-1

Figure F- :	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26		
Agency																											
NDOT and Local Assistance	X	X	X	X	X	X	X	X	X	X	X	X	X	X			X	X	X	X	X	X	X	X	X	X	
NDOT															X												
Local Assistance																X											
Funding and program																											
All Funding Sources	X	X	X	X			X	X	X	X	X	X	X	X	X	X	X	X	X	X	X						
Federal						X																X	X	X	X		
State					X																						
Time Period																											
FFY 2012-2015	X	X	X	X	X	X			X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	
FFY 2012-2013							X																				
FFY 2014-2015								X																			
Type																											
Construction, Professional Services, Goods and Other Services	X				X	X	X	X	X	X					X	X	X	X	X	X	X	X	X				
Construction		X									X		X											X			
Professional Services			X									X		X											X		
Goods and Other Services				X																						X	
Contract role																											
Prime Contractors, Subcontractors and Suppliers	X	X	X	X	X	X	X	X							X	X	X	X	X				X	X	X	X	
Prime Contractors									X		X	X								X	X						
Subcontractors and Suppliers										X			X	X													
Geography																											
Statewide	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X					X	X	X	X	X	X	
District 1																	X										
District 2																		X									
District 3																			X								
Contract size																											
All	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X				X	X	X	X
Under \$2M for Construction, Under \$500k for Prof. Svcs., Under \$50k for Goods																					X						
Over \$2M for Construction, Over \$500k for Prof. Svcs., Over \$50k for Goods																						X					
Components of DBE goal																											
Analysis of Potential DBEs																							X	X	X	X	

Figure F-2.

Funding source: Federally and state-funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction, professional services, goods and support services

Contract role: Prime contractors and subcontractors

Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	1,679	\$1,716,661	\$1,716,661				
(2) MBE/WBE	371	\$88,921	\$88,921	5.2	14.7	-9.5	35.3
(3) WBE	277	\$67,769	\$67,769	3.9	6.9	-3.0	56.9
(4) MBE	94	\$21,152	\$21,152	1.2	7.7	-6.5	16.0
(5) Black American-owned	22	\$3,541	\$3,541	0.2	1.9	-1.6	11.1
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	2.6	-2.6	0.0
(7) Subcontinent Asian American-owned	1	\$30	\$30	0.0	0.1	-0.1	1.4
(8) Hispanic American-owned	63	\$15,411	\$15,411	0.9	3.1	-2.2	29.1
(9) Native American-owned	8	\$2,170	\$2,170	0.1	0.1	0.1	200+
(10) Unknown MBE	0	\$0					
(11) DBE-certified	112	\$27,859	\$27,859	1.6			
(12) Woman-owned DBE	91	\$22,966	\$22,966	1.3			
(13) Minority-owned DBE	21	\$4,893	\$4,893	0.3			
(14) Black American-owned DBE	3	\$373	\$373	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	16	\$4,489	\$4,489	0.3			
(18) Native American-owned DBE	2	\$31	\$31	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-3.

Funding source: Federally and state-funded
Agency: NDOT and local assistance
Time period: January 1, 2012 to December 31, 2015
Contract area: Construction
Contract role: Prime contractors and subcontractors
Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	1,316	\$1,584,066	\$1,584,066				
(2) MBE/WBE	316	\$83,445	\$83,445	5.3	14.8	-9.5	35.6
(3) WBE	243	\$66,313	\$66,313	4.2	7.0	-2.8	60.0
(4) MBE	73	\$17,132	\$17,132	1.1	7.8	-6.8	13.8
(5) Black American-owned	17	\$2,887	\$2,887	0.2	1.7	-1.5	10.8
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	2.7	-2.7	0.0
(7) Subcontinent Asian American-owned	1	\$30	\$30	0.0	0.1	-0.1	1.5
(8) Hispanic American-owned	49	\$12,075	\$12,075	0.8	3.3	-2.5	23.4
(9) Native American-owned	6	\$2,140	\$2,140	0.1	0.1	0.1	200+
(10) Unknown MBE	0	\$0					
(11) DBE-certified	88	\$26,781	\$26,781	1.7			
(12) Woman-owned DBE	77	\$22,482	\$22,482	1.4			
(13) Minority-owned DBE	11	\$4,299	\$4,299	0.3			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	11	\$4,299	\$4,299	0.3			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-4.

Funding source: Federally and state-funded
Agency: NDOT and local assistance
Time period: January 1, 2012 to December 31, 2015
Contract area: Professional services
Contract role: Prime contractors and subcontractors
Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	323	\$117,503	\$117,503				
(2) MBE/WBE	52	\$5,003	\$5,003	4.3	10.6	-6.4	40.0
(3) WBE	34	\$1,456	\$1,456	1.2	7.1	-5.8	17.5
(4) MBE	18	\$3,546	\$3,546	3.0	3.6	-0.6	84.3
(5) Black American-owned	2	\$180	\$180	0.2	1.4	-1.2	11.0
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	0.9	-0.9	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(8) Hispanic American-owned	14	\$3,336	\$3,336	2.8	1.1	1.8	200+
(9) Native American-owned	2	\$31	\$31	0.0	0.1	-0.1	27.5
(10) Unknown MBE	0	\$0					
(11) DBE-certified	22	\$720	\$720	0.6			
(12) Woman-owned DBE	14	\$484	\$484	0.4			
(13) Minority-owned DBE	8	\$237	\$237	0.2			
(14) Black American-owned DBE	1	\$15	\$15	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	5	\$191	\$191	0.2			
(18) Native American-owned DBE	2	\$31	\$31	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-5.

Funding source: Federally and state-funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Goods and support services

Contract role: Prime contractors and subcontractors

Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	40	\$15,092	\$15,092				
(2) MBE/WBE	3	\$474	\$474	3.1	29.3	-26.2	10.7
(3) WBE	0	\$0	\$0	0.0	2.8	-2.8	0.0
(4) MBE	3	\$474	\$474	3.1	26.5	-23.4	11.8
(5) Black American-owned	3	\$474	\$474	3.1	23.4	-20.3	13.4
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	2.1	-2.1	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(8) Hispanic American-owned	0	\$0	\$0	0.0	1.0	-1.0	0.0
(9) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(10) Unknown MBE	0	\$0					
(11) DBE-certified	2	\$358	\$358	2.4			
(12) Woman-owned DBE	0	\$0	\$0	0.0			
(13) Minority-owned DBE	2	\$358	\$358	2.4			
(14) Black American-owned DBE	2	\$358	\$358	2.4			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	0	\$0	\$0	0.0			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-6.

Funding source: State funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction, professional services, goods and support services

Contract role: Prime contractors and subcontractors

Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	640	\$193,599	\$193,599				
(2) MBE/WBE	98	\$7,073	\$7,073	3.7	23.2	-19.5	15.8
(3) WBE	82	\$5,948	\$5,948	3.1	13.0	-10.0	23.6
(4) MBE	16	\$1,126	\$1,126	0.6	10.2	-9.6	5.7
(5) Black American-owned	3	\$186	\$186	0.1	1.0	-0.9	9.4
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	3.5	-3.5	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(8) Hispanic American-owned	11	\$909	\$909	0.5	5.3	-4.9	8.8
(9) Native American-owned	2	\$31	\$31	0.0	0.2	-0.2	8.0
(10) Unknown MBE	0	\$0					
(11) DBE-certified	36	\$2,872	\$2,872	1.5			
(12) Woman-owned DBE	30	\$2,560	\$2,560	1.3			
(13) Minority-owned DBE	6	\$312	\$312	0.2			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	4	\$281	\$281	0.1			
(18) Native American-owned DBE	2	\$31	\$31	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-7.

Funding source: Federally funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction, professional services, goods and support services

Contract role: Prime contractors and subcontractors

Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	1,039	\$1,523,063	\$1,523,063				
(2) MBE/WBE	273	\$81,848	\$81,848	5.4	13.6	-8.2	39.6
(3) WBE	195	\$61,822	\$61,822	4.1	6.2	-2.1	65.8
(4) MBE	78	\$20,027	\$20,027	1.3	7.4	-6.1	17.8
(5) Black American-owned	19	\$3,355	\$3,355	0.2	2.0	-1.7	11.2
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	2.5	-2.5	0.0
(7) Subcontinent Asian American-owned	1	\$30	\$30	0.0	0.1	-0.1	1.5
(8) Hispanic American-owned	52	\$14,501	\$14,501	1.0	2.8	-1.9	34.0
(9) Native American-owned	6	\$2,140	\$2,140	0.1	0.0	0.1	200+
(10) Unknown MBE	0	\$0					
(11) DBE-certified	76	\$24,987	\$24,987	1.6			
(12) Woman-owned DBE	61	\$20,406	\$20,406	1.3			
(13) Minority-owned DBE	15	\$4,581	\$4,581	0.3			
(14) Black American-owned DBE	3	\$373	\$373	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	12	\$4,208	\$4,208	0.3			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-8.

Funding source: Federally and state-funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2013

Contract area: Construction, professional services, goods and support services

Contract role: Prime contractors and subcontractors

Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	700	\$473,472	\$473,472				
(2) MBE/WBE	179	\$44,255	\$44,255	9.3	20.6	-11.2	45.5
(3) WBE	123	\$33,078	\$33,078	7.0	9.8	-2.8	71.6
(4) MBE	56	\$11,177	\$11,177	2.4	10.8	-8.4	21.8
(5) Black American-owned	13	\$2,960	\$2,960	0.6	2.8	-2.2	22.4
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	4.1	-4.1	0.0
(7) Subcontinent Asian American-owned	1	\$30	\$30	0.0	0.4	-0.4	1.7
(8) Hispanic American-owned	38	\$7,712	\$7,712	1.6	3.5	-1.9	46.8
(9) Native American-owned	4	\$474	\$474	0.1	0.1	0.0	119.1
(10) Unknown MBE	0	\$0					
(11) DBE-certified	10	\$2,517	\$2,517	0.5			
(12) Woman-owned DBE	7	\$2,135	\$2,135	0.5			
(13) Minority-owned DBE	3	\$382	\$382	0.1			
(14) Black American-owned DBE	2	\$358	\$358	0.1			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	1	\$24	\$24	0.0			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-9.

Funding source: Federally and state-funded

Agency: NDOT and local assistance

Time period: January 1, 2014 to December 31, 2015

Contract area: Construction, professional services, goods and support services

Contract role: Prime contractors and subcontractors

Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	979	\$1,243,189	\$1,243,189				
(2) MBE/WBE	192	\$44,667	\$44,667	3.6	12.4	-8.8	29.0
(3) WBE	154	\$34,691	\$34,691	2.8	5.9	-3.1	47.5
(4) MBE	38	\$9,976	\$9,976	0.8	6.5	-5.7	12.3
(5) Black American-owned	9	\$581	\$581	0.0	1.5	-1.5	3.1
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	2.0	-2.0	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(8) Hispanic American-owned	25	\$7,698	\$7,698	0.6	2.9	-2.3	21.1
(9) Native American-owned	4	\$1,696	\$1,696	0.1	0.0	0.1	200+
(10) Unknown MBE	0	\$0					
(11) DBE-certified	102	\$25,342	\$25,342	2.0			
(12) Woman-owned DBE	84	\$20,831	\$20,831	1.7			
(13) Minority-owned DBE	18	\$4,511	\$4,511	0.4			
(14) Black American-owned DBE	1	\$15	\$15	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	15	\$4,465	\$4,465	0.4			
(18) Native American-owned DBE	2	\$31	\$31	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-10.

Funding source: Federally and state-funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction, professional services, goods and support services

Contract role: Prime contractors

Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	541	\$1,354,145	\$1,354,145				
(2) MBE/WBE	33	\$11,522	\$11,522	0.9	12.5	-11.7	6.8
(3) WBE	21	\$8,144	\$8,144	0.6	5.3	-4.7	11.3
(4) MBE	12	\$3,377	\$3,377	0.2	7.2	-7.0	3.5
(5) Black American-owned	2	\$180	\$180	0.0	2.0	-2.0	0.7
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	2.6	-2.6	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(8) Hispanic American-owned	8	\$3,167	\$3,167	0.2	2.5	-2.3	9.3
(9) Native American-owned	2	\$31	\$31	0.0	0.0	0.0	7.8
(10) Unknown MBE	0	\$0					
(11) DBE-certified	6	\$1,807	\$1,807	0.1			
(12) Woman-owned DBE	3	\$1,586	\$1,586	0.1			
(13) Minority-owned DBE	3	\$221	\$221	0.0			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	1	\$191	\$191	0.0			
(18) Native American-owned DBE	2	\$31	\$31	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-11.

Funding source: Federally and state-funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction, professional services, goods and support services

Contract role: Subcontractor and suppliers

Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	1,138	\$362,517	\$362,517				
(2) MBE/WBE	338	\$77,400	\$77,400	21.4	22.6	-1.2	94.6
(3) WBE	256	\$59,625	\$59,625	16.4	13.0	3.4	126.5
(4) MBE	82	\$17,775	\$17,775	4.9	9.6	-4.7	51.3
(5) Black American-owned	20	\$3,361	\$3,361	0.9	1.1	-0.2	80.8
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	2.4	-2.4	0.0
(7) Subcontinent Asian American-owned	1	\$30	\$30	0.0	0.6	-0.6	1.4
(8) Hispanic American-owned	55	\$12,244	\$12,244	3.4	5.2	-1.8	64.7
(9) Native American-owned	6	\$2,140	\$2,140	0.6	0.2	0.4	200+
(10) Unknown MBE	0	\$0					
(11) DBE-certified	106	\$26,051	\$26,051	7.2			
(12) Woman-owned DBE	88	\$21,380	\$21,380	5.9			
(13) Minority-owned DBE	18	\$4,672	\$4,672	1.3			
(14) Black American-owned DBE	3	\$373	\$373	0.1			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	15	\$4,299	\$4,299	1.2			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-12.

Funding source: Federally and state-funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction

Contract role: Prime contractors

Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	304	\$1,242,532	\$1,242,532				
(2) MBE/WBE	21	\$8,077	\$8,077	0.7	12.6	-11.9	5.2
(3) WBE	17	\$7,681	\$7,681	0.6	5.3	-4.7	11.7
(4) MBE	4	\$397	\$397	0.0	7.3	-7.3	0.4
(5) Black American-owned	1	\$64	\$64	0.0	1.8	-1.8	0.3
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	2.8	-2.8	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(8) Hispanic American-owned	3	\$332	\$332	0.0	2.7	-2.6	1.0
(9) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(10) Unknown MBE	0	\$0					
(11) DBE-certified	4	\$1,777	\$1,777	0.1			
(12) Woman-owned DBE	3	\$1,586	\$1,586	0.1			
(13) Minority-owned DBE	1	\$191	\$191	0.0			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	1	\$191	\$191	0.0			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-13.

Funding source: Federally and state-funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Professional services

Contract role: Prime contractors

Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	199	\$96,878	\$96,878				
(2) MBE/WBE	11	\$3,329	\$3,329	3.4	9.5	-6.1	36.1
(3) WBE	4	\$464	\$464	0.5	6.1	-5.7	7.8
(4) MBE	7	\$2,865	\$2,865	3.0	3.4	-0.4	87.1
(5) Black American-owned	0	\$0	\$0	0.0	1.4	-1.4	0.0
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	1.0	-1.0	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(8) Hispanic American-owned	5	\$2,834	\$2,834	2.9	1.0	2.0	200+
(9) Native American-owned	2	\$31	\$31	0.0	0.1	0.0	48.6
(10) Unknown MBE	0	\$0					
(11) DBE-certified	2	\$31	\$31	0.0			
(12) Woman-owned DBE	0	\$0	\$0	0.0			
(13) Minority-owned DBE	2	\$31	\$31	0.0			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	0	\$0	\$0	0.0			
(18) Native American-owned DBE	2	\$31	\$31	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-14.

Funding source: Federally and state-funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction

Contract role: Subcontractor and suppliers

Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	1,012	\$341,534	\$341,534				
(2) MBE/WBE	295	\$75,368	\$75,368	22.1	22.9	-0.8	96.4
(3) WBE	226	\$58,633	\$58,633	17.2	13.1	4.1	131.0
(4) MBE	69	\$16,735	\$16,735	4.9	9.8	-4.9	50.1
(5) Black American-owned	16	\$2,823	\$2,823	0.8	1.1	-0.3	73.1
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	2.5	-2.5	0.0
(7) Subcontinent Asian American-owned	1	\$30	\$30	0.0	0.6	-0.6	1.5
(8) Hispanic American-owned	46	\$11,743	\$11,743	3.4	5.4	-2.0	63.2
(9) Native American-owned	6	\$2,140	\$2,140	0.6	0.2	0.5	200+
(10) Unknown MBE	0	\$0					
(11) DBE-certified	84	\$25,004	\$25,004	7.3			
(12) Woman-owned DBE	74	\$20,896	\$20,896	6.1			
(13) Minority-owned DBE	10	\$4,108	\$4,108	1.2			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	10	\$4,108	\$4,108	1.2			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-15.

Funding source: Federally and state-funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Professional services

Contract role: Subcontractor and suppliers

Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	124	\$20,625	\$20,625				
(2) MBE/WBE	41	\$1,674	\$1,674	8.1	15.9	-7.8	51.0
(3) WBE	30	\$992	\$992	4.8	11.5	-6.7	41.9
(4) MBE	11	\$682	\$682	3.3	4.4	-1.1	74.4
(5) Black American-owned	2	\$180	\$180	0.9	1.4	-0.6	60.7
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	0.6	-0.6	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.5	-0.5	0.0
(8) Hispanic American-owned	9	\$501	\$501	2.4	1.6	0.8	148.6
(9) Native American-owned	0	\$0	\$0	0.0	0.2	-0.2	0.0
(10) Unknown MBE	0	\$0					
(11) DBE-certified	20	\$690	\$690	3.3			
(12) Woman-owned DBE	14	\$484	\$484	2.3			
(13) Minority-owned DBE	6	\$206	\$206	1.0			
(14) Black American-owned DBE	1	\$15	\$15	0.1			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	5	\$191	\$191	0.9			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-16.

Funding source: Federally and state-funded

Agency: NDOT

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction, professional services, goods and support services

Contract role: Prime contractors and subcontractors

Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	1,551	\$1,565,870	\$1,565,870				
(2) MBE/WBE	325	\$79,916	\$79,916	5.1	14.1	-9.0	36.2
(3) WBE	247	\$63,283	\$63,283	4.0	6.8	-2.7	59.6
(4) MBE	78	\$16,633	\$16,633	1.1	7.3	-6.2	14.6
(5) Black American-owned	20	\$3,514	\$3,514	0.2	1.6	-1.4	13.7
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	2.4	-2.4	0.0
(7) Subcontinent Asian American-owned	1	\$30	\$30	0.0	0.1	-0.1	1.4
(8) Hispanic American-owned	50	\$12,218	\$12,218	0.8	3.0	-2.3	25.6
(9) Native American-owned	7	\$870	\$870	0.1	0.1	0.0	86.6
(10) Unknown MBE	0	\$0					
(11) DBE-certified	101	\$24,571	\$24,571	1.6			
(12) Woman-owned DBE	82	\$21,377	\$21,377	1.4			
(13) Minority-owned DBE	19	\$3,194	\$3,194	0.2			
(14) Black American-owned DBE	3	\$373	\$373	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	14	\$2,791	\$2,791	0.2			
(18) Native American-owned DBE	2	\$31	\$31	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-17.

Funding source: Federally and state-funded

Agency: Local Assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction, professional services, goods and support services

Contract role: Prime contractors and subcontractors

Region: Statewide

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	128	\$150,792	\$150,792				
(2) MBE/WBE	46	\$9,005	\$9,005	6.0	20.6	-14.7	28.9
(3) WBE	30	\$4,486	\$4,486	3.0	8.6	-5.6	34.5
(4) MBE	16	\$4,520	\$4,520	3.0	12.0	-9.0	24.9
(5) Black American-owned	2	\$27	\$27	0.0	4.2	-4.1	0.4
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	4.3	-4.3	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(8) Hispanic American-owned	13	\$3,193	\$3,193	2.1	3.5	-1.4	60.3
(9) Native American-owned	1	\$1,300	\$1,300	0.9	0.0	0.9	200+
(10) Unknown MBE	0	\$0					
(11) DBE-certified	11	\$3,287	\$3,287	2.2			
(12) Woman-owned DBE	9	\$1,589	\$1,589	1.1			
(13) Minority-owned DBE	2	\$1,699	\$1,699	1.1			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	2	\$1,699	\$1,699	1.1			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-18.

Funding source: Federally and state-funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction, professional services, goods and support services

Contract role: Prime contractors and subcontractors

Region: District 1

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	481	\$496,113	\$496,113				
(2) MBE/WBE	115	\$45,607	\$45,607	9.2	20.4	-11.2	45.1
(3) WBE	78	\$35,093	\$35,093	7.1	7.1	-0.1	99.1
(4) MBE	37	\$10,514	\$10,514	2.1	13.3	-11.1	16.0
(5) Black American-owned	4	\$207	\$207	0.0	5.2	-5.2	0.8
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	3.1	-3.1	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(8) Hispanic American-owned	33	\$10,307	\$10,307	2.1	4.9	-2.8	42.3
(9) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(10) Unknown MBE	0	\$0					
(11) DBE-certified	40	\$18,931	\$18,931	3.8			
(12) Woman-owned DBE	30	\$14,599	\$14,599	2.9			
(13) Minority-owned DBE	10	\$4,332	\$4,332	0.9			
(14) Black American-owned DBE	1	\$15	\$15	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	9	\$4,316	\$4,316	0.9			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-19.

Funding source: Federally and state-funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction, professional services, goods and support services

Contract role: Prime contractors and subcontractors

Region: District 2

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	930	\$976,950	\$976,950				
(2) MBE/WBE	174	\$17,929	\$17,929	1.8	10.1	-8.2	18.2
(3) WBE	136	\$10,841	\$10,841	1.1	5.6	-4.5	19.8
(4) MBE	38	\$7,088	\$7,088	0.7	4.4	-3.7	16.3
(5) Black American-owned	12	\$1,281	\$1,281	0.1	0.6	-0.4	23.5
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	1.8	-1.8	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(8) Hispanic American-owned	23	\$4,476	\$4,476	0.5	2.0	-1.6	22.7
(9) Native American-owned	3	\$1,331	\$1,331	0.1	0.1	0.1	200+
(10) Unknown MBE	0	\$0					
(11) DBE-certified	58	\$5,396	\$5,396	0.6			
(12) Woman-owned DBE	47	\$4,835	\$4,835	0.5			
(13) Minority-owned DBE	11	\$561	\$561	0.1			
(14) Black American-owned DBE	2	\$358	\$358	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	7	\$173	\$173	0.0			
(18) Native American-owned DBE	2	\$31	\$31	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-20.

Funding source: Federally and state-funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction, professional services, goods and support services

Contract role: Prime contractors and subcontractors

Region: District 3

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	268	\$243,598	\$243,598				
(2) MBE/WBE	82	\$25,386	\$25,386	10.4	21.4	-11.0	48.7
(3) WBE	63	\$21,835	\$21,835	9.0	11.9	-2.9	75.4
(4) MBE	19	\$3,551	\$3,551	1.5	9.5	-8.1	15.3
(5) Black American-owned	6	\$2,053	\$2,053	0.8	0.2	0.6	200+
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	4.7	-4.7	0.0
(7) Subcontinent Asian American-owned	1	\$30	\$30	0.0	0.8	-0.8	1.6
(8) Hispanic American-owned	7	\$628	\$628	0.3	3.7	-3.4	7.0
(9) Native American-owned	5	\$840	\$840	0.3	0.1	0.2	200+
(10) Unknown MBE	0	\$0					
(11) DBE-certified	14	\$3,531	\$3,531	1.4			
(12) Woman-owned DBE	14	\$3,531	\$3,531	1.4			
(13) Minority-owned DBE	0	\$0	\$0	0.0			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	0	\$0	\$0	0.0			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-21.

Funding source: Federally and state-funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction, professional services, goods and support services

Contract role: Prime contractors

Region: Statewide

Small prime contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	429	\$104,023	\$104,023				
(2) MBE/WBE	28	\$6,878	\$6,878	6.6	27.3	-20.7	24.2
(3) WBE	20	\$6,009	\$6,009	5.8	17.3	-11.5	33.4
(4) MBE	8	\$870	\$870	0.8	10.0	-9.2	8.3
(5) Black American-owned	1	\$64	\$64	0.1	1.4	-1.4	4.3
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	3.4	-3.4	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(8) Hispanic American-owned	5	\$775	\$775	0.7	4.8	-4.1	15.4
(9) Native American-owned	2	\$31	\$31	0.0	0.3	-0.3	10.1
(10) Unknown MBE	0	\$0					
(11) DBE-certified	6	\$1,807	\$1,807	1.7			
(12) Woman-owned DBE	3	\$1,586	\$1,586	1.5			
(13) Minority-owned DBE	3	\$221	\$221	0.2			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	1	\$191	\$191	0.2			
(18) Native American-owned DBE	2	\$31	\$31	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-22.

Funding source: Federally and state-funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction, professional services, goods and support services

Contract role: Prime contractors

Region: Statewide

Large prime contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	112	\$1,250,122	\$1,250,122				
(2) MBE/WBE	5	\$4,643	\$4,643	0.4	11.3	-10.9	3.3
(3) WBE	1	\$2,136	\$2,136	0.2	4.3	-4.2	4.0
(4) MBE	4	\$2,507	\$2,507	0.2	7.0	-6.8	2.9
(5) Black American-owned	1	\$116	\$116	0.0	2.1	-2.1	0.4
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	2.6	-2.6	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(8) Hispanic American-owned	3	\$2,392	\$2,392	0.2	2.3	-2.1	8.2
(9) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	0.0
(10) Unknown MBE	0	\$0					
(11) DBE-certified	0	\$0	\$0	0.0			
(12) Woman-owned DBE	0	\$0	\$0	0.0			
(13) Minority-owned DBE	0	\$0	\$0	0.0			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	0	\$0	\$0	0.0			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-23.

Funding source: Federally funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction, professional services, goods and support services

Contract role: Prime contractors and subcontractors

Region: Statewide

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	1,039	\$1,523,063	\$1,523,063				
(2) MBE/WBE	273	\$81,848	\$81,848	5.4	12.8	-7.4	41.9
(3) WBE	195	\$61,822	\$61,822	4.1	6.2	-2.1	65.8
(4) MBE	78	\$20,027	\$20,027	1.3	6.7	-5.3	19.8
(5) Black American-owned	19	\$3,355	\$3,355	0.2	1.2	-1.0	18.2
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	2.5	-2.5	0.0
(7) Subcontinent Asian American-owned	1	\$30	\$30	0.0	0.1	-0.1	1.5
(8) Hispanic American-owned	52	\$14,501	\$14,501	1.0	2.8	-1.9	34.0
(9) Native American-owned	6	\$2,140	\$2,140	0.1	0.0	0.1	200+
(10) Unknown MBE	0	\$0					
(11) DBE-certified	76	\$24,987	\$24,987	1.6			
(12) Woman-owned DBE	61	\$20,406	\$20,406	1.3			
(13) Minority-owned DBE	15	\$4,581	\$4,581	0.3			
(14) Black American-owned DBE	3	\$373	\$373	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	12	\$4,208	\$4,208	0.3			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-24.

Funding source: Federally funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Construction

Contract role: Prime contractors and subcontractors

Region: Statewide

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	795	\$1,416,278	\$1,416,278				
(2) MBE/WBE	225	\$76,929	\$76,929	5.4	12.8	-7.4	42.5
(3) WBE	164	\$60,634	\$60,634	4.3	6.1	-1.9	69.7
(4) MBE	61	\$16,295	\$16,295	1.2	6.7	-5.5	17.3
(5) Black American-owned	15	\$2,817	\$2,817	0.2	1.0	-0.8	20.6
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	2.6	-2.6	0.0
(7) Subcontinent Asian American-owned	1	\$30	\$30	0.0	0.1	-0.1	1.6
(8) Hispanic American-owned	39	\$11,308	\$11,308	0.8	2.9	-2.1	27.2
(9) Native American-owned	6	\$2,140	\$2,140	0.2	0.0	0.1	200+
(10) Unknown MBE	0	\$0					
(11) DBE-certified	54	\$23,939	\$23,939	1.7			
(12) Woman-owned DBE	47	\$19,922	\$19,922	1.4			
(13) Minority-owned DBE	7	\$4,017	\$4,017	0.3			
(14) Black American-owned DBE	0	\$0	\$0	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	7	\$4,017	\$4,017	0.3			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-25.

Funding source: Federally funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Professional services

Contract role: Prime contractors and subcontractors

Region: Statewide

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	228	\$93,637	\$93,637				
(2) MBE/WBE	46	\$4,561	\$4,561	4.9	10.6	-5.7	45.9
(3) WBE	31	\$1,188	\$1,188	1.3	7.2	-6.0	17.5
(4) MBE	15	\$3,374	\$3,374	3.6	3.4	0.2	106.8
(5) Black American-owned	2	\$180	\$180	0.2	1.3	-1.1	14.7
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	0.8	-0.8	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(8) Hispanic American-owned	13	\$3,194	\$3,194	3.4	1.0	2.4	200+
(9) Native American-owned	0	\$0	\$0	0.0	0.1	-0.1	0.0
(10) Unknown MBE	0	\$0					
(11) DBE-certified	20	\$690	\$690	0.7			
(12) Woman-owned DBE	14	\$484	\$484	0.5			
(13) Minority-owned DBE	6	\$206	\$206	0.2			
(14) Black American-owned DBE	1	\$15	\$15	0.0			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	5	\$191	\$191	0.2			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.

Figure F-26.

Funding source: Federally funded

Agency: NDOT and local assistance

Time period: January 1, 2012 to December 31, 2015

Contract area: Goods and support services

Contract role: Prime contractors and subcontractors

Region: Statewide

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All firms	16	\$13,148	\$13,148				
(2) MBE/WBE	2	\$358	\$358	2.7	31.5	-28.8	8.6
(3) WBE	0	\$0	\$0	0.0	1.7	-1.7	0.0
(4) MBE	2	\$358	\$358	2.7	29.8	-27.1	9.1
(5) Black American-owned	2	\$358	\$358	2.7	26.5	-23.8	10.3
(6) Asian Pacific American-owned	0	\$0	\$0	0.0	2.5	-2.5	0.0
(7) Subcontinent Asian American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(8) Hispanic American-owned	0	\$0	\$0	0.0	0.8	-0.8	0.0
(9) Native American-owned	0	\$0	\$0	0.0	0.0	0.0	100.0
(10) Unknown MBE	0	\$0					
(11) DBE-certified	2	\$358	\$358	2.7			
(12) Woman-owned DBE	0	\$0	\$0	0.0			
(13) Minority-owned DBE	2	\$358	\$358	2.7			
(14) Black American-owned DBE	2	\$358	\$358	2.7			
(15) Asian Pacific American-owned DBE	0	\$0	\$0	0.0			
(16) Subcontinent Asian American-owned DBE	0	\$0	\$0	0.0			
(17) Hispanic American-owned DBE	0	\$0	\$0	0.0			
(18) Native American-owned DBE	0	\$0	\$0	0.0			
(19) Unknown DBE-MBE	0	\$0					
(20) White male-owned DBE	0	\$0	\$0	0.0			

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

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

Source: BBC Research & Consulting Disparity Analysis.